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The Bedrock of Individual Rights in Times of Natural Disaster

DIANE P. WOOD*

Hurricane Katrina blasted into the Gulf Coast of the United States on August 29, 2005,¹ thirteen days short of the fourth anniversary of the terrorist attacks of September 11, 2001. Thirteen days after the Katrina disaster, on September 24, 2005, Hurricane Rita hit this still-suffering area of the country.² The aftermath, both in human and economic terms, is well known.³ For a time, chaos reigned, especially in New Orleans and the surrounding area. Even today, New Orleans continues to suffer from the effects of the storms, its population cut in half, and its economic base devastated.⁴ Similarly, residents of Houston, a city also affected by the storms of 2005, acknowledge their relative good fortune, yet still recall with horror the twelve to twenty-four hour ordeals they endured while attempting to comply with official orders to evacuate.⁵ In the three years since the storms, the Nation has had a chance to reflect upon the legal implications of disasters, both natural and manmade. For some time, the tension between the rule of law and threats posed by terrorists and other hostile entities has been apparent. Comparable tensions exist, however, when the urgency at hand stems from a natural event, such as a hurricane, a pandemic, or a fire.

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1. See National Climatic Data Center, U.S. Dept. of Commerce, *Climate of 2005 Summary of Hurricane Katrina*, <http://lwf.ncdc.noaa.gov/oa/climate/research/2005/katrina.html>.

2. Shaila Dewan & Jere Longman, *Hurricane Slams into Gulf Coast; Flooding Begins*, N.Y. TIMES, Sept. 25, 2005, at A11.

3. For an excellent survey of these events and the law relating to them, see generally DANIEL A. FARBER & JIM CHEN, *DISASTERS AND THE LAW: KATRINA AND BEYOND* (2006).

4. Stephen Ohlemacher, *Katrina's Louisiana Legacy: A Half-Abandoned Region*, THE STAR-LEDGER, Mar. 22, 2007, at 12.

5. Ralph Blumenthal, *Storm and Crisis: The Overview; Miles of Traffic as Texans Heed Order to Leave*, N.Y. TIMES, Sept. 23, 2005, at A1.

A brief review of the essential elements of the rule of law confirms that the courts play a central role in its creation and maintenance. If courts are unavailable or unable to function, as was the case following Hurricane Katrina, little stands between the citizenry and the breakdown of the rule of law.⁶ After setting the stage, therefore, this article then looks at what steps the courts have taken, since Katrina, to assure continuity of operations. Assuming that the courts have managed to stay open and inform the public of any alternative arrangements that may be in place, the question becomes: what problems, if any, have been rendered nonjusticiable because of the exigencies of the emergency? Finally, in deciding whether courts are prepared or permitted to address a problem, it is useful to identify the greatest potential conflicts with individual rights that can arise in these troubled situations.

Open for Business: The Rule of Law and the Courts

In an earlier paper, entitled *The Rule of Law in Times of Stress*,⁷ I discussed the extent to which the United States has, or has not, adhered to the rule of law during times of insurrection, foreign wars, or other threats to national security. That paper used the following working definition of the “rule of law”:

[T]he rule of law has both a substantive and a procedural dimension; . . . there is no one in a society governed by law who is above the law or immune from some form of legal constraint; . . . neither laws nor the procedures used to create or implement them should be secret; and . . . the laws must not be arbitrary.⁸

Perhaps the most important part of the procedural dimension of the rule of law is the existence of “instrumentalities of impartial justice,”⁹ meaning courts that use fair procedures.¹⁰

The State Department of the United States takes much the same approach to the concept of the rule of law. Its Office of International Information Programs identifies the following characteristics of states that follow the rule of law:

6. See Press Release, Admin. Office of the U.S. Courts, Federal Courts Closed by Hurricane Katrina, <http://www.uscourts.gov/newsroom/hurricane2.html>.

7. See Diane P. Wood, *The Rule of Law in Times of Stress*, 70 U. CHI. L. REV. 455 (2003).

8. *Id.* at 457.

9. Richard H. Fallon, Jr., “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 9 (1997).

10. *Id.*

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[1] Rule of law means that no individual, president or private citizen, stands above the law. Democratic governments exercise authority by way of law and are themselves subject to law's constraints.

[2] Laws should express the will of the people, not the whims of kings, dictators, military officials, religious leaders, or self-appointed political parties.

