

Essay

Is It Safe to *Chevron* “Two-Step” in a Hurricane? A Critical Examination of How Expanding the Government’s Role in Disaster Relief Will Only Exacerbate the Damage

Ross C. Paolino*

*“[W]e’ve seen a disaster response [to the 2007 California wildfires] operating exactly the way it’s supposed to.”*¹

—Frances Townsend, Homeland Security Adviser to the President.

Introduction

In the summer of 2004, a slow-moving Category Three hurricane struck the heart of New Orleans, Louisiana.² The hurricane engulfed New Orleans in catastrophic flooding, placing homes, hospitals, and nursing homes completely under water.³ The hurricane killed thousands of residents, displaced hundreds of thousands more, and

* J.D., The George Washington University Law School; B.A., University of Florida. The author would like to thank the editorial staff of *The George Washington Law Review* for their help in preparing this Essay for publication.

¹ Edwin Chen, *Bush Tours California Fire Zone, Gets Briefing on Aid*, BLOOMBERG.COM, Oct. 25, 2007, <http://www.bloomberg.com/apps/news?pid=20601087&sid=aVZNT2UiKqSY&refer=home>.

² *Preparing for a Catastrophe: The Hurricane Pam Exercise: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 109th Cong. (2006) [hereinafter Lieberman statement] (statement of Sen. Joseph Lieberman, Ranking Member), available at http://hsgac.senate.gov/public/_files/012406JILOpen.pdf.

³ *Id.*

incapacitated responders at every level of government.⁴ To make matters worse, thousands of residents evacuated to the New Orleans Superdome, only to meet horrific and desperate living conditions.⁵

The hurricane that “struck” New Orleans in the summer of 2004 was not really a hurricane at all.⁶ “Hurricane Pam” was actually a catastrophic hypothetical disaster scenario designed to frame discussion and identify operational concerns in hopes of developing an extensive “catastrophic hurricane plan” for Louisiana.⁷ The eerily striking similarities between “Hurricane Pam” and Hurricane Katrina are not coincidental—the details of “Hurricane Pam” were specific formal concerns and recommendations raised after the hypothetical exercise.⁸ “Hurricane Pam” provided the Federal Emergency Management Agency (“FEMA”) with explicit notice that a major hurricane striking New Orleans would undeniably overwhelm state and local governments and suggested the need for a coordinated federal response.⁹ Unfortunately, despite these dire warnings, the nation’s response to Hurricane Katrina failed miserably.¹⁰

Hurricane Katrina annihilated the Gulf Coast in the summer of 2005.¹¹ Qualifying as the worst natural disaster in U.S. history, the storm took more than 1,300 lives, destroyed more than 300,000 homes, and left a financial toll estimated at over \$100 billion.¹² Along with the extensive damage throughout the Gulf Coast, and the mammoth economic costs associated with the storm, Hurricane Katrina obliterated the nation’s sense of security in the government’s ability to deal with disasters of this magnitude.¹³

⁴ *Id.*

⁵ *Id.*

⁶ *Preparing for a Catastrophe: The Hurricane Pam Exercise: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 109th Cong. 7–8 (2006) [hereinafter Fairley statement] (statement of Wayne Fairley, Federal Emergency Management Agency), available at http://hsgac.senate.gov/public/_files/012406Fairley.pdf.

⁷ *Id.* at 2–3.

⁸ Lieberman statement, *supra* note 2. See also Fairley statement, *supra* note 6, at 2–4.

⁹ Lieberman statement, *supra* note 2.

¹⁰ *Id.*

¹¹ RICHARD D. KNABB ET AL., NAT’L HURRICANE CTR., TROPICAL CYCLONE REPORT: HURRICANE KATRINA 1 (2005) (updated Aug. 10, 2006), available at http://www.nhc.noaa.gov/pdf/TCR-AL122005_Katrina.pdf.

¹² Joe Whitley et al., *Homeland Security After Hurricane Katrina: Where Do We Go from Here?*, 20 NAT. RESOURCES & ENV’T 3, 3 (2006).

¹³ *Id.* This false sense of security includes all man-made or natural disasters with the potential for widespread destruction. See Elizabeth F. Kent, “Where’s the Cavalry?” *Federal Response to 21st Century Disasters*, 40 SUFFOLK U. L. REV. 181, 181 (2006) (discussing potential disaster situations requiring coordinated responses).

When the federal government's coordination and preparation failed in the face of a predicted and anticipated major hurricane, society demanded action to ensure such gross inadequacies would no longer threaten the nation's preparedness.¹⁴ The blame for the inefficiencies after Hurricane Katrina do not lie solely on local, state, or federal authorities—Katrina unearthed massive government failure at all levels.¹⁵

Although the country and the federal government argue for a greater federal role in handling disasters, such a desire runs contrary to the nation's traditional federalism-based approach to disaster response.¹⁶ The federal government's historical role in disaster response, primarily guided by the Stafford Act, supplements state and local resources at the request of state and local governments,¹⁷ and places primary disaster relief responsibility on state and local governments.¹⁸ This current federalism-based system, however, was blamed as the primary culprit for the inefficiencies resulting from Katrina, and ignited debate regarding how to increase the federal government's role in these situations.¹⁹ This Essay examines whether FEMA can interpret the Stafford Act to respond to the post-Katrina call for a broader federal role in disaster relief. In answering this inquiry in the negative, this Essay maintains that such an empowering interpretation will not receive *Chevron*²⁰ deference. Moreover, despite FEMA's inept response to Hurricane Katrina, increasing federal disaster power is *not* the solution, as the federal government already possesses the necessary power to effectively respond to natural disasters.

Part I of this Essay describes the inefficiencies and power struggles between federal, state, and local governments during Hurricane Katrina. Part II discusses the relevant statutory authority that guides the nation's disaster response scheme. Finally, Part III discusses the call for a greater federal role in disaster relief and concludes that expanding this role through agency interpretation of the Stafford Act will fail, and not receive *Chevron* deference. Part III also discusses

¹⁴ See Kent, *supra* note 13, at 182–83.

¹⁵ See Whitley et al., *supra* note 12, at 3 (illustrating government breakdowns leading to society's loss of confidence in the government's ability to respond to disasters).

¹⁶ *Id.* at 4.

¹⁷ Kent, *supra* note 13, at 185–86.

¹⁸ *Id.* at 185. “The intention is not . . . for FEMA to be ‘a national fire and rescue team . . . [i]t is not a first responder agency with the resources to assume principal responsibility for overwhelmed state and local governments during a disaster.’” *Id.* at 187 (citation omitted).

