

# ENCOURAGING CORPORATE INNOVATION FOR OUR HOMELAND DURING THE BEST OF TIMES FOR THE WORST OF TIMES: EXTENDING SAFETY ACT PROTECTIONS TO NATURAL DISASTERS

AVA A. HARTER<sup>1</sup>

## ABSTRACT

*This article first analyzes the innovative tort reform of the SAFETY Act and then argues for expansion of SAFETY Act type risk protection to natural disasters such as hurricanes, earthquakes and wildfires. The SAFETY Act was drafted to stimulate the development and deployment of technologies that combat terrorism by providing liability protection. Applying the same type of legislation to natural disasters will provide a commensurate benefit of encouraging preparedness and development of technologies that could mitigate harms resulting from natural disasters. The Department of Homeland Security voiced a desire to increase the use of the SAFETY Act by private industry. This article argues that one way to increase the utility of the SAFETY Act and provide more value for the American public is for Congress to extend SAFETY Act protections, by amendment or new legislation, to cover risk related to national catastrophes.*

## INTRODUCTION

¶1 Two disasters have defined the turn of the 21<sup>st</sup> century for the nation: the terrorist assault of September 11, 2001 (“9/11”) and natural disaster Hurricane Katrina. Both events humbled the United States, confused the American public, and left its government searching for answers and vowing to be better prepared for the next national emergency. The events of 9/11 led to the creation of the Department of Homeland Security (“DHS”), the 9/11 Commission, and a new body of statutes and regulations. Reactions to Hurricanes Rita and Katrina similarly led to commotion at the Capitol and DHS and also resulted in proposals to better

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<sup>1</sup> Counsel, The Dow Chemical Company. JD, Northwestern University School of Law, MA, Nebraska University, BS, Northwestern University. The views in this article are solely those of the author and do not necessarily reflect those of The Dow Chemical Company.

position the country to deal with the next natural catastrophe.<sup>2</sup> With respect to terrorist attacks and natural disasters, human interference—whether public, private, non-governmental organizations or individual—influences a nation’s ability to respond and mitigate the gravity of resulting damage.

¶2 This article analyzes the Support Anti-Terrorism by Fostering Effective Technologies Act of 2002 (“SAFETY Act”)<sup>3</sup>—one of the legislative outgrowths of the events of 9/11—which is incentive-based tort reform legislation developed in response to the need for liability protection for technologies and services deployed to combat terrorism. As the Under Secretary of DHS explained, “[t]he mission of the SAFETY Act is to facilitate the development and deployment of qualified anti-terrorism technologies by creating a system of risk and litigation management.”<sup>4</sup> The SAFETY Act ensures “that the threat of liability does not deter potential manufacturers or sellers of anti-terrorism technologies from creating or providing products and services that could save lives.”<sup>5</sup> This article argues that risk mitigation and liability protection should be extended to encourage the private industry to support governmental efforts to protect the American public from the type of destruction resulting from Hurricane Katrina. The threat of liability should not deter the efforts of developers or service providers from developing technology or systems that minimize harm from a catastrophe whether caused by terrorist assault or natural disaster—both are beyond human control and are entitled to similar protections.

### I. LIABILITY RISK IN THE WAKE OF TERRORISM

¶3 The SAFETY Act is a landmark tort reform addressing the concern that potential legal exposure would discourage the development, production

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<sup>2</sup> See generally A FAILURE OF INITIATIVE: THE FINAL REPORT OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA (2006), [http://katrina.house.gov/full\\_katrina\\_report.htm](http://katrina.house.gov/full_katrina_report.htm).

<sup>3</sup> Support Anti-Terrorism by Fostering Effective Technologies Act of 2002, 6 U.S.C. §§ 441–44 (2006).

<sup>4</sup> *Testimony Before the Subcomm. on Management, Integration and Oversight of the H. Comm. on Homeland Sec.*, 109th Cong. (2006) (statement of Jay M. Cohen, Under Secretary, Science and Technology Directorate, Department of Homeland Security) available at <https://www.safetyact.gov/DHS/SActHome.nsf> (follow “Under Secretary’s Testimony” hyperlink in left column) (last visited Nov. 4, 2007) [hereinafter *Testimony*].

<sup>5</sup> *Id.*; see also *Implementing the SAFETY Act: Advancing New Technologies for Homeland Security: Hearing before the H. Comm. on Government Reform*, 108th Cong. 2 (2003) (statement by Comm. Chair Rep. Davis) (“By passing the SAFETY Act, Congress acted quickly to resolve uncertainty over liability concerns so that the full power of the American technology could be unleashed in the war on terrorism.”).

and deployment of new technologies needed to protect the United States from the consequences of an “act of terrorism.”<sup>6</sup> The SAFETY Act defines the term “act of terrorism” broadly to include any unlawful act “designed or intended to cause mass destruction, injury or other loss to citizens or institutions of the United States.”<sup>7</sup> Following 9/11, the uncertainties related to the hazards of terrorism and the exposure to massive liabilities meant that many hopeful developers and providers of anti-terrorism products could not obtain reasonable insurance, even with the passage of the Terrorist Risk Insurance Act.<sup>8</sup> This lack of liability coverage and the tremendous risk it caused could be perceived as an impediment to the optimal development and deployment of crucial counter-terrorism technologies. In response, the SAFETY Act was created to stimulate private industry to create, develop and use proven anti-terrorism products and services by eliminating or minimizing unlimited exposure to liability should their products allegedly fail to prevent, deter, or mitigate a terrorist act.<sup>9</sup> The SAFETY Act affords risk management and litigation management protections for the sellers or providers of qualified anti-terrorism technologies and others throughout the supply, distribution, and user chain in the event of an act of terrorism.<sup>10</sup> In sum, the SAFETY Act encourages the development and deployment of anti-terrorism technologies (“ATTs”) that would substantially enhance the protection of the United States.<sup>11</sup>

¶4 Even before the events of 9/11, various industries were subject to civil liability following a terrorist attack. In the civil litigation following the Pan American flight bombing, a jury found that willful misconduct on the part of Pan American Airline permitted terrorists to plant the bomb on Flight 103.<sup>12</sup> Similarly, during the first bombing of the World Trade Center, a court held the Port Authority of New York/New Jersey liable for failure to

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<sup>6</sup> See Regulations Implementing the Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (the SAFETY Act), 71 Fed. Reg. 33,147, 33,154 (June 8, 2006) (to be codified at 6 C.F.R. pt. 25) (defining “acts of terrorism” to also cover acts that occur outside of the U.S. so long as the act causes harm to a person, property, or entity in the United States).

<sup>7</sup> Regulations to Support Anti-Terrorism by Fostering Effective Technologies, 6 C.F.R. § 25.2 (2007).

<sup>8</sup> Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322 (2002).

<sup>9</sup> SAFETY Act, 6 U.S.C. §§ 441–44 (2006).

<sup>10</sup> SAFETY Act, Encouraging the Development of Anti-Terrorism Technologies, <https://www.safetyact.gov> (last visited Nov. 4, 2007).

<sup>11</sup> *Id.*

<sup>12</sup> *In re Air Disaster at Lockerbie*, Scot., 811 F. Supp. 84, 87–89 (E.D.N.Y. 1992) (holding Pan AM not liable). *But see* *Gaines-Tabb v. ICI Explosives USA Inc.*, 160 F.3d 613, 620 (10th Cir. 1998) (finding terrorists were a supervening, unforeseen cause).

implement prior vulnerability assessment recommendations.<sup>13</sup> However, the court did not hold the fertilizer manufacturer of the material used to detonate the homemade bomb liable, because it found the manufacturer did not have a duty to the public to prevent terrorists from using ammonium nitrate fertilizer.<sup>14</sup>

¶5 The aftermath of 9/11 established that civil liability associated with a terrorist attack could be staggering. New York City suffered over \$16 billion in losses above insurance and federal emergency monies.<sup>15</sup> The families choosing not to sue the numerous potential defendants received billions in compensation from the Victim Compensation Fund pursuant to the Air Transportation Safety and System Stabilization Act of 2001.<sup>16</sup> Others not receiving compensation from the fund could pursue and recover under common law tort for damages for personal loss, business interruption and economic loss.

¶6 In the notable 9/11 tort case, a federal district court determined that airports, security companies, an airline manufacturer, the World Trade Center and the New York/New Jersey Port Authority had a duty to the public at large to prepare for an Act of Terror and permitted wrongful death suits filed on behalf of decedents of 9/11 attacks.<sup>17</sup> The defendants, in a motion to dismiss, claimed they owed no duty to the plaintiffs because they “could not reasonably have anticipated that terrorists would hijack several jumbo jet airplanes and crash them, killing passengers, crew, thousands on the ground, and themselves.”<sup>18</sup> In denying the motion, the court found that the possibility of terrorist attacks was foreseeable and the airline companies, security companies and airport operators had a duty under New York,

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<sup>13</sup> *In re* World Trade Ctr. Bombing Litig., 709 N.E.2d 452, 455 (N.Y. 1999) (stating the result of the Appellate division, which was reversed in this decision).

<sup>14</sup> *Port Auth. v. Arcadian Corp.*, 189 F.3d 305, 317 (3d Cir. 1999).

<sup>15</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO NO. 02-700R, IMPACT OF TERRORIST ATTACKS ON THE WORLD TRADE CENTER 22 (2002).

<sup>16</sup> See Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001). “The Fund will have processed more than 7,300 death and personal injury claims by its closing on June 15, 2004, accounting for claims on behalf of more than 98 percent of those who lost their lives on September 11, 2001.” *In re* Sept. 11th Litig., No. 21 MC97 (AKH), slip op. at 3 (S.D.N.Y. June 10, 2004). Civilians killed or seriously injured received a total of \$8.7 billion, averaging about \$3.1 million per recipient. Most of this came from the Victim Compensation Fund, but payments also came from insurance companies, employers and charities. See LLOYD DIXON AND RACHEL KAGANOFF STERN, COMPENSATION FOR LOSSES FROM THE 9/11 ATTACK, (RAND Corporation 2004).

<sup>17</sup> *In re* Sept. 11 Litig., 280 F. Supp. 2d 279, 296 (S.D.N.Y. 2003) (holding that the September 11th attacks were “foreseeable”).

<sup>18</sup> *Id.* at 287.

Virginia, and Pennsylvania law to the ground victims.<sup>19</sup> The court also found that the Port Authorities and the World Trade Center operator had duties to the building occupants and, relying on Virginia and Pennsylvania law, permitted the product liability claims to continue against Boeing Corp.<sup>20</sup> The district court sent a clear message to the private sector that it should be on guard against an act of terrorism by finding the private sector has a duty to the public to be properly prepared.<sup>21</sup>

¶7 Potential claimants after an act of terrorism are plentiful: survivors, representatives of victims, property owners, municipalities, non-governmental organizations, insurers of property, and businesses.<sup>22</sup> Even though the public and private sector share in the reputational risks, it is only the private sector carrying the risk of tort litigation. The doctrine of sovereign immunity limits the government's legal liability for harms related to disaster planning and response. With the passage of the SAFETY Act, Congress extended this immunity, allowing protection of private parties from legal liability while encouraging the discovery and implementation of anti-terrorist devices and services that could save lives and minimize damage.

## II. THE SAFETY ACT

¶8 Since the inception of the SAFETY Act and the promulgation of the interim SAFETY Act regulations by DHS in 2003, over one hundred ATTs have been designated and/or certified under the SAFETY Act.<sup>23</sup> Most of these technology applications and SAFETY Act awards, however, are new developments, and DHS has acknowledged that the SAFETY Act is an underutilized tool holding more promise as a mechanism to stimulate technology to battle terrorism.<sup>24</sup> To spur more anti-terrorism innovation, DHS amended the regulations to clarify the broad range of protection and

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<sup>19</sup> *Id.* at 295–97.

<sup>20</sup> *Id.* at 300–01, 310.

<sup>21</sup> *See id.* at 287.

<sup>22</sup> *See Health Effects in the Aftermath of the World Trade Center Attack: Testimony Before the Subcomm. on Nat'l Sec., Emerging Threats, and Int'l Relations of the H. Comm. on Gov't Reform, 108th Cong. 1 (2004)* (statement of Janet Heinrich, Director, Health Care–Public Health Issues), available at <http://www.gao.gov/new.items/d041068t.pdf> (relating the death of nearly 3,000 people and the exposure of an estimated 250,000 to 400,000 people to a mixture of dust, debris, smoke and various chemicals).

<sup>23</sup> *See* 6 C.F.R. § 25.2 (2006) (detailing the process for SAFETY Act certification).

<sup>24</sup> *Testimony, supra* note 4 (“I believe we can more fully utilize what is an important homeland security tool.”).

potential beneficiaries under the SAFETY Act.<sup>25</sup> On June 8, 2006, three and a half years after the interim rules, DHS promulgated the final SAFETY Act regulations,<sup>26</sup> and on August 16, 2006, DHS posted a new SAFETY Act Application Kit on its website which refined and clarified the final rules with the intent to encourage more applications under the SAFETY Act.<sup>27</sup>

¶9 Under the SAFETY Act there are two distinct sets of protections: Designation and Certification. To receive protections under the SAFETY Act, a seller or provider of “anti-terror technologies” must complete a comprehensive SAFETY Act Application Kit, which includes, among other documentation, a detailed description of the technology, information about terrorism insurance coverage, the benefits to the public, and the need for coverage.<sup>28</sup> Qualified anti-terrorism technology (“QATT”), the technology entitled to coverage, is broadly defined to include, “any product, equipment, service (including support services), device, or technology (including information technology) designed, developed, modified, procured, or sold for the purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause.”<sup>29</sup> A “seller” of a QATT is defined as, “any person, firm, or other entity that sells or otherwise provides Qualified Anti-Terrorism Technology to any customer(s) [which includes internal deployment]<sup>30</sup> and to whom or to

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<sup>25</sup> Regulations Implementing the Support Anti-Terrorism by Fostering Effective Technologies Act of 2002 (the SAFETY Act), 71 Fed. Reg. at 33,147, 33,148 (June 8, 2006) (to be codified at 6 C.F.R. pt. 25) (“Shortly after being sworn in, Secretary of Homeland Security Michael Chertoff stated: ‘There is more opportunity, much more opportunity, to take advantage of this important law, and we are going to do that.’”).