[3] Citizens in democracies are willing to obey the laws of their society, then, because they are submitting to their own rules and regulations. Justice is best achieved when the laws are established by the very people who must obey them.

[4] Under the rule of law, a system of strong, independent courts should have the power and authority, resources, and the prestige to hold government officials, even top leaders, accountable to the nation's laws and regulations.

[5] For this reason, judges should be well trained, professional, independent, and impartial. To serve their necessary role in the legal and political system, judges must be committed to the principles of democracy.

[6] The laws of a democracy may have many sources: written constitutions; statutes and regulations; religious and ethical teachings; and cultural traditions and practices. Regardless of origin, the law should enshrine certain provisions to protect the rights and freedoms of citizens:

[i] Under the requirement of equal protection under the law, the law may not be uniquely applicable to any single individual or group.

[ii] Citizens must be secure from arbitrary arrest and unreasonable search of their homes, or the seizure of their personal property.

[iii] Citizens charged with crimes are entitled to a speedy and public trial, along with the opportunity to confront and question their accusers. If convicted, they may not be subjected to cruel or unusual punishment.

[iv] Citizens cannot be forced to testify against themselves. This principle protects citizens from coercion, abuse, or torture, and greatly reduces the temptation of police to employ such measures.¹¹

Characteristics Four and Five are the areas of greatest concern for present purposes; each addresses the need for a system of strong,

11. U.S. DEP'T OF STATE, BUREAU OF INT'L INFO. PROGRAMS, PRINCIPLES OF DEMOCRACY: THE RULE OF LAW, <http://usinfo.state.gov/products/pubs/principles/lawrule.pdf>.

independent courts staffed by independent and impartial judges who are committed to the principles of democracy.

The American Bar Association further highlighted the need for strong courts during times of peril in the Twelve Principles entitled *Rule of Law in Times of Major Disaster* that it adopted in August 2007.¹² Principles Two, Three, and Four are particularly important to this discussion. Principle Two stresses that:

It is the duty of all legal organizations—the courts, the organized bar, prosecutors, public defenders, providers of legal services to the poor, individual lawyers, police, and prison and jail officials—to undertake adequate planning and preparation to insure that the legal systems, both civil and criminal, can continue to dispense justice in times of major disaster.¹³

Principle Three establishes a number of steps that courts, in particular, should take “[i]n planning, preparing, and training for a major disaster.”¹⁴ This Principle emphasizes, above all, that courts must remain open for business. Furthermore, courts must be in a position to do their work properly. Legal records and evidentiary materials must be preserved; alternative physical facilities should be available, relying on inter-jurisdictional sharing if necessary; and judicial personnel should be deployed where they are most needed. Further, Principle Four states, without qualification, that “the requirements of the Constitution must be respected, particularly with respect to criminal prosecutions.”¹⁵ Many of these goals will be difficult to achieve if a natural disaster has the effect of shutting down regular courts in the affected area.

In the related area of military justice, the principle is well established that extraordinary tribunals, such as military commissions, are not authorized to operate if the normal courts are open for business. For example, in *Hamdan v. Rumsfeld*,¹⁶ the Supreme Court acknowledged that Colonel William Winthrop, whom it regarded as the author of the definitive treatise on military law,¹⁷ included as one of the pre-

12. AM. BAR ASS'N, *RULE OF LAW IN TIMES OF MAJOR DISASTER* (2007), http://www.abanet.org/litigation/ruleoflaw/rol_disaster.pdf.

13. *Id.* at 3 (commentary for Principle Two).

14. *Id.* at 4 (commentary for Principle Three).

15. *Id.* at 5.

16. 126 S. Ct. 2749 (2006).

17. *Id.* at 2777. Colonel William Winthrop was an Assistant Army Judge Admiral General, law professor, and author of a treatise on military law that was first published in 1896 and is still highly regarded today. *Col. William Winthrop's Retirement: By It the Army Will Lose a Very Able Assistant Judge Advocate General*, N.Y. TIMES, July 30, 1895, available at <http://query.ny>

conditions for the exercise of jurisdiction by a military tribunal the criterion that “the trial must be had within the theatre of war; that, if held elsewhere, and where the civil courts are open and available, the proceedings and sentence will be *coram non judice*.”¹⁸ In fact, this principle was first and most famously expressed in *Ex parte Milligan*,¹⁹ in which the Supreme Court held that the laws and usages of war could “never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed.”²⁰ The Court went on to observe that Indiana was such a state, and therefore Milligan’s military trial was contrary to law.²¹ Similarly, just after the conclusion of World War II, in *Duncan v. Kahanamoku*,²² the Court held that two men who had been tried by military tribunals in Hawaii during the course of the war were entitled to be released on the ground that Congress had not authorized such a sweeping use of military power in the Hawaiian territory.²³ In his opinion for the Court, Justice Black hinted at the outcome by phrasing the relevant question as follows:

