

# DREXEL LAW REVIEW

THOMAS R. KLINE SCHOOL OF LAW

---

VOLUME 16

2024

ISSUE 1

---

## ARTICLE

### WHEN DISASTERS AREN'T LOCAL: THE STAFFORD ACT IN A POST-COVID-19 WORLD

*Ryan Houser\**

#### ABSTRACT

*Unlike weather events such as major snowstorms or hurricanes, which are the commonly thought of disasters within the parameters of the Stafford Act, infectious diseases, by their nature, share similar disastrous impacts that extend far beyond a small geographic segment of the country. While delegating disaster response to local governments worked for many weather disasters, the COVID-19 pandemic has highlighted the threats to our nation that exceed the capabilities of local and state governments. Similarly, the pandemic has highlighted how public health emergencies can exceed the scope of existing disaster legislation, limiting the effectiveness of the national response, and necessitating a rethinking of the legislative emergency and disaster response in the United States.*

*This Article calls for unity among local and state government disaster and emergency responses that can span the nation if necessary. While local emergency managers will continue to be the foundation of a community's disaster response system, a new and improved system*

---

\* Biodefense doctoral student, George Mason University Schar School of Policy and Government. JD Rutgers Law School, MHA/MPH George Washington University Milken Institute School of Public Health, MSc/EMPS Georgetown University. The author extends grateful thanks to Professor Kelly Deere for her invaluable Legal Analysis, Writing, Research and Skills education and for her stimulating COVID-19 and The Law course which inspired this piece.

*that leverages an updated Stafford Act, which outlines the available aid and resources for addressing various crises, will ensure that science—and not state, local, or tribal political considerations—drive decision making and collective action in response to occurrences similar to the COVID-19 pandemic.*

*This Article begins by analyzing the historical context and legislative intent that led to the passage of the Stafford Act and the legislative intent that frames its current structure. Additionally, this Article explores the key features, investigates the use of the Stafford Act in the COVID-19 response, and highlights the major limitations of the Act that prevent it from being successfully applied to various types of emergencies and disasters. The federal government has historically amended disaster response legislation to address previous shortcomings highlighted by the occurrence of a disaster. Ultimately, this Article argues for the improvement of the Stafford Act to address the inadequate response to the COVID-19 pandemic through amendments addressing accountability of leadership, coordination between local, state, and federal government, and improved healthcare for more effective and applicable responses to public health and pandemic emergencies that necessitate a whole government approach.*

#### TABLE OF CONTENTS

INTRODUCTION .....	85
I. ORIGINS AND LEGISLATIVE HISTORY .....	89
A. <i>Federal and State Police Power as Essential to Disaster Response</i> .....	90
B. <i>National Security Authority</i> .....	92
C. <i>Legislative History of Disaster Response Legislation</i> .....	94
D. <i>Legislative Intent &amp; Key Features</i> .....	98
E. <i>Use of the Stafford Act Prior to COVID-19</i> .....	101
II. COVID-19 & RESPONSE .....	103
A. <i>The Pandemic</i> .....	104
B. <i>Legislative &amp; Policy Response</i> .....	106

III. LIMITATIONS OF THE STAFFORD ACT .....	115
IV. RECOMMENDATIONS.....	118
A. <i>Accountable Leadership</i> .....	120
B. <i>Statutory Authorities</i> .....	123
C. <i>Coordination</i> .....	126
D. <i>Healthcare</i> .....	130
E. <i>Counterarguments</i> .....	133
CONCLUSION.....	134

## INTRODUCTION

“All disasters are local” is the mantra of emergency management within the United States.<sup>1</sup> This commonly held belief suggests that emergency and disaster response falls on local and state governments—at least until the response needs exceed the capabilities of non-federal entities.<sup>2</sup> The most recent data from the 2017 Census showed 90,075 local governments existed within the United States.<sup>3</sup> Any system that relies on that many government entities is one that is bound to fail in a world where disasters transcend jurisdictional boundaries.<sup>4</sup> The current disaster response system in the United States reflects the principles of “dispersed power,” distributing the responsibility to the

---

1. See Elaine Pittman, *Remember: All Disasters Are Local, Says FEMA Deputy Administrator*, GOV'T TECH. (Nov. 14, 2011), <https://www.govtech.com/em/disaster/remember-all-disasters-are-local-says-fema-deputy-administrator.html> [https://perma.cc/KPE9-D6NL].

2. See ELIZABETH B. BAZAN, CONG. RSCH. SERV., RL33090, ROBERT T. STAFFORD DISASTER RELIEF AND EMERGENCY ASSISTANCE ACT: LEGAL REQUIREMENTS FOR FEDERAL AND STATE ROLES IN DECLARATIONS OF AN EMERGENCY OR A MAJOR DISASTER 1 (2005), [https://courses.worldcampus.psu.edu/canvas/master/ms-142201-20160217140554/content/03\\_lesson/corefiles/Staf-ford%20Act\\_LegalRqmtsforFedandState%20Roles.pdf](https://courses.worldcampus.psu.edu/canvas/master/ms-142201-20160217140554/content/03_lesson/corefiles/Staf-ford%20Act_LegalRqmtsforFedandState%20Roles.pdf) [https://perma.cc/A5NB-K8YH].

3. U.S. CENSUS BUREAU, 2017 CENSUS OF GOVERNMENTS – ORGANIZATION, TABLE 2: LOCAL GOVERNMENTS BY TYPE AND STATE (2019), <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html> [https://perma.cc/68R5-7EJY] (“Local governments” includes the 3,031 county governments, 19,495 cities or municipalities; 16,253 townships governments and 51,296 special purpose governments that exist in the United States.).

4. See generally OPERATIONAL LESSONS LEARNED IN DISASTER RESPONSE, U.S. FIRE ADMIN. 12, 30 (June 2015), [https://www.usfa.fema.gov/downloads/pdf/publications/operational\\_lessons\\_learned\\_in\\_disaster\\_response.pdf](https://www.usfa.fema.gov/downloads/pdf/publications/operational_lessons_learned_in_disaster_response.pdf) [https://perma.cc/EUU6-49C6].

mentioned government entities.<sup>5</sup> However, local government is sometimes ill-equipped to effectively respond to large catastrophes.<sup>6</sup> As such, more responsive federal emergency management legislation is necessary to ensure the health and safety of the country.<sup>7</sup> The absence of comprehensive federal legislation creates a scenario where state and local governments struggle to work together to respond to disasters, further exacerbating the issues and prolonging recovery.<sup>8</sup>

Dispersed power is embodied within the United States Constitution and other essential features of the American democratic system.<sup>9</sup> For example, the separation of powers and checks and balances among the three branches of government embody a commitment to dispersed power.<sup>10</sup> Notably, the Tenth Amendment states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”<sup>11</sup> Historically, disaster response and recovery followed the same federalist principle of limited central government, with local citizens and their communities playing the largest role in ordering their lives in response to “civil disturbance and threats to public safety.”<sup>12</sup> A major disaster is legally defined as any significant catastrophe, whether of natural or human origin, occurring

---

5. See FED. EMERGENCY MGMT. AGENCY, NATIONAL DISASTER RECOVERY FRAMEWORK 1, 19–23 (Sept. 2011), <https://www.fema.gov/pdf/recoveryframework/ndrf.pdf> (discussing the roles and responsibilities of different recovery partners); see U.S. CONST. arts. I, II, III.

6. See Carlos Martín, Carolyn Kousky, Karina French & Manann Donoghoe, *How the Federal Government Should Build Local Governments’ Capacity for Addressing Disasters*, BROOKINGS INST., (Oct. 18, 2023), <https://www.brookings.edu/articles/how-the-federal-government-should-build-local-governments-capacity-for-addressing-disasters/> [<https://perma.cc/8WAL-DNKL>].

7. See Pittman, *supra* note 1.

8. See, e.g., *Disaster Assistance: Action Needed to Improve Resilience, Response, and Recovery*, GAO (Mar. 15, 2023), <https://www.gao.gov/products/gao-23-106544> [<https://perma.cc/HWB6-57CN>] (discussing the U.S. Government Accountability Office’s recommendations for improving disaster response).

9. See U.S. CONST. arts. I, II, III.

10. See THE FEDERALIST NOS. 48, 50 (James Madison).

11. U.S. CONST. amend. X.

12. See EXEC. OFF. OF THE PRESIDENT, THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED 11 (2006).

within the United States, which, as determined by the President, results in damage of such serious and extensive nature that it necessitates substantial disaster assistance.<sup>13</sup> This assistance is provided to complement the efforts and existing resources of states, local governments, and relief organizations in mitigating the “damage, losses, hardships, or suffering” caused by the catastrophe.<sup>14</sup> National strategy and planning documents for homeland security strategies in the United States, which include disaster response plans, adhere to the belief that the federal government should reinforce, rather than replace, lower levels of government in disaster response.<sup>15</sup> As every community across the nation is unique, each municipality and state’s emergency preparedness planning and response considerations are complex and take into “account for local conditions of culture, geography, language, infrastructure, politics, and numerous other factors” to which the federal government cannot easily respond.<sup>16</sup> Federal legislation, including the Robert T. Stafford Emergency and Disaster Assistance Act and other associated directives embody this tiered approach where state and local authorities have the initial lead role in managing any disaster within the United States.<sup>17</sup> The core assumption of the American disaster response system is that “the federal government lacks the resources to serve as first responder for every disaster that occurs in the United States . . . [and] should focus on the most extensive and threatening emergencies.”<sup>18</sup> While this tactic works much of the time, issues emerge when disasters are anything but local due to the nature of their impact.<sup>19</sup> The question then arises as to whether our legislative

---

13. Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5122(2).

14. *Id.*

15. *See, e.g., Disaster Assistance, supra* note 8.

16. RICHARD WEITZ, *FEDERALISM AND DOMESTIC DISASTERS: PROMOTING A BALANCED APPROACH* 3 (2006).

17. 42 U.S.C. §§ 5121–5207.

18. *See* WEITZ, *supra* note 16, at 3.

19. *See, e.g.,* Chris Edwards, *Hurricane Katrina: Remembering the Federal Failures*, CATO INST. (Aug. 27, 2015), <https://www.cato.org/blog/hurricane-katrina-remembering-federal-failures> [<https://perma.cc/B2QQ-A3HV>].

frameworks allow for a federal-first response in instances of expansive, state-line crossing emergencies.

The COVID-19 pandemic was just this type of expansive, state-line crossing disaster.<sup>20</sup> Unlike significant weather events such as major snowstorms or hurricanes, which are the commonly thought of disasters, infectious diseases by their nature have impacts that extend far beyond a small segment of the country.<sup>21</sup> Whenever there is an infectious disease outbreak, it affects the entire country, “so we need to respond as a nation, not in a fragmented way.”<sup>22</sup> Similar challenges arise in addressing the smoke from uncontrolled Canadian wildfires that impacted the northeastern United States.<sup>23</sup> While the current disaster response mechanisms have made sense in the past, the COVID-19 pandemic highlighted the inability of state and local mechanisms to respond to certain threats.<sup>24</sup> Similarly, the pandemic highlighted how public health emergencies can exceed the scope of disaster legislation, limiting the effectiveness of the national response and necessitating a rethinking of emergency and disaster response in the United States.<sup>25</sup> The concern should

---

20. See Ryan Scott Houser, *The Role of Public Health Emergency Management in Biodefense: A COVID-19 Case Study*, 17 DISASTER MED. & PUB. HEALTH PREPAREDNESS 1, 2 (2022).

21. See Naim Kapucu & Qian Hu, *An Old Puzzle and Unprecedented Challenges: Coordination in Response to the COVID-19 Pandemic in the US*, 45 PUB. PERFORMANCE & MGMT. REV. 773, 773–75 (2022).

22. Amanda Kaufman, *Dr. Fauci Says US Needs a National Response to COVID-19 Crisis, Instead of ‘Disjointed’ State-by-State Approach*, BOS. GLOBE, <https://www.bostonglobe.com/2020/11/17/nation/dr-fauci-says-us-needs-national-response-covid-19-crisis-instead-disjointed-state-by-state-approach/> [<https://perma.cc/E93M-L7C4>] (Nov. 17, 2020, 1:11 PM) (quoting Dr. Anthony Fauci).

23. Maya Yang, *Poor Air Quality Returns to US North-East from Canada Wildfires*, GUARDIAN (June 11, 2023, 3:25 PM), <https://www.theguardian.com/world/2023/jun/11/poor-air-quality-returns-to-us-north-east-canada-wildfires> [<https://perma.cc/9RQK-3THK>]; Sarah Coefield, *Seeing Through the Haze: How the Federal Government Does (and Doesn’t) Work to Reduce Public Exposure to Wildland Fire Smoke*, FED’N OF AM. SCIENTISTS (Sept. 13, 2023), <https://fas.org/publication/seeing-through-the-haze/> [<https://perma.cc/MTQ6-8BCW>].

24. See Adam Schroeder, Gary Wamsley & Robert Ward, *The Evolution of Emergency Management in America: From a Painful Past to a Promising but Uncertain Future*, in HANDBOOK OF CRISIS AND EMERGENCY MGMT. 357, 361 (Ali Farazmand ed., 2001) (detailing disaster response’s historic evolution); Lisa Schnirring, *High-Level Group Distills Failures, Successes of US COVID Response*, UNIV. OF MINN. (Apr. 25, 2013), <https://www.cidrap.umn.edu/covid-19/high-level-group-distills-failures-successes-us-covid-response> [<https://perma.cc/C4ST-DASG>].

25. See Kaufman, *supra* note 22.

not be whether leaders will abuse their emergency powers to implement laws that reach beyond their authority; rather, it should be whether leaders will abuse their emergency powers by not using them to protect the health and safety of the public. The Stafford Act must authorize the federal government to coordinate and manage responses to disasters that transcend individual state borders. This Article calls for unity among local and state government emergency responses that can span the nation if necessary. While local emergency managers will continue to be the foundation of a community's disaster response system, a new and improved disaster response system that leverages an updated Stafford Act, legislation that defines "disaster" and outlines the available aid and resources for addressing various crises, will ensure that science—and not state, local, or tribal political considerations—drive decision making and collective action.

Part I of this Article analyzes the historical context and legislative intent that led to the passage of the Stafford Act and explores the key features of the Act, as well as key case studies of the Act's use during a disaster. Part II investigates the use of the Stafford Act in the COVID-19 response and how emergency responders and policy makers approached the pandemic. Part III subsequently highlights the major limitations of the Stafford Act that prevent it from being successfully applied to various types of emergencies and disasters. Finally, Part IV makes recommendations to improve the Stafford Act and make it more applicable for public health and pandemic emergencies that necessitate a whole government approach.

## I. ORIGINS AND LEGISLATIVE HISTORY

It has been over seventy years since Congress enacted its first Disaster Relief Act in 1950.<sup>26</sup> There are, however, "major gaps in the printed record" when it comes to legislative intent, as "[m]uch of the legislation was developed in Committee or by

---

26. See Act of Sept. 30, 1950, Pub. L. No. 81-875, 64 Stat. 1109 (repealed 1970).

staff members on which no record exists.”<sup>27</sup> Additionally, “[d]ebates were few and of sparse content since most disaster relief legislation was neither partisan nor controversial,” limiting the amount of historical data related to these pieces of legislation outside the documents themselves.<sup>28</sup> It is important, however, to review the origins of federal and state police power, the federal authority to amend the Stafford Act, and the historical pieces of disaster legislation, as well as the context of their passing, in order to evaluate the charted path of progress, which may instruct us to amend our laws to meet current and future conditions.

*A. Federal and State Police Power as Essential to Disaster Response*

The doctrine of police powers addresses the distinct and exceptional privileges of a sovereign state to establish laws for the betterment of society.<sup>29</sup> Police powers represent the manifestation of governmental authority, initially legitimized in Philadelphia during the Revolutionary War to manage the risk of Yellow Fever.<sup>30</sup> These powers empower state public health authorities to enforce treatment, restrict or guide specific behaviors, or detain and isolate individuals, provided they can establish that such actions are essential to advance public health goals.<sup>31</sup> In 1824, the Supreme Court reaffirmed this authority, acknowledging that the ability to quarantine was permissible “to provide for the health of the citizens.”<sup>32</sup> The police powers

---

27. FRANK P. BOURGIN, FED. EMERGENCY MGMT. AGENCY, A LEGISLATIVE HISTORY OF FEDERAL DISASTER RELIEF, 1950-1974 1 (1983).

28. *Id.*

29. Richard K. Norton & Nancy H. Welsh, *Reconciling Police Power Prerogatives, Public Trust Interests, and Private Property Rights Along Laurentian Great Lakes Shores*, 8 MICH. J. ENV'T & ADMIN. L. 409, 418-19 (2019). Traditional examples of police power include “[p]ublic safety, public health, morality, peace and quiet, law and order.” *Berman v. Parker*, 348 U.S. 26, 32 (1954).

30. See *Smith v. Turner*, 48 U.S. (7 How.) 283, 340-41 (1849).

31. Jorge E. Galva, Christopher Atchison & Samuel Levey, *Public Health Strategy and the Police Powers of the State*, 120 PUB. HEALTH REPS. 20, 21 (2005).

32. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 5 (1824).



are reserved for the states through, the Tenth Amendment, which provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>33</sup> Therefore, states have broad regulatory powers whereas the federal government may only act when such power is enumerated.<sup>34</sup>

The police powers create critical boundaries that define the disaster response operations within the United States. As a result of the police powers, the United States’ strategy for disaster relief places the primary duty on state and local governments to respond to natural disasters, honoring the principles of federalism.<sup>35</sup>

In contrast to the states, the federal government does not possess inherent police powers.<sup>36</sup> Instead, its involvement in disaster-related actions, whether to enforce state or local disaster preparedness or to respond to disasters, derives from the authority granted in Article I, section 8 of the Constitution.<sup>37</sup> The federal government’s role in disaster relief is thus only delineated by its power to regulate interstate commerce, levy taxes and allocate funds, and ensure the common defense, with The Stafford Act operating within the purview of all three of these powers.<sup>38</sup>

The Stafford Act provides a line of protection when the state and local police powers cannot adequately address a disaster. In situations where disasters reach a scale that exceeds the capacity of local and state governments, the federal government

---

33. U.S. CONST. amend. X.

34. *Bond v. U.S.*, 572 U.S. 844, 854 (2014) (quoting *U.S. v. Lopez*, 514 U.S. 549, 567 (1995)).

35. See Jim Winthrop, *The Oklahoma City Bombing: Immediate Response Authority and Other Military Assistance to Civil Authority*, ARMY LAW., July 1997, at 3, 8–9 (defining states’ reserved powers under federalism).

36. *United States v. E.C. Knight Co.*, 156 U.S. 1, 11–12 (1895) (affirming that police power resides within the jurisdiction of states and remains unyielded to the federal government under the Constitution).

37. See U.S. CONST. art. I, § 8 (articulating enumerated powers of legislative branch).

38. See Ernest B. Abbott, Otto J. Hetzel & Alan D. Cohn, *Federalism and Constitutional Challenges*, 2006 A.B.A. SEC. STATE & LOC. GOV’T L. 1 (outlining federal government’s legal authority in disaster response).

can step in upon the request of a state governor, still maintaining a focus on state and local governments' sovereignty.<sup>39</sup>

### *B. National Security Authority*

It has been said that “necessity knows no law.”<sup>40</sup> The statement may be a valid “description of official behavior during crises,” as seen with President Trump during the COVID-19 pandemic, but it is not an accurate “description of our legal system.”<sup>41</sup> Presidential power is derived from one of two sources: the Constitution or congressional laws.<sup>42</sup> Unlike modern constitutions across the globe, the United States Constitution does not contain an emergency rule provision.<sup>43</sup> There are provisions that could be considered “crisis-response powers,” but they do not appear in Article II, which provides the President with the authority to sign treaties with foreign powers, “defend the United States against sudden attack, manage the conduct of war,” conclude international agreements, exercise prerogative powers, and possess inherent executive powers.<sup>44</sup> Article I of the Constitution, for example, grants “Congress the authority to suspend the writ of habeas corpus ‘when in Cases of Rebellion or Invasion . . .’ and to ‘call[] forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.’”<sup>45</sup> While Article II does not explicitly confer “emergency powers, there are implied powers [that] accompany[]

---

39. See Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5170 (requiring state governor’s request for assistance prior to federal disaster declaration or involvement).

40. Roger Alford, “Necessity Knows No Law,” OPINIO-JURIS (May 18, 2009), <http://opiniojuris.org/2009/05/18/necessity-knows-no-law/> [<https://perma.cc/TWH3-4S6L>].

41. Elizabeth Goitein, *Emergency Powers, Real and Imagined: How President Trump Used and Failed to Use Presidential Authority in the COVID-19 Crisis*, 11 J. NAT’L SEC. L. & POL’Y 27, 28 (2020).

42. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case)*, 343 U.S. 579, 585 (1952); *id.* at 28–29.

43. Goitein, *supra* note 41, at 29, n.3 (reviewing findings from the constitution comparison project to show “at least 178 countries’ constitutions have provisions for emergency rule”).

44. *Id.* at 29; U.S. CONST. art. II, § 2.

45. U.S. CONST. art. I, § 9, cl. 2, § 8, cl. 15.

some of its express provisions.”<sup>46</sup> The Commander-in-Chief power allows the President “to defend the United States against sudden attack” and “manage the conduct of war.”<sup>47</sup> The Supreme Court has also asserted that the President is the “sole organ of the federal government in the field of international relations,”<sup>48</sup> although the extent of this exclusive power in the international relations field is unclear.<sup>49</sup> This means that emergency powers for the President under the Constitution are limited.<sup>50</sup>

However, Congress has passed several laws that delegate certain emergency powers to the president, including laws that grant the executive branch “the power to issue emergency declarations in specified situations, which in turn unlock resources and authorities as provided in the law.”<sup>51</sup> The Stafford Act grants the president emergency authority in and of itself, but it is also supplemented by “more than 120 statutory authorities that become available to the president when [they] declare[] a ‘national emergency.’”<sup>52</sup> It is clear that Congress has recognized the need for federal-level emergency efforts to support disaster response and recovery.<sup>53</sup> Congress has passed new legislation amending the Stafford Act, attempting to fix the problems identified in the disaster response.<sup>54</sup> These amendments encompass a set of objectives concerning disaster relief and preparedness. The amendments aim to enhance and expand existing disaster relief programs while emphasizing the importance of

---

46. Goitein, *supra* note 41, at 29.

47. *Id.*; *Brig Amy Warwick (Prize Cases)*, 67 (2 Black) U.S. 635, 668 (1863) (holding the president has inherent powers to respond to invasion or insurrection); *Fleming v. Page*, 50 U.S. 603, 615 (1850) (holding the president has the power “to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy”).

48. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

49. Goitein, *supra* note 41, at 29.

50. *Id.*

51. *Id.*

52. *Id.*

53. *See Disaster Assistance*, *supra* note 8.

54. *See, e.g., Post-Katrina Emergency Management Reform Act of 2006*, 6 U.S.C. § 701; *Stafford Act*, 42 U.S.C. § 5121.

promoting comprehensive disaster preparedness and assistance plans, programs, capabilities, and organizations at both the state and local levels.<sup>55</sup> Additionally, they seek to enhance the coordination and responsiveness of disaster preparedness and relief efforts.<sup>56</sup> These objectives underscore the importance of identifying and enhancing the resilience of vulnerable communities, particularly in the face of climate-related and natural hazards. All the objectives are key improvements to the United States' disaster response framework; however, the focus on incidents involving novel infectious disease threats that transcend any typical disaster response capabilities is still lacking. The time is now for Congress to amend the Stafford Act to address the failures of the federal response and ensure federal legislation that prepares the country for the next infectious disease outbreak—which is “just around the corner.”<sup>57</sup>

### *C. Legislative History of Disaster Response Legislation*

Before 1950, the United States did not have any comprehensive legislation that covered federal disaster relief.<sup>58</sup> Rather, “Congress had to pass a separate law to provide federal funds” each time a major disaster occurred.<sup>59</sup> Congress enacted 128 disaster relief laws in the nearly one-hundred fifty years between 1803 and 1950, eliminating the need to pass separate funding laws.<sup>60</sup> This established, however, ample precedent for

---

55. See 6 U.S.C. § 701; 42 U.S.C. § 5121.

56. See 6 U.S.C. § 701; 42 U.S.C. § 5121.

57. See Houser, *supra* note 20, at 4 (claiming increased potential for bioterrorism and outbreaks in the future); Bhargavi Duvvuri, *Disease X Is Coming, and with It the Next Global Pandemic, Scientists Warn*, NAT'L POST (May 21, 2023) <https://nationalpost.com/health/disease-x-global-pandemic-covid-19-virus-outbreak> [<https://perma.cc/X359-HMH4>] (quoting Pranab Chatterjee, a researcher at the Department of International Health, stating that “[i]t is not an exaggeration to say that there is potential of a Disease X event just around the corner”).

58. *Legislative History of the Role of the Federal Government in Disaster Assistance*, INST. FOR BUILDING TECH. & SAFETY, <https://ibtsonhand.org/resource/legislative-history-role-federal-government-disaster-assistance/> [<https://perma.cc/7NMF-JFR4>].

59. *Id.*

60. *Id.*

supplemental disaster assistance from the federal government to state and local governments, albeit after a disaster occurred.<sup>61</sup> Over the next thirty years, Congress and the executive branch worked to enact statutes that would update the disaster response and recovery framework within the United States, realizing a need to transition from an “uncoordinated and decentralized system” for disaster relief “to one dominated by the federal government.”<sup>62</sup> In 1950, an act primarily used to repair flood-damaged farm-to-market roads, set the course for a more structured, nationwide disaster response system within the country.<sup>63</sup> While it was hardly predictable at the time of its passing, this act’s significance would shape all future emergency response legislation.<sup>64</sup> This legislation was the “product of accretion and gradual evolution.”<sup>65</sup>

The Federal Disaster Relief Act of 1950 formalized the structure outlined in the initial appropriations legislations from 1947 and 1948.<sup>66</sup> The 1948 legislation, which provided the President with broad latitude to expend funds, also contained several features that persist in modern disaster relief legislation,<sup>67</sup> including: presidential authority to declare a disaster and allocate federal relief; eligibility for federal support that requires states to certify the need for support and willingness to also commit state resources; federal aid that does not fund the entirety of relief but instead “supplement[s] the efforts and available resources of [s]tate and local governments or other agencies” and gives the President the authority to direct federal agency

---

61. *See id.*

62. *See id.*; Use of the Disaster Relief Act of 1974 in an “Immigration Emergency,” 6 Op. O.L.C. 708, 709–10 (1982).

63. BOURGIN, *supra* note 27, at 1.

64. *See id.*

65. *See id.* at 2.

66. *See* Act of July 25, 1947, Pub. L. No. 80-233, § 2, 61 Stat. 422 (authorizing the federal government to provide surplus property “to [s]tates and local governments situated in any area struck by any such flood or catastrophe”); Secondary Deficiency Appropriations Act of 1948, Pub. L. No. 80-785, 62 Stat. 1027.

67. WILLIAM L. PAINTER, CONG. RSCH. SERV., R45484, THE DISASTER RELIEF FUND: OVERVIEW AND ISSUES 11 (2022); *see also* Secondary Deficiency Appropriations Act of 1948, Pub. L. No. 80-785, 62 Stat. 1027.

participation in emergency assistance.<sup>68</sup> The 1950 legislation was the first time that Congress indicated its intent:

to provide an orderly and continuing means of assistance by the Federal Government to States and local governments in carrying out their responsibilities to alleviate suffering and damage resulting from major disasters, to repair essential public facilities in major disasters, and to foster the development of such State and local organizations and plans to cope with major disasters . . . as may be necessary.<sup>69</sup>

The Federal Disaster Relief Act of 1950 authorized the President to provide supplementary federal assistance when a governor requested help and the President approved the request by declaring a major disaster.<sup>70</sup> This maintained the idea that “[t]he federal government would not function as the first-line provider of emergency assistance and disaster response and recovery, but would support and supplement efforts and available resources of the state and local governments.”<sup>71</sup> Additionally, state and local governments were required to provide reasonable funding before being eligible to receive federal assistance.<sup>72</sup> Despite the recent passage of legislation allocating funds for general disaster relief, Congress also approved supplementary disaster relief authorization to assist those impacted by an earthquake in Alaska, floods in western states, and Hurricane Betsy in Florida, Louisiana, and Mississippi.<sup>73</sup> Throughout the 1960s, the federal government continued to play a larger role in disaster relief.<sup>74</sup>

---

68. PAINTER, *supra*, note 67, at 11.

69. 64 Stat. at 1109.

70. *Id.*

71. *Legislative History of the Role of the Federal Government in Disaster Assistance*, *supra* note 58.

72. *Id.*

73. PAINTER, *supra* note 67, at 12.

74. *Id.*

From 1966 to 1974, general relief broadened under federal disaster legislation.<sup>75</sup> The Federal Disaster Relief Act of 1966 improved upon the 1950 Federal Disaster Relief Act by providing added authorities to handle “non-routine, large-scale catastrophic disasters.”<sup>76</sup> This period also included the National Flood Insurance Act of 1968<sup>77</sup> and Flood Disaster Protection Act of 1973,<sup>78</sup> which “made flood insurance available for the first time” and “mandatory for protection of properties located in Special Flood Hazard Areas,” respectively.<sup>79</sup> Crucially, in order to take part in the National Flood Insurance program, communities were obligated to adhere to minimum development standards and land-use controls.<sup>80</sup> This framework was established with the intention of promoting resilience against future disasters.<sup>81</sup> The Disaster Relief Act of 1974<sup>82</sup> created a “more robust preparedness program and introduced the concept of ‘emergency’ declarations to accommodate assistance in cases where an incident did not rise to the ‘major disaster’ threshold.”<sup>83</sup> The Disaster Relief and Emergency Assistance Amendments of 1988 renamed the Disaster Relief Act of 1974 as the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act).<sup>84</sup> Two key pieces of legislation—The Disaster Relief and Emergency Assistance Amendments of 1988 and Stafford Act—shape the relationship between state and federal governments when it comes to managing emergency and

---

75. *See id.* at 12–13.

76. *Legislative History of the Role of the Federal Government in Disaster Assistance*, *supra* note 58; Disaster Relief Act of 1966, Pub. L. No. 89-769, 80 Stat. 1316.

77. National Flood Insurance Act of 1968, 42 U.S.C. § 4001.

78. Flood Disaster Protection Act of 1973, Pub. L. No. 93-234, 87 Stat. 975 (amending 42 U.S.C. § 4001).

79. *Legislative History of the Role of the Federal Government in Disaster Assistance*, *supra* note 58; *see id.*

80. DIANE P. HORN, CONG. RSCH. SERV., IN11049, A BRIEF INTRODUCTION TO THE NATIONAL FLOOD INSURANCE PROGRAM: HOMELAND SECURITY ISSUES IN THE 116TH CONGRESS 2 (2020).

81. *Legislative History of the Role of the Federal Government in Disaster Assistance*, *supra* note 58.

82. Disaster Relief Act of 1974, 93 Pub. L. 288, 88 Stat. 143.

83. PAINTER, *supra* note 67, at 13.

84. PAINTER, *supra* note 67, at 10; *see generally* The Disaster Relief and Emergency Assistance Amendments of 1988, 100 Pub. L. No. 707, 102 Stat. 4689; 42 U.S.C. §§ 5121–23.

disaster relief.<sup>85</sup> These laws are frequently amended and reformed in the wake of large-scale emergencies.<sup>86</sup>

Adjacently, in 1979, President Carter restructured the major bureaucracy that surrounded disaster responses by consolidating almost thirty disaster-related agencies and programs into one Federal Emergency Management Agency (FEMA).<sup>87</sup> FEMA “coordinate[s] all disaster relief assistance (including voluntary assistance) provided by Federal agencies, private organizations, and State and local governments[.]”<sup>88</sup> Additionally, the agency is mandated to provide federal assistance programs following disasters, promote the development of comprehensive disaster preparedness plans by states and local governments, and enhance coordination and responsiveness of disaster relief programs while promoting the implementation of measures to mitigate hazards.<sup>89</sup>

#### *D. Legislative Intent & Key Features*

Article I, Section 8 of the U.S. Constitution refers to the need to “provide for the common Defence,”<sup>90</sup> a recognition “of the federal government’s role in preventing and managing large-scale attacks and other emergencies.”<sup>91</sup> Following decades of legislative advancement to more efficiently respond to disasters within the United States, Congress enacted the Stafford Disaster Relief and Emergency Assistance Act, also known as the Disaster Relief Act of 1974, to provide federal assistance to states in times of disaster.<sup>92</sup> In doing so Congress intended “to provide

---

85. PAINTER, *supra* note 67, at 11; see *Relevant Disaster Legislation and Materials*, U.S. DEP’T OF THE INTERIOR, <https://www.doi.gov/recovery/about-recovery/disaster-laws> [https://perma.cc/8M3R-D3EC].

86. PAINTER, *supra* note 67, at 11.

87. See Exec. Order No. 12,148, 44 Fed. Reg. 43239 (July 24, 1979).

88. 42 U.S.C. § 5192(a)(2).

89. 44 C.F.R. § 206.3 (2023).

90. U.S. CONST. art. I, § 8, cl. 1.

91. WEITZ, *supra* note 16.

92. Disaster Relief & Emergency Assistance Amendments of 1988, 100 Pub. L. No. 707, 102 Stat. 4689; 42 U.S.C. § 5121.



an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from such disasters[.]”<sup>93</sup>

Federal relief under the Stafford Act is primarily initiated in two ways: a “presidential declaration[] of a major disaster [or] emergency situation.”<sup>94</sup> An “emergency” as defined by the Act is any instance in which, by “the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.”<sup>95</sup> A “major disaster” is statutorily defined as any natural or man-made catastrophe within the United States in which, by “the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance . . . 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.”<sup>96</sup> The presidential declarations follow a request from a governor asking for assistance after making “a finding that the disaster is of such severity and magnitude that effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary[.]”<sup>97</sup> following the federalist principles that define emergency management within the United States. After the president declares a major disaster, the affected state becomes a “grantee” of the federal government, and it must disperse the funding in an agreed upon manner.<sup>98</sup> Revisions made in 1988 incorporated two other situations that would trigger

---

93. 42 U.S.C. § 5121(b).

94. Deborah F. Buckman, Annotation, *Construction & Application of Robert T. Stafford Disaster Relief & Emergency Assistance Act (Stafford Act)*, 42 U.S.C.A. §§ 5121 et seq, 14 A.L.R. Fed. 2d 173, § 2 (2021).

95. 42 U.S.C. § 5122(1).

96. *Id.* § 5122(2).

97. 42 U.S.C. § 5170(a).

98. *City of San Bruno v. Fed. Emergency Mgmt. Agency*, 181 F. Supp. 2d 1010, 1011 (N.D. Cal. 2001) (citing 44 C.F.R. § 206.431(d)).

federal disaster relief.<sup>99</sup> In extreme circumstances that require an immediate response, they permit the president "to use U.S. Department of Defense resources in the immediate aftermath of an incident to preserve life and property"<sup>100</sup> or to allow the President to declare an emergency without a request from a governor, although consultation is required, when the affected area is one in which "the United States exercises exclusive or preeminent responsibility and authority" under the Constitution or United States law.<sup>101</sup>

While the Stafford Act does not explicitly exclude the use of major disaster declarations for infectious disease, commentary from the time of its passage suggest that the Act's drafters may not have intended such use.<sup>102</sup> Arlan Stangeland, the Ranking Member of the Subcommittee on Water Resources of the House Public Works and Transportation Committee, stated in his final "comments on the final version of the bill:"

Title I reorganizes the disaster relief program to clearly define Presidential authority to respond to major disasters and emergencies. Major disasters would include primarily natural catastrophes or, in certain instances, nonnatural catastrophes while emergencies would include any occasion or instance in which Federal assistance was necessary. However, we do not intend for emergency declarations to be available in responding to public health problems such as disease epidemics or environmental or nuclear catastrophes for which Federal assistance is already available.<sup>103</sup>

Since its creation, The Stafford Act has embodied Congress's intention to establish a systematic and ongoing mechanism for

---

99. Buckman, *supra* note 94.

100. *Id.*

101. 42 U.S.C. § 5191(b); Buckman, *supra* note 94.

102. *See* Painter, *supra* note 67, at 14.

103. *Id.*

federal assistance to support state and local governments in fulfilling their duties to mitigate the suffering and harm caused by such disasters.<sup>104</sup> In response to disasters, Congress has made amendments to the initial 1974 legislation to ensure complete coverage of the American people; yet, there remains a need to respond post COVID-19 pandemic. To manifest the intentions of the Constitution and provide for the common defense of the American people from infectious disease threats, COVID-19 should be viewed as a “disaster” and as such, Congress should amend the Stafford Act.

#### *E. Use of the Stafford Act Prior to COVID-19*

The Stafford Act authorizes the President of the United States to issue declarations that provide states, localities, and tribes with a range of federal assistance to help them respond to natural and man-made disasters.<sup>105</sup> The number of declarations made by the President have increased over time, as the frequency of declarations from 1960 to 1969 was about 18.6 per year while the average number of major disaster declarations issued per year from 2000 to 2009 was 57.1.<sup>106</sup> A congressional analysis of Stafford declarations found that most emergency declarations were for winter storms and hurricanes while most major disaster declarations were for floods, tornadoes, winter storms, and hurricanes.<sup>107</sup>

One of the most illustrative case studies of the need for federal response to major events is the response to Hurricane Katrina.<sup>108</sup> Under a federalist approach to disaster response, local governments are the first to respond given their proximity to the disaster and awareness of its impact—two realities that enable them to use their police powers more effectively to

---

104. See 42 U.S.C. 5121(b).

105. Stafford Act, 42 U.S.C. §§ 5170–71.

106. BRUCE R. LINDSAY, CONG. RSCH. SERV., R42702, STAFFORD ACT DECLARATIONS 1953-2016: TRENDS, ANALYSES, AND IMPLICATIONS FOR CONGRESS 1 (2017) [hereinafter R42702].

107. *Id.* at Summary.

108. See EXEC. OFF. OF THE PRESIDENT, *supra* note 12, at 5–9 (detailing the damage of Hurricane Katrina and the federal government’s response).

protect residents from imminent natural disasters.<sup>109</sup> However, during Hurricane Katrina, like many other disasters, local responders were also affected by the hurricane, leaving them unable to effectively respond to the ongoing disaster.<sup>110</sup> The next line of defense—the state government—is also expected to use its police power to respond to natural disasters by providing local resources, but more importantly, by tapping the “supreme executive power” to authorize the governor to exercise powers either directly or indirectly that are “necessary to meet the dangers presented by emergencies.”<sup>111</sup> However, similar to the locality’s restraints, the state was also “thoroughly overwhelmed” by the task of protecting its residents and managing the overall disaster response.<sup>112</sup>

The legislative posture established by the Stafford Act in most cases, as was the case with Katrina, requires local and state governments to exhaust their resources prior to receiving the federal government’s assistance, which follows federalist principles.<sup>113</sup> Under the Act, state and local governments may not receive federal aid for the first seventy-two hours after a disaster strikes.<sup>114</sup> Once the federal response to Katrina began, ten

---

109. See David L. Feinberg, *Hurricane Katrina & the Public Health-Based Argument for Greater Federal Involvement in Disaster Preparedness and Response*, 13 VA. J. SOC. POL’Y & L. 596, 607 (2006).

110. *Id.* at 608.

111. See David G. Tucker & Alfred O. Bragg, III., *Florida’s Law of Storms: Emergency Management, Local Government, and the Police Power*, 30 STETSON L. REV. 837, 854–55 (2001) (discussing section 252.36 of the Florida Code, which “authorizes the governor to assume control over the State’s emergency management functions when local authorities are unable” to do so, and sections 1(a) and 1(d) of article IV of the Florida Constitution, which grants the governor executive power).

112. Feinberg, *supra* note 109, at 609.

113. See EXEC. OFF. OF THE PRESIDENT, *supra* note 12; Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5170.

114. JILL D. RHODES & JAMES JAY CARAFANO, STATE AND REGIONAL RESPONSES TO DISASTERS: SOLVING THE 72-HOUR PROBLEM, HERITAGE FOUND. 1 (2006) (explaining that “[o]n average, the federal government needs 72 hours to marshal national resources in response to an incident,” but state and local governments are generally able to manage during that time; however, when the state and local governments are overwhelmed, as was the case after Hurricane Katrina, delays in disaster response have significant consequences).

agencies provided necessary support to the affected areas.<sup>115</sup> The federal response was able to obtain and distribute crucial commodities of water, food, and ice, which were in short supply during the first two or so weeks of landfall.<sup>116</sup>

The Stafford Act has also been used for non-storm related incidents, including a declaration following the Oklahoma City bombing.<sup>117</sup> On April 19, 1995, President Bill Clinton declared an emergency under the Stafford Act to authorize federal relief and emergency assistance for the affected areas in Oklahoma City following the blast.<sup>118</sup> The declaration provided Emergency Assistance under Title V of the Act, with assistance being provided at 100% federal funding.<sup>119</sup> President Clinton's declaration triggered the American Red Cross to provide food, shelter, first aid, relief supplies, and welfare information, "which allowed 665 FEMA rescue team members to be sent to the city."<sup>120</sup> The swift response of federal resources and collaboration between all levels of government, coordinated through the Stafford Act, demonstrated how critical it is for this type of federal planning and coordination to be implemented during disasters.

## II. COVID-19 & RESPONSE

The COVID-19 pandemic caused an unprecedented shock and disruption to the United States and the world.<sup>121</sup> Three years after the pandemic began, it remains unclear how long the

---

115. See *USA Hurricane Katrina: What Government Is Doing*, OFF. FOR THE COORDINATION OF HUMAN AFFS.: RELIEFWEB (Sept. 21, 2005), <https://reliefweb.int/report/united-states-america/usa-hurricane-katrina-what-government-doing-21-sep-2005> [<https://perma.cc/N28C-F9UY>] (describing federal government relief efforts in the aftermath of Hurricane Katrina).

116. *Hurricane Katrina: Perspectives of FEMA's Operations Professionals: Hearing Before the Senate Committee on Homeland Security & Governmental Affairs*, 109th Cong. 6 (2005) (statement of William L. Carwile, III, Federal Coordinating Officer, FEMA Joint Field Office), <https://www.hsgac.senate.gov/wp-content/uploads/imo/media/doc/120805Carwile.pdf> [<https://perma.cc/MDM2-4TDV>].

117. U.S. DEP'T OF JUST., OFF. FOR VICTIMS OF CRIME, *RESPONDING TO TERRORISM VICTIMS: OKLAHOMA CITY AND BEYOND* 4 (2000).