<sup>26</sup> 71 Fed. Reg. at 33,168. The final rule also provides for a block Designation or block Certification so that SAFETY Act protections apply for an entire category of QATTs based upon performance standards. 71 Fed. Reg. at 33,156-57.

<sup>27</sup> The Application Kit can be found by following the “Application Kit” hyperlink at <http://www.safetyact.gov>.

<sup>28</sup> Completed Application Kits are submitted, usually electronically, to the SAFETY Act office. Safety Act Application Login, <https://www.safetyact.gov/DHS/SActHome.nsf/Register?ReadForm> (last visited Nov. 4, 2007).

<sup>29</sup> 6 C.F.R. §25.2 (2007). The definitions further establish that design services, threat assessments, vulnerability studies, and other analyses relevant to homeland security may be deemed a technology under the Act. *Id.*

<sup>30</sup> The term “customer” is broad and means the recipient or user of the QATT. A single entity may be both the “Seller” and the customer in the event such entity is deploying its QATT internally. SAFETY Act Application Kit at 13, <http://www.safetyact.gov> (follow “Application Kit” hyperlink).

which (as appropriate) a Designation and/or Certification has been issued under this Part . . . .”<sup>31</sup>

¶10 Following review and approval of an application for SAFETY Act coverage, DHS confers either a Designation or the more comprehensive Certification.<sup>32</sup> The benefits of receiving a Designation award include: (1) an exclusive federal cause of action and federal court jurisdiction;<sup>33</sup> (2) liability caps at a level such that purchased protection does not unduly affect the price of the technology (usually capped at the amount of liability insurance);<sup>34</sup> (3) no joint and several liability for non-economic damages, (4) no punitive damages or prejudgment interest<sup>35</sup> and, (5) plaintiffs’ recovery is reduced by any amounts collected from insurance or other collateral sources.<sup>36</sup>

¶11 In the case of Certification, an applicant receives the same benefits as a Designation and an additional level of protection in the form of a rebuttable presumption that the Seller is entitled to the “Government Contractor Defense” (“GCD”), which extends governmental immunity to the applicant.<sup>37</sup> Entitlement to GCD means that if a private party has contracted with the federal government to carry out a project, then that private party, like the federal government, is shielded from liability under the doctrine of sovereign immunity. GCD was originally a judicially-created extension of governmental immunity to those entities providing the federal government with products and/or services for which the government had

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<sup>31</sup> 6 C.F.R. § 25.2 (2007).

<sup>32</sup> See 6 C.F.R. § 25.4(b) (2007) (describing the criteria the Under Secretary may use when evaluating technology).

<sup>33</sup> 6 U.S.C. § 442(a) (2006). In developing the regulations, DHS clarified that the federal cause of action can only be brought for claims or injuries that are proximately caused by sellers that provide the QATT and that the cause of action cannot be brought against buyers, buyer’s contractors, suppliers or any downstream users. Regulations Implementing the Support Anti-Terrorism by Fostering Effective Technologies Act of 2002 (the SAFETY Act), 71 Fed. Reg. 33,147, 33,150 (June 8, 2006) (to be codified at 6 C.F.R. pt. 25).

<sup>34</sup> 6 U.S.C. § 443(c) (2006). A Designation is made contingent upon the Seller’s acquisition and maintenance of reasonable insurance coverage as required by DHS. 6 U.S.C. § 443(a)(1). The liability of the Seller cannot be in an amount greater than the limits of liability insurance coverage required to be maintained by the Seller as set forth by DHS in the Designation. 6 U.S.C. § 443(c). The amount of coverage is not prescriptive and is determined by DHS based upon the “maximum amount of liability insurance reasonably available from private sources on the world market at prices and terms that will not unreasonably distort the sales price” of the QATT. 6 U.S.C. § 443(a)(2).

<sup>35</sup> 6 U.S.C. § 442(b)(1) (2006); 6 C.F.R. § 25.7 (2007).

<sup>36</sup> 6 U.S.C. § 442(c) (2006); 6 C.F.R. § 25.7 (2007).

<sup>37</sup> 6 U.S.C. § 442(d) (2006); 6 C.F.R. § 25.8 (2007).

created or adopted the specifications,<sup>38</sup> but the SAFETY Act's express terms supplant the requirements in the case law with the application of the defense.<sup>39</sup> In essence, the SAFETY Act codifies the protections afforded by the Government Contractor Defense.<sup>40</sup> Furthermore, any claims against such sellers of a certified QATT arising out of acts of terrorism are subject to presumptive dismissal unless fraud or knowing and willful misconduct in submitting information to DHS in the application process is established by clear and convincing evidence.<sup>41</sup>

¶12 Designation is a prerequisite for Certification and generally, sellers apply for both at the same time.<sup>42</sup> In determining whether to issue Certification, the Under Secretary of DHS conducts a comprehensive review of the design of the QATT and determines whether: (1) it will perform as intended, (2) conforms to the seller's specifications and (3) is safe for use as intended.<sup>43</sup> Receiving a Designation without a Certification award may mean that the seller or provider could not demonstrate that the QATT will "perform as intended."<sup>44</sup> A party awarded with Certification will receive a "Certificate of Conformance," and will be published on the "Approved Product List," which is maintained by the Office of Safety Act Implementation.<sup>45</sup>

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<sup>38</sup> See *Boyle v. United Techs. Corp.*, 487 U.S. 500, 511–12 (1988) (holding that contractors may assert an affirmative defense to product liability and other tort liability when (1) the U.S. approved reasonably precise design specifications, (2) the equipment conformed to those specifications and (3) the contractor warned the government about relevant dangers known to it, that were previously unknown to the government).

<sup>39</sup> Unlike GCD, in the case of a certified QATT, the affirmative statutory defense will be determined by whether the technology conforms to the technology description as defined by the Seller (versus the government), will apply to all sales to anyone, including internal deployment (the Government need not be involved) and will remain in effect *ad infinitum* for sales made during the period of the QATT designation. Regulations Implementing the Support Anti-Terrorism by Fostering Effective Technologies Act of 2002 (the SAFETY Act), 71 Fed. Reg. 33,147, 33,150 (June 8, 2006) (to be codified at 6 C.F.R. pt. 25).

<sup>40</sup> 6 U.S.C. § 442(d)(1).

<sup>41</sup> 71 Fed. Reg. at 33,153-54.

<sup>42</sup> 6 C.F.R. § 25.9(a) (2007) (stating that "[s]uch applications may be filed simultaneously . . .").

<sup>43</sup> 6 C.F.R. § 25.2. (2007).

<sup>44</sup> See 6 C.F.R. § 25.8(a) (2007) (stating that a prerequisite to certification is a finding that the technology will "perform as intended").

<sup>45</sup> Recent SAFETY Act Designations/Certifications, <https://www.safetyact.gov/DHS/SActHome.nsf/Awards?ReadForm> (last visited Nov. 4, 2007).



¶13 To date, DHS has awarded Certification for hardware, software, services and methodologies for a wide variety of ATTs. The technologies include: biological detection and collection systems; vehicle and cargo inspection systems for palletized and other bulk cargo; threat and vulnerability assessment methodologies for cargo containers at ports; situational awareness systems for shore-based port security and traffic control; countermeasures planning methodologies; screening and identification systems for trace explosives found on baggage, packages or people; explosive detection canines; physical security and force protection services; and support services for the US VISIT program.<sup>46</sup>

¶14 Thus, the SAFETY Act, with the promulgation of the refined final rules and the new Application Kit, provides a significant user-friendly tool encouraging the private sector to pursue technologies that will fight the war on terror without fear of unlimited liability exposure. When companies receive an award for developments preventing or deterring breaches of security, the general public and company stockholders benefit because the added security protects against all acts, whether acts of terrorism, accident or wrongdoing.<sup>47</sup>

¶15 The SAFETY Act also helps to improve security and safety standards for industries. If one company takes advantage of the SAFETY Act's liability protection by improving its security and safety standards, then other companies arguably strive to meet the same standards in order to prevent allegations that they failed to meet the industry standard of care. In receiving an award for developments preventing or deterring breaches of security, companies receive the direct benefit of security against all acts, whether acts of terrorism, accidents or wrongdoing. This adds to the companies' value not only to the general public, but to the stockholders as well.<sup>48</sup>

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<sup>46</sup> *Id.*

<sup>47</sup> See U.S. DEPT. OF JUSTICE, ASSESSMENT OF THE INCREASED RISK OF TERRORIST OR OTHER CRIMINAL ACTIVITY ASSOCIATED WITH POSTING OFF-SITE CONSEQUENCE ANALYSIS INFORMATION ON THE INTERNET (April 18, 2000), available at <http://news.findlaw.com/cnn/docs/doj/dojinternetinfo041800.pdf>; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO No. GAO-03-24R, SECURITY OF CHEMICAL FACILITIES 4 (2002) (discussing "the extent to which the Clean Air Act's accidental release regulations have resulted in actions that are effective in detecting, preventing, and minimizing the consequences of releases of regulated substances that may be caused by criminal and terrorist activity").

<sup>48</sup> U.S. DEPT. OF JUSTICE, *supra* note 47; U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 47.

### III. THE CHEMICAL INDUSTRY EXAMPLE

¶16 Companies involved in the business of homeland security, whether as developers or manufacturers of ATTs or providing professional services, will benefit from the protections offered under the SAFETY Act. Chemical facilities and oil companies make products vital to medicine, public health, energy, and the military and are part of the United States' critical infrastructure.<sup>49</sup> They also employ millions of people and support the communities in which they operate. As such, they are not only profit-driven companies, but also contain national critical assets that need to be protected.

¶17 The oil and chemical industries were identified as terrorist targets as part of the critical infrastructure due to the great economic and/or physical harm that could be caused by attack.<sup>50</sup> Furthermore, trends in international and domestic terrorism and burgeoning interest in weapons of mass destruction portend of potential targeting of chemical facilities.<sup>51</sup> The Department of Justice has warned that an attempt in the foreseeable future to cause chemical release is real and credible.<sup>52</sup> Chemical plants are an attractive target for terrorists intent on causing massive damage.<sup>53</sup> A terrorist attack involving theft or release of certain chemicals could significantly impact the health and safety of millions of Americans, disrupt local or regional economies, and impact other critical infrastructures (e.g., drinking water and wastewater treatment).<sup>54</sup>

¶18 Threats to chemical plants and the energy industry are not new. In the late 1990s, domestic terrorists plotted to destroy a U.S. facility with millions of gallons of propane.<sup>55</sup> Terrorists have also targeted chemical facilities in Europe.<sup>56</sup> On May 15, 2005, suspected Basque separatists

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<sup>49</sup>See U.S. DEP'T OF HOMELAND SECURITY, NATIONAL INFRASTRUCTURE PROTECTION PLAN 17-18 (2006), available at [http://www.dhs.gov/xlibrary/assets/NIPP\\_Plan.pdf](http://www.dhs.gov/xlibrary/assets/NIPP_Plan.pdf).

<sup>50</sup>*Id.*

<sup>51</sup>*Id.* at 39.

<sup>52</sup>U.S. DEP'T OF JUSTICE, *supra* note 47; U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 47.

<sup>53</sup>U.S. DEP'T OF HOMELAND SECURITY, THE NATIONAL STRATEGY FOR THE PHYSICAL PROTECTION OF CRITICAL INFRASTRUCTURES AND KEY ASSETS 65-66 (2003), available at <http://www.whitehouse.gov/pcipb/physical.html>.

<sup>54</sup>*Id.*

<sup>55</sup>Mark Gladstone, *2 Men Held in Alleged Plot to Bomb N. California Sites*, L.A. TIMES, Dec. 8, 1999, at A1.

<sup>56</sup>*Four Small Bombs Explode in Spain*, USATODAY.COM, May 15, 2005, available at [http://www.usatoday.com/news/world/2005-05-15-spain-blasts\\_x.htm](http://www.usatoday.com/news/world/2005-05-15-spain-blasts_x.htm).

detonated heavy explosives in a paint factory and a metal works facility in Spain.<sup>57</sup>

¶19 The new challenges of a terrorist threat added to traditional security concerns for chemical and oil companies of theft, vandalism, employee violence, and emergency response. Since September 11, 2001, the chemical industry has made tremendous strides in improving the security of its facilities from acts of terrorism. Members of the American Chemistry Council (“ACC”) and the Synthetic Organic Chemicals Manufacturers Association completed site vulnerability assessments and implemented security improvements at their plants commensurate with such risks.<sup>58</sup> The ACC also established a recognized security program, the Responsible Care® Security Code of Management Practices, which sets the standard for handling security at chemical facilities. ACC member companies claim to have spent over \$3 billion in security measures and are continually improving their approach to preventing, deterring or mitigating the possibility of an act of terrorism.

¶20 The recently published regulations allow sellers of anti-terror services and integrated systems to seek protections in one application for multiple component services and products that can work in concert together to combat terrorism, such as the security measures implemented at a chemical security plant. These regulations reaffirm possible protection to the expansive range of potential security measures deployed at oil and chemical facilities. Such measures include: anti-terrorism equipment and devices, consulting services, engineering services, threat assessments, vulnerability studies and other analyses relevant to homeland security.<sup>59</sup>

¶21 The SAFETY Act protections deserve to be awarded to proactive oil and chemical companies meeting their specifications for anti-terrorist security measures and setting standards for other companies.<sup>60</sup> It may be

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<sup>57</sup> *Id.*

<sup>58</sup> See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO NO. GAO-03-439, HOMELAND SECURITY: VOLUNTARY INITIATIVES ARE UNDER WAY AT CHEMICAL FACILITIES, BUT THE EXTENT OF SECURITY PREPAREDNESS IS UNKNOWN 23–24 (2003).