Have the principles and practices developed during the birth and growth of our political institutions been such as to persuade us that Congress intended that loyal civilians in loyal territory should have their daily conduct governed by military orders substituted for criminal laws, and that such civilians should be tried and punished by military tribunals?²⁴

Not surprisingly, he answered that question in the negative, proclaiming that “[c]ourts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued.”²⁵

There is no reason why the same rule mandating use of the normal civil courts, unless they have shut down, should not apply to areas struck by a natural disaster. Although it may be necessary, during

times.com/mem/archive-free/pdf?_r=1&res=9404E3D8103DE433A25753C3A9619C94649ED7CF&oref=slogin. For treatise citation, see *infra* note 18.

18. *Hamdan*, 126 S. Ct. at 2777 n.29 (citing WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 836 (rev. 2d ed. 1920)) (internal quotations omitted). *Coram non judice* means “outside the presence of a judge” or “before a judge or court that is not the proper one or that cannot take legal cognizance of the matter.” *BLACK’S LAW DICTIONARY* 338 (7th ed. 1999).

19. 71 U.S. 2 (1866).

20. *Id.* at 76.

21. *Id.* at 83.

22. 327 U.S. 304 (1946).

23. *Id.* at 324.

24. *Id.* at 319.

25. *Id.* at 322.

times of emergency, for authorities to assume full control for the area, in the interest of the rule of law every effort must be taken to assure that such a period is as brief as possible. That said, the question of the role of the courts in ensuring that emergency powers stay within legal boundaries is a difficult one, which is addressed in Part III of this article. The courts can do nothing, however, unless they remain open for business. Recognition of this fundamental point has led courts around the country to develop “continuity of operations plans,” or COOPs.

Continuity of Operations in the Courts

The purpose of any court’s continuity of operations plan is plain: to facilitate the court’s ability to carry out its essential functions during periods when use of its ordinary facilities is threatened, diminished, or utterly blocked because of a disaster of any type.²⁶ Perhaps the most important part of any COOP is clarity; clarity in how and when it should be triggered, and how and when it should be terminated. Second—and a close second—is the effectiveness of the communication systems for which the COOP provides. As America learned, to its sorrow, during both the September 11th attacks and the Katrina disaster, lack of communication can hamper or even cripple the most well-meaning responsive efforts. Internal communications among court personnel are critical to maintaining or re-establishing functioning courts, but external communications to other governmental authorities and the public at large are just as important. If the police do not know who can issue a warrant or where that person is located, they face the Hobson’s choice of ignoring the Fourth Amendment or foregoing a criminal investigation for which they have probable cause. If the public does not know what has happened to the courts, people may resort, in desperation, to chaotic self-help measures.

The Administrative Office (AO) of the U.S. Courts has helped federal courts around the country devise appropriate COOPs for themselves. Following advice given in a Federal Preparedness Circular, the AO identified six critical elements for any plan: (1) essential functions, (2) delegations of authority, (3) orders of succession, (4) alternative facilities, (5) interoperable communications, and (6) vital

26. See generally R. ERIC PETERSEN, CONGRESSIONAL RESEARCH SERVICE, EMERGENCY PREPAREDNESS AND CONTINUITY OF OPERATIONS (COOP) PLANNING IN THE FEDERAL JUDICIARY (2003), http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RL31978_08082003.pdf.

records and databases.²⁷ Not all disasters require the same type of response, of course, and so there is a debate among planners about what type of response is appropriate for each situation. One school of thought takes the position that one COOP is enough, as long as it is flexible. Attempting to prescribe for the future in too much detail is risky. The U.S. Court of Appeals for the Fifth Circuit, for example, which is headquartered in New Orleans, had engaged in substantial planning after the 9/11 attacks and had decided that its alternate base of operations would be Lafayette, Louisiana. That decision was one of the earliest casualties of Hurricane Katrina. The court abandoned the plan to use Lafayette and instead promptly decided to move its base of operations to Houston, Texas.²⁸ Its earlier plan had failed to anticipate the need for the entire court staff, complete with their families, to relocate to a different city for a substantial period of time. However accommodating the facilities may have been in Lafayette, they were better in Houston—indeed, the then-sitting Chief Judge was based in Houston, as were several other members of the court. Further, the court was accustomed to occasional sittings in Houston. The process of planning is itself educational for all who are involved, and those who urge that a COOP should be one unified, relatively general plan, believe that this education plus the general outlines of a solution are all that can be expected.

