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## MEMORANDUM

### Hurricane Katrina Response

#### H.R. 3736 – Katrina Volunteer Protection Act of 2005

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On September 13, 2005, Rep. James Sensenbrenner (R-WI) introduced the Katrina Volunteer Protection Act of 2005, H.R. 3736, in the House of Representatives. The bill provides qualified immunity from liability to all persons who voluntarily assisted in the response to Hurricane Katrina. The relevant text of the bill is as follows:

Any person or entity (including any Indian Tribe) that, in response to harm caused by Hurricane Katrina of 2005, voluntarily, in good faith, and without a preexisting duty or expectation of compensation, renders aid (including medical treatment and rescue assistance) to any individual, shall not be liable for any injury (including personal injury, property damage or loss, and death) arising out of or resulting from that aid that was not caused by—

- (1) willful, wanton, reckless or criminal conduct of that person or entity;
- or
- (2) conduct of that person or entity that constitutes a violation of a Federal or State civil rights law.

The bill also provides that it will preempt any state laws that are inconsistent with its provisions unless the state law provides additional protection from liability to volunteers.

There are limitations to the legal protections under this bill. First, the extent of the bill's protections for voluntary actions in response to the harm caused by Hurricane Katrina is somewhat vague. The reach of these protections is not clear, specifically noting that potential for long-term disabilities and injuries stemming from the hurricane. The bill does not seem to denote a time limitation on its coverage, nor any geographic limitation on the locale of the volunteers entitled to immunity. Also unclear is whether the definition of "persons" include corporations, non-profits, or other entities that participated in the response efforts.

Another limitation is the application of the bill to any tortious conduct that occurred prior to its passage. Art. I, § 9 of the U.S. Constitution prevents Congress from passing *ex post facto* laws. An *ex post facto* law is one which is “passed after the occurrence of a fact or commission of an act, [and] which retrospectively changes the legal consequences or relations of such fact or deed.” *State v. Sepulvado*, 342 So.2d 630, 635 (La. 1977). Therefore, if a law attached new legal consequences to events that occurred before the act’s effective date, the legal protections would be prohibited. *See Arledge v. Holman, Inc.*, 957 F. Supp. 822, 828 (M.D. La. 1996). Thus, in the application of the bill (if passed), Congress may not be empowered to provide individuals with immunity for negligent actions that occurred prior to its passage.

Furthermore, principles of fairness and due process dictate that individuals have notice of what the law is, in order to conform their actions. *See Landgraf v. USI Film Products, Inc.*, 511 U.S. 244, 265 (1994). Generally, the legal effect of conduct should be determined by the law that exists at the time that the conduct occurs. *See id.* For these reasons, there is a strong presumption against the retrospective application of legislation. *See id.*

The retrospective application of a law which is remedial in nature may be in violation of due process principles under the 14<sup>th</sup> Amendment. In *Greyhound Food Management, Inc. v. City of Dayton*, 653 F. Supp. 1207 (S.D. Ohio 1986), the court held that a statute barring an insurer’s subrogation claims against a city via the application of sovereign immunity could not be applied to claims that arise before the passage of the act. The court reasoned that the provision of statutory immunity to events occurring before its passage would effectively deny the insurer of its right to property without due process of law.

Courts have found statutes that effect an individual’s right to sue for civil relief to have an impermissible retrospective allocation. In *Theberge v. Transportation Systems*, 611 F. Supp. 368, 371 (D.N.H. 1984), a federal district court found that a statute of limitations for wrongful death actions effected the individual’s vested right to sue. The court based its conclusion on the fact that the right to a wrongful death action was statutorily constructed. *See id.* Therefore, the statute of limitations could not be applied retroactively.

In the case of negligence associated with the response to Hurricane Katrina, much of the conduct subject to this act may have occurred prior to its potential passage. Thus, the injured party’s right of action would have vested at the time of the event before the effective date of the statute. Immunizing health care professionals for actions of negligence, or otherwise, would effectively deny an injured individual of his right to sue for compensation for his injuries because the responsible party would be immunized from liability. Thus, such retrospective application of this law may be constitutionally impermissible. Of course, if the bill applied only to actions occurring after its passage, *ex post facto* concerns do not arise.

One additional note regarding this bill. When examining the House debates on the bill, Cong. Rec. H7883-H7887 (daily ed. Sept. 14, 2005), available at <http://thomas.loc.gov/cgi-bin/query/D?r109:33:/temp/~r109UbrwoW>, it appears that the *Center’s* scholarship, notably its recent article, *Volunteer Health Professionals and Emergencies: Assessing and Transforming the Legal Environment*, *Biosecurity and Bioterrorism* 2005; 3:3 216-223, by James G. Hodge, Jr., Lance A. Gable, and Stephanie H. Cálves, was reviewed prior to proposing this legislation (this has been confirmed by the most recent CRS report which was sent to us by Sarah Lister on Sept. 19, 2005). Much of the discussion by Rep. Sensenbrenner and others supporting the bill focused on the current lack of legal clarity regarding the availability of liability protections for VHPs. Additionally, there was repeated mention of the need for a federal uniform standard regarding liability to resolve this lack of legal clarity. Furthermore, the bill

provides for an exception to liability for willful, wanton, reckless or criminal conduct. These sentiments directly reflect some of the concerns and recommendations in the *Center's* article.

As of October 7, 2005, the bill passed in the House and has been sent to the Senate for consideration. No further action has been taken in the Senate.

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