118. Letter to Governor Frank Keating on Disaster Assistance to Oklahoma City, 1 PUB. PAPERS 552, 553 (1995).

119. *Id.*

120. U.S. DEP'T OF JUST., *supra* note 117.

121. See Houser, *supra* note 20, at 1.

economic and epidemiological impacts will continue to last.<sup>122</sup> Even with a change in Executive Administration, it is difficult to gauge the extent and direction of the federal government's response to this ongoing crisis or discern how the American approach to disaster relief may change as a result.<sup>123</sup> Nonetheless, the pandemic has placed "significant strain on both the ability of Americans to meet basic needs and our government's capacity to assist [struggling Americans]," suggesting there is a need for immense change in legislative approaches to disasters."<sup>124</sup>

### A. *The Pandemic*

On December 30, 2019, the China Bureau of the World Health Organization (WHO) received reports that a group of patients in Wuhan, China suffered from pneumonia with an unknown cause.<sup>125</sup> Three days later, on January 2, 2020, a virology expert had successfully sequenced the genome of SARS-CoV-2, a new coronavirus, and the Chinese National Health Commission quickly sounded the alarm on the resulting and impending danger.<sup>126</sup> On January 20, 2020, samples taken two days prior in Washington state were laboratory-confirmed by the United States Centers for Disease Control and Prevention as the first case of the disease in the United States.<sup>127</sup> On February 11, 2020, the WHO's International Committee on Taxonomy of Viruses officially named the disease COVID-19.<sup>128</sup> What followed was a

---

122. Andrew Hammond, Ariel Jurow Kleiman & Gabriel Scheffler, *How the COVID-19 Pandemic Has & Should Reshape the American Safety Net*, 105 MINN. L. REV. HEADNOTES 154, 154 (2020).

123. See ERICA A. LEE, DIANE P. HORN, BRUCE R. LINDSAY, WILLIAM L. PAINTER, LAUREN R. STEINSTR, SHAWN REESE & ELIZABETH M. WEBSTER, CONG. RSCH. SERV., R47048, *FEMA'S ROLE IN THE COVID-19 FEDERAL PANDEMIC RESPONSE* 61 (2022).

124. Hammond et al., *supra* note 122.

125. Fred Plapp, *The COVID-19 Pandemic: A Summary*, PATHOLOGIST (July 6, 2020), <https://thepathologist.com/subspecialties/the-covid-19-pandemic-a-summary> [<https://perma.cc/7RAM-M5CS>].

126. *Id.*

127. *Id.*

128. *CDC Museum COVID-19 Timeline*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 15, 2023), <https://www.cdc.gov/museum/timeline/covid19.html> [<https://perma.cc/8XN8-5KGY>].

disjointed and appalling approach to public health crisis mitigation efforts at the federal level.<sup>129</sup> The United States' astounding response to the novel coronavirus pandemic caused it to be the country with the highest number of COVID-19 cases and deaths in the world through mid-2020.<sup>130</sup> As of late July 2020, the United States had over 4,600,000 cases of COVID-19 and over 159,000 deaths since the beginning of the pandemic.<sup>131</sup> The United States' COVID-19 response was one that was fraught with several failures, including: "(1) accountable leadership, (2) statutory authorities and policies, (3) inter-agency coordination, (4) coherent data system for situational awareness, (5) strategic national stockpile and supply chain, (6) testing and surveillance, (7) health care system surge capacity and resilience, and (8) federal funds."<sup>132</sup>

A delayed initial response hampered efforts to contain the virus's spread, contributing to a rapid increase in cases.<sup>133</sup> Testing shortages and delays hindered the ability to identify and isolate cases effectively.<sup>134</sup> Healthcare workers faced shortages of crucial personal protective equipment, placing them at risk and straining their capacity to care for patients.<sup>135</sup> Miscommunication and inconsistent messaging from public health officials and political leaders led to confusion among the public.<sup>136</sup> The lack of a cohesive national strategy for containment, testing, and

---

129. See Houser, *supra* note 20, at 6.

130. Drew Altman, *Understanding the US Failure on Coronavirus—an Essay by Drew Altman*, BMJ, Sept. 14, 2020, at 1, 1.

131. *United States of America Situation*, WORLD HEALTH ORG., <https://covid19.who.int/region/amro/country/us> [<https://perma.cc/qq43-mg94>] (The World Health Organization continually updates this website to reflect the current number of COVID-19 cases and deaths in the United States. As of late October 2023, there were more than 103,400,000 cases of COVID-19 and more than 1,130,000 deaths in the United States.).

132. Houser, *supra* note 20, at 1.

133. *Id.*

134. See Tim R. Mercer & Marc Salit, *Testing at Scale During the Covid-19 Pandemic*, 22 NATURE REVS. GENETICS 415, 420–21 (2021).

135. See Briana D. Long, *Prioritizing Preparation: Ensuring Access to Health Care Through Hospitals' Stockpiling of Personal Protective Equipment*, 21 WYO. L. REV. 45, 50, 68–69 (2021).

136. Do Kyun David Kim & Gary L. Kreps, *An Analysis of Government Communication in the United States During the Covid-19 Pandemic: Recommendations for Effective Government Health Risk Communication*, 12 WORLD MED. & HEALTH POL'Y 398, 407 (2020).

vaccine distribution left states with varying approaches.<sup>137</sup> Vaccine distribution initially encountered logistical challenges, including some doses going to waste.<sup>138</sup> The pandemic's politicization and resistance to public health measures, such as mask mandates, further complicated efforts to control the virus's spread.<sup>139</sup> Additionally, disparities in information regarding the impact of the virus highlighted existing health inequalities, and vaccine hesitancy hindered achieving widespread immunity.<sup>140</sup> These failures underscored the need for improved preparedness and coordination in responding to public health crises.

### *B. Legislative & Policy Response*

As expected of a federalism-informed system, the United States' response to the pandemic was defined by a division of power between federal and state governments.<sup>141</sup> Without much direction from the federal government, state and local governments acted as the primary policy decisionmakers.<sup>142</sup> With local and state governments being responsible for their citizens under the police powers doctrine, localities responded

---

137. See W.J. Hennigan, Alice Park & Jamie Ducharme, *The U.S. Fumbled Its Early Vaccine Rollout. Will the Biden Administration Put America Back on Track?*, TIME (Jan. 21, 2021, 6:12 AM), <https://time.com/5932028/vaccine-rollout-joe-biden/> [https://perma.cc/CXU3-X6KU].

138. Stephen Gandel, *Pfizer's COVID-19 Vaccine Distribution Will Be a "Logistical Nightmare,"* CBS NEWS (Nov. 17, 2020, 12:44 PM), <https://www.cbsnews.com/news/covid-vaccine-pfizer-distribution-logistical-nightmare/> [https://perma.cc/SKM4-9ZL8]; Apu Gomes, *The U.S. Has Wasted over 82 Million Covid Vaccine Doses*, NBC NEWS (June 6, 2022, 4:27 PM), <https://www.nbcnews.com/news/us-news/covid-vaccine-doses-wasted-rcna31399> [https://perma.cc/YEC2-LCDF].

139. Dror Walter, Yotam Ophir & Hui Ye, *Conspiracies, Misinformation and Resistance to Public Health Measures During COVID-19 in White Nationalist Online Communication*, 41 VACCINE 2868, 2868 (2023).

140. See Joshua E. Porterfield, Beth Blauer & Lainie Rutkow, *Demographic Data and the Covid-19 Pandemic: A Regulatory Conundrum*, 65 HOW. L.J. 387, 409–10 (2022).

141. Savannah Bergquist, Thomas Otten & Nick Sarich, *COVID-19 Pandemic in the United States*, 9 HEALTH POL'Y & TECH. 623, 623 (2020) (discussing the impact of politics on the United States' response to the COVID-19 pandemic).

142. *Id.*



more quickly than the federal government to protect from the COVID-19 pandemic.<sup>143</sup>

State legislatures in the United States implemented exceptional measures to address the virus' transmission.<sup>144</sup> Initially, seven counties in the San Francisco Bay area issued the nation's first stay-at-home orders.<sup>145</sup> In densely populated cities like Chicago, New Orleans, and New York City, extra social mitigation measures were adopted to combat the heightened spread of the virus.<sup>146</sup> In New York, an Executive Order "limited religious service attendance to ten people in areas that were designated as 'high risk' of COVID-19 infections."<sup>147</sup> Some cities and counties in predominantly conservative states like Florida and Texas took independent action when their state governments did not implement measures.<sup>148</sup> Frequently, these local areas enforced mask mandates for either the general population or educational institutions to curb the virus's transmission.<sup>149</sup>

On the federal level, in response to the WHO declaration of an emergency in January 2020, Secretary of Health and Human Services (HHS), Alex Azar, declared a public health emergency under the Public Health Service Act (PHSA) on January 31, 2020.<sup>150</sup> Under this activation, resources, such as the Strategic National Stockpile (SNS), which is a reserve supply of "drugs, vaccines, and other biological products, medical devices, and

---

143. See Sheila R. Foster, *As COVID-19 Proliferates Mayors Take Response Lead, Sometimes in Conflicts with Their Governors*, GEO. L., <https://www.law.georgetown.edu/salpal/as-covid-19-proliferates-mayors-take-response-lead-sometimes-in-conflicts-with-their-governors/> [<https://perma.cc/57AS-PP63>].

144. See Bergquist, *supra* note 141, at 628.

145. Kelly J. Deere, *Democratizing Emergencies: The Local Predicament*, 101 N.C. L. REV. 1, 2 (2022) [hereinafter Deere, *Democratizing Emergencies*].

146. *Id.*

147. Ryan Houser & Andrés Constantin, *Covid-19, Religious Freedom and the Law: The United States' Case*, 49 AM. J.L. & MED. 24, 33 (2023).

148. Deere, *Democratizing Emergencies*, *supra* note 145, at 2.

149. *Id.*

150. See *Determination That a Public Health Emergency Exists*, DEP'T OF HEALTH & HUM. SERVS. (Jan. 31, 2020), <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx> [<https://perma.cc/BRV4-B8WW>]; WHO Director-General's Statement on IHR Emergency Committee on Novel Coronavirus (2019-nCoV) (Jan. 30, 2020), [https://www.who.int/director-general/speeches/detail/who-director-general-s-statement-on-ihr-emergency-committee-on-novel-coronavirus-\(2019-ncov\)](https://www.who.int/director-general/speeches/detail/who-director-general-s-statement-on-ihr-emergency-committee-on-novel-coronavirus-(2019-ncov)) [<https://perma.cc/D3ZL-PLF6>].

other supplies . . . in such numbers, types, and amounts . . . to provide for the emergency health security of the United States . . . in the event of a bioterrorist attack or other public health emergency,” became available to responders across the country.<sup>151</sup> Under the law, the deployment of resources to respond to an actual or potential emergency is “at the discretion” of the Secretaries of Health and Human Services and Federal Emergency Management Agency.<sup>152</sup> Such resources are crucial to help support state responses to pandemics, as would be expected of a federalism based system; however, an HHS Inspector General report<sup>153</sup> and agency documents provided to Congress<sup>154</sup> suggests that the distribution from the SNS during COVID-19 was slow and inadequate as supplies did not make it to localities in time to provide necessary protection.<sup>155</sup> Additionally under the activation, the “rapid development and widespread distribution of an effective diagnostic test was arguably the most important measure the federal government could have taken to limit the spread of COVID-19.”<sup>156</sup> However, even after test production increased significantly, states’ capacities to test for COVID-19 continued to lag far behind the need, limiting the effectiveness of response.<sup>157</sup>

---

151. 42 U.S.C. § 247d-6b(a)(1).

152. *Id.* § 247d-6b(a)(2)(G); see *Public Health Emergency Declaration Q&As*, U.S. DEP’T OF HEALTH & HUM. SERVS. (Sept. 5, 2019), <https://www.phe.gov/Preparedness/legal/Pages/phe-qa.aspx> [<https://perma.cc/8GEU-BTBK>]; G. JAMES HERRERA & FRANK GOTTRON, CONG. RSCH. SERV., IF11574, NATIONAL STOCKPILES: BACKGROUND AND ISSUES FOR CONGRESS (2020).

153. See CHRISTI A. GRIMM, U.S. DEP’T OF HEALTH AND HUM. SERVS., OFF. OF INSPECTOR GEN., HOSPITAL EXPERIENCES RESPONDING TO THE COVID-19 PANDEMIC: RESULTS OF A NATIONAL PULSE SURVEY MARCH 23-27, 2020 1-3 (2020), <https://oig.hhs.gov/oei/reports/oei-06-20-00300.pdf> [<https://perma.cc/W3DT-B4WB>].

154. See, e.g., STAFF OF H. COMM. ON OVERSIGHT & ACCOUNTABILITY, 116TH CONG., SNS PPE DISTRIBUTION REPORT - EACHES 1 (COMM. REP. 2020), [<https://perma.cc/K5K3-TT49>] (listing distribution status across states and territories).

155. See Dinah Voyles Pulver & Erin Mansfield, *Rare Look at Stockpile Handouts Shows Which States Got Ventilators, Masks Amid Coronavirus*, USA TODAY (Apr. 10, 2020, 11:23 AM), <https://www.usatoday.com/story/news/investigations/2020/04/10/rare-look-stockpile-shows-which-states-got-supplies-amid-covid/5126900002/> [<https://perma.cc/VUE8-66EA>].

156. Goitein, *supra* note 41, at 48.

157. See Houser, *supra* note 20, at 7; Rob Stein, *U.S. Coronavirus Testing Starts to Ramp Up but Still Lags*, NPR (Mar. 18, 2020, 4:19 PM), <https://www.npr.org/sections/health->

However, some of President Trump's mitigation efforts took full advantage of the President's emergency powers, including those related to immigration, in which he utilized the pandemic to use "one subset of emergency powers" by enacting travel bans and taking "full advantage of COVID-19 to deliver on longstanding promises to dramatically reduce the flow of lawful immigrants into the United States."<sup>158</sup> The March 24, 2020 Center for Disease Control (CDC) order "suspending the introduction of certain persons from countries where a communicable disease exists" was delivered under the authority of Section 362 of the PHSA.<sup>159</sup> This "pseudo-emergency power" vests the executive branch with "extraordinary discretion" by delegating its powers to the Director of the CDC through the HHS in order "to address an immediate threat to the country."<sup>160</sup> However, the language of the provision that refers to the "existence of any communicable disease in a foreign country" that poses a "serious danger of the introduction of such disease into the United States" and allows the prohibition of "the introduction of persons and property from such countries or places as [the Surgeon General] shall designate in order to avert such danger" was not meant for a situation like COVID-19.<sup>161</sup> While the restriction of immigration would have the purpose of averting the potential introduction of a disease, it is not meant to be used when a disease is already present in the United States as it was since at least January of 2020.<sup>162</sup> Additionally, a proclamation from the President directed the Secretary of Homeland Security to "take

---

shots/2020/03/18/817768723/u-s-coronavirus-testing-starts-to-ramp-up-but-still-lags [https://perma.cc/P2ME-DH6G].

158. Goitein, *supra* note 41, at 28, 31; *see generally* Proclamation No. 9984: Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus and Other Appropriate Measures to Address This Risk, 85 Fed. Reg. 6709 (Jan. 31, 2020) [hereinafter Proclamation No. 9984].

159. Goitein, *supra* note 41, at 35 (citing Centers for Disease Control Order Suspending Introduction of Persons from a Country Where a Communicable Disease Exists, 85 Fed. Reg. 16567 (Mar. 24, 2020)).

160. *Id.* at 35–36.

161. 42 U.S.C. § 265; *see* Goitein, *supra* note 41, at 36 (explaining that Section 362 differentiates COVID-19 as an internal, national threat versus the external threats contemplated by the statute).

162. Goitein, *supra* note 41, at 28, 36.

all necessary and appropriate steps to regulate the travel of persons and aircraft[s] to the United States to facilitate the orderly medical screening and, where appropriate, quarantine of persons who enter the United States and who may have been exposed to the virus.”<sup>163</sup> The extensive use of quarantines that followed was a “radical departure from past practice” where “PHSA’s quarantine authority had been used only once before.”<sup>164</sup>

When it came to “deploying emergency powers” that would actually decrease disease transmission via community spread, President Trump was “restrained to a fault.”<sup>165</sup> President Trump did finally declare a national emergency on March 13, 2020.<sup>166</sup> Such a declaration was well within his discretion; however, he also simultaneously declared a nationwide Stafford Act emergency, even in the absence of requests from any state governor.<sup>167</sup> To do so, President Trump invoked a provision of the law that allows a president to declare an emergency without a state request if “the emergency involves a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority.”<sup>168</sup>

The COVID-19 pandemic was the first time in which major disaster assistance programs under the Stafford Act were used to respond to an infectious disease outbreak.<sup>169</sup> While two

---

163. Proclamation No. 9984, *supra* note 158, at 6710.

164. Goitein, *supra* note 41, at 40.

165. *Id.* at 28.

166. Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, 85 Fed. Reg. 15337 (Mar. 13, 2020).

167. *See id.*; Letter from Donald J. Trump, Pres., U.S. of Am., to Chad F. Wolf, Acting Sec’y, Dep’t of Homeland Sec., Steven T. Mnuchin, Sec’y, Dep’t of the Treasury, Alex M. Azar II, Sec’y, Dep’t of Health & Hum. Servs., and Pete T. Gaynor, Adm’r, Fed. Emergency Mgmt. Agency (Mar. 13, 2020), [https://www.scribd.com/document/451600062/Read-Trump-letter-declaring-coronavirus-national-emergency-under-Stafford-Act#fullscreen&from\\_embed](https://www.scribd.com/document/451600062/Read-Trump-letter-declaring-coronavirus-national-emergency-under-Stafford-Act#fullscreen&from_embed) [<https://perma.cc/WB2X-SFND>].

168. 42 U.S.C. § 5191(b).

169. *See LEE ET AL.*, *supra* note 123, at 3 (detailing previous examples of how the Stafford Act has been employed, including “in response . . .” to West Nile Virus “ . . . an infectious disease

Stafford Act emergency declarations were made in 2000 to control the West Nile virus, the scope of activation and use of disaster assistance programs at that time were limited, as the declarations served only “to activate the federal response and appointed an official of the FEMA to act as the Federal Coordinating Officer for the emergencies.”<sup>170</sup> Following the emergency declarations President Trump passed several executive orders which invoked the Defense Production Act.<sup>171</sup> However, the “use of these authorities [was] incongruously modest” with the pandemic metastasizing throughout the United States.<sup>172</sup>

There is no executive emergency declaration power that mirrors the Secretary of HHS’s ability to declare a public health emergency—as Secretary Azar did in January 2020.<sup>173</sup> An HHS “declaration gives executive branch officials the *ability* to take a number of steps to address the crisis, but it is not self-executing; the relevant officials must take further action to implement the measures they deem appropriate.”<sup>174</sup> The emergency declarations made in the wake of the COVID-19 outbreak did little to cure the lack of coordination and lackluster efforts to implement preventative measures.<sup>175</sup>

While the executive branch enacted these early orders to address the pandemic, much of the response was based on state and local orders. By March 17, 2020, after President Trump had already declared an emergency, all fifty states similarly declared emergencies due to COVID-19.<sup>176</sup> Governors issued

---

incident” in New York and New Jersey as opposed to a major disaster declaration as with COVID-19).

170. See *id.*; GREGORY SUNSHINE, CTRS. FOR DISEASE CONTROL & PREVENTION, EXECUTIVE ORDERS AND EMERGENCY DECLARATIONS FOR THE WEST NILE VIRUS: APPLYING LESSONS FROM PAST OUTBREAKS TO ZIKA 7 (2016).

171. Goitein, *supra* note 41, at 28.

172. *Id.*

173. See Goitein, *supra* note 41, at 48 (describing Secretary Azar’s ability to declare a public health emergency); PUB. HEALTH L. PROGRAM, CTRS. FOR DISEASE CONTROL & PREVENTION, SELECTED FEDERAL LEGAL AUTHORITIES PERTINENT TO PUBLIC HEALTH EMERGENCIES 4 (2017).

174. Goitein, *supra* note 41, at 48.

175. See Houser, *supra* note 20, at 6–8.

176. See Rosie Perper, Ellen Cranley & Sarah Al-Arshani, *Almost All US States Have Declared States of Emergency to Fight Coronavirus—Here’s What It Means for Them*, BUS. INSIDER (Mar. 17, 2020, 1:34 AM), <https://www.businessinsider.com/california-washington-state-of-emergency->

shelter-in-place orders and other social-distancing measures to prevent the spread of the virus, but provided exceptions for accessing essential goods.<sup>177</sup> Even as states started to reopen, many enacted ongoing mitigation efforts such as mask mandates, restrictions on gathering sizes, and prohibitions on indoor dining.<sup>178</sup> Some of these measures at times varied intra-state, with different regions reopening sooner than others.<sup>179</sup> When state legislatures failed to pass bills to prevent the spread of COVID-19, mainly due to politicization of the response, governors or state health officials took action and issued emergency orders.<sup>180</sup> Many stay-at-home orders and other measures intended to mitigate the spread of COVID-19 were successful; however, some states like Florida, Texas, and Arizona, reopened to improve their economies, garnering criticism from medical experts.<sup>181</sup> The combination of state-based mitigation policies and open state borders created a problem where lenient policies in one state had the ability to exacerbate and complicate outbreaks in neighbor states and beyond.<sup>182</sup> For example, a

---

coronavirus-what-it-means-2020-3 [<https://perma.cc/YVF8-UMK9>] (noting that all states except for West Virginia and Oklahoma declared an emergency by March 17, 2020); *Governor's Executive Orders Regarding COVID-19*, OKLA. DEP'T OF CONSUMER CREDIT, [https://www.ok.gov/okdocc/News\\_Media/Executive\\_Orders\\_regarding\\_COVID-19/index.html](https://www.ok.gov/okdocc/News_Media/Executive_Orders_regarding_COVID-19/index.html) [<https://perma.cc/MR5K-LHKE>] (Sept. 22, 2021) (Oklahoma's governor declared a state of emergency on March 15, 2020); *West Virginia's Response to COVID-19*, OFF. OF THE GOVERNOR JIM JUSTICE, <https://governor.wv.gov/Pages/WV-COVID-19-actions-and-executive-orders.aspx> [<https://perma.cc/38A3-NFV9>] (West Virginia's governor declared a state of emergency on March 16, 2020).

177. Kelly J. Deere, *Governing by Executive Order During the COVID-19 Pandemic: Preliminary Observations Concerning the Proper Balance Between Executive Orders and More Formal Rule Making*, 86 MO. L. REV. 721, 738 (2021) [hereinafter Deere, *Executive Orders During COVID-19*].

178. *See id.* at 738–39.

179. *Id.*

180. *See id.*, *passim*.

181. *Id.* at 740–41; Jessie Hellmann, *Florida, Texas, Arizona Face Hurdles in Getting Outbreaks under Control*, THE HILL. (June 25, 2020, 6:18 PM), <https://thehill.com/policy/healthcare/504630-florida-texas-arizona-face-hurdles-in-getting-outbreaks-under-control/> [<https://perma.cc/8HUR-EJBW>].

182. *See* Dhaval Dave, Andrew I. Friedson, Drew McNichols & Joseph J. Sabia, *The Contagion Externality of a Superspreading Event: The Sturgis Motorcycle Rally and COVID-19* 25–26 (IZA Institute of Labor Economics, Discussion Paper no. 13670, 2020), <https://www.econstor.eu/bitstream/10419/227197/1/dp13670.pdf>

Sturgis Motorcycle Rally in South Dakota in August of 2020 led to a broad interstate spread of COVID-19.<sup>183</sup> “COVID-19 cases increased by approximately [six] to [seven] cases per 1,000 [people] in its home county of Meade. Finally, [dose response] estimates show that following the Sturgis event, counties that contributed the highest inflows of rally attendees experienced a 7.0 to 12.5 percent increase in COVID-19 cases relative to counties that did not contribute inflows.<sup>184</sup> While this is only one example, research has shown that the presence of “inter-state spillovers significantly affected the rate at which COVID-19 spread across the US.”<sup>185</sup>

The discrepancies between efforts to protect public health and actions of state governments became increasingly worrisome as differing approaches began to erode common sense protections within states that were implemented immediately upon COVID-19’s arrival in the United States.<sup>186</sup> As certain states failed to take sufficient steps to mitigate the spread, the White House Coronavirus Task Force began asking local public health officials to alert local populations directly about what was needed to curb transmission of the virus because some governor-level actions were ineffective.<sup>187</sup> As the pandemic continued, the divide on how to implement safety measures widened as the politicization of the pandemic prevented intuitive and informed measures.<sup>188</sup> Efforts even began to erode the norms of federalism that typically govern disaster response.<sup>189</sup> State governments began to preempt the actions of local governments,

---

[<https://perma.cc/CUK2-7ZGJ>].

183. *See id.* at 3–4.

184. *Id.* at Abstract.

185. Michael Insler, Jacek Rothert & Ryan Brady, *The Fragmented US: Local COVID-19 Policies Impact the Rest of the Country*, VoxEU (Sept. 22, 2020), <https://cepr.org/voxeu/columns/fragmented-us-local-covid-19-policies-impact-rest-country> [<https://perma.cc/5LPT-AGHU>].

186. *See Altman*, *supra* note 130, at 1–2.

187. *See* EXECUTIVE OFF. OF THE PRESIDENT, NATIONAL STRATEGY FOR THE COVID-19 RESPONSE AND PANDEMIC PREPAREDNESS 7–8 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/01/National-Strategy-for-the-COVID-19-Response-and-Pandemic-Preparedness.pdf> [<https://perma.cc/9LQM-33YJ>].

188. *See Deere*, *Democratizing Emergencies*, *supra* note 145, at 2–3.

189. *See id.* at 2–3.

which are “at their most basic level . . . the ones most responsible [to] their citizens’ critical everyday needs, including health, police, and education.”<sup>190</sup> Early in the pandemic, certain local governments resisted imposing mask mandates, but as COVID-19 continued, the number of hostile state governments increased with almost a dozen states imposing mask mandate bans.<sup>191</sup> This action was counterintuitive to the emergency powers vested in the governor and the state’s police powers—which exist to protect public health reserved to the states.<sup>192</sup> States have even gone as far as to issue vaccine mandate bans, with eleven states issuing Governor Executive Order bans and nine states using state legislation.<sup>193</sup> Mask bans have become “contested issues between state and local governments,” with local government defiance leading to the withholding of funds and litigation for failing to comply.<sup>194</sup>

Because of federalism and the construction of disaster legislation, political and legal literature is dominated by “[t]he fear that leaders will abuse their emergency authorities and consolidate power during real or fictional crises.”<sup>195</sup> Some of these concerns may be valid based on the immigration measures implemented by President Trump in response to COVID-19,<sup>196</sup> but the most detrimental impact during this two-plus year response has been the lack of accountability and good faith leadership at all levels of government and the passive response to central public health issues by failing to implement the safety measures

---

190. *Id.*

191. *See id.* at 16–17.

192. *See id.*

193. *See id.*; *see, e.g.*, Exec. Ord. No. GA-38, 46 Tex. Reg. 4913 (Tex. 2021) (banning local authorities from requiring face coverings); Exec. Ord. 21-175 (Fla. 2021) (adopting the policy that school districts could not institute a mask mandate); OKLA. STAT. ANN. tit. 70, § 1210.189 (West 2023) (banning mask and vaccine mandates); S.J. Res. 3, 64th State Leg., (Utah 2022) (terminating “public health orders of constraint that require the wearing of a mask or face covering in Salt Lake County, Summit County, Salt Lake City, or any other place in the state of Utah.”).

194. *See Deere, Democratizing Emergencies, supra* note 145, at 17.

195. *See Goitein, supra* note 41, at 28.

196. *See id.* at 31–33.



needed.<sup>197</sup> The concern should not be whether leaders will abuse their emergency powers to implement laws that reach beyond their authority, but whether leaders will abuse their emergency powers by *not* using them to protect the health and safety of the public.<sup>198</sup>

### III. LIMITATIONS OF THE STAFFORD ACT

As noted by Representative Arlan Stangeland, there is legislation beyond the Stafford Act that can respond to public health emergencies like COVID-19.<sup>199</sup> However, the COVID-19 pandemic highlighted how authorities and emergency health declarations are constrained by a lack of coordination on the part of the federal government.<sup>200</sup>

Time and time again, when [the United States is] faced with a large-scale national emergency, [it] has been forced to rely on a broken system made up of weak agency delegation programs, legislation cobbled together in the immediate wake of the emergency, and defense regulations stretched beyond their intended capacity to fit the situation's immediate needs.<sup>201</sup>

Despite the other legislation that exists, the Stafford Act remains the centerpiece of emergency management legislation and drives the federal response.<sup>202</sup> Before making suggestions on how to amend the Stafford Act to ensure a more responsive federal emergency management legislation, it is important to recognize that the Act is deeply flawed.<sup>203</sup>

---

197. See Houser, *supra* note 20, at 1.

198. See Goitein, *supra* note 41, at 28.

199. See PAINTER, *supra* note 67, at 14.

200. See Lucinda Hendrix, *Lessons from Disaster: Improving Emergency Response Through Greater Coordination of Federal, State, and Local Response Efforts*, 51 PUB. CONT. L. J. 69, 70–71 (2021).

201. *Id.* at 71.

202. See PAINTER, *supra* note 67, at 14.

203. See Scott Maucione, *What Is the Stafford Act and Why Might It Be Making Disaster Relief Worse?*, FED. NEWS NETWORK (Oct. 31, 2017, 4:27 PM),

The Stafford Act often undercuts its own support measures and is used in a ‘one-size-fits-all strategy’ for disaster response that ignores the complexities and intricacies of various types of disasters.<sup>204</sup> The Act only recognizes two levels of disasters: emergencies and major disasters.<sup>205</sup> Emergencies are smaller, limited scale events, such as any natural catastrophe or fire, flood, or explosion.<sup>206</sup> Major disasters are larger events, such as a blizzard in Buffalo or a major earthquake in California that can impact millions.<sup>207</sup> FEMA is the federal agency responsible for managing Stafford Act disaster declarations, but many of its efforts have fallen short of the needs of affected areas.<sup>208</sup> Even as recently as 2017, with a traditionally defined disaster of a hurricane, FEMA admitted to improper preparation and was unable to provide adequate support to victims in Puerto Rico following Hurricane Maria.<sup>209</sup> Nearly all Stafford Act powers are delegated to FEMA’s Director, outside of the ability to declare an emergency or major disaster which lies with the

---

<https://federalnewsnetwork.com/congress/2017/10/what-is-the-stafford-act-and-why-might-it-be-making-disaster-relief-worse/> [<https://perma.cc/H2HL-DKT2>].

204. See Hendrix, *supra* note 200, at 72.

205. 42 U.S.C. §§ 5170(a), 5191(a), 5122.

206. MITCHELL L. MOSS & CHARLES SHELHAMER, CTR. FOR CATASTROPHE PREPAREDNESS & RESPONSE, *THE STAFFORD ACT: PRIORITIES FOR REFORM 15* (2007).

207. *Id.*

208. *Id.* at 3; see Steve Cohen, *FEMA’s Failure and the Catastrophe of Our Federal Government*, COLUM. CLIMATE SCH. (July 15, 2019), <https://news.climate.columbia.edu/2019/07/15/femas-failure-catastrophe-federal-government/> [<https://perma.cc/2UGE-49CP>].

209. Hurricane Maria struck Puerto Rico on September 20, 2017 and was the “deadliest U.S.-based natural disaster in 100 years” that resulted in some \$90 billion in damage and left many residents without power for almost one year. Nicole Acevedo, *Puerto Rico Sees More Pain and Little Progress Three Years After Hurricane Maria*, NBC NEWS (Sept. 20, 2020, 5:30 AM), <https://www.nbcnews.com/news/latino/puerto-rico-sees-more-pain-little-progress-three-years-after-n1240513> [<https://perma.cc/JXW7-NSWB>]; Laura Sullivan & Emma Schwartz, *FEMA Report Acknowledges Failures in Puerto Rico Disaster Response*, NPR (Jul. 13, 2018, 2:23 PM)

<https://www.npr.org/2018/07/13/628861808/fema-report-acknowledges-failures-in-puerto-rico-disaster-response> [<https://perma.cc/ZEP5-AL9H>] (outlining major flaws, including “a lack of key supplies on Puerto Rico before the storm, unqualified staff, and challenges with delivering emergency supplies”).

President.<sup>210</sup> Inadequate disaster preparation and response efforts throughout the country for various disasters motivated the 2018 amendments to the Stafford Act and manifested as the Disaster Recovery Reform Act of 2018.<sup>211</sup> Although unlikely to change, FEMA and other federal agencies involved in “the exercise or performance of or failure to exercise or perform a ‘discretionary’ function or duty to carrying out the provisions of the Stafford Act” are not liable for their mistakes, diminishing external pressure to act more effectively.<sup>212</sup> The government has historically tried to use its discretionary-function immunity to defend against a wide range of issues.<sup>213</sup>

Further, the Stafford Act is not isolated from the political pressures that eroded public health measures during the COVID-19 pandemic.<sup>214</sup> The Act is riddled with vague language, like the inadequately defined terms “Emergency” and “Major Disasters.”<sup>215</sup> Without a concrete set of criteria on what to declare a disaster, such a decision is solely left to the President, opening the potential for an abuse of power because of political influences and pressure.<sup>216</sup> Additionally, there is no Congressional regulation for when the President can declare an emergency.<sup>217</sup> Leaving a decision that implicates the lives of American’s in a single hand, breeds an environment ripe for abuse and self-dealing that should be inexplicably erased from

---

210. John K. Pierre, *Understanding the Stafford Act: Providing Disaster-Related Legal Assistance to Individual Victims of Hurricanes and Other Natural Disasters*, 54 LA. BAR. J. 86, 88 (2006).

211. See generally Disaster Recovery Reform Act of 2018, S. 3041, 115th Cong. (2018) (amending Stafford Act to cover newly discovered deficiencies in disaster response); Press Release, U.S. Senator John Kennedy, Sen. John Kennedy (R-La.) Signs on to the Disaster Recovery Reform Act of 2018 (Jun. 29, 2018) (claiming changes to the Act are in response to flooding disasters in 2016).

212. 42 U.S.C. § 5148; Pierre, *supra* note 210.

213. Pierre, *supra* note 210; see, e.g., *Graham v. Fed. Emergency Mgmt. Agency*, 149 F.3d 997, 1005 (9th Cir. 1998) (exemplifying government defense of tort immunity); *City of San Bruno v. Fed. Emergency Mgmt. Agency*, 181 F. Supp. 2d 1010, 1013 (N.D. Cal. 2001) (also exemplifying government defense of tort immunity).

214. See Thomas A. Garrett & Russell S. Sobel, *The Political Economy of FEMA Disaster Payments*, 41 ECON. INQUIRY 496, 497, 507–08 (2003) (explaining how data shows “nearly half” of FEMA disaster relief is politically driven).

215. See *Id.* at 497–98; 42 U.S.C. § 5122.

216. Garrett & Sobel, *supra* note 214, at 497.

217. *Id.* at 497–98.

the disaster response system within the United States, further echoing the need to provide for a common defense as indicated by the Constitution. While disaster has no political identity and catastrophes are hard to spin, our system permits bad faith actors to dictate responses and aid to those most in need based on their own self-gain.<sup>218</sup> Scholars have suggested that “states politically important to the president have higher rates of disaster declaration [by the president] . . . the mean level of disaster declaration is found to be higher in certain election years compared to nonelection years. . . . [and] once a disaster is declared, disaster expenditures are higher in states having congressional representation on FEMA oversight committees.”<sup>219</sup> Lending support to this conclusion, an analysis of Stafford Act declarations from 1974 to 2016 found that a slightly greater number of disaster declarations are made during presidential election years.<sup>220</sup> Many disasters like Hurricane Katrina would be hard to ignore, but as seen with the COVID-19 pandemic, even settled science can be eroded by political ideology.<sup>221</sup>

While several scholars and practitioners have contentions with the Stafford Act and its areas for improvement, the aforementioned limitations, along with the Act’s intended scope, are the biggest factors that prevent the United States from implementing a seamless, coordinated disaster response.<sup>222</sup>

#### IV. RECOMMENDATIONS

While COVID-19 is used as the backdrop of this Article due to its prevalence in today’s society, the limitations of current disaster legislation are not unique to the pandemic and similar governmental failures that have stemmed from disasters throughout American history would benefit from the

---

218. *See id.* at 508.

219. *Id.*

220. *See* R42702, *supra* note 106 at 8 (noting the statistically insignificant difference).

221. *See* Houser, *supra* note 20, at 9.

222. *See* Hendrix, *supra* note 200, at 77–78.

amendments proposed herein.<sup>223</sup> Determining how to properly handle disaster declarations on the federal level requires examining the federal government's proper role in the entire disaster management process.<sup>224</sup> As a result of severe weather, increased population, and ongoing development, disasters have continued to increase in frequency, necessitating an approach to disasters that reflects the reality of our current environment.<sup>225</sup> After a disaster occurs, Congress generally passes legislation to fix problems identified in the response.<sup>226</sup> For example, following the September 11 terrorist attacks,<sup>227</sup> Congress passed the Homeland Security Act;<sup>228</sup> following Hurricane Katrina,<sup>229</sup> Congress amended the Stafford Act with the Post-Katrina Emergency Management Reform Act of 2006;<sup>230</sup> and following Hurricane Sandy,<sup>231</sup> Congress again amended the Stafford Act with the Sandy Recovery Improvement Act of 2013.<sup>232</sup> Similarly, following the COVID-19 pandemic, the Stafford Act should be amended to ensure that the United States is better prepared to respond to not only future infectious disease outbreaks but other disasters as well. Considering the eight primary failures

---

223. See Aaron Schroeder, Gary Wamsley & Robert Ward, *The Evolution of Emergency Management in America: From a Painful Past to a Promising but Uncertain Future*, in HANDBOOK OF CRISIS AND EMERGENCY MANAGEMENT, 357, 359–60 (Ali Farazmand ed., 2001).

224. R42702, *supra* note 106, at 31.

225. *Id.*

226. See, e.g., Post-Katrina Emergency Management Reform Act of 2006, S. 3721, 109th Cong. (2006) (amending Stafford Act after Hurricane Katrina); Hurricane Sandy Tax Relief Act of 2012, H.R. 6683, 112th Cong. (2012) (discussing ways to help survivors of Hurricane Sandy work through taxes after the federally declared disaster).

227. See *The Global War on Terrorism: The First 100 Days*, U.S. DEPT. OF STATE, <https://2001-2009.state.gov/s/ct/rls/wh/6947.htm> [<https://perma.cc/J7S5-EQ5Q>].

228. See generally Homeland Security Act of 2002, H.R. Res. 5005, 107th Cong. (enacted) (addressing concerns over terrorism post 9/11 and amending emergency response).

229. See Edwards, *supra* note 6.

230. Department of Homeland Security Appropriations Act, Pub. L. No. 109-295, 120 Stat. 1355 (2007).

231. See Press Release, Fed. Emergency Mgmt. Agency, Remembering Sandy Five Years Later (Oct. 28, 2017), <https://www.fema.gov/press-release/20210318/remembering-sandy-five-years-later> [<https://perma.cc/AEK3-KBQH>].

232. Sandy Recovery Improvement Act of 2013, 42 U.S.C. § 5121 (2013); see *Sandy Recovery Improvement Act of 2013*, FED. EMERGENCY MGMT. AGENCY, <https://www.fema.gov/disaster/sandy-recovery-improvement-act-2013#> [<https://perma.cc/SS62-6G46>] (July 6, 2021).

of the government's COVID-19 response,<sup>233</sup> amendments should fall into three categories: accountable leadership, coordination, and healthcare.

### A. Accountable Leadership

The COVID-19 pandemic caused a breakdown in leadership for which leaders refuse to hold themselves responsible.<sup>234</sup> Never before this pandemic did any emergency management professional imagine that leaders and those in positions of power would act in bad faith, against the health and wellbeing of the public, and directly against the intentions of their police powers.<sup>235</sup> State governments have restricted the tools available to public health officials to help prevent the spread of COVID-19, and the pressure placed on local governments in some states shows no signs of stopping.<sup>236</sup> Litigation that hindered government responses to COVID-19 and future pandemics also endangered the fundamental tools that public health workers have utilized for decades to protect the public health, including: “mandatory vaccinations for public school children against devastating diseases like measles and polio, local officials’

---

233. Houser, *supra* note 20, at 1 (identifying eight common failures that occurred during the COVID-19 response: “(1) accountable leadership, (2) statutory authorities and policies, (3) inter-agency coordination, (4) coherent data system for situational awareness, (5) strategic national stockpile and supply chain, (6) testing and surveillance, (7) health care system surge capacity and resilience, and (8) federal funds and the role of public health emergency management in the evolving landscape of biothreats, both intentional and natural”).

234. See Nicholas Kristof, Opinion, *America and the Virus: ‘A Colossal Failure of Leadership,’* N.Y. TIMES (Oct. 22, 2020), <https://www.nytimes.com/2020/10/22/opinion/sunday/coronavirus-united-states.html> [<https://perma.cc/XEK8-PCV2>] (quoting Larry Brilliant, a veteran epidemiologist, who said, “I see it as a colossal failure of leadership”).

235. See *id.*; James G. Hodge, *COVID-19’s Repercussions on Public Health Policy and Law in the United States*, THINK GLOB. HEALTH (May 3, 2022), <https://www.thinkglobalhealth.org/article/covid-19s-repercussions-public-health-policy-and-law-united-states> [<https://perma.cc/R9DY-3CTZ>] (“Politicians introduced thousands of bills in state legislatures to curtail the authority of public health agencies. Anti-public health proposals dominated legislative agendas and threatened to undermine governmental duties to protect and promote population health.”).

236. Mike Baker & Danielle Ivory, *Why Public Health Faces a Crisis Across the U.S.*, N.Y. TIMES (Oct. 20, 2021), <https://www.nytimes.com/2021/10/18/us/coronavirus-public-health.html> [<https://perma.cc/DF93-M8JT>].

ability to issue health orders in an emergency, basic investigative tactics used to monitor the spread of infectious diseases, and the use of quarantines to stem that spread.”<sup>237</sup> The politicization of the COVID-19 response and the intentional efforts to restrict public health measures have upended the legal landscape and will impact the nation’s emergency response to future pandemics by limiting the tools available to protect the population.<sup>238</sup> This current age will “come back to haunt America.”<sup>239</sup> The Stafford Act must then provide for the federal government to coordinate and manage responses to disasters that transcend individual state borders. A system in which there are 90,126<sup>240</sup> different responses does not work for infectious disease threats that easily cross arbitrary state and national borders. A “fragmented” response to such contagious threats ignores the fact that a national problem requires a “national response.”<sup>241</sup> Coordination at the federal level, with enhanced checks and balances, can ensure the health of the public is protected by science-informed, intelligent policy, and it will erode the possibility that bad faith actors, working along political lines, can restrict common sense actions that fall under traditional police powers.<sup>242</sup> The accountable leadership concerns do not rest solely at the state or local level.<sup>243</sup> President Trump’s inaction and downplaying of the pandemic by suggesting “[w]e

---

237. Lauren Weber & Anna Maria Barry-Jester, *Conservative Blocs Unleash Wave of Litigation to Curb Public Health Powers*, NPR (July 18, 2022, 5:00 AM), <https://www.npr.org/sections/health-shots/2022/07/18/1111766924/conservative-bloc-litigation> [<https://perma.cc/LGP8-AMYD>].

238. *Id.*; Kristof, *supra* note 234.

239. Weber & Barry-Jester, *supra* note 237 (quoting Lawrence Gostin, faculty director of Georgetown University’s O’Neill Institute for National and Global Health Law, saying, “We will rue the day where we have other public health emergencies, and we’re simply unable to act decisively and rapidly.”).

240. Mary Sauers, *The Census and Special Districts in the U.S.*, NEB. LIBR. COMM’N (Oct. 29, 2019), <https://nlcblogs.nebraska.gov/nlcblog/2019/10/29/the-census-and-special-districts-in-the-u-s/> [<https://perma.cc/7YDW-PEQ3>].

241. Kaufman, *supra* note 22 (quoting Dr. Anthony Fauci).

242. See ARJEN BOIN, ALLAN MCCONNELL & PAUL T HART, *GOVERNING THE PANDEMIC: THE POLITICS OF NAVIGATING A MEGA-CRISIS* 117–18 (2021); see also Kapucu & Hu, *supra* note 21, at 777–78.

243. See Kapucu & Hu, *supra* note 21 at 784–85.

have it totally under control”<sup>244</sup> likely caused significant loss of life and generations of disability following unnecessary infections.<sup>245</sup>

The potential for political decisions behind declarations is also a concern, as people should not be pawns in a political arena.<sup>246</sup> In order to address the potential for unaccountable leadership and bad faith actions at the federal level, particularly with a federally coordinated response to disasters, the Stafford Act must utilize an independent panel of experts to recommend authorization of declarations and help facilitate the response outside of a Federal Coordinating Officer,<sup>247</sup> who is a political appointee of the President.<sup>248</sup> Such amendments have already

---

244. Dan Mangan, *Trump Dismissed Coronavirus Pandemic Worry in January—Now Claims He Long Warned About It*, CNBC (Mar. 17, 2020, 2:10 PM), <https://www.cnbc.com/2020/03/17/trump-dismissed-coronavirus-pandemic-worry-now-claims-he-warned-about-it.html> [<https://perma.cc/F4JR-8LEP>].

245. Yasmeen Abutaleb, Ashley Parker, Josh Dawsey & Philip Rucker, *The Inside Story of How Trump’s Denial, Mismanagement and Magical Thinking Led to the Pandemic’s Dark Winter*, WASH. POST (Dec. 19, 2020), <https://www.washingtonpost.com/graphics/2020/politics/trump-covid-pandemic-dark-winter/> [<https://perma.cc/BPZ8-55CQ>]; see also Amanda Holpuch, *U.S. Could Have Averted 40% of Covid Deaths, Says Panel Examining Trump’s Policies*, GUARDIAN (Feb. 11, 2021), <https://www.theguardian.com/us-news/2021/feb/10/us-coronavirus-response-donald-trump-health-policy> [<https://perma.cc/PLD7-QJGR>] (“The US could have averted 40% of the deaths from Covid-19, had the country’s death rates corresponded with rates in other high-income G7 countries, according to a Lancet commission tasked with assessing Donald Trump’s health policy record.”); *Guidance on “Long COVID” as a Disability Under the ADA, Section 504, and Section 1557*, DEP’T OF HEALTH & HUM. SERVS. (July 26, 2021), <https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/guidance-long-covid-disability/index.html> [<https://perma.cc/4745-XKUE>] (designating “long COVID” as a disability under the Americans with Disabilities Act).

246. Goitein, *supra* note 41, at 28.

247. FED. EMERGENCY MGMT. AGENCY, UFR ADVISOR ROLES AND RESPONSIBILITIES: UNIFIED FEDERAL ENVIRONMENTAL AND HISTORIC PRESERVATION REVIEW 1–3 (2022), [https://www.fema.gov/sites/default/files/documents/fema\\_ufr-advisor-roles-responsibilities.pdf](https://www.fema.gov/sites/default/files/documents/fema_ufr-advisor-roles-responsibilities.pdf). A Federal Coordinating Officer (FCO) is a person designated by the Federal Emergency Management Agency (FEMA) “to coordinate federal assistance following a declared disaster or emergency.” *Id.* at 2. The FCO works alongside state, local, tribal, and territorial governments and directs federal agencies to strive toward a unified and effective response to the disaster. *Id.* at 2–3 The FCO works to assess the needs of the affected area, coordinate the deployment of federal resources and personnel, and facilitate communication and collaboration among all involved parties. *Id.*

248. See 42 U.S.C. § 5143(a); see also Feinberg, *supra* note 109, at 612–13 (noting that “[t]he Federal Coordinating Officer (FCO) is the top of the hierarchy of federal involvement. By statute, the FCO is to operate out of the disaster scene and report regularly to the Director of FEMA



been suggested by Congress along with a new category of “catastrophic disaster.”<sup>249</sup> As norms of promoting and protecting public health above political-self-gain begin to erode and disasters are increasingly politicized, federal legislation that ensures accountable leadership that acts in the best interest of the public is critical.<sup>250</sup> Such legislation would merely ensure that states act within their delegated police powers and do not infringe on the safety of others by failing to mitigate the spread of infectious diseases;<sup>251</sup> however, it could also ensure that the federal government coordinates an informed and non-political response that is collaborative and effective.<sup>252</sup>

### B. Statutory Authorities

Following Hurricane Katrina, the White House noted that “[o]ur current system for homeland security does not provide the necessary framework to manage the challenges posed by 21st Century catastrophic threats.”<sup>253</sup> As the country begins to face expanded threats—including natural disasters of unprecedented scale,<sup>254</sup> as well as catastrophic biological threats due to

---

and the President. The FCO’s duties include ‘mak[ing] an initial appraisal of the types of relief needed most, and ‘coordinat[ing] the administration of [such] relief.’”) (quoting 42 U.S.C. § 5143(b)(1), (b)(3)).

249. See e.g., Disaster Recovery Act of 2011, S. 1630, 112th Cong. § 109 (2011) (proposing the Stafford Act be amended by adding section 327, which creates an expert panel to designate a new category of declaration known as a “catastrophic disaster” and criteria the panel would use to determine whether an incident meets the requisite threshold); BRUCE R. LINDSAY, CONG. RSCH. SERV., R41884, CONSIDERATIONS FOR A CATASTROPHIC DECLARATION: ISSUES AND ANALYSIS 4 (2011) (recommending that Congress amends “Section 102 of the Stafford Act with the language used to define a catastrophic incident in the Post-Katrina Emergency Management Reform Act of 2006”).

250. See Dominique Vervoort & Hloni Bookholane, *COVID-19 Isn’t Political; Its Response Shouldn’t Be Politicized*, GLOB. HEALTH NOW (Jan. 25, 2021), <https://globalhealthnow.org/2021-01/covid-19-isnt-political-its-response-shouldnt-be-politicized> [https://perma.cc/G42V-YGCE].

251. Cf. Larry Gostin, *The Future of Communicable Disease Control: Toward a New Concept in Public Health Law*, 83 MILBANK Q., Dec. 2005, at 1 (considering the extent to which states might mitigate infectious diseases and how that power could infringe on the liberty, autonomy, and privacy of the public).

252. See Kapucu & Hu, *supra* note 21, at 777–78.

253. EXEC. OFF. OF THE PRESIDENT, *supra* note 12, at 52.

254. Eric McDaniel, *Weather Disasters Have Become 5 Times as Common, Thanks in Part to Climate Change*, NPR (Sept. 7, 2021, 2:10 PM), <https://www.npr.org/2021/09/07/1034607602/weather->

an “increasingly interconnected world and the heightened risk of spillover from animals to humans”<sup>255</sup>—our disaster legislation must respond accordingly. It is critically important that disaster policy appropriately address the threats of catastrophic events.<sup>256</sup> Current Stafford Act regulations and policies, which may be well-intentioned to meet disaster response and recovery needs of smaller-scale disasters, become roadblocks that hinder response and recovery during deployments of resources to more complex incidents.<sup>257</sup> While the Post-Katrina Emergency Management Reform Act of 2006 amended sections of the Stafford Act, its addition of a new category of disaster—catastrophic incident—was not adopted by the Stafford Act.<sup>258</sup> The “major disaster” definition “does not cover chemical, biological, radiological, or nuclear attacks or accidents, leaving questions about the scope of the federal response and types of assistance to be provided should such an incident occur.”<sup>259</sup>

In order to better prepare for all disaster events in the country, the definition of major disaster in Section 102 should be amended to include coverage for chemical, biological, radiological, or nuclear attacks or accidents, including infectious disease outbreaks. Infectious diseases should also be included within the explicit language of the definition of “a major disaster,” which is currently limited to “any natural catastrophe (including any hurricane, tornado, storm, high water, winddriven water, tidal wave, tsunami, earthquake, volcanic eruption,

---

disasters-have-become-five-times-as-common-thanks-in-part-to-climate-cha  
[<https://perma.cc/7YGA-AHKN>].

255. Houser, *supra* note 20, at 8; *A Call to Stop the Next Pandemic*, WORLD WILDLIFE FUND, <https://www.worldwildlife.org/stories/a-call-to-stop-the-next-pandemic> [https://perma.cc/73CJ-49M6] (explaining that many new diseases can spread from animals to humans, including Ebola, SARS, MERS, Zika, and COVID-19).

256. EXEC. OFF. OF THE PRESIDENT, *supra* note 12, at 52.

257. Hendrix, *supra* note 200, at 72 (“The Stafford Act is also used as a ‘one size fits all’ strategy for disaster response, ignoring the unique intricacies and complexities of each event.”).

258. Compare Post-Katrina Emergency Management Reform Act of 2006, 6 U.S.C. § 701(4), with Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5122(a).

259. MOSS & SHELHAMER, *supra* note 206, at 23; Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5122(2).

landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion.”<sup>260</sup> The COVID-19 pandemic has caused more deaths than all severe weather events combined, yet it does not currently meet the statutory definition.<sup>261</sup> Section 102 should also be amended to allow for more appropriate federal assistance based on the type of disaster by including a “catastrophic incident” category to the declaration options. The act could even follow the language of the Post-Katrina Emergency Management Reform Act of 2006:

[A]ny natural disaster, act of terrorism, or other man-made disaster that results in extraordinary levels of casualties or damage or disruption severely affecting the population (including mass evacuations), infrastructure, environment, economy, national morale, or government functions in an area.<sup>262</sup>

Infectious disease should be added to the Stafford Act to ensure complete disaster response coverage for the American people. The proposed definition would dramatically improve disaster response within the United States: “[A]ny natural disaster, infectious disease spread, act of terrorism, or other man-made disaster that results in extraordinary levels of casualties or damage or disruption severely affecting the population (including mass evacuations), infrastructure, environment, economy, national morale, or government functions in an area.”<sup>263</sup>

Further, the Stafford Act warrants declaration of a catastrophic incident “to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering

---

260. 42 U.S.C. § 5122(2).

261. Compare *United States of America Situation*, *supra* note 132 (showing that from 2020-2023, 1,127,152 Americans died from COVID-19), with *Weather Related Fatality and Injury Statistics*, NAT'L WEATHER SERV., <https://www.weather.gov/hazstat/> [<https://perma.cc/8K6K-MWTZ>] (showing that from 2020-2022, 2,367 Americans died from severe weather events).

262. Post-Katrina Emergency Management Reform Act of 2006, 6 U.S.C. § 701(4).

263. *Id.*

caused thereby.”<sup>264</sup> Comments during the passage of the Stafford Act, like those from Representative Stangeland, indicate that the Stafford Act was not intended to apply to public health problems like epidemics, environmental emergencies, and nuclear emergencies because other pieces of legislation already provide federal assistance in those events.<sup>265</sup> However, in order to address the confusing, conflicting, and overlapping statutory requirements, the Stafford Act should be amended to integrate portions of other laws and the National Response Plan that deal with catastrophic events,<sup>266</sup> so that the Act can truly be what it has been operationalized as: “[t]he centerpiece of emergency management legislation.”<sup>267</sup>

### C. Coordination

Fragmented government responses at both the federal and state level supported the unsuccessful response to COVID-19.<sup>268</sup> The disparities between state-level mitigation measures led to interstate spillovers, which significantly affected the rate at which COVID-19 spread across state borders—and the same would be true of the next contagious disaster that hits the United States.<sup>269</sup> Although the federalist framework that characterizes United States government is as old as the United States, it had not been tested in disaster response until the 1990s when it came to prominence, suggesting that a reevaluation of disaster legislation is necessary, and that the original intent of the legislation may not accurately reflect the threats we face today.<sup>270</sup>

---

264. 42 U.S.C. § 5122(2).

265. See PAINTER, *supra* note 67, at 14.

266. See DEP’T OF HOMELAND SEC., NATIONAL DISASTER RECOVERY FRAMEWORK 4 (2d ed., 2016) (explaining the National Disaster Recovery Framework); see, e.g., 6 U.S.C. § 701(4); Sandy Recovery Improvement Act of 2013, 42 U.S.C. § 5121.

267. Hendrix, *supra* note 200, at 71.

268. Insler et al., *supra* note 185.

269. See *id.*

270. See *id.* at 16–17.

Infectious diseases by their nature are incompatible with the federalist approach to disasters and therefore necessitate a federal-level response coordination.<sup>271</sup> Opponents of deepening the federal government's role in disaster response will rely on the federalist foundations of our system and will reference Representative Stangeland's comments at the time the Stafford Act was passed to suggest that emergency declarations are not intended to address public health problems because other federal assistance is already available.<sup>272</sup> However, as is evidenced by the increasing amount of legislation passed following major disasters,<sup>273</sup> as well as the specific wording of the Post-Katrina Emergency Management Reform Act,<sup>274</sup> Congress has explicitly stated that FEMA's primary mission is to "reduce the loss of life and property and protect the Nation from *all hazards*."<sup>275</sup> All hazards by nature include infectious diseases, and, as seen within the COVID-19 pandemic, coordination of response is critical.<sup>276</sup> Preventing the spread of an infectious disease is thus well within FEMA's delegated authority.<sup>277</sup>

The Stafford Act is thus the appropriate legislation to ensure that there is federal coordination of disaster relief that still leverage local and state public health capabilities within its response, while maintaining the local knowledge and expertise necessary to ensure successful public health interventions.<sup>278</sup> However, FEMA should only serve as the coordinating agency with the HHS and Center for Disease Control and Prevention ("CDC") serving as the expert panelists driving the decision

---

271. Donald Kettl, *States Divided: The Implications of American Federalism for COVID-19*, 80 PUB. ADMIN. REV. 595 *passim* (2020).

272. See PAINTER, *supra* note 67, at 14.

273. R42702, *supra* note 106, at 18.

274. 6 U.S.C. § 701.

275. 6 U.S.C. § 313(b)(1) (emphasis added).

276. See Jacek Rothert, Ryan Brady & Michael Inzer, *The Fragmented United States of America: The Impact of Scattered Lockdown Policies on Country-Wide Infections*, 43 COVID ECON. 42, 79–80 (2020).

277. See 6 U.S.C. § 313(b)(1); Off. of Response & Recovery, Fed. Emergency Mgmt. Agency, FP 104-009-001, Fact Sheet: Infectious Disease Event (2016).

278. See 6 U.S.C. § 313(b)(1).

making for an infectious disease response.<sup>279</sup> This statutory integration would ensure that the limited regional footprint of Administration for Strategic Preparedness and Response and the limited subject-matter expertise of FEMA would not contribute to response failures during the next infectious disease outbreak as they did with COVID-19.<sup>280</sup>

Coordination between agencies would also help overcome the testing and surveillance failures that exceeded local capabilities during the pandemic and necessitated federal government assistance.<sup>281</sup> The use of the Stafford Act in the COVID-19 response allowed the “federal government to utilize emergency procurement flexibilities to acquire goods faster” and to “enable state and local governments to access federal funding to support COVID-19 response efforts[,]” all of which are crucial to curbing an infectious disease outbreak.<sup>282</sup> Although the COVID-19 response did utilize a federal-coordinated approach, state and local governments were still provided with the resources necessary to continue serving as key implementers of policy and action.<sup>283</sup>

Still, a lag exists between a state’s request for federal support and the delivery of that support. When the health and safety of first responders and other citizens are on the line, the federal government should not have to wait until a state exhausts its resources to intervene.<sup>284</sup> Even “the architects of the [National

---

279. See LEE ET AL., *supra* note 123, at 40 (recognizing the importance of FEMA as “the ultimate support agency”).

280. See *id.*; Houser, *supra* note 20, at 7.

281. See S.E. Galaitsi, Jeffery C. Cegan, Katlin Volk, Matthew Joyner, Benjamin D. Trump & Igor Linkov, *The Challenges of Data Usage for the United States’ COVID-19 Response*, 58 INT’L J. INFO. MGMT. 58–59 (2021).

282. Michael J. Schaengold, *The Impact of Recent Stafford Act and Defense Production Act Declarations on COVID-19 Procurements*, GREENBURG TRAUIG LLP (Mar. 24, 2020), <https://www.gtlaw.com/en/insights/2020/3/the-impact-of-recent-stafford-act-and-defense-production-act-declarations-on-covid19-procurements> [<https://perma.cc/6KH8-85MZ>].

283. See *id.*

284. See Feinberg, *supra* note 109, at 615 (finding that “a key operational assumption relied upon by FEMA is that state and local governments must combat a natural disaster on their own for the first seventy-two hours after impact”).

Response Plan] have conceded that federal involvement could be necessary before seventy-two hours have elapsed.”<sup>285</sup> Therefore, the Stafford Act should codify and operationalize a section of the National Response Plan titled the Catastrophic Incident Annex (“CIA”),<sup>286</sup> which “establishes the context and overarching strategy [necessary] for implementing and coordinating an accelerated, proactive national response to a catastrophic incident”<sup>287</sup> Operationalizing the key provisions of the CIA would include the following language:

Only the Secretary of Homeland Security or designee may initiate implementation of the NRP-CIA. Recognizing that Federal and/or national resources are required to augment overwhelmed State, local, and tribal response efforts, the NRPCIA establishes protocols to preidentify and rapidly deploy key essential resources (e.g., medical teams, urban search and rescue teams, transportable shelters, medical and equipment caches, etc.) that are expected to be urgently needed/required to save lives and contain incidents. In the case of catastrophic incident, it is expected that the Federal Government or other national entities provide expedited assistance in one or more of the following areas:

Public Health and Medical Support (ESF #8):  
There is a significant need for public health and medical support, including mental health services. Medical support is required not only at medical facilities, but at casualty evacuation

---

285. *Id.* at 616.

286. See DEP'T OF HOMELAND SEC., *Catastrophic Incident Annex*, in NAT'L RESPONSE PLAN (Dec. 2004), [https://www.dco.uscg.mil/Portals/9/CG-5R/nsarc/Catastrophic\\_Incident\\_Annex.pdf](https://www.dco.uscg.mil/Portals/9/CG-5R/nsarc/Catastrophic_Incident_Annex.pdf) [https://perma.cc/ZS4Y-UVQX].

287. *Id.*; Nat'l Search & Rescue Comm., *Catastrophic Incident SAR*, U.S. COAST GUARD, <https://www.dco.uscg.mil/Our-Organization/Assistant-Commandant-for-Response-Policy-CG-5R/Office-of-Incident-Management-Preparedness-CG-5RI/US-Coast-Guard-Office-of-Search-and-Rescue-CG-SAR/CG-SAR-2/Catastrophic-Incident-SAR/> [https://perma.cc/P8DK-YFAH].

points, evacuee and refugee points and shelters, and at other locations to support field operations.

Casualty and Fatality Management and Transportation (ESF #8): Federal resources may be required to manage the transportation and storage of deceased, injured, and exposed victims if their numbers are extremely high. In addition, the immense numbers of casualties are likely to overwhelm the bed capacities of local and State medical facilities.<sup>288</sup>

The CIA deals with disasters that “profoundly overwhelm state and local governments,” like COVID-19.<sup>289</sup> This amendment would allow for a more proactive federal response with an “expedited approach to the provision of Federal resources”<sup>290</sup> that bypasses the traditional Stafford Act requirement “for the state to request such a response,” if such a federal response would benefit the entire country.

#### *D. Healthcare*

There are a number of emergency authorities that President Trump failed to immediately implement in response to the COVID-19 pandemic.<sup>291</sup> One such authority is section 1135 of the Social Security Act, which allows the Secretary of HHS to waive “conditions of participation or other certification requirements for an individual health care provider or types of providers” to facilitate the provision of health care services.<sup>292</sup> Such an

---

288. See DEP’T OF HOMELAND SEC., NATIONAL RESPONSE PLAN CAT-1–2 (2004).

289. Feinberg, *supra* note 109, at 616.

290. *Id.* (quoting NATIONAL RESPONSE PLAN CAT-4).

291. See, e.g., Charles F. Parker & Eric K. Stern, *The Trump Administration & the COVID-19 Crisis: Exploring the Warning-Response Problems and Missed Opportunities of a Public Health Emergency*, 100 PUB. ADMIN. 616, 619 (2022) (exploring the various failures of the Trump administration during the COVID-19 pandemic).

292. 42 U.S.C. § 1320b-5(b).



authority would have had huge benefits for the provision of care necessary to protect people from COVID-19, especially those most at risk and without the financial support to obtain full care and services on their own.<sup>293</sup> While this action does not fall under the Stafford Act specifically, the Secretary may only invoke Section 1135 if two states of emergency are in effect: 1) a public health emergency declared by the Secretary under the PHSA; and 2) either a Stafford Act emergency or a national emergency declared by the president.<sup>294</sup> The reliance on other public health emergency declarations may suggest the Stafford Act does not have a role to play in infectious disease disaster response.<sup>295</sup> Such a view is nearsighted and ignores a major limitation of a response to such an event.

However, the public assistance offered by a Stafford declaration for COVID-19 provided for “emergency protective measures, including assistance for vaccination, emergency medical care, non-congregate sheltering, the purchase and distribution of food, and the costs of mobilizing the National Guard,” all of which assisted the healthcare community and ensured the health and safety of the public.<sup>296</sup> Specific provisions must also be built into the Stafford Act to allow for the immediate deployment of public assistance in accordance with the CIA procedures to ensure that the impacts on life and safety from a rapidly spreading infectious disease are mitigated before the disaster grows beyond the capabilities of the whole government.<sup>297</sup> Such language could be as simple as:

---

293. See Elizabeth Dahl Coleman & Peter Mellette, *The Future of CMS 1135 Pandemic Waivers—Will They Survive COVID-19?*, AM. HEALTH L. ASS'N (July 24, 2020), <https://www.american-healthlaw.org/content-library/health-law-weekly/article/9759e52b-c964-46e2-bb71-b2c592a8f77b/the-future-of-cms-1135-pandemic-waivers-will-they> [https://perma.cc/8LZ7-QWYG].

294. § 1320b-5(g)(1)(A).

295. See Goitein, *supra* note 41, at 54.

296. ERICA A. LEE & BRUCE R. LINDSAY, CONG. RSCH. SERV., IN11229, STAFFORD ACT ASSISTANCE FOR PUBLIC HEALTH INCIDENTS 3 (2021).

297. See Feinberg, *supra* note 109, at 617.

When the Secretary of Homeland Security, notices a catastrophic incident,<sup>298</sup> the Stafford Act shall permit “accelerated, proactive national response to a catastrophic incident” by providing federal resources and legislative measures that are organized into incident specific “packages,” deployed in accordance with the NRP-CIS and in coordination with the affected State and incident command structure.<sup>299</sup>

This would also allow for the immediate easing of health measure constraints, such as the practice of telemedicine and delays on hospitals hiring additional doctors, which fall under Section 1135 and were delayed in the COVID-19 response.<sup>300</sup> After the change in president, President Biden’s administration continued the use of the Stafford Act declaration to fund 100% of the cost of activities associated for COVID-19 testing as an emergency protective measure.<sup>301</sup> In order to better prepare the United States for future infectious disease outbreaks, a single piece of legislation that allows for comprehensive response

---

298. A catastrophic incident is defined as “any natural or manmade incident, including terrorism, that results in extraordinary levels of mass casualties, damage, or disruption severely affecting the population, infrastructure, environment, economy, national morale, and/or government functions. A catastrophic incident could result in sustained national impacts over a prolonged period of time; almost immediately exceeds resources normally available to local, State, Tribal, and private-sector authorities in the impacted area; and significantly interrupts governmental operations and emergency services to such an extent that national security could be threatened.” *Glossary*, FED. EMERGENCY MGMT. AGENCY, <https://www.fema.gov/about/glossary> [https://perma.cc/K7Z6-84GB] (2023).

299. See generally Nat’l Search & Rescue Comm., *supra* note 287.

300. Goitein, *supra* note 41, at 52.

301. Memorandum for the Secretary of Health & Human Services, the Secretary of Homeland Security, & the Administrator of the Federal Emergency Management Agency on Maximizing Assistance to Respond to COVID-19 (Dec. 27, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/12/27/memorandum-for-the-secretary-of-health-and-human-services-the-secretary-of-homeland-security-and-the-administrator-of-the-federal-emergency-management-agency-on-maximizing-assistance-to-respond-to-c/> [https://perma.cc/JU4M-PZWP]; see Tami Luhby, Phil Mattingly, & Jeremy Diamond, *These Benefits Will Disappear When Biden Ends the Covid National and Public Health Emergencies in May*, CNN, <https://edition.cnn.com/2023/01/30/politics/may-11-end-of-covid-and-public-health-emergencies/index.html> [https://perma.cc/Y7SA-YXU9] (Jan. 31, 2023, 12:29 PM).

strategy and immediate activation of all necessary assistance is crucial to control a disaster which can quickly exceed the constraints of certain mitigation efforts and which requires a comprehensive response strategy to slow and stop the spread.

### *E. Counterarguments*

While the Stafford Act as traditionally implemented does not supplant or supersede other federal authorities directed at public health incidents, such as those exercised by the Secretary of Health and Human Services, it is necessary for Congress to streamline disaster response legislation because future pandemics like COVID-19, will require assistance that can be provided for under the Stafford Act.<sup>302</sup> The intention of individual assistance under the Stafford Act includes unemployment assistance, housing assistance, and legal services, all of which are necessary during an infectious disease outbreak, as they were during COVID-19.<sup>303</sup> A single source of disaster legislation would make disaster response less complicated and more comprehensive, even for an emergency response that relies mainly on states, because operational efforts to obtain funding and support would be clearer and more appropriate given the scale of the disaster.<sup>304</sup>

For those members of Congress who fear federal overreach and an erosion of federalist norms that govern the current disaster response system, it is important to recognize the failures of a local and state-based approach. When disasters extend beyond the borders of a state, the actions of one state can impact the entire country, as was the case with the COVID-19 pandemic. The Stafford Act could be amended to restrict reimbursement eligibility to those states that meet basic performance requirements for critical functions, which include

---

302. LEE ET AL., *supra* note 123, at 1–2.

303. See ELIZABETH M. WEBSTER, ERICA A. LEE & WILLIAM L. PAINTER, CONG. RSCH. SERV., R46326, STAFFORD ACT DECLARATIONS FOR COVID-19 FAQ 7 (2020); Hammond et al., *supra* note 122, at 154.

304. See Lance Gable, *Evading Emergency: Strengthening Emergency Responses Through Integrated Pluralistic Governance*, 91 OR. L. REV. 375, 404 (2012).

disaster functions like mass evacuation, and to restrict federal assistance to states with assistance programs including public, individual, and housing programs.<sup>305</sup> Establishing such a requirement would ensure that states increase their capacity to handle certain incidents without federal assistance, which would signal a return to the original intent of the federalism-based Stafford Act response.<sup>306</sup>

Last, many have argued that responses to natural disasters may be politicized, and this politicization has resulted in delayed or inadequate federal assistance in the wake of a disaster.<sup>307</sup> While this proposal cannot eliminate politicization, it lays the foundation for a more immediate and coordinated disaster response that was missing in the wake of COVID-19.

As noted, Congress has the clear authority to make the amendments necessary to ensure comprehensive disaster-response legislation is available to improve the response to a disaster that implicates the entire nation.

#### CONCLUSION

The response to the COVID-19 pandemic must be used as an opportunity to re-evaluate how the federal government is able to respond to emergencies. A disaster system wherein the availability of measures that exist to protect human life wholly depends on the outcome of an election is fractured and in need of repair. The current approach to national emergency

---

305. LEE ET AL., *supra* note 123, at 30 (“Section 206 of the Disaster Mitigation Act of 2000 (DMA2K; P.L. 106-390) amended the Stafford Act to remove temporary mortgage and rental payments, and added the language predicating assistance on displacement . . .”).

306. See Weitz, *supra* note 16 (explaining Stafford Act and related federal emergency management has historically been structured to respect the federalist reliance on state governments to manage their local affairs in a “tiered system” built on localities).

307. David Kemp & Peter Van Doren, *The Politicization of Disaster Relief*, CATO Inst. (June 17, 2020, 3:29 PM), <https://www.cato.org/blog/politicization-disaster-relief> [<https://perma.cc/7EEE-PXY7>]; Fernando Tormos-Aponte, Gustavo García-López & Mary Angelica Painter, *How Inequality and Politics Influence Government Responses to Natural Disasters*, SCHOLARS STRATEGY NETWORK (Sept. 20, 2021), <https://scholars.org/contribution/how-inequality-and-politics-influence> [<https://perma.cc/AFC2-GUAY>].

management must be restructured into one that considers the common conditions of national emergencies and better prepares the country for their inevitable occurrence. While there are multiple pieces of disaster legislation that implicate federal emergency response, the Stafford Act is at the center of all federal efforts.<sup>308</sup> While local emergency managers should continue to be the foundation of the American disaster response system, the unity of disaster response at the federal level to widespread disasters is crucial. Given the new reality of biological threats, the Stafford Act must play a critical role in all-hazard disaster response by ensuring that more responsive federal emergency management legislation exists to protect the health and safety of the country.

---

308. See Hendrix, *supra* note 200, at 71.