



## COMMENT

### TAKING CONFUSION OUT OF CRISIS: MAKING SENSE OF THE LEGAL FRAMEWORK FOR FEDERAL AGENCIES TO PROVIDE LAW ENFORCEMENT SUPPORT TO STATE AND LOCAL GOVERNMENTS IN EMERGENCIES

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#### INTRODUCTION

*First the levees were breached—and then law and order. As Katrina left people scrambling for food, for water, for supplies—for survival—lawlessness and violence, both real and imagined, spread, creating yet another problem for authorities who were burdened enough already.*

– HOUSE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE  
PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA<sup>1</sup>

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In August 2005, Hurricane Katrina devastated the Gulf Coast, leaving officials at all levels of government scrambling to figure out how federal agencies could provide law enforcement assistance to affected states and local jurisdictions.<sup>2</sup> No one seemed to have answers to some basic questions about law enforcement resources in a national emergency. *Who is in charge? What is the process to send federal assistance? How can federal agents get the proper authority to enforce state laws?*<sup>3</sup> This confusion over legal and policy matters had real, human consequences. With the delay of law enforcement support, 911 calls went unanswered, residents panicked, and rumors about lawlessness and disorder spread.<sup>4</sup> Some people providing disaster assistance turned back out of fear.<sup>5</sup> Many first responders who remained could not work effectively in a climate of perceived societal breakdown.<sup>6</sup>

In the months after the storm, the White House, the U.S. Senate, and the U.S. House of Representatives all released highly critical reports analyzing the federal government's failures.<sup>7</sup> Congress passed the Post-Katrina Emergency Management Reform Act ("PKEMRA"), designed to strengthen the Federal Emergency Management Agency ("FEMA") and improve federal disaster

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<sup>1</sup> H. SELECT BIPARTISAN COMM. TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, A FAILURE OF INITIATIVE: FINAL REPORT OF THE HOUSE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, H.R. REP. NO. 109-377, at 260 (2006) [hereinafter HOUSE REPORT].

<sup>2</sup> U.S. ASSISTANT TO THE PRESIDENT FOR HOMELAND SEC. & COUNTERTERRORISM, EXEC. OFFICE OF THE PRESIDENT, THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED 1 (2006) [hereinafter WHITE HOUSE REPORT]; U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL EDUC., EXEC. OFFICE FOR U.S. ATT'YS, CRISIS RESPONSE AND RELATED LITIGATION ix (2009) [hereinafter CRISIS RESPONSE].

<sup>3</sup> CRISIS RESPONSE, *supra* note 2, at ix.

<sup>4</sup> WHITE HOUSE REPORT, *supra* note 2, at 40.

<sup>5</sup> See S. COMM. ON HOMELAND SEC. & GOV'T AFFAIRS, HURRICANE KATRINA: A NATION STILL UNPREPARED, S. REP. NO. 109-322, at 11 (2006) [hereinafter SENATE REPORT]; HOUSE REPORT, *supra* note 1, at 260.

<sup>6</sup> SENATE REPORT, *supra* note 5, at 11.

<sup>7</sup> See BRUCE LINDSAY, CONG. RESEARCH SERV., THE NATIONAL RESPONSE FRAMEWORK: OVERVIEW AND POSSIBLE ISSUES FOR CONGRESS 1-2 (2008).

response.<sup>8</sup> But in the law enforcement realm, improvements were slow to materialize.

Three years after Katrina, in the summer of 2008, Hurricanes Gustav and Ike offered the first glimpse of whether the U.S. Department of Justice (“DOJ”) and the U.S. Department of Homeland Security (“DHS”) had learned lessons from Hurricane Katrina and would be prepared to provide effective law enforcement support in a large disaster. There were notable improvements, but Gustav and Ike did not bring nearly the level of devastation or need for law enforcement support as Katrina, and many of the same coordination challenges remained.