<sup>59</sup> Regulations Implementing the Support Anti-Terrorism by Fostering Effective Technologies Act of 2002 (the SAFETY Act), 71 Fed. Reg. 33,147, 33153–54 (June 8, 2006) (to be codified at 6 C.F.R. pt. 25).

<sup>60</sup> See Recent SAFETY Act Designations, <https://www.safetyact.gov/DHS/SActHome.nsf/Designations?ReadForm> (last visited Nov. 4, 2007) (listing, for example, the Dow Chemical Company for its *Dow Chemical Facility Security Services*, a comprehensive set of services designed to enhance security and protect key assets); Recent SAFETY Act Designations/Certifications, <https://www.safetyact.gov/DHS/SActHome.nsf/Awards?ReadForm>, (last visited

financially demanding to develop innovative and effective security safeguards, however, SAFETY Act protections set off some of the expenses to companies and also advance national security by producing and demonstrating proven effective security technologies. A recent study by Stanford University in partnership with the National Association of Manufacturers showed there is also a business case to be made for addressing security.<sup>61</sup>

#### IV. OTHER TORT REFORM LEGISLATION

¶22 Elements of the SAFETY Act are similar to other protections afforded by legislation resulting from 9/11. The Air Transportation Safety and System Stabilization Act provided exclusive federal jurisdiction for torts arising out of the 9/11 events and limited liability of certain defendants to their insurance coverage.<sup>62</sup> Unlike the SAFETY Act, the Air Transportation Safety and System Stabilization Act only applies to 9/11 actions and only to those who opted out of the Victim Compensation Fund.<sup>63</sup> The act does not afford coverage related to future assaults, and even though it is likely that Congress will follow a similar approach following another fateful day, the protections would have more value if they were in place now.

¶23 Vaccines and other countermeasures to prevent pandemic outbreaks received protections similar to those found in the SAFETY Act. In December 2005, President Bush signed into law the Public Readiness and Emergency Preparedness Act (“PREP Act”),<sup>64</sup> which provides broad legal liability protection to private companies involved in the production and

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Nov. 4, 2007) (listing, for example, the Wackenhut Corporation for its *Consulting and Risk Management Services*, which is a vulnerability assessment and countermeasure planning tool for public and private sector customer; Triple Canopy Inc. for its *Security Assessment Services*, which identify physical and operational vulnerabilities at various facilities, including critical infrastructure, and recommend mitigation in a comprehensive security plan; Securitas Holdings, Inc. for its *Security Services*, which are described as a total security solution for buildings, facilities, and other operations and infrastructure, using an array of services and technologies uniquely tailored to customer needs).

<sup>61</sup> Barchi Peleg-Gillai, Gauri Bhat and Lesley Sept, *Innovators in Supply Chain Security: Better Security Drives Business Value*, THE MANUFACTURING INNOVATION SERIES, at 1 (July 2006), available at [http://www.nam.org/s\\_nam/index.asp](http://www.nam.org/s_nam/index.asp) (click on “Research and Reports” under “The Manufacturing Institute” in the left column).

<sup>62</sup> Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 408(a)–(b), 115 Stat. 230, 240 (2001) (amended by Aviation and Transportation Security Act, Pub. L. No. 107-71, § 201, 115 Stat. 597, 45 (2001)).

<sup>63</sup> *Id.*

<sup>64</sup> 42 U.S.C. §§ 247d-6d to -6e (2006).

distribution of pandemic and epidemic products and other covered “countermeasures.”<sup>65</sup> The PREP Act was modeled after the SAFETY Act. In the event the Health and Human Services Department Secretary declares a public health emergency as a result of disease or other health condition, it provides statutory-based immunity (a rebuttable presumption) to manufacturers and providers of drugs, vaccines, biological devices and products, and treatment authorized for use in diagnosing, mitigating, preventing, treating or curing a pandemic or epidemic.<sup>66</sup> The immunity applies automatically to covered countermeasures and there is no reference to the Government Contractor Defense or any other precedent or immunity theory within the plain language of the PREP Act. Like the SAFETY Act, the only exception to the immunity is in the case of willful misconduct.<sup>67</sup> Unlike the SAFETY Act, however, the PREP Act also requires the establishment of a compensation fund for potential victims of a pandemic or epidemic whose injuries were caused by using the covered product.<sup>68</sup>

#### V. THE NEED TO EXTEND SAFETY ACT TYPE TORT REFORM TO NATURAL DISASTERS

¶24 Hurricanes Katrina and Rita led to unprecedented damage, rivaling 9/11 with respect to economic and personal loss and impact on the United States.<sup>69</sup> Hurricane Katrina affected over half of a million people, caused the death of over 1,300 people and displaced an entire city’s population. It also left standing water in high temperatures, causing a breeding ground for disease and environmental challenges.<sup>70</sup> Both hurricanes caused enormous concern for environmental and public health because of the release of untreated sewage with debris and sludge throughout affected towns; compromised public water supplies; the release and dispersion of oil,

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<sup>65</sup> 42 U.S.C. § 247d-6d(a)(1).

<sup>66</sup> 42 U.S.C. § 247d-6d(a)–(b).

<sup>67</sup> 42 U.S.C. § 247d-6d(c)–(d).

<sup>68</sup> The fund’s purpose is to provide “timely, uniform, and adequate compensation to eligible individuals for covered injuries directly caused by the administration or use of covered countermeasure pursuant to such declaration.” The legislation, however, does not appropriate any money for the fund. 42 U.S.C. § 247d-6e(a).

<sup>69</sup> See Robert J. Rhee, *Terrorism Risk in a Post-9/11 Economy: The Convergence of Capital Markets, Insurance, and Government Action*, 37 ARIZ. ST. L.J. 435, 467 (2005) (analyzing terrorism risk and arguing, even before Hurricane Katrina, that the “greatest risk of exogenous shock to the industry is from a natural mega-catastrophe”).

<sup>70</sup> See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO No. GAO-05-1053T, HURRICANE KATRINA: PROVIDING OVERSIGHT OF THE NATION’S PREPAREDNESS, RESPONSE, AND RECOVERY ACTIVITIES 1 (2005), available at <http://www.gao.gov/new.items/d051053t.pdf>.

petroleum and industrial chemicals; and the contamination of buildings with mold and rot.<sup>71</sup> Extensive wetland and forest resources were severely damaged as was much of the critical energy infrastructure.<sup>72</sup> Katrina also surpassed 9/11 as the largest insurance loss arising out of a single event.<sup>73</sup> Insurance losses were estimated at \$34.4 billion and did not include the potential economic consequences.<sup>74</sup>

¶25 The aftermath of the hurricanes demonstrated the inadequacies of the United States' emergency management system in responding to natural and catastrophic disasters.<sup>75</sup> The Secretary of DHS, Michael Chertoff, admitted that in addition to inter-agency disputes and lack of coordination, governmental agencies lacked "the skill set" to fulfill preparedness functions.<sup>76</sup> Much has already been done to repair the system so that the United States will be better prepared for the next catastrophic disaster.<sup>77</sup> However, the criticism of federal, state and local governments spawned the recognition that the private sector was a great source of knowledge and assets for emergency preparedness and response and the private sector needed to be involved.<sup>78</sup> Private companies had hurricane crisis

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<sup>71</sup> See U.S. ENVTL. PROT. AGENCY, ENVIRONMENTAL HEALTH NEEDS & HABITABILITY ASSESSMENT JOINT TASKFORCE: HURRICANE KATRINA RESPONSE INITIAL ASSESSMENT 12–16 (2005), available at <http://www.bt.cdc.gov/disasters/hurricanes/katrina/pdf/envassessment.pdf>.

<sup>72</sup> *Id.*

<sup>73</sup> Edmund L. Andrews, *Hurricane Expected To Cost Government Up To \$100 Billion*, N.Y. TIMES, Sept. 6, 2005. Asbestos liability has produced the single greatest largest insurance loss but it is related to a product and is not a one-time event. See Holborn Corporation, *Katrina: Market Insured Losses* (Sept. 21, 2005), <http://partners.holborn.com/holborn/reports/katrina09-21-2005/Katrina2005.pdf>.

<sup>74</sup> Robert J. Rhee, *Catastrophic Risk and Governance after Hurricane Katrina: A Postscript to Terrorism Risk in a Post-9/11 Economy*, 38 ARIZ. ST. L.J. 581, 591 (2006) (citing Press Release, ISO Prop. Claims Servs., Preliminary Estimate Puts Insured Losses from Hurricane Katrina at \$34.4 Billion (Oct. 4, 2005)).

<sup>75</sup> See William L. Waugh Jr., *The Political Costs of Failure in the Katrina and Rita Disasters*, 604 ANNALS AM. ACAD. POL. & SOC. SCI. 10 (2006) (discussing recommendations to repair the National Emergency Management System and correct other issues regarding federal, state and local response to disasters).

<sup>76</sup> Evan Thomas, *What the Hell is Going On?*, NEWSWEEK, Dec. 26, 2005, at 54–55.

<sup>77</sup> Post-Katrina Emergency Management Reform Act, S. 3721, 109th Cong. (2006), available at <http://www.govtrack.us/congress/bill.xpd?bill=s109-3721>.

<sup>78</sup> Rhee, *supra* note 69, at 605–06 (inquiring as to what may have been the result or "how many lives could have been saved during the Hurricane Katrina crisis if a corporate-like management team with a clear mandate, supported by the authority and virtually unlimited resources of the state and federal governments, had been tasked with the disaster preparedness and relief efforts").

management plans in place years before the storm and began preparing for the worst days well ahead of time.<sup>79</sup> Immediately after the storms, these companies resumed operations even in the most devastated areas.<sup>80</sup> Companies such as Wal-Mart and The Dow Chemical Company worked both with the government and independently to provide charitable services and support.<sup>81</sup> Public service is the responsibility of the government, which is today, as exemplified by Hurricane Katrina, ultimately a result of the government's interconnectedness with private corporations and nongovernmental organizations (NGOs); and the future of public service therefore depends on how the government manages its relationship with its private partners.<sup>82</sup>

¶26 The private sector is situated to make very substantial contributions to the safety and security of the United States. A SAFETY Act type of coverage would ensure the threat of liability and lack of insurance coverage would not deter potential developers and providers of natural disaster preparedness and response tools from developing or commercializing their technologies and services that could reduce the risks of harm or mitigate the effects of a grave natural disaster. As such, Congress should consider either (1) amending the SAFETY Act to include grave "natural disasters," or (2) promulgating new legislation modeled on the SAFETY Act. Such actions would improve private sector activity to help protect the public from the effects of natural disasters.

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<sup>79</sup> See Justin Fox, *A Meditation on Risk: Hurricane Katrina Brought Out the Worst in Washington and the Best in Business*, FORTUNE, Oct. 3, 2005, at 50. As an example, the Dow Chemical Company (including its affiliated companies) posted a communication days before landfall on its website at <http://www.dow.com/facilities/namerica/plaquemi/news/20050829a.htm>.

<sup>80</sup> Press Release, The Dow Chemical Company, Dow Completes Preliminary Assessment of Gulf Coast Sites (Sept. 24, 2005), [http://news.dow.com/dow\\_news/corporate/2005/20050924a.htm](http://news.dow.com/dow_news/corporate/2005/20050924a.htm); Press Release from Office of the Press Secretary of Homeland Security, U.S. Dep't of Homeland Sec., Department of Homeland Security Announces First Designations and Certifications Under the Safety Act (June 18, 2004), [http://www.dhs.gov/xnews/releases/press\\_release\\_0438.shtm](http://www.dhs.gov/xnews/releases/press_release_0438.shtm).

<sup>81</sup> See, e.g., The Dow Chemical Company, Dow and UCC Respond to Employee and Community Needs in Louisiana During Hurricane Katrina Aftermath, <http://www.dow.com/facilities/namerica/laops/katrina/index.htm> (last visited Nov. 4, 2007) (providing links to new releases about Dow and Union Carbide Corporation's response to needs in Louisiana during Hurricane Katrina aftermath); Michael Barbaro and Justin Gillis, *Wal-Mart at Forefront of Hurricane Relief*, WASH. POST, Sept. 6, 2005, at D01.

<sup>82</sup> See DONALD F. KETTL, *THE TRANSFORMATION OF GOVERNANCE: PUBLIC ADMINISTRATION FOR TWENTY-FIRST CENTURY AMERICA* 118 (The Johns Hopkins University Press 2002).

¶27 As part of any tort reform, Congress should recognize that compensation funds must be established for injured individuals. The Victim Compensation Fund for 9/11 families provided the necessary financial support for the survivors and representatives of the victims,<sup>83</sup> and it is likely Congress will follow the precedent of previous reforms and create a fund for victims in the event of another terrorist attack. Nevertheless, responsible legislation should mandate the creation and funding of a compensation fund commensurate with the reduction of exposure allotted by the legislation and strike a reasonable balance between bolstering U.S. preparedness and response and compensating those who may be harmed. Further, a compensation fund would reduce the likelihood of litigation risk where every non-compensated victim will seek recourse under various theories based upon loopholes or gaps in the legislation.