The other school of thought advocates alternative plans.²⁹ On a geographical planning axis, one could imagine at least four scenarios:

The courthouse building alone is affected, e.g., the 1995 bombing of the Murrah Federal Building in Oklahoma City;³⁰

27. See *Court Continuity of Operations Plans Get Assist*, THE THIRD BRANCH NEWSLETTER (Admin. Office of the U.S. Courts, Washington, D.C.), July 2002, available at <http://www.uscourts.gov/ttb/july02ttb/essentials.html>; *Fifth Circuit First to Gauge Emergency Preparedness*, THE THIRD BRANCH NEWSLETTER (Admin. Office of the U.S. Courts, Washington, D.C.), Apr. 2002, <http://www.uscourts.gov/ttb/apr02ttb/papertrail.html#gauge>.

28. See Press Release, Admin. Office of the U.S. Courts, Federal Courts Regrouping After Hurricane Katrina (Sept. 08, 2005), <http://www.uscourts.gov/newsroom/hurricane090805.html>.

29. Of course, for security reasons, I cannot go into detail about any particular court's COOP. In general, however, the plans are careful to provide for numerous alternatives. If the primary courthouse is unavailable because of physical destruction, contamination, or inability to travel to it, then a COOP will provide for City B as an alternate location. If the emergency affects City B as well, then Cities C and D are named. If the natural disaster, for example, is an influenza pandemic, as opposed to a fire that destroys the courthouse building, the plan might provide for networking among the judges of the court and court personnel, minimizing the need to assemble in person.

30. Thomas A. Birkland & Carrie A. Schneider, *Emergency Management in the Courts: Trends After September 11th and Hurricane Katrina*, 28 JUST. SYS. J. 20, 21 tbl.1 (2007).

The courthouse and the immediate vicinity might be damaged, e.g., the flooding of the Chicago River in April 1992³¹ that affected most of Chicago's downtown area known as the Loop;

A defined geographic region is affected, e.g., what could have happened as a result of the March 28, 1979 incident³² at the Three Mile Island nuclear power plant if radiation had escaped and contaminated a large area; and

A complete government shutdown or unavailability, e.g., imagine a temporary shutdown of the nation's communication networks or power grid.

On an alternate axis, one might plot types of disasters ranging from terrorist attacks and pandemics to weather-related disasters such as hurricane, tornadoes, or floods, or other types of natural disasters like earthquakes and fires. While there may be a risk in allowing plans to become too complex, the fact remains that the solutions to these different problems are likely to vary significantly. When Hurricane Katrina hit New Orleans, it made perfect sense for the court of appeals to relocate, *en masse*, to Houston, and for the district court to relocate to Baton Rouge. If the problem were a pandemic, however, a different plan would be required, one enabling people to work while they remain largely isolated from one another.

In an article discussing the issue of emergency management in courts, authors Thomas A. Birkland and Carrie A. Schneider highlight a number of problems that have arisen in the past, which plans should be designed to address in the future.³³ Apart from the need to keep the courts open, or to leave them closed for the shortest possible time, courts must relocate to areas that are readily accessible to the public, as well as to court employees, litigants, witnesses, jurors, and law enforcement officers who must appear in court.³⁴ Courts must also keep their records and evidence secure to avoid lengthy postponements of proceedings, or worse, dismissals for inability to prosecute.³⁵ Additionally, COOPs must address a court's ability to monitor probation-

31. The facts of the 1992 flood are described briefly in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 530 (1995), and then again in *Great Lakes Dredge & Dock Co. v. City of Chicago*, 260 F.3d 789, 790-91 (7th Cir. 2001).

32. For a brief description of the nuclear incident that resulted in the release of radioactive materials into the atmosphere and the subsequent evacuation of thousands of residents who lived in the surrounding area, see *In re Three Mile Island Litigation*, 87 F.R.D. 433, 434 (D.C. Pa. 1980).

33. Birkland & Schneider, *supra* note 30, at 20.

34. *Id.* at 23-26.

35. *Id.* at 25 (In the aftermath of Katrina, "[e]vidence in approximately 3,000 criminal cases pending before the court system was lost, and many witnesses and victims had left the city, and

ers, parolees, and others subject to outstanding court orders; and finally, key information must flow to “stakeholders,” including parties before the court, the public, law enforcement officers, and detainees and prisoners.³⁶

Learning a lesson from Katrina, COOPs now regularly anticipate the need for inter-jurisdictional cooperation, whether from one federal circuit or district to the next, from one state to the next, or from one city to the next. Professor Farber and Dean Chen ask the question whether federalism was a friend or a foe in addressing the Katrina catastrophe.³⁷ The answer seems to be a combination of both. One thing that federalism certainly offers is redundancy; in a crisis, that redundancy can be enormously useful. If a federal courthouse has been destroyed, the judges might be able to move to another part of town and use the state courthouse. If state prisons have been flooded, there will be a federal prison or a prison from a sister state available to take the inmates on a temporary basis. The states are party to an Emergency Management Assistance Compact,³⁸ which provides the legal underpinning for many of these cooperative measures. Federal statutes such as the Stafford Disaster Relief and Emergency Assistance Act³⁹ provide the basis for federal assistance to states struck by disasters, and the federal government has direct authority to render assistance to federal facilities that are affected by a disaster.

Justiciability During Emergencies

Having a continuity plan to keep the courthouses open during a crisis is critical, but that alone is not enough. People seeking judicial services must have standing to sue, and the questions they present must be capable of judicial resolution. In times of emergency, one or both of these prerequisites to judicial action may be missing.

As the Supreme Court noted recently in *Lance v. Coffman*:⁴⁰

even one year later, many had not returned. As a result, many cases were delayed or dismissed for lack of witnesses.”).

36. During the Katrina crisis, detainees and prisoners received especially bad treatment. For an indepth discussion of the civil and human rights violations on the Gulf Coast during and after Katrina, see ACLU, *BROKEN PROMISES: 2 YEARS AFTER KATRINA* (2007), http://www.aclu.org/pdfs/prison/brokenpromises_20070820.pdf.

37. FARBER & CHEN, *supra* note 3, at 19.

38. Emergency Management Assistance Compact, Pub. L. No. 104-321, 110 Stat. 3877 (1996).

39. 42 U.S.C. §§ 5121-5206 (2005).

40. 127 S. Ct. 1194 (2007).

Article III of the Constitution limits the jurisdiction of federal courts to “Cases” and “Controversies.” One component of the case-or-controversy requirement is standing, which requires a plaintiff to demonstrate the now-familiar elements of injury in fact, causation, and redressability. “We have consistently held that a plaintiff raising only a generally available grievance about government-claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large-does not state an Article III case or controversy.”⁴¹

Generalized grievances, the Court repeatedly emphasizes, belong in the political branches of the government.

Under this doctrine, citizens with only a general objection to the declaration of a state of emergency or to the details of the emergency regime might be unable to challenge those arrangements in court. The only parties who will be permitted to go forward are those who: (1) have a particularized grievance, (2) have suffered “injury in fact,” (3) can show that the government’s action has caused that injury, and (4) are asking for some type of relief the court is capable of granting.⁴² The last of those requirements may be the most difficult since it is quite unlikely that a court would tell a quasi-military commander how to maintain order, second-guess a governor’s decision to implement an evacuation order, or step into other details of emergency governance.

The potential restrictions stemming from the separation of powers among the branches of government are even more important than standing limitations. In *Baker v. Carr*,⁴³ the Supreme Court recalled its previous position in which it said that:

In determining whether a question falls within the [political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations. The nonjusticiability of a political question is primarily a function of the separation of powers.⁴⁴

Although the Court in *Baker* went on to note that not every question touching on foreign relations, dates of duration of hostilities, va-

41. *Id.* at 1196 (quotations and internal citations omitted).

42. *See Whitmore v. Arkansas*, 495 U.S. 149, 155-56 (1990).

43. 369 U.S. 186 (1962).

44. *Id.* at 210 (quoting *Coleman v. Miller*, 307 U.S. 433, 454-55 (1939)) (alteration in original)(internal quotations and citations omitted).

lidity of enactments, the status of Indian tribes, or the existence of a republican form of government is nonjusticiable, it acknowledged that many are.⁴⁵

One of the areas the Court mentioned is of particular relevance to natural disasters: dates of duration of hostilities. The *Baker* Court reviewed the reasons for the judiciary's reluctance to intervene in this area:

Though it has been stated broadly that the power which declared the necessity is the power to declare its cessation, and what the cessation requires, here too analysis reveals isolable reasons for the presence of political questions, underlying this Court's refusal to review the political departments' determination of when or whether a war has ended. Dominant is the need for finality in the political determination, for emergency's nature demands [a] prompt and unhesitating obedience. Moreover, the cessation of hostilities does not necessarily end the war power. [Rather, it has been stated] that the war power includes the power to remedy the evils which have arisen from its rise and progress and continues during that emergency. But deference rests on reason, not habit. The question in a particular case may not seriously implicate considerations of finality—e.g., a public program of importance (rent control) yet not central to the emergency effort. Further, clearly definable criteria for decision may be available. In such case the political question barrier falls away: A Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. It can inquire whether the exigency still existed upon which the continued operation of the law depended. On the other hand, even in private litigation which directly implicates no feature of separation of powers, lack of judicially discoverable standards and the drive for even-handed application may impel reference to the political departments' determination of dates of hostilities' beginning and ending.⁴⁶

These comments carry over directly to natural disasters. Included among the issues that may arise are the power of the Governor or the President: (1) to characterize a particular event or series of events as an emergency or a major disaster, (2) to determine the scope of the emergency, (3) to decide on the measures that are necessary to deal with the emergency, (4) to specify which, if any, of the ordinary laws should be suspended while the emergency persists, and (5) ultimately

45. *Id.* at 211-19.

46. *Id.* at 213-14 (internal citations and quotations omitted).

to decide when the emergency has abated sufficiently to permit the return of ordinary legal structures. Just as there is a need in the face of hostilities for “a prompt and unhesitating obedience,”⁴⁷ there may well be a period of time when the same imperative exists in the face of a Katrina-like disaster. Similar to the Court’s tradition of refusing to second-guess the political branches’ “determination of when or whether a war has ended,”⁴⁸ courts will be wary of trying to decide when or whether an emergency has ended, or when a natural disaster and its aftereffects are over.

A quick review of the statutes that confer power on the Executive Branch to declare the existence of an emergency or natural disaster shows that they lack the kind of standards the courts would be able to apply. The Stafford Act⁴⁹ is currently the primary disaster relief statute that authorizes the federal government to intervene in these urgent situations. Section 5170 permits the President, upon the request of the Governor of the affected state, to declare that a “major disaster”⁵⁰ exists.⁵¹ Section 5191 provides the same authority for the President, upon the request of the Governor of the affected state, to declare that an “emergency”⁵² exists.⁵³ The statutes provide little more than a circular definition for these two terms. For the most part, they simply spell out that a “natural disaster” or “emergency” is whatever the President declares it to be, and then they outline the procedures for obtaining a Presidential declaration and the types and terms of assistance that the federal government may offer. These statutes also provide the necessary statutory authorization for deploy-

47. *Id.* at 213.

48. *Id.*

49. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5206 (2005).

50. A “major disaster” is defined as:

any natural catastrophe (including any hurricane, tornado, storm, high water, wind driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought) or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this chapter to supplement the efforts and available resources of states, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.

42 U.S.C. § 5122(2) (2008).

51. 42 U.S.C. § 5170 (2008).

52. An “emergency” is:

any occasion or instance for which, in the determination of the President, federal assistance is needed to supplement state and local efforts and capabilities to save lives and protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.

42 U.S.C. § 5122(1) (2008).

53. 42 U.S.C. § 5191 (2008).

ment of military personnel in an area affected by an emergency or major disaster; absent these statutes, the Posse Comitatus Act forbids the use of “any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws.”⁵⁴ Another exception appears in the Insurrection Act,⁵⁵ which permits the President, upon the request of a state’s legislature or governor if the legislature cannot be convened, to call into federal service the militia of other states or the armed forces in order to quell the insurrection.

Though they would not normally be used in natural disasters, the National Emergencies Act (NEA),⁵⁶ and the International Emergency Economic Powers Act (IEEPA),⁵⁷ also provide guidance. The NEA empowers the President, acting under appropriate legislation, to declare a national emergency during the time it exists.⁵⁸ Interestingly, this statute also provides for the termination of a national emergency, if: “(1) there is enacted into law a joint resolution [of Congress] terminating the emergency; or (2) the President issues a proclamation terminating the emergency.”⁵⁹ In addition, each House of Congress is supposed to review all declarations of national emergency every six months to see whether the emergency should be terminated.⁶⁰ Finally, the NEA requires the President and Executive agencies to maintain “a file and index of all significant orders,”⁶¹ rules, and regulations issued pursuant to the national emergency declaration, and to transmit that information, if need be, to Congress promptly and confidentially.⁶²

IEEPA applies to any unusual and extraordinary threat to the national security, foreign policy, or economy of the United States, if that threat “has its source in whole or substantial part outside the United States. . . .”⁶³ The President first must declare a national emergency with respect to the threat, and then he or she may exercise the powers granted in IEEPA as well.⁶⁴ The President’s powers are

54. 18 U.S.C. § 1385 (2008).

55. 10 U.S.C. §§ 331–34 (2008).

56. 50 U.S.C. §§ 1601–51 (2008).

57. 50 U.S.C. §§ 1701–07 (2008).

58. 50 U.S.C. § 1621(a) (2008).

59. 50 U.S.C. § 1622(a) (2008).

60. 50 U.S.C. § 1622(b) (2008).

61. 50 U.S.C. § 1641(a) (2008) (discussing President’s accounting and reporting requirements).

62. 50 U.S.C. § 1641(b) (2008).

63. 50 U.S.C. § 1701(a) (2008).

64. *Id.*

very broad, as a quick look at section 1702 reveals. They include the authority to regulate financial flows between the United States and other countries; the power to investigate, regulate, or block acquisitions by foreign nationals; and the right to confiscate property held by foreign persons (broadly defined).⁶⁵ Interestingly, the statute addresses judicial review, even though it purports to be neutral on the topic. In one section, the statute confers immunity from suit: "No person shall be held liable in any court for or with respect to anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on, this chapter, or any regulation, instruction, or direction issued under this chapter."⁶⁶ In another section, addressing classified information, it states: "In any judicial review of a determination made under this section, if the determination was based on classified information . . . such information may be submitted to the reviewing court *ex parte* and in camera. This subsection does not confer or imply any right to judicial review."⁶⁷ Later, following the same approach as the National Emergencies Act, IEEPA requires the President to file regular reports with Congress about his or her use of IEEPA.⁶⁸

It is impossible to say, in the abstract, whether the political branches are entirely beyond the reach of the courts as soon as the President utters the magic words "emergency" or "major disaster." One can always imagine far-fetched hypotheticals: a President declares an emergency for *bona fide* reasons, but refuses to acknowledge that the crisis has passed and seeks to continue the exercise of extraordinary powers; faced with wildfires in Southern California and a request from California's Governor for disaster assistance, a President decides instead to put the entire State of California under military rule until an upcoming national election is over; and so on. The first line of defense is surely in Congress, which has a variety of powers that could be used to rein in such abuses. Whether the courts also have a part to play is less clear, but depending on the facts, the injury suffered by the plaintiff, and the relief sought, they might.

More realistically, most emergencies or natural disasters will not require wholesale displacement of civil authorities. Courts will remain open, or will reopen quickly under their emergency plans. Ordi-

65. 50 U.S.C. § 1702(a)(1) (2008).

66. 50 U.S.C. § 1702(a)(3) (2008).

67. *Id.* at § 1702(c) (emphasis added).

68. 50 U.S.C. § 1703(b) (2008).

nary police will have jobs to do, even if military personnel assist them. Citizens may have grievances against the emergency authorities or amongst themselves, but in all but the most grievous situations, the courts should be able to respond to these grievances and uphold the rule of law. The final section of this article speculates about the kind of problems that might arise during the pendency of the emergency and its aftermath.

Conflicts with Individual Rights

Here, as is often the case, it is useful to draw a rough line between substantive rights and procedural rights. Natural disasters can threaten a wide range of substantive rights, including freedom of speech, freedom of the press, public access to information, religious freedom and tolerance, recognized limits on police power (such as the Fourth Amendment's prohibition of unreasonable searches), the right to privacy, freedom of movement or the "right to travel", and economic and property rights such as the right against governmental takings that are not for a public purpose or that are not accompanied by proper compensation. Procedural rights are equally important, and vulnerable. Without notice and opportunity to be heard before an impartial tribunal that will follow the rule of law, there is a greater risk of erroneous governmental action. Furthermore, when the government must justify its actions in public, prosecutors or enforcement authorities will think more carefully before they institute a proceeding. If administrative rights are in danger of being revoked, the affected citizen should ideally be given the opportunity to present the equities of her case to the decision-maker.