¹⁹ Whitley et al., *supra* note 12, at 4.

²⁰ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

the misplaced motivations for a greater federal role and argues the federal government already possesses adequate power to respond to future disasters.

I. Hurricane Katrina—The Inefficiencies and Power Struggle That Fueled Disaster

After Hurricane Katrina brushed over South Florida as a Category One hurricane, it rapidly intensified in the Gulf of Mexico and took aim at New Orleans,²¹ prompting New Orleans Mayor Ray Nagin to order evacuation of the city’s half-million residents.²² Although the city transported thousands of residents to the Superdome, the city’s lack of organization prevented thousands more outside the city from being evacuated.²³ As the storm raged on, New Orleans residents waited inside the darkened Superdome as Katrina’s winds collapsed cell phone towers, cut power lines, and tore apart the roof of the Superdome itself.²⁴ By morning, city officials believed that New Orleans had largely been spared.²⁵ In this brief moment of relief, however, the levees protecting New Orleans broke, “inundating 80% of the city” under a wall of water so high it “forc[ed] many families to cut through their roofs to breathe.”²⁶

The breach of the New Orleans levees began the hell-storm that will forever be associated with Hurricane Katrina and plague the country’s disaster response system. Communication among officials in New Orleans completely broke down, and a power struggle between local, state, and federal authorities led to confusion and a begrudgingly slow response.²⁷ Instead of initiating relief efforts, FEMA waited for specific requests from state and local officials.²⁸ With telephone and cell phone services out, and the state’s emergency communications system overloaded, officials could not inventory damage nor specifically identify the assistance needed from the federal govern-

²¹ See KNABB ET AL., *supra* note 11, at 1–3.

²² Brandon L. Garrett & Tania Tetlow, *Criminal Justice Collapse: The Constitution After Hurricane Katrina*, 56 DUKE L.J. 127, 134 (2006).

²³ *Id.*

²⁴ *Id.* at 134–35.

²⁵ *Id.* at 135.

²⁶ *Id.*

²⁷ See Scott R. Tkacz, *In Katrina’s Wake: Rethinking the Military’s Role in Domestic Emergencies*, 15 WM. & MARY BILL RTS. J. 301, 303–07 (2006) (detailing the aftermath of Hurricane Katrina).

²⁸ Eric Lipton et al., *Breakdowns Marked Path from Hurricane to Anarchy*, N.Y. TIMES, Sept. 11, 2005, at 1.

ment.²⁹ Overwhelmed and not knowing what explicit aid to request, Louisiana Governor Kathleen Blanco just asked President Bush for “everything you’ve got,” causing further confusion as to exactly what relief was being requested.³⁰ Furthermore, another political battle ignited when Governor Blanco refused President Bush’s request to federalize the National Guard.³¹

The political battle and power struggle created devastating consequences to the relief effort. FEMA’s lack of command over the Katrina fallout led to questions about the ability of the nation’s disaster response plan to cope with disasters.³² Governor Bill Richardson of New Mexico had 200 of his National Guard troops ready to help in New Orleans, yet two full days passed before anyone took the Governor up on his offer.³³ Firefighters hoping to help in the rescue and relief efforts in New Orleans were instead sent to Georgia for “sensitivity training.”³⁴ FEMA rerouted shipments of ice meant for hurricane victims to Maine.³⁵ Buses that could have been used to evacuate residents lay idle in parking lots.³⁶ Cell phones used by police officers were not compatible with the National Guard’s communication system, which only worsened the lack of communication already in place.³⁷ FEMA turned away three Wal-Mart trucks loaded with water for hurricane victims and “prevented the Coast Guard from delivering 1,000 gallons of diesel fuel.”³⁸ FEMA’s incompetence in certain areas was so high that a sheriff actually posted armed guards near his parish’s emergency communications line, after FEMA mistakenly cut it.³⁹

To make matters worse, the resulting confusion led to pure lawlessness in the city. The New Orleans Police Department fell into disarray from a lack of communication—more than 200 officers left under the stress and two officers committed suicide.⁴⁰ Prisoners required evacuation from flooding city jails, but with no other place to put them, law enforcement placed many men and women charged

²⁹ *Id.*

³⁰ *See id.*

³¹ Garrett & Tetlow, *supra* note 22, at 142–43.

³² *See* Kent, *supra* note 13, at 199.

³³ Tkacz, *supra* note 27, at 303–04.

³⁴ Kent, *supra* note 13, at 199.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Scott Shane & Eric Lipton, *Storm and Crisis: The Fallout; After Failures, Officials Play Blame Game*, N.Y. TIMES, Sept. 5, 2005, at A1.

³⁹ *Id.*

⁴⁰ Garrett & Tetlow, *supra* note 22, at 140.

with misdemeanors in cells with inmates facing felony and murder convictions.⁴¹ Stranded residents began looting local stores and property owners defended themselves with shotguns and small firearms.⁴² Many of the rescued residents who evacuated to the New Orleans Convention Center not only faced dehydration and starvation dangers, but theft, robbery, rape, and violence resulting from inadequate security.⁴³

II. Statutory Authority and Limitations Governing the Federal Government During Disasters

The U.S. disaster relief system is rooted in federalism and gives state and local governments, not the national government, primary disaster relief responsibility.⁴⁴ Often described as a “pull” or “reactive” approach, the federal government assumes state and local governments can deal with a disaster and stands aside until these governments request help, or a “pulling” of federal government resources.⁴⁵ The preference for this state and local power grows out of the Tenth Amendment’s reservation of police power for the states.⁴⁶ This police power allows state and local governments to, among other things, protect citizens’ lives and safety,⁴⁷ preserve public health,⁴⁸ and put down civil disorder.⁴⁹ Despite wielding such power, however, the magnitude of some disasters simply overwhelms state and local gov-

⁴¹ *Id.* at 135–37.

⁴² Tkacz, *supra* note 27, at 304. The violence erupting after Katrina caused many to take drastic actions to protect their property—for example, “[r]esidents in one of the city’s most exclusive gated communities hired armed Israeli mercenaries to guard their mansions.” Garret & Tetlow, *supra* note 22, at 141.

⁴³ Lipton et al., *supra* note 28.

⁴⁴ Jim Rossi, *State Executive Lawmaking in Crisis*, 56 DUKE L.J. 237, 241 (2006).

⁴⁵ Whitley et al., *supra* note 12, at 4; Stephen M. Griffin, *Stop Federalism Before It Kills Again: Reflections on Hurricane Katrina*, 21 ST. JOHN’S J. LEGAL COMMENT. 527, 532 (2007). Hurricane Katrina ignited a call for more of a “push” approach, where the federal government provides federal resources before waiting for state and local government requests. See Whitley et al., *supra* note 12, at 4.

⁴⁶ Kent, *supra* note 13, at 185.

⁴⁷ *United States v. E.C. Knight Co.*, 156 U.S. 1, 11 (1895).

⁴⁸ *Gibbons v. Ogden*, 22 U.S. (1 Wheat.) 1, 205 (1824). See also Melissa Healy, *Are Quarantines Back?*, L.A. TIMES, Apr. 14, 2003, at F5 (discussing possible quarantines in response to the SARS epidemic).

⁴⁹ See David G. Tucker & Alfred O. Bragg, III, *Florida’s Law of Storms: Emergency Management, Local Government, and the Police Power*, 30 STETSON L. REV. 837, 839 (2001) (discussing that the sovereign police power “aims directly to secure and promote the public welfare, and it does so by restraint and compulsion”) (citation omitted).

ernments and requires the federal government to ensure citizen safety.⁵⁰

Although the federal government does not have inherent police power,⁵¹ it plays an important role in disaster relief.⁵² Traditionally, the federal government supplements state and local governments. Its role, however, has historically continued to expand.⁵³ Congress made the first attempt to formalize comprehensive legislation for federal disaster relief with the Federal Civil Defense Act of 1950,⁵⁴ which sought to supplement, rather than replace, the roles of state and local governments.⁵⁵

A. *The Stafford Act*

Today, the Robert T. Stafford Disaster Relief and Emergency Act (“Stafford Act”) governs the protocol for federal aid and disaster response.⁵⁶ The Stafford Act is implemented under the Department of Homeland Security (“DHS”) through FEMA.⁵⁷ Consistent with the federalism-based “pull” model of disaster relief, FEMA’s role

⁵⁰ See Kent, *supra* note 13, at 185–86.

⁵¹ Hamilton v. Ky. Distilleries & Warehouse Co., 251 U.S. 146, 156 (1919).

⁵² For a detailed discussion of sovereign police power and the role of the federal government in disaster relief, see Tucker & Bragg, *supra* note 49.

⁵³ See Whitley et al., *supra* note 12, at 4. See also Jonathan Walters & Donald Kettl, *The Katrina Breakdown*, GOVERNING, Dec. 2005, available at <http://www.governing.com/archive/2005/dec/disaster.txt>. The modern era of intergovernmental disaster relief likely began on April 22, 1927, when President Coolidge named a special cabinet-level committee to deal with the massive flooding of the Mississippi River. *Id.* Not surprisingly, this action also represented the first politicization of the federal government’s disaster response—the individual in charge of the cabinet committee, Herbert Hoover, rode the public wave of support to the Presidency. *Id.*

⁵⁴ See Federal Civil Defense Act of 1950, Pub. L. No. 81-920, *repealed in part by* Pub. L. No. 103-337, *reinstated in part as* Title VI of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5195–5197(q) (2000).

⁵⁵ See Whitley et al., *supra* note 12, at 4; see also Walters & Kettl, *supra* note 53.

⁵⁶ The Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121 (2000). While the federal government lacks inherent police power, it can respond to disasters by using the power granted in Article I, Section 8 of the Constitution: the power to regulate interstate commerce, tax and spend, and provide for the common defense. See Kent, *supra* note 13, at 186. “The Stafford Act is exercised pursuant to all three.” *Id.*; see also Ernest B. Abbott et al., *Federalism and Constitutional Challenges*, in AMERICAN BAR ASSOCIATION HURRICANE KATRINA TASK FORCE SUBCOMMITTEE REPORT 1, 1 (2006), available at http://www.tisp.org/files/pdf/publications/aba_katrina_report_february_2006.pdf (discussing the interplay of federal constitutional authority with state and local police power when providing disaster relief).

⁵⁷ See KEITH BEA, CONG. RES. SERV., FEDERAL STAFFORD DISASTER ASSISTANCE; PRESIDENTIAL DECLARATIONS, ELIGIBLE ACTIVITIES, AND FUNDING 1 (2006), available at <http://www.fas.org/sgp/crs/homsec/RL33053.pdf>.

under the Stafford Act is only triggered after a formal request from the governor of an afflicted state.⁵⁸

The federal disaster relief features of the Stafford Act come into play when the governor of a state requests “a declaration by the President that a major disaster exists.”⁵⁹ The request must assert that the state has done all it can do to respond to the disaster, but that the “disaster is of such severity and magnitude” that it exceeds the capacity of the state to deal with the emergency, and federal assistance is necessary.⁶⁰ Based on the governor’s request, FEMA will recommend the President “declare . . . that a major disaster or emergency exists.”⁶¹

The President’s declaration of a major disaster or emergency initiates a large influx of federal assistance into the requesting state, including financial contributions to state and local governments.⁶² Under the Stafford Act, the President can “direct *any* Federal agency, with or without reimbursement, to utilize its authorities and . . . resources . . . in support of State and local assistance . . . efforts.”⁶³ Once the President declares a major disaster or emergency, the National Response Plan (“NRP”)⁶⁴ helps coordinate DHS/FEMA’s implementation of the Stafford Act.⁶⁵

⁵⁸ Whitley et al., *supra* note 12, at 4.

⁵⁹ 42 U.S.C. § 5170. The President may declare an “emergency” without receiving a state’s request if “primary responsibility . . . rests with the United States because the emergency involves a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority.” *Id.* § 5191(b). Examples typically include “attacks on federal buildings, disasters involving Indian tribal lands, and incidents involving nuclear materials.” Abbott et al., *supra* note 56, at 4.

⁶⁰ 42 U.S.C. § 5170. *See also* Tucker & Bragg, *supra* note 49, at 862. Each state affected must make its own request for a disaster declaration, which the President must issue separately. Abbott et al., *supra* note 56, at 4.

⁶¹ 42 U.S.C. § 5170. The Stafford Act merely permits, but does not require, the President to declare a major disaster—therefore, although a presidential declaration is likely, it is not etched in stone. *See id.*; *see also* Abbott et al., *supra* note 56, at 4. Once the President declares a major disaster or emergency, he must appoint a Federal Coordinating Officer, responsible for managing nearly all aspects of the federal response in his assigned state. 42 U.S.C. § 5143.