¶28 We can examine one of the certified QATTs as an example of the benefits of extending SAFETY Act type coverage to natural disasters. One of the first sellers to receive SAFETY Act coverage was the Lockheed Martin Corporation for their Risk Assessment Platform.<sup>84</sup> The “automated, threat-based Risk Assessment Platform is an integrated computer system that provides near real-time, event-driven terrorism threat analysis, allowing the focus of resources on the most imminent threats and greatest risks.”<sup>85</sup> This QATT “enables effective, responsible sharing of information between private industry and the government through continuous independent auditing of compliance with policies governing access, use, and distribution of information.”<sup>86</sup> Development of a similar integrated computer system that provides near real-time natural disaster (earthquakes, hurricanes, wildfires, etc.) risk analysis on imminent threats and facilitating information sharing between public and private bodies would be a great benefit. Furthermore, comparable to the security vulnerability assessment and security measures implemented by chemical plants and oil companies, integrated systems assessing the vulnerability to natural disasters, enacting natural disaster security and safety plans, and espousing tested comprehensive emergency response capabilities would also be of value to society. An extension of SAFETY Act-type incentives, protections and approval would encourage the increased development and use of such technologies and tools. Awards must be given to those whose technologies or services are intended to benefit the public and the assets of the United

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<sup>83</sup> See James R. Copland, *Tragic Solutions: The 9/11 Victim Compensation Fund, Historical Antecedents, and Lessons for Tort Reform*, CTR. FOR LEGAL POLICY AT THE MANHATTAN INSTITUTE 22-24 (2005), available at [http://www.manhattan-institute.org/pdf/clpwp\\_01-13-05.pdf](http://www.manhattan-institute.org/pdf/clpwp_01-13-05.pdf).

<sup>84</sup> Department of Homeland Security Announces First Designations and Certifications Under the Safety Act, *supra* note 80.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*



States. However, profitability, corporate responsibility and the reputation of a company should be contributing factors.

¶29 The private sector possesses the best expertise and know-how to develop and discover technology and services to assist the government in responding to natural disasters.<sup>87</sup> By allowing the private sector to develop the technology or service, test it, and submit its innovation to the government, both the public and private sector benefit. For example, a warning system or other innovative detection devices or preparedness and response systems could have provided a great benefit when, on December 26, 2004, an undersea earthquake rated at a 9.0 magnitude on the Richter scale<sup>88</sup> triggered the recent tsunami in South Asia, causing the death of 280,000 people.

¶30 Congress provisionally recognized, following Hurricane Katrina, that SAFETY Act type reform should be applied to all disasters, whether man-made or nature-made. After Katrina, Congress considered a “good Samaritan” tort-reform legislation,—the Gulf Coast Recovery Act (“GCRA”)—intended to provide insulation against liability for contractors involved in disaster relief and reconstruction.<sup>89</sup> The rationale espoused by the drafters of the GCRA was to protect those involved in relief efforts after the hurricanes.<sup>90</sup> The findings in the GCRA noted the admirable behavior of the response workers who answered the call on September 11, 2001 and who are now facing litigation for their Good Samaritan actions without insulation from liability.<sup>91</sup> Congress intended for the GCRA to protect the

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<sup>87</sup> See Steven L. Schooner & Erin Siuda-Pfeffer, *Post-Katrina Reconstruction Liability: Exposing the Inferior Risk-Barrier*, 43 HARV. J. ON LEGIS. 287, 326 (2006).

<sup>88</sup> See U.S. Geological Survey, Earthquake Hazards Program, <http://earthquake.usgs.gov/eqcenter> (last visited Nov. 4, 2007).

<sup>89</sup> Gulf Coast Recovery Act, S. 1761, 109th Cong. (2005).

<sup>90</sup> *Oversight Hearing on the Impact of Certain Governmental Contractor Liability Proposals on Environmental Laws: Hearing on S.1761 Before the Subcomm. on Superfund and Waste Management of the S. Comm. on Environment and Public Works*, 109th Cong. 3 (2005) (statement of Sen. John Thune) (“Because large-scale disaster recovery in the Gulf Coast Region doesn’t occur in a vacuum, I strongly believe that Congress should provide private contractors with a measurable level of liability protections due to the nature of the work they do in helping the government restore the basic services the public expects and deserves.”).

<sup>91</sup> Gulf Coast Recovery Act of 2005, H.R. 4438, 109th Cong. § 2 (2005) (The covered contractors should be those who “answered the call on September 11, 2001, and in the following weeks and months, working hand-in-hand with Federal, State, and local officials to rescue the survivors of the terrorist attacks on that historic date, to recover the bodies of those who died, to remove

response workers in the Gulf Coast by protecting against the liability of the 9/11 contractors. Although Congress modeled the GCRA after the SAFETY Act, its intentions fell short in that it focused too narrowly on “contractors” already providing relief work and the intent to protect such recovery and relief workers.<sup>92</sup> The GCRA became more of a recognition award rather than an incentive award and was singularly drafted to address the then-current situation in the Gulf Coast. Furthermore, the GCRA did not establish a compensation fund for the victims, which would be a vital part of any legislative effort to expand the SAFETY Act to natural disasters. A true expansion of the SAFETY Act to cover severe natural conditions would require applying protections encouraging the development of countermeasures that would reduce the ultimate harm to the public as well as those awarding Good Samaritan behavior.

#### VI. TORT LIABILITY PROTECTION FOR NATURAL DISASTERS IS CONSISTENT WITH RELATED TRENDS AND LAWS

¶31 The concept of expanding the SAFETY Act’s protections to natural disasters is not a new concept, but rather a logical continuation of legislative initiatives designed to adapt to the post 9/11 and Hurricane Katrina world.

¶32 The limitation of legal liability for administrative enforcement actions arising out of “acts of God” or natural disasters as well as “acts of war” already exists in over 50 federal law exemptions.<sup>93</sup> The exemptions span from categorical exemptions for any damages arising out of acts of war or God to specific exemptions allowing for certain behaviors without recourse during weather disasters or in the interest of national security.<sup>94</sup> These exemptions allow the President or authorized designees, such as the Environmental Protection Agency (“EPA”), to exempt, suspend or modify requirements without risk of enforcement actions in times of emergency or

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mountains of debris, to reconstruct the Pentagon, and ultimately, to restore some sense of normalcy to New York City and Arlington, Virginia.”).

<sup>92</sup> See Schooner, *supra* note 87 (arguing that the GRCA would inappropriately place the cost of accidents or negligence on the victims or uncovered relief workers and that the immunity of liability for contractors contravenes basic good government principles).

<sup>93</sup> Letter from Lynn L. Bergeson, Chair of the American Bar Association Section of Environment, Energy, and Resources, to Stephen L. Johnson, United States Environmental Protection Agency, *available at* <http://www.abanet.org/environ/katrina/Whitepaper.pdf> (last visited Nov. 4, 2007) (commenting on “the breadth and efficacy of existing exemptions in our federal environmental laws and regulations).