The rule of law itself suffers when government operates in secret, in haste, and without accountability from an independent adjudicator. We disparage dictators and strongmen in other countries who treat their citizens in this way. Our concern must be just as great when the normal protections of the rule of law are suspended temporarily during a natural disaster in the United States. One analogy that may point the way toward a solution to these problems is found in the Omnibus Crime Control and Safe Streets Act of 1968, Title III of which permits the Attorney General to authorize wiretaps.⁶⁹ Title III re-

69. 18 U.S.C. §§ 2510-2520 (2008). For present purposes, the amendments to this statute made by the PATRIOT Act are unimportant. *See, e.g.*, PATRIOT Act, Pub. L. No. 107-56, §§ 206, 214, 216, 2001 HR 3162 (2008).

quires that wiretapping or electronic surveillance “be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter. . . .”⁷⁰ This is often referred to as the Title III minimization requirement.

In my view, the idea behind the Title III minimization requirement can and should be extended to virtually all measures that abridge individual rights during the time of an emergency. One must be practical about the exigencies of a true emergency, but it is equally essential not to compromise the values embodied in the rule of law. Upon a proper challenge by a person individually affected by a particular measure, the responsible authority should either explain why the measure was essential, or modify the measure to be more carefully tailored to the need at hand. If the measure is too sweeping, or if it has been in effect longer than the crisis to which it was addressed, there should be a way of complaining to the responsible authority and obtaining redress. Perhaps, in extreme cases, there is a role for the courts, even during the emergency. If not, either across-the-board or in particular cases, then following the model of the confiscations made by the Alien Property Custodian during World War II,⁷¹ there may be a way of permitting after-the-fact compensation for parties whose rights were unlawfully infringed.

Courts should also be able to continue operations for any and every function not directly addressed by the emergency authority. Ordinary police work will continue, and if magistrates are available, the police should still obtain warrants for arrests, searches, and seizures. Racially discriminatory practices such as ethnic or religious profiling are no more accurate or justifiable during an emergency than at any other time. This is not to say, however, that the competent emergency authority would never be able to justify other forms of nondiscriminatory checkpoints, queries on the part of the police, and preventive measures.⁷² Free speech can be equally imperiled during an emergency. The government has a strong interest in ensuring that accurate information reaches as many people as quickly as possible, but that cannot be a justification for censorship. Natural disasters, by definition, are less likely to implicate national security concerns than disas-

70. 18 U.S.C. § 2518(5) (2008).

71. See generally *Societe Internationale v. Rogers*, 357 U.S. 197 (1958).

72. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (highway checkpoints for drunk driving and illegal immigration); *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646 (1995) (random drug testing of student athletes); *Delaware v. Prouse*, 440 U.S. 648 (1979) (roadblock to verify drivers' licenses and vehicle registration permissible).

ters like the Oklahoma City bombing or the September 11th attacks. Once again, the message is that measures designed to restore order should minimize intrusions on personal freedom to the greatest extent practicable.

CONCLUSION

The rule of law in times of natural disaster cannot sustain itself without careful attention to its requirements. Although every branch of government and every official share the responsibility of acting in accordance with the rule of law, the courts stand in a special position. Courts have begun the important work of developing plans to ensure that they will be open for business during even the worst natural disaster, and that the public will know how to reach them. More attention, however, is needed regarding the way in which emergency measures, ordered by executive authorities, might interact with background legal norms, and to the ways in which society can require those executive authorities to respect the rule of law even during time periods when courts cannot or should not act. On-the-spot remedies may not be practical or appropriate, but, as Congress has shown in the National Emergency Act and IEEPA, there are ways in which authorities can be required to operate transparently. There may also be kinds of after-the-fact remedies available to vindicate the rights of those who did not receive their due. Knowing that such remedies might be invoked in the future, public actors will have an incentive to observe the rule of law even during the worst hours of an emergency. Natural disasters will, unfortunately, visit us from time to time, but if we meet them without panic, with dignity, and with fidelity to our fundamental rights and values, they will pass without lasting damage.