Over the last several years, there have been further improvements in the federal government’s ability to provide law enforcement support in an emergency, but this remains a complicated area that is little understood. Although hurricanes are not national security matters per se, these storms show the federal government’s level of preparedness to coordinate the law enforcement response to a large disaster, and, by extension, to provide for the safety and security of the American public amidst the chaos of a national security incident. Many Americans assume the federal government will protect them, especially in times of crisis.<sup>9</sup> However, poor planning and coordination among federal agencies could lead to a failure of the federal government to protect its citizens. Worse, a disorganized or haphazard federal response could even exacerbate an ongoing crisis.<sup>10</sup>

This is a pressing national security issue because effective crisis response is a key aspect of combating terrorism and other national security threats. Simply stated, good incident management makes our nation more resilient. Natural disasters like Katrina, Ike, and Gustav provide a glimpse into how the federal government may respond to a terrorist attack or other large national security incidents on American soil.

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<sup>8</sup> ALAN D. COHN, DOMESTIC PREPAREDNESS: LAW, POLICY, AND NATIONAL SECURITY 70 (2012).

<sup>9</sup> CRISIS RESPONSE, *supra* note 2 at ix.

<sup>10</sup> *Id.*

Over the past decade, despite major changes in U.S. emergency management structures, such as the creation of DHS and the reorganization of FEMA, the federal government has only marginally improved its law enforcement response capabilities for major disasters. This paper examines the risks to U.S. security posed by ill-defined structures for emergency federal law enforcement support, including legal complexities, and then poses some potential solutions.

## I. BACKGROUND

Emergency management in the United States is based on principles of federalism.<sup>11</sup> Incidents are generally managed at the lowest level of government, starting with a city or county.<sup>12</sup> If an incident overwhelms a local jurisdiction, local leaders first request support from neighboring jurisdictions (for example, through mutual aid agreements).<sup>13</sup> If an incident is particularly large or complex, local leaders can request additional help from their state.<sup>14</sup> Finally, if the combined resources of state and local government prove insufficient,<sup>15</sup> the state governor can turn to the federal government for assistance.<sup>16</sup> Over the last century, our nation's emergency management system, which started in communities as neighbors helping neighbors, has grown and evolved into a complex system involving all levels of government.<sup>17</sup>

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<sup>11</sup> WHITE HOUSE REPORT, *supra* note 2, at 11, 17; *see also* COHN, *supra* note 8, at 79-80.

<sup>12</sup> COHN, *supra* note 8, at 4-5.

<sup>13</sup> WHITE HOUSE REPORT, *supra* note 2, at 14.

<sup>14</sup> *Id.*

<sup>15</sup> Generally throughout this paper, the term "state and local government" is used to refer to state, local, territorial, and tribal governments, unless otherwise specified. The federal government has a unique relationship with Indian tribes, which was recently modified by the Sandy Recovery Improvement Act of 2013 (Pub. L. No. 113-2); such discussion is outside the scope of this article.

<sup>16</sup> WHITE HOUSE REPORT, *supra* note 2, at 11.

<sup>17</sup> COHN, *supra* note 8, at 4-5.

### A. *The Evolution of Federal Emergency Management*

Historically, federal emergency preparedness in the United States centered on civil defense and efforts to protect the public from enemy attack.<sup>18</sup> Over time, though, the federal government has played a larger and more formal role in disaster response.<sup>19</sup> From the civil defense era of the 1950s and '60s,<sup>20</sup> to the creation of FEMA in 1979, to the increased terrorist threat in the 1990s, the federal emergency management enterprise has continued to evolve to meet new hazards and threats.<sup>21</sup>

The terrorist attacks of September 11, 2001, led to a more focused national effort to improve federal emergency planning and preparedness.<sup>22</sup> With the Homeland Security Act of 2002,<sup>23</sup> Congress created DHS and gave it responsibility for coordinating national emergency planning and incident management.<sup>24</sup> FEMA, which existed for decades as an independent agency, was merged into DHS.<sup>25</sup>