<sup>94</sup> *Id.*

national security.<sup>95</sup> These exemptions to enforcement actions also work to preclude citizen suits brought to enforce the same regulations or statutes.<sup>96</sup>

¶33 The Stafford Act also vests federal agencies with the power to appoint “temporary personnel” in the event of a public health emergency or disaster.<sup>97</sup> This broad grant of authority permits federal agencies, such as the DHS, the Federal Emergency Management Agency (“FEMA”) or the Department of Human and Health Services (“HHS”), to appoint personnel in advance of or following a disaster to carry out disaster-relief efforts.<sup>98</sup> Also, the Secretary of HHS is specifically authorized to appoint individuals to serve as intermittent disaster-response personnel of the National Disaster Medical System (“NDMS”) in accordance with applicable laws.<sup>99</sup> Intermittent disaster-response personnel are granted the same immunity from civil liability available to employees of the U.S. Public Health Service.<sup>100</sup> This means that suits cannot be brought against intermittent disaster-response personnel; rather, such suits are brought against the United States and will be defended by the U.S. Attorney General.<sup>101</sup> On August 31, 2005, the Secretary of HHS declared a public health emergency in the Gulf region,<sup>102</sup> thus setting the foundation for civil liability protections for health disaster personnel.

¶34 In the Shipowners’ Limitation of Liability Act,<sup>103</sup> vessel owners are afforded a defense to tort claims following an act of terror or a natural disaster limiting their liability to the value of the ship and its pending freight after casualty so long as they did not have “privity” or “knowledge.”<sup>104</sup> Therefore, a terrorist bomb or a hurricane that virtually flattens a private vessel and destroys the contents could arguably render the ship worthless

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<sup>95</sup> See, e.g., 33 U.S.C. § 1321(c) (2006) (creating exemption for oil and hazardous substances discharges into U.S. waters during disasters and in the interest of national security); 42 U.S.C. § 9607(b) (2006) (providing defenses to liability for acts of God or war).

<sup>96</sup> See, e.g., 33 U.S.C. § 1321(c)(4); 42 U.S.C. 9607(b).

<sup>97</sup> 42 U.S.C. § 5149(b) (2006).

<sup>98</sup> See *id.*

<sup>99</sup> 42 U.S.C. § 300hh-11(c) to (d) (2006).

<sup>100</sup> Memorandum from the Ctr. for Law and the Pub. Health 2 (Sept. 15, 2005) (on file with the Duke Law and Technology Review), available at <http://www.publichealthlaw.net/Research/PDF/Katrina%20-%20Federal%20PH%20Dec%20and%20IDRP.pdf>.

<sup>101</sup> 42 U.S.C. § 233(a)–(b) (2006).

<sup>102</sup> The Secretary of HHS has the authority to declare a public health emergency under § 319 of the Public Health Act. 42 U.S.C. § 247(d) (2006).

<sup>103</sup> Shipowners’ Limitation of Liability Act, 46 App.U.S.C. §§ 181–89 (1851) (current version at 46 U.S.C. §§ 30503–12 (2006)).

<sup>104</sup> 46 App.U.S.C. § 183 (1851) (current version at 46 U.S.C. § 30505(b) (2006)).

and the vessel owner could argue that there was no liability based on the lack of the value of the ship and its former contents.<sup>105</sup> The Shipowners' Limitation of Liability Act also requires the creation of a *concursum* of claims so that all claims are consolidated into a single federal case allowing the resolution of all claims subject to the limitation of liability and precluding future claims.<sup>106</sup> However, the Shipowner's Limitation of Liability Act affords protection only to seagoing vessel owners in the event of a disaster—whether terrorist or manmade.<sup>107</sup> The owners of terminals, ports and platforms are left to traditional tort defenses.<sup>108</sup>

¶35 Individual states can also issue Emergency and Administrative Orders to provide liability relief to the private sector during emergencies. After Hurricane Katrina, the Governor of Mississippi and the Governor of Louisiana each issued an order to provide incentives and the release of liability risk so that the private sector could work with the government to best address the impact of the storm.<sup>109</sup>

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<sup>105</sup> Limitation of liability for personal injury and death claims were not being included in the limitation of liability and are subject to a separate limit of \$420 per ton. See 46 App.U.S.C. § 183(b) (1851) (current version at 46 U.S.C. §30506(b)); see also Christopher E. Carey, *Maritime Transportation Security Act of 2002 (Potential Civil Liabilities and Defenses)*, 28 TUL. MAR. L. J. 295 (2004).

<sup>106</sup> *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 414 (1954).

<sup>107</sup> 46 App.U.S.C. § 183 (1851) (current version at 46 U.S.C. § 30505(b) (2006)).

<sup>108</sup> The Oil Pollution Act of 1990, 33 U.S.C. §§ 2701–2762 (2006). The legislative response to the Exxon Valdez spill expressly included a limitation of liability provision precluding the vessel owner from availing itself of the more general relief afforded by the Shipowners' Limitation of Liability Act. See Robert Force & Jonathan M. Gutoff, *Limitation of Liability in Oil Pollution Cases: In Search of Concursum or Procedural Alternatives to Concursum*, 22 TUL. MAR. L. J. 331 (1998).

<sup>109</sup> See Mississippi State Board of Medical Licensure, *Emergency Temporary Medical Licenses (M.D./ D.O./ D.P.M.)* (Aug. 31, 2005), available at <http://www.msaml.state.ms.us/EmergencyLicensing.pdf>; Louisiana State Board of Medical Examiners, *Statement of Position: Bioterrorism and National Emergency Response* (Dec. 2003), available at <http://www.texmed.org/Template.aspx?id=4295>. Additionally, the Louisiana Good Samaritan Law, La. R.S. § 9:2793, provides a level of immunity from civil liability for individuals providing medical services in cases of emergency. Accordingly, the Louisiana Medical Practice Act provides a specific exemption from licensure for “[t]he administration of first aid in cases of emergency.” La. R.S. § 37:1291.

## CONCLUSION

¶36 The SAFETY Act is a necessary and innovative legislative tool encouraging the development of anti-terrorism technologies and is “a vital tool for our government to remove barriers to full industry participation in finding new and unique technologies to combat an evolving enemy.”<sup>110</sup> Yet, as noted by DHS, there has not been “enough done to take advantage of this powerful tool to spur new technologies and new systems.”<sup>111</sup> With a better understanding of the tremendous benefits that SAFETY Act Designation and Certification can bring, applications are likely to increase. However, the promise of this important tool to better protect the United States falls short when considering that nation-wide disaster prevention and emergency preparedness concerns are not afforded the same incentives and protections. SAFETY Act-type legislation for natural disasters would create incentives for industry to invest and share knowledge regarding technology and measures that would enhance America’s ability to withstand the next homeland security crisis.

¶37 Hurricanes Katrina and Rita and 9/11 show that private sector expertise can prevent, deter, mitigate, respond to, and repair damage caused by such grave crises and disasters. Tort reform as found in the SAFETY Act and the PREP Act ensures the threat of liability will not deter potential manufacturers, service providers and others from developing, deploying, and commercializing technologies and services that could save lives. With over three years of operation under the Department of Homeland Security, an extension of the SAFETY Act to applying for benefits related to damages resulting from natural disasters should be smoother and easier and should be made available to the private sector to protect the United States, our industry and our communities further.

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<sup>110</sup> *Testimony, supra* note 4.

<sup>111</sup> *Id.*