⁶² 42 U.S.C. §§ 5170(a), 5192; *see also* Abbott et al., *supra* note 56, at 5.

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

⁶⁴ U.S. DEP’T OF HOMELAND SEC., THE NATIONAL RESPONSE PLAN (2004). The NRP, put in place following the September 11th attacks, provides the principal guidance that governs federal procedures for responding to and managing a domestic incident. Whitley et al., *supra* note 12, at 4. Consistent with the “pull” approach of the federal disaster relief scheme, the NRP stresses that “incidents are generally handled at the lowest jurisdictional level possible.” U.S. DEP’T OF HOMELAND SEC., QUICK REFERENCE GUIDE FOR THE NATIONAL RESPONSE PLAN 3 (2006), available at http://www.dhs.gov/xlibrary/assets/NRP_Quick_Reference_Guide_5-22-06.pdf.

⁶⁵ Abbott et al., *supra* note 56, at 5. The NRP is more of a “framework” than an actual plan and is essentially an agreement between federal agencies to coordinate their capabilities in

Despite the federal resources made available by the Stafford Act, the statute reflects the traditional reluctance to interfere with state and local governments.⁶⁶ In the aftermath of Hurricane Katrina, this reluctance and required deference created great frustration; rather than proactively initiating relief efforts, FEMA left buses, food, fuel, and other rescue supplies idle until receiving specific and itemized requests from state and local governments.⁶⁷ When Governor Blanco finally requested President Bush to give her “everything you’ve got,” instead of a specific list of requests, the federal government failed to comprehend exactly what the governor was requesting, leading to delayed relief efforts.⁶⁸ Governor Blanco also refused President Bush’s request to federalize the National Guard, fearing that the Posse Comitatus Act⁶⁹ would prohibit the Guard from engaging in law enforcement operations.⁷⁰

B. *The Posse Comitatus Act*

The Posse Comitatus Act (“Posse Act”), enacted in 1878, is rooted in the Anglo-American tradition of military subordination to civilian authority and largely resulted as “a response to the imposition of federal martial law upon the former Confederate States to maintain civil order.”⁷¹ The Posse Act, as it exists today, is a criminal statute prohibiting the use of federal troops for law enforcement purposes, except in cases and circumstances “expressly authorized by the Constitution or Act of Congress.”⁷² The Posse Act became the subject of

the event of a domestic incident. *Id.* at 8. The NRP is not a law, does not have legal effect, and does not bind state and local governments, and, therefore, it is not a primary focus of this Essay. *Id.* For a further discussion of the NRP’s application during Hurricane Katrina, see Whitley et al., *supra* note 12, at 4–6.

⁶⁶ See Garrett & Tetlow, *supra* note 22, at 165.

⁶⁷ See Lipton et al., *supra* note 28, at 28; see also David D. Kirkpatrick & Scott Shane, *Ex-FEMA Chief Tells of Frustration and Chaos*, N.Y. TIMES, Sept. 15, 2005, at A1.

⁶⁸ See Lipton et al., *supra* note 28, at 1, 28; Eric Lipton et al., *Political Issues Snarled Plans for Troop Aid*, N.Y. TIMES, Sept. 9, 2005, at A22 [hereinafter Lipton, *Political Issues*]; David E. Sanger, *Federal Response: Bush Wants to Consider Broadening of Military’s Powers During Natural Disasters*, N.Y. TIMES, Sept. 27, 2005, at A18.

⁶⁹ The Posse Comitatus Act, 18 U.S.C. § 1385 (2000).

⁷⁰ See Lipton, *Political Issues*, *supra* note 68; Tkacz, *supra* note 27, at 305–06.

⁷¹ Michael Greenberger, *Did the Founding Fathers Do “A Heckuva Job”?* *Constitutional Authorization for the Use of Federal Troops to Prevent the Loss of a Major American City*, 87 B.U. L. REV. 397, 406 (2007); see also U.S. N. COMMAND, THE POSSE COMITATUS ACT, http://www.northcom.mil/About/history_education/posse.html. For a discussion of the larger historical underpinnings of the Posse Comitatus Act, see Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 YALE L. & POL’Y REV. 383, 389–98 (2003).

⁷² 18 U.S.C. § 1385. The exceptions to the Posse Comitatus Act are not a primary focus in this Essay but are worth noting. The Act does not apply when the Constitution or Congress

a political brouhaha during Katrina as federal lawyers pondered, for several days, whether the Act allowed the introduction of federal troops into Louisiana.⁷³

“The National Guard is the modern version of the state militias,”⁷⁴ and “remains under state executive control when not federalized by Congress or the President.”⁷⁵ When control over the National Guard remains vested in the hands of state governors, however, the Posse Act does not prohibit the Guard from engaging in law enforcement activities.⁷⁶ When Governor Blanco requested National Guard assistance, the White House repeatedly asked her to agree to a federalization of the National Guard.⁷⁷ At the advice of state advisors, Governor Blanco vehemently refused the proposal, fearing a federalization of the Guard would prohibit it from engaging in law enforcement operations under the Act.⁷⁸ Once federal soldiers arrived in Louisiana, the Posse Act prohibited them from making arrests and only hindered the efforts of local law enforcement.⁷⁹

C. *Department of Defense Directive 3025.1 and “Immediate Response Authority”*

Article 4.5 of the Department of Defense (“DoD”) Directive 3025.1⁸⁰ outlines the DoD’s “Immediate Response” authority, which authorizes “immediate action by military commanders . . . to save lives, prevent human suffering, or mitigate great property damage” in the wake of a civil emergency.⁸¹ Only after a request by civil authori-

expressly authorizes the use of the military to execute the law. For example, under the Insurrection Act, Congress may authorize the President to use the federal armed forces to quell an insurrection “in any State against its government.” 10 U.S.C. § 331 (2000); *see also* JENNIFER K. ELSEA, CONG. RES. SERV., *THE USE OF FEDERAL TROOPS FOR DISASTER ASSISTANCE: LEGAL ISSUES* 3 (2007) (CRS Report RS22266) (discussing historical uses of the Insurrection Act). Moreover, the Act authorizes the President to suppress a rebellion in a state when it is otherwise “impracticable to enforce the laws of the United States.” 10 U.S.C. § 332.

⁷³ *See* Lipton, *Political Issues*, *supra* note 68.

⁷⁴ Kent, *supra* note 13, at 188.

⁷⁵ Tkacz, *supra* note 27, at 314.

⁷⁶ *See id.* at 314–15.

⁷⁷ Robert Travis Scott, *Politics Delayed Troops Dispatch to N.O.: Blanco Resisted Bush Leadership Proposal*, *TIMES-PICA YUNE*, Dec. 11, 2005, at A12.

⁷⁸ *See id.*; *see also* 18 U.S.C. § 1385 (2000).

⁷⁹ *See* Scott, *supra* note 77.

⁸⁰ DEP’T OF DEF., DIRECTIVE NO. 3025.1, *MILITARY SUPPORT FOR CIVIL AUTHORITIES* (1993), available at <http://www.uscg.mil/hq/g-o/g-opr/nsarc/DOD302501pMSCA.pdf> [hereinafter DoD DIRECTIVE].

⁸¹ *See id.* § 4.5.1; *see also* Joshua M. Samek, Note, *The Federal Response to Hurricane Katrina: A Case for Repeal of the Posse Comitatus Act or a Case for Learning the Law?*, 61 U.

ties, and only “where there has *not been* any declaration of major disaster or emergency by the President” under the Stafford Act, can the government provide relief.⁸²

The civil assistance provided through DoD’s Immediate Response authority is strikingly similar to relief under the Stafford Act, including, *inter alia*, rescue, evacuation, emergency medical treatment, emergency restoration of essential public services, and facilitating the reestablishment of civil government functions.⁸³ Despite the similarities to the Stafford Act, however, the DoD Immediate Response authority differs in one important respect: relief under this authority “may also *include law enforcement activities* that would ordinarily be prohibited by the [Posse Act].”⁸⁴ The federal government did not use the Immediate Response authority during Hurricane Katrina.⁸⁵

III. Chevron Deference and the Call for Greater Federal Power During Disasters—Why It Fails and Why We Should Hang Up on the Call Altogether

The inefficiencies plaguing the failed government response to Katrina galvanized support for greater federal power during disaster relief, particularly by amending the Stafford Act⁸⁶ and Posse Act.⁸⁷ President Bush himself called on Congress to amend federal law to allow the military to respond to natural disasters like Katrina.⁸⁸ Another method to increase federal power, albeit not extensively dis-

MIAMI L. REV. 441, 449 (2007) (setting forth the various relief and assistance that can be provided by military commanders pursuant to the DoD Immediate Response authority).

⁸² DoD DIRECTIVE, *supra* note 80, §§ 4.5.1, E2.1.18 (emphasis added); *see also* Samek, *supra* note 81, at 449.

⁸³ *See* DoD DIRECTIVE, *supra* note 80, § 4.5.4; *see also* Samek, *supra* note 81, at 449–50.

⁸⁴ Samek, *supra* note 81, at 450 (emphasis added) (citation omitted).

⁸⁵ *See id.* at 464–65.

⁸⁶ *See, e.g.*, Kent, *supra* note 13, at 207–08 (suggesting amendments to the Stafford Act that would broaden federal authority by allowing utilization of the National Guard and armed forces during disasters).

⁸⁷ *See, e.g.*, Tkacz, *supra* note 27, Part IV (discussing changes to the Posse Comitatus Act that would prevent state, local, and federal authorities from wrestling for power in the wake of disasters). *But see* Kealy, *supra* note 71, Part VI (calling for greater restrictions of federal military use during disasters and a repeal of the Posse Comitatus Act altogether).

⁸⁸ Sanger, *supra* note 68. On October 17, 2006, Congress enacted the John Warner National Defense Authorization Act (“Warner Amendment”), Pub L. No. 109-364, 120 Stat. 2083 (2006). The Warner Amendment allows the President, without state consent, to deploy federal troops to respond to natural disasters. *Id.* § 1706, 120 Stat. at 2404 (to be codified at 10 U.S.C. § 333). Every state governor vehemently opposed the law. *See* Greenberger, *supra* note 71, at 400, 415. The Warner Amendment, however, does not take the primary control over disaster relief away from the states and, accordingly, much debate continues as to whether the federal government should have greater control over disaster relief. *See, e.g., id.* at 401.

cussed, is whether FEMA could interpret ambiguities in the Stafford Act to afford it greater control during domestic natural disasters and, accordingly, receive *Chevron* deference for its interpretation. This Essay maintains that such action would not withstand the test of *Chevron* and therefore would not receive deference. Moreover, despite FEMA’s failed post-Katrina performance, this Essay posits that the federal government already possesses the power to adequately handle disasters like Katrina, and the movement for expanding federal power during natural disasters will only create more confusion and exacerbate damage.

A. *A Claim to Interpret the Stafford Act with Chevron Deference Will Fail to Expand Federal Power over Disaster Relief*

“*Chevron* deference” refers to the Supreme Court’s decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,⁸⁹ where the Court dramatically expanded the circumstances under which courts defer to agency statutory interpretations. Deferring to an agency’s statutory interpretation regarding questions of law was not a new concept; prior to *Chevron*, a court was only required to defer to an agency when Congress expressly delegated agency authority “to define a statutory term or prescribe a method of executing a statutory provision.”⁹⁰ Apart from this restricted context, courts were not required to afford deference to an agency’s statutory interpretations.⁹¹

Chevron removed a great deal of judicial discretion over when to afford agency deference by placing a duty on courts to defer to *reasonable* agency interpretations not only when Congress expressly delegated agency interpretive authority, but also when Congress left ambiguities in the statute administered by the agency.⁹² By inherently deeming these gaps and ambiguities in an agency’s statute as “implied delegations” of interpretive authority,⁹³ “the Court effected a fundamental transformation in the relationship between courts and [administrative] agencies.”⁹⁴

⁸⁹ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

⁹⁰ *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982); *Rowan Cos. v. United States*, 452 U.S. 247, 253 (1981).

⁹¹ See Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 833 (2001) (citation omitted).

⁹² *Id.*

⁹³ See *Chevron*, 467 U.S. at 843–44 (citations omitted); see also Merrill & Hickman, *supra* note 91, at 833–34.

⁹⁴ Merrill & Hickman, *supra* note 91, at 833–34.

Chevron sets forth a two-part deference formula, commonly known as the “*Chevron* Two-Step,” to determine when an agency’s statutory interpretation prevails. Step One asks, “whether Congress has directly spoken to the precise question at issue.”⁹⁵ If the statute leaves no ambiguity, “that is the end of the matter” and the unambiguous statute governs, regardless of the agency’s interpretation.⁹⁶ If ambiguity exists, however, the Court determines whether the agency’s interpretation is *reasonable*;⁹⁷ a reasonable interpretation prevails irrespective of whether a “better” interpretation exists, as long as it is not “arbitrary, capricious, or manifestly contrary to the statute.”⁹⁸

With the foundational underpinnings of *Chevron* established, is it permissible that FEMA, charged with administering the Stafford Act,⁹⁹ could interpret the statute to afford it greater control over disaster response? For example, § 5170 of the Stafford Act allows the President to direct any federal agency to use its resources in support of state and local efforts.¹⁰⁰ Could FEMA interpret “in support” to mean overriding state authority if the state and local governments are simply overwhelmed by the scope of the disaster? It is the broad contention of this Essay that this interpretation, as well as any other conceivable interpretation of the Stafford Act enlarging federal control over disaster relief, runs directly contrary to the purpose of the statute and will not receive *Chevron* deference.¹⁰¹

I. *Chevron* Step One

Should FEMA attempt to interpret the Stafford Act to expand its control over disaster relief, the agency will not clear Step One.¹⁰² In

⁹⁵ *Chevron*, 467 U.S. at 842.

⁹⁶ *Id.* at 842–43.

⁹⁷ *Id.* at 843 (specifically holding that a reasonable interpretation is one that is “permissible”); see also, e.g., *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 84 (2002) (opining that an agency’s *reasonable* interpretation is one that makes sense of the statute).

⁹⁸ *Chevron*, 467 U.S. at 844.

⁹⁹ See BEA, *supra* note 57, at 1.

¹⁰⁰ See 42 U.S.C. § 5170(a) (2000).

¹⁰¹ When an agency is not entitled to *Chevron* deference, it may still receive some form of deference under the *Skidmore* test, discussed *infra*, Part III.B. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

¹⁰² This Essay assumes that should FEMA attempt the action discussed herein, it would do so in a manner qualifying for *Chevron* deference. Often termed “*Chevron* Step Zero,” there are a number of agency actions that do not qualify for *Chevron* deference. See Merrill & Hickman, *supra* note 91, at 836 (opining that agencies that solely perform funding, investigating, or prosecuting functions are not eligible for *Chevron* deference). For example, only agency action that has the force of law is entitled to *Chevron* deference. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). Notice-and-comment rulemaking procedures and formal adjudication give the

determining whether language is ambiguous, a court “employ[s] the traditional tools of statutory construction; if Congress had an intent on th[e] issue, that intent is the law and must be given full effect.”¹⁰³ Moreover, the court must interpret the words in the statute in accordance with their ordinary meaning, “with a view [toward] their place in the overall statutory scheme.”¹⁰⁴ While FEMA could conceivably argue, for example, that “in support” is susceptible to two different meanings—supporting the states in a technically subservient fashion versus supporting the states by taking the helm of disaster response when the state is overwhelmed—the Stafford Act language runs entirely to the converse of a dual interpretation. The entire context of the Stafford Act unequivocally places the overall control of disaster response in the hands of state and local governments.¹⁰⁵

As discussed above,¹⁰⁶ the federal government’s involvement in disaster relief under the Stafford Act does not exist until *authorized* by state and local governments; without a state governor’s request for a Presidential disaster declaration, no federal authority, at least under the Stafford Act, exists.¹⁰⁷ Despite citizens and state governments looking to FEMA to “sweep in and save them” after a natural disaster,¹⁰⁸ Congress clearly and unambiguously drafted the Stafford Act to leave power in the hands of the states. Accordingly, any straying interpretation will fail *Chevron* Step One.¹⁰⁹

agency power to issue rules with the force of law and, therefore, entitle the agency to *Chevron* deference. *Id.* at 227. In less formal cases, however, such as agency interpretive rules or opinion letters, the agency does not have the power to issue rules with the force of law and will not receive *Chevron* deference. See *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). This Essay assumes that FEMA would proceed with its interpretation to expand federal control in a manner, such as notice-and-comment rulemaking, qualifying for *Chevron* deference.

¹⁰³ *Student Loan Fund of Idaho, Inc. v. Dep’t of Educ.*, 272 F.3d 1155, 1165 (9th Cir. 2001).

¹⁰⁴ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); see also *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

¹⁰⁵ See Whitley et al., *supra* note 12, at 4.

¹⁰⁶ See *supra* Part II.A.

¹⁰⁷ See 42 U.S.C. §§ 5121, 5170 (2000).

¹⁰⁸ See Kent, *supra* note 13, at 187.

¹⁰⁹ Another possible interpretation of the Stafford Act to expand federal power could be that once a state or local government makes a formal request for federal relief, the federal government could then take over, thereby abdicating the requirements for specific detailed relief following the initial request. See, e.g., *supra* notes 67–68. While it is quite possible to engage in a number of hypothetical interpretations that ultimately expand the federal government’s disaster relief power, this Essay broadly contends that any such interpretation runs directly contrary to the intent of the Stafford Act, and therefore fails *Chevron*’s first step.

2. Chevron Step Two

Assuming, *arguendo*, that FEMA clears the Step One hurdle, it assuredly fails Step Two. *Chevron* holds that agency deference is not appropriate when an agency's interpretation is "manifestly contrary to the statute."¹¹⁰ A court would be hard-pressed, for many of the reasons outlined in Part III.A.1 above, to find FEMA's interpretation expanding its control over disaster response as a reasonable interpretation of the statute. In fact, such an interpretation strips the states of their important powers in disaster response and directly contravenes the congressional purpose of the Stafford Act.

Congress enacted the Stafford Act specifically on the premise that it would allow the federal government to *supplement* state and local governments in times of disaster. Specifically, the findings and definitions embodied within the Stafford Act itself clearly set forth Congress's unequivocal intent that state and local governments, not the federal government, carry the primary responsibility for disaster relief.¹¹¹ For example, the Stafford Act was intended to "*assist* the efforts of the affected [*s*]tates"¹¹² and to "provide an orderly and continuing means of *assistance* by the [f]ederal [g]overnment to [*s*]tate and local governments"¹¹³ in carrying out disaster relief by, *inter alia*, "encouraging . . . [*s*]tates and local governments to protect themselves."¹¹⁴ Moreover, if federal assistance is needed, it is only meant to "*supplement* the efforts and available resources of [*s*]tates, local governments, and disaster relief organizations."¹¹⁵

Accordingly, the Stafford Act assumes that state and local officials are best equipped to direct disaster relief, given their knowledge of local citizens, geography, and other special circumstances.¹¹⁶ Stripping this power from state and local governments and placing it in the federal government's hands subverts the intent of the Stafford Act and therefore such an interpretation is not entitled to *Chevron* deference.¹¹⁷

¹¹⁰ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

¹¹¹ *See generally* 42 U.S.C. §§ 5121–5207.

¹¹² *Id.* § 5121(a) (emphasis added).

¹¹³ *Id.* § 5121(b) (emphasis added).

¹¹⁴ *Id.* § 5121(b)(4).

¹¹⁵ *Id.* § 5122(2) (emphasis added); *see also id.* § 5122(1) (federal assistance is meant to "supplement [*s*]tate and local [disaster relief] efforts").

¹¹⁶ *See Kent*, *supra* note 13, at 187.

¹¹⁷ *See Nat'l R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 417–18 (1992) (holding that an agency's interpretation of a silent or ambiguous statute is only permissible if it is not in conflict with the statute's plain language); *IRS v. Fed. Labor Relations Auth.*, 494 U.S.

B. *Attempts to Enlarge the Federal Disaster Relief Role Only Aggravate Inefficiency*

An agency that does not receive *Chevron* deference may still persuade the reviewing court to afford *Skidmore*¹¹⁸ deference to its statutory interpretation.¹¹⁹ While *Chevron* deference is an all-or-nothing proposition, *Skidmore* deference considers certain persuasion factors, including the thoroughness of an agency’s decision, logic, consistency with prior interpretations, and the expertise the agency brings to the table.¹²⁰ FEMA’s attempt to broaden its control through interpretation of the Stafford Act will incontrovertibly fail even under *Skidmore* deference. While *Chevron* deference focuses primarily on statutory language to determine the existence of ambiguity, *Skidmore* unleashes a plethora of other considerations that make FEMA’s interpretation ill-advised and patently improper.

Although the experience of the domestic disaster following Hurricane Katrina “spurred calls [for] increase[d] federal authority,”¹²¹ the expansion of federal power through FEMA’s attempted statutory interpretation, amendment to statutes prohibiting federal power, or any other method, will only exacerbate the damage left by future catastrophes. First, expanding federal power in disaster relief casts a preemptive net that encompasses those state and local governments that flourish under the current approach. State and local officials are the most knowledgeable about their citizenry and the geography affected by a natural disaster and thus play the most important operational role in disaster relief.¹²² The federal government does not share this intimate relationship with local citizens and, therefore, its power usurpation obliterates the vital authority and responsibility of the actor in the best position to coordinate, prepare, respond, and recover from a disaster.¹²³

922, 928 (1990) (withholding deference to an agency interpretation because it was flatly contradicted by statutory language); *Pub. Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 171 (1989) (holding no deference is afforded to an agency interpretation that is “at odds with the plain language of the statute” it administers); *INS v. Cardozo-Fonseca*, 480 U.S. 421, 447–48 (1987) (explaining that courts owe no deference to an agency interpretation “contrary to clear congressional intent”); *Hawaii v. FEMA*, 294 F.3d 1152, 1158 (9th Cir. 2002) (holding FEMA’s interpretation of portion of the Stafford Act to be unreasonable).

¹¹⁸ *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

¹¹⁹ *Id.* at 140.

¹²⁰ *See id.*; Merrill & Hickman, *supra* note 91, at 833, 836, 855.

¹²¹ *See* Adam M. Guiliano, *Emergency Federalism: Calling on the States in Perilous Times*, 40 U. MICH. J.L. REFORM 341, 342 (2007).

¹²² Tucker & Bragg, *supra* note 49, at 838.

¹²³ *See* Whitley et al., *supra* note 12, at 4.

For an example of the calamitous effect federal usurpation of state disaster authority will have, consider the state of Florida. No other state is more susceptible to hurricanes than Florida.¹²⁴ Within a fourteen-month period beginning in 2004, Florida endured seven hurricanes (Charlie, Frances, Ivan, Jeanne, Dennis, Katrina, and Rita) and three tropical storms (Bonnie, Ophelia, and Tammy).¹²⁵ Florida effectively prepared, coordinated, and responded to each storm under the bottom-up approach governing the current disaster relief scheme.¹²⁶ Moreover, following Hurricane Katrina, Florida Governor Jeb Bush testified before Congress, offering harsh rebukes to the concept of federalized emergency response: “I can say with certainty that federalizing emergency response to catastrophic events would be a disaster as bad as Hurricane Katrina.”¹²⁷ Florida’s hurricane response, and even FEMA’s recent successful response to the 2007 California wildfires,¹²⁸ serve as tantamount examples that the current disaster relief system succeeds if “everyone understands, accepts[,] and is willing to fulfill their responsibilities.”¹²⁹

Secondly, while proponents of greater federal disaster authority claim this control will hasten response and erase ambiguities,¹³⁰ it is far more likely to create more uncertainty and inefficiency. For example, when would the federal government initiate its power to override decisions of state and local officials?¹³¹ Is the power appropriate to invoke for a Category Five hurricane, but not a Category Three?¹³² Would this power supplement or supplant state authority?¹³³ Can such authority be structured appropriately given the limitations of the Tenth Amendment?¹³⁴ These questions merit further discussion beyond the context of this Essay, but serve to illustrate the added confu-

¹²⁴ Tucker & Bragg, *supra* note 49, at 837.

¹²⁵ *Federalism and Disaster Response: Examining the Roles and Responsibilities of Local, State & Federal Agencies: Hearing Before the H. Comm. on Homeland Security*, 109th Cong. 139 (2005) [hereinafter Gov. Bush Statement] (statement of Florida Governor Jeb Bush).

¹²⁶ See Gov. Bush Statement, *supra* note 125, at 20.

¹²⁷ Gov. Bush Statement, *supra* note 125, at 1; see also Fred Grimm, Op-Ed., *Responses to Storms: A Tale of Two Brothers*, MIAMI HERALD, Oct. 23, 2005, at 1B.

¹²⁸ See *FEMA Faces Wildfire, Katrina Comparisons*, CNN.COM, Oct. 24, 2007, <http://www.cnn.com/2007/POLITICS/10/24/fire.fema/> (discussing FEMA’s successful response to the 2007 California wildfires vis-à-vis Hurricane Katrina).

¹²⁹ Gov. Bush Statement, *supra* note 125, at 20.

¹³⁰ See, e.g., Griffin, *supra* note 45, at 531–32 (discussing the need for a greater federal role).

¹³¹ See Abbott et al., *supra* note 56, at 12.

¹³² See *id.*

¹³³ See *id.*

¹³⁴ See *id.*

sion, complexities, and ambiguities that arise by expanding federal disaster relief power.

C. *The Misplaced Call for Greater Federal Disaster Authority*

Hurricane Katrina was a domestic disaster of monumental proportions and, as is often the case in the aftermath of such disasters, produced heated debate and demands for legislative changes to ensure the country never revisits similar fallout.¹³⁵ Various scholarship discusses how to devise greater federal disaster authority—for example, conditioning federal funding on the President’s ability to authorize the use of federal troops (if the state is overcome by the disaster)¹³⁶ or affording the federal government override authority if the state is incapable of effective disaster response.¹³⁷ This authority, however, already exists under various disaster relief statutes and does not require subsequent legislation that may haphazardly aggrandize executive power.¹³⁸ In actuality, the federal government’s public lobby for greater federal disaster power after Hurricane Katrina largely results from poor reading comprehension, and less from an actual need for broader federal action. Moreover, as exhibited by effective disaster response during Florida’s 2004–2005 hurricane seasons and the response to California’s wildfires in 2007, the current system of disaster relief works just fine when each entity and level of government knows its role and operates within the system.¹³⁹

The prolonged debate over the federalization of the National Guard during Hurricane Katrina, and the present call for greater federal power to utilize federal troops in disaster relief, exemplify this

¹³⁵ After a major disaster, public sentiment galvanizes behind an issue and demands change. See, e.g., Josef Braml, *Rule of Law or Dictates by Fear: A German Perspective on American Civil Liberties in the War Against Terrorism*, FLETCHER F. WORLD AFF., Summer/Fall 2003, at 115, 119–21 (discussing public support for the PATRIOT Act after September 11th).

¹³⁶ See Greenberger, *supra* note 71, at 401.

¹³⁷ See Abbott et al., *supra* note 56, at 12.

¹³⁸ The federal government’s powers under the PATRIOT Act provide an illustrative example. Following the September 11th attacks, Congress hastily, and perhaps haphazardly, enacted the PATRIOT Act to help the federal government identify and capture terrorists. The PATRIOT Act, however, unnecessarily aggrandized the government’s power to pursue U.S. citizens for common crimes—a far cry from the Act’s original antiterrorism intent. See, e.g., David B. Caruso, *Critics Cite PATRIOT Act Abuse and Misuse—Dodson: Act Stretches Beyond Terrorism Cases*, DAILY TEXAN (Austin), Sept. 14, 2003, available at <http://media.www.dailytexanonline.com/media/storage/paper410/news/2003/09/14/StateLocal/Critics.Cite.Patriot.Act.Abuse.And.Misuse-465391.shtml> (discussing executive misuses of the PATRIOT Act).

¹³⁹ See *supra* notes 124–29 and accompanying text; see also Sheryl Gay Stolberg, *With Katrina Fresh, Bush Moves Briskly*, N.Y. TIMES, Oct. 24, 2007, at A14 (discussing the lessons learned from Hurricane Katrina).

already existing authority.¹⁴⁰ Once federalized, the Posse Act prohibits the National Guard from engaging in law enforcement functions.¹⁴¹ Although the use of the military in response to natural disasters pursuant to DoD Directive 3025.1 and the DoD Immediate Response authority is not subject to the law enforcement prohibition, such use is only engaged if the President has not made a major disaster declaration.¹⁴² Although federal funds and resources under the Stafford Act are only available to states if the President makes a major disaster declaration,¹⁴³ the Act does not mandate that the President make this declaration.¹⁴⁴

Hypothetically, if the President feels the magnitude of a disaster will overcome state resources, he can refuse to declare a major disaster area. In the absence of such declaration, the President can utilize the DoD's Immediate Response authority under DoD Directive 3025.1 and use troops, under federal control, to evacuate and rescue civilians, distribute food and essential medical supplies, establish interim emergency communications, conduct damage assessments, safeguard the city, and reestablish local government functions.¹⁴⁵ Moreover, the military assistance provided under DoD's Immediate Response authority "may also include law enforcement activities . . . ordinarily [prohibited] by the Posse Comitatus Act."¹⁴⁶ By not issuing a major disaster declaration and utilizing the Immediate Response authority, the President has extensive authority to control disaster relief if he feels the state and local governments cannot effectively control the situation. Accordingly, the federal government does not need new legislation or legislative amendments to achieve this authority—just better reading comprehension skills.¹⁴⁷

Conclusion

The aftermath of Hurricane Katrina was a national tragedy that will forever plague government disaster response. The storm simply overcame state and local government response efforts, while political infighting and lack of communication gave way to a myriad of ineffi-

¹⁴⁰ See Sanger, *supra* note 68; Susan Saulny & Jim Rutenberg, *Kansas Tornado Renews Debate on Guard at War*, N.Y. TIMES, May 9, 2007, at A1.

¹⁴¹ See *supra* Part II.B.

¹⁴² See *supra* Part II.C.

¹⁴³ 42 U.S.C. § 5170 (2000).

¹⁴⁴ See *supra* note 61 and accompanying text.

¹⁴⁵ See DoD DIRECTIVE, *supra* note 80, § 4.5.4.

¹⁴⁶ Samek, *supra* note 81, at 450.

¹⁴⁷ For a detailed discussion of "learning the law," see generally Samek, *supra* note 81.

ciencies. These inefficiencies ignited an emotional and fiery debate as to whether the nation’s traditional model of disaster relief needed an overhaul to place greater control, direction, and authority in FEMA’s hands. Achieving this amplified disaster response authority through broad interpretation of the Stafford Act runs entirely contrary to the supplemental nature of federal disaster response under the Stafford Act and thus, this reading will not receive deference under *Chevron*. Moreover, the added confusion and ambiguity resulting from this interpretation makes it unlikely that such an interpretation by FEMA qualifies for even *Skidmore* deference.

Regardless of the method for increasing federal disaster authority, whether legislatively or through the *Chevron* and *Skidmore* deference doctrines, the recent lobbying for a greater federal role in disaster response is unjustified and misplaced. The federal government already possesses inherent authority under existing disaster relief statutes to adequately respond to future disasters and, if necessary, to override state authority. Instead of journeying down a dangerous path of unnecessary executive aggrandizement, executive officials vested with the responsibility of responding to a domestic disaster should simply reread the relevant law governing their authority and act accordingly.