The federal government is now entangled in several laws that shape emergency management and crisis response activities, including the Robert T. Stafford Disaster Relief and Emergency

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<sup>18</sup> CRISIS RESPONSE, *supra* note 2, at 32; NAT'L PREPAREDNESS TASK FORCE, U.S. DEP'T OF HOMELAND SEC., CIVIL DEFENSE AND HOMELAND SECURITY: A SHORT HISTORY OF NATIONAL PREPAREDNESS EFFORTS (2006) [hereinafter CIVIL DEFENSE HISTORY], available at <http://training.fema.gov/EMIWeb/edu/docs/DHS%20Civil%20Defense-HS%20-%20Short%20History.pdf>; STEPHEN DYCUS, ARTHUR L. BERNEY, WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW 1123 (2011).

<sup>19</sup> CRISIS RESPONSE, *supra* note 2, at 32-33; COHN, *supra* note 8, at 4; see also DYCUS ET AL., *supra* note 18, at 1124.

<sup>20</sup> The Civil Defense Act of 1950, ch. 1228, 64 Stat. 1245 (1951), though focused primarily on defending the nation against a nuclear attack, also provided for the federal government to respond to natural disasters. DYCUS ET AL., *supra* note, 18 at 1123-24.

<sup>21</sup> CRISIS RESPONSE, *supra* note 2, at 32-33; CIVIL DEFENSE HISTORY, *supra* note 18; DYCUS ET AL., *supra* note, 18 at 1123-24.

<sup>22</sup> LINDSAY, *supra* note 7, at 1, 3; COHN, *supra* note 8, at 23-24.

<sup>23</sup> Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

<sup>24</sup> LINDSAY, *supra* note 7, at 3.

<sup>25</sup> WHITE HOUSE REPORT, *supra* note 2, at 16.

Assistance Act (“Stafford Act”), as amended;<sup>26</sup> the Homeland Security Act of 2002;<sup>27</sup> the Insurrection Act;<sup>28</sup> PKEMRA;<sup>29</sup> and the Emergency Federal Law Enforcement Assistance provisions of the Justice Assistance Act of 1984 (“EFLEA”),<sup>30</sup> to name a few.

While all of these laws shape federal emergency response practices, the two pieces of legislation that provide an avenue for the federal government to support state governments during an emergency are the Stafford Act and EFLEA.<sup>31</sup> Both existed long before 9/11, and both created emergency support mechanisms whose underlying structures remain largely unchanged through the post-9/11 homeland security era.<sup>32</sup> Although the Homeland Security Act did a lot to change how the federal government is organized, the Stafford Act and EFLEA still provide the authority for the federal government to provide states with disaster assistance, to include law enforcement support.

This dual legislative framework leaves some fundamental questions unanswered and raises still others. Under what statutory authority are federal officers deployed during a disaster? Under whose authority do they operate? Must federal officers be deputized to enforce state law, and how does that process work? The law governing these questions is ambiguous at best, and there is little legal scholarship to clarify the subject. Many scholars have analyzed the appropriate role the U.S. military should play in domestic law enforcement during emergencies, but little is written on the authority

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<sup>26</sup> 42 U.S.C. §§ 5121-5207 (2012) (amending the Disaster Relief Act of 1974, Pub. L. No. 93-288, 88 Stat. 143).

<sup>27</sup> Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of 5, 6, 18, 44 and 49 U.S.C.).

<sup>28</sup> 10 U.S.C. §§ 331-335 (2012).

<sup>29</sup> Pub. L. No. 109-295, title VI, 120 Stat. 1394.

<sup>30</sup> 42 U.S.C. §§ 10501-10513 (2012).

<sup>31</sup> See generally COHN, *supra* note 8, at 308.

<sup>32</sup> The Disaster Relief Act of 1974 was the forerunner to the modern Stafford Act; FEMA was created in 1979; and EFLEA was established in 1984. COHN, *supra* note 8, at 22-23. The Homeland Security Act of 2002, while it significantly changed how the federal government was organized, did little to change how the federal government could provide disaster assistance.

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of federal law enforcement officers to perform state law enforcement functions in times of crisis.

*B. Federal Authority to Enforce State Laws*

As a general rule, federal law enforcement officers cannot enforce state laws.<sup>33</sup> Even in emergencies, states—and not the federal government—have the primary responsibility for maintaining public safety and security.<sup>34</sup> In many ways, emergency management activities represent classic police powers, reserved to the states by the Constitution: evacuating citizens, clearing roads, performing rescue functions, and so on.<sup>35</sup> Federal authority to make an arrest “must be conferred expressly by statute”—and most federal statutes only give federal law enforcement officers the authority to enforce federal law, not state law.<sup>36</sup> Even the authority for federal law enforcement personnel to enforce federal law varies from one agency to the next.<sup>37</sup> The organic federal law enforcement authority of some agencies may not be broad enough to accommodate the range of functions they may need to perform when supporting a state in a disaster environment.<sup>38</sup> Even when federal officers have some authority to enforce state laws, such as through state peace officer statutes, they often do not have authority to police certain misdemeanor offenses, such as looting.<sup>39</sup> Federal law enforcement officers typically need to be cross-deputized by a state or locality to fully enforce state or local laws.<sup>40</sup> Even then, federal law enforcement officers need to rely on some statutory grant of authority for their deputation; state common law is insufficient.<sup>41</sup> How the deputation process works—and how

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<sup>33</sup> State and Local Deputation of Federal Law Enforcement Officers During Stafford Act Deployments, 35 Op. O.L.C. 1, 3 (Mar. 5, 2012), <http://www.justice.gov/olc/2012/state-local-fleo-stafford-act-deployments.pdf> [hereinafter OLC Memo].

<sup>34</sup> *Id.*

<sup>35</sup> See COHN, *supra* note 8, at 79-80.

<sup>36</sup> OLC Memo, *supra* note 33, at 4-5.

<sup>37</sup> *Id.*; see also COHN, *supra* note 8, at 321-22 (describing the comparatively broad authority of the U.S. Marshals Service).

<sup>38</sup> COHN, *supra* note 8, at 321.

<sup>39</sup> OLC Memo, *supra* note 33, at 3.

<sup>40</sup> COHN, *supra* note 8, at 326.

<sup>41</sup> OLC Memo, *supra* note 33, at 3.

the federal government gets the authority to support disaster-stricken states in the first place—is not always straightforward.

## II. ANALYZING THE LEGISLATIVE AND POLICY FRAMEWORK

### A. *Statutory Authority: The Stafford Act*

The Stafford Act is the main authority under which FEMA and the rest of the federal community provide disaster assistance to affected states.<sup>42</sup> Under the Stafford Act, only a state governor may request federal assistance, and only when the resources of his or her state will be insufficient to respond to an incident.<sup>43</sup> The governor's request is forwarded through FEMA to the President, who can then declare an “emergency” or a “major disaster.”<sup>44</sup> An emergency or major disaster declaration allows the federal government to provide assistance to the state, which then bears a portion of the associated cost.<sup>45</sup>

For decades, the federal government has relied on the Stafford Act to send personnel, commodities, and other resources to disaster-stricken states. The Stafford Act generally allows federal agencies, under the direction of FEMA, to “provide assistance essential to meeting immediate threats to life and property resulting from a major disaster,” to include “services essential to saving lives and protecting and preserving property or public health and safety.”<sup>46</sup> The Stafford Act sets up a funding pool, the “Disaster Relief Fund,” which allows FEMA to reimburse other federal agencies supplying

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<sup>42</sup> LINDSAY, *supra* note 7, at 2; WHITE HOUSE REPORT, *supra* note 2, at 12; OLC Memo, *supra* note 33, at 2.

<sup>43</sup> 42 U.S.C. § 5170 (2012); WHITE HOUSE REPORT, *supra* note 2, at 17. In addition, the Sandy Recovery Improvement Act of 2013 amended the Stafford Act to allow the chief executive of a federally recognized tribe to request federal disaster assistance. FEMA FACT SHEET: SANDY RECOVERY IMPROVEMENT ACT OF 2013, *available at* <http://www.fema.gov/media-library/assets/documents/30822?id=6983>.

<sup>44</sup> WHITE HOUSE REPORT, *supra* note 2, at 12; U.S. DEP'T OF HOMELAND SEC., NATIONAL RESPONSE FRAMEWORK 27-28 (2d ed. 2012).

<sup>45</sup> COHN, *supra* note 8, at 160 (stating federal share of assistance efforts may not be less than 75% of eligible costs after such a declaration is made).

<sup>46</sup> OLC Memo, *supra* note 33, at 2 (quoting 42 U.S.C. § 5170B).



requested federal assistance.<sup>47</sup> The Stafford Act also provides authority for the FEMA Administrator to prepare federal response plans.<sup>48</sup>

The Stafford Act, by itself, provides no authority for federal law enforcement officers to enforce state laws.<sup>49</sup> The Stafford Act does not even mention law enforcement; it merely sets up a general process for the federal government to provide disaster assistance to affected states.<sup>50</sup>

### B. *Executive Branch Implementation: The National Response Framework*

Before September 11, 2001, at least five separate plans covered federal emergency response.<sup>51</sup> In 2004, taking direction from Congress and the President, the newly-formed DHS released a consolidated “National Response Plan.”<sup>52</sup> This plan, now known as the National Response Framework (“NRF”),<sup>53</sup> is the guiding interagency document for coordinating disaster response and providing federal support to state and local jurisdictions.<sup>54</sup>

When a large disaster overwhelms the capability of state and local governments to respond, federal assistance typically is coordinated through the processes outlined in the NRF, facilitated by

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<sup>47</sup> COHN, *supra* note 8, at 162; *see also* OLC Memo, *supra* note 33, at 9.

<sup>48</sup> LINDSAY, *supra* note 7, at 2.

<sup>49</sup> OLC Memo, *supra* note 33, at 2 (“[T]he Stafford Act does not expressly grant federal officials *any* arrest authority, much less authority to make arrests for violations of state law.”).

<sup>50</sup> *Id.* at 5.

<sup>51</sup> LINDSAY, *supra* note 7, at 1.

<sup>52</sup> Both the Homeland Security Act of 2002 (Pub. L. No. 107-296), passed by Congress, and Homeland Security Presidential Directive 5 (HSPD-5), issued by the President, directed DHS to develop a single, coordinated response plan for the federal government. *See* LINDSAY, *supra* note 7, at 1; CRISIS RESPONSE, *supra* note 2, at 49; WHITE HOUSE REPORT, *supra* note 2, at 12.

<sup>53</sup> The National Response Plan (“NRP”) was superseded by the National Response Framework (“NRF”) following PKEMRA. LINDSAY, *supra* note 7, at 2, 4.

<sup>54</sup> U.S. DEP’T OF HOMELAND SEC., NATIONAL RESPONSE FRAMEWORK (2008) [hereinafter NRF]; LINDSAY, *supra* note 7, at 1.

FEMA.<sup>55</sup> The NRF guides the federal response to all hazards, whether acts of nature or acts of terrorism.<sup>56</sup> It describes an emergency response process based on an engaged partnership and tiered response,<sup>57</sup> in which officials at all levels of government coordinate planning and preparedness activities, and respond to incidents at the lowest appropriate level of government.<sup>58</sup> True to its name, the NRF does not prescribe specific plans for all types of incidents, but rather presents a general framework for how local, state, and federal government officials should work together to respond to emergencies, based principally on the Stafford Act.<sup>59</sup>

In short, the Stafford Act establishes statutory authority while the NRF sets out implementing processes.<sup>60</sup> However, while the Federal Executive Branch always carries out the Stafford Act using the processes established in the NRF, the NRF does not rely solely on the Stafford Act for authority. As cited in the NRF:

The NRF's structures and procedures address incidents where Federal support to local, state, tribal, territorial, and insular area governments is coordinated under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), as well as incidents where Federal departments and agencies exercise other authorities and responsibilities.<sup>61</sup>

The NRF is intended to be the federal government's coordinated way of responding to any disaster, whether it warrants a Stafford Act declaration or not. The NRF would still be used to respond to some other type of non-Stafford Act emergency, such as an oil spill, which is covered by a different set of statutes. Since most large disasters typically involve a Stafford Act declaration, however, it

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<sup>55</sup> LINDSAY, *supra* note 7, at 2-4; *see generally* WHITE HOUSE REPORT, *supra* note 2, at 16-18 (providing a brief history of FEMA and an overview of the agency's role coordinating federal disaster assistance).

<sup>56</sup> NRF, *supra* note 54, at 1, 7.

<sup>57</sup> NRF, *supra* note 54, at 8; LINDSAY, *supra* note 7, at 5.

<sup>58</sup> NRF, *supra* note 54, at 1-2; CRISIS RESPONSE, *supra* note 2, at 51.

<sup>59</sup> CRISIS RESPONSE, *supra* note 2, at 50-51; LINDSAY, *supra* note 7, at 4.

<sup>60</sup> OLC Memo, *supra* note 33, at 1, 5.

<sup>61</sup> NATIONAL RESPONSE FRAMEWORK, 2d ed., *supra* note 44, at 5.

is easy to think of the NRF as the implementing processes for the Stafford Act.

### 1. Supporting Element: Emergency Support Function #13

FEMA typically coordinates the federal response to a disaster overall, but FEMA is a relatively small agency and relies on other federal departments and agencies to take the lead in specific areas.<sup>62</sup> Accordingly, the NRF contains 15 annexes for “Emergency Support Functions,” or “ESFs,” which outline the federal government’s processes to provide emergency support in specific functional areas.<sup>63</sup> For example, ESF #1 is “Transportation,” whereby the U.S. Department of Transportation provides support to state and local transportation agencies on disaster response matters involving public highways, aviation, waterways, and rail networks.<sup>64</sup> ESF #13 is “Public Safety and Security,” whereby DOJ coordinates the process for federal law enforcement agencies to help disaster-stricken state and local jurisdictions provide for the safety and security of the general population.<sup>65</sup> For all the ESFs, FEMA tracks requests for assistance from the states, issues mission

#### Emergency Support Functions

- ESF #1: Transportation
- ESF #2: Communications
- ESF #3: Public Works and Engineering
- ESF #4: Firefighting
- ESF #5: Information and Planning
- ESF #6: Mass Care, Emergency Assistance, Temporary Housing and Human Services
- ESF #7: Logistics
- ESF #8: Public Health and Medical Services
- ESF #9: Search and Rescue
- ESF #10: Oil and Hazardous Materials
- ESF #11: Agriculture and Natural Resources
- ESF #12: Energy
- ESF #13: Public Safety and Security
- ESF #14: Long-Term Community Recovery
- ESF #15: External Affairs

Source: U.S. DEP’T OF HOMELAND SEC., NATIONAL RESPONSE FRAMEWORK (2d ed. 2013).

<sup>62</sup> DYCUS ET AL., *supra* note 18, at 1126.

<sup>63</sup> LINDSAY, *supra* note 7, at 6; WHITE HOUSE REPORT, *supra* note 2, at 15.

<sup>64</sup> NRF, *supra* note 54, at 58.

<sup>65</sup> NRF, *supra* note 54, at 59; U.S. DEP’T OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, CONGRESSIONAL BUDGET SUBMISSION FOR FISCAL YEAR 2013 28 (2012), [hereinafter ATF BUDGET REQUEST], available at <http://www.justice.gov/jmd/2013justification/office/fy13-atf-justification.docx>.

assignments to the responsible departments or agencies to carry out those requests, and then tracks the associated costs.

Originally, under the old National Response Plan, DOJ and DHS shared responsibility for ESF #13.<sup>66</sup> As discussed later, that shared role led to confusion during Hurricane Katrina, so responsibility for ESF #13 now rests solely with DOJ.<sup>67</sup> In turn, DOJ has delegated operational responsibility to the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”), which executes ESF #13 requests using available resources from law enforcement agencies across the federal government.<sup>68</sup>

The ESF #13 process is part of the NRF and follows the principles of federalism that underlie emergency management policy in the United States, meaning emergency response to an incident is handled at the lowest possible jurisdictional level.<sup>69</sup> If a local police department or sheriff’s office is overwhelmed by an incident—for example, it does not have enough personnel or resources to police the streets of the community after a storm—then that jurisdiction requests mutual aid from neighboring jurisdictions, and then, if needed, from their state.<sup>70</sup> If the state cannot provide adequate assistance from the state police, the governor may deploy the National Guard as a state asset.<sup>71</sup> If the combined resources of state and local jurisdictions are still overwhelmed by the disaster, the state may request federal law enforcement assistance through ESF #13 under the NRF.<sup>72</sup> The NRF alone provides no statutory authority, however, so the typical process requires that the governor has already

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<sup>66</sup> CRISIS RESPONSE, *supra* note 2, at 13; *see also* U.S. DEP’T OF HOMELAND SEC., NATIONAL RESPONSE PLAN (2004) (listing both DOJ and DHS as the leads for ESF #13).

<sup>67</sup> CRISIS RESPONSE, *supra* note 2, at 13; NRF, *supra* note 54, at 59; ATF BUDGET REQUEST, *supra* note 65, at 27.

<sup>68</sup> OLC Memo, *supra* note 33, at 1; CRISIS RESPONSE, *supra* note 2, at 13; NRF, *supra* note 54, at 59; ATF BUDGET REQUEST, *supra* note 65, at 27.

<sup>69</sup> WHITE HOUSE REPORT, *supra* note 2, at 12, 17.

<sup>70</sup> *See* CRISIS RESPONSE, *supra* note 2, at 13.

<sup>71</sup> *Id.*

<sup>72</sup> NRF, *supra* note 54, at 59; *see* CRISIS RESPONSE, *supra* note 2, at 13.

requested, and the President has already approved, an emergency or major disaster declaration as authorized by the Stafford Act.<sup>73</sup>

The entire ESF #13 process is complex and has many moving parts. When ESF #13 is activated, ATF sets up a coordination center at its headquarters, and sends liaison personnel to the FEMA National Response Coordination Center (“NRCC”), the location where the disaster response at large is tracked.<sup>74</sup> Out in the field, an ESF #13 representative is assigned to a Joint Field Office, which is a temporary facility managed by FEMA that serves as the central hub for the federal government to provide assistance to the affected state.<sup>75</sup> At each location, ATF coordinates the ESF #13 requests it receives from FEMA or the affected state, evaluates the requests against available federal law enforcement assets, and deploys federal officers (such as FBI agents, ATF agents, and others) to assist state and local law enforcement.<sup>76</sup> Many different federal agencies may contribute personnel to assist, all coordinated through the ESF #13 process.<sup>77</sup>

In a really large incident, if a local jurisdiction is so overwhelmed that it cannot manage its own law enforcement resources, a Law Enforcement Coordination Center (“LECC”) may be set up upon request to help manage the law enforcement assets in the affected region.<sup>78</sup> Command of the LECC would likely fall to the ATF agent coordinating ESF #13 or a separate position called the Senior Federal Law Enforcement Official.<sup>79</sup>

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<sup>73</sup> OLC Memo, *supra* note 33, at 1-2; NRF, *supra* note 54, at 59; *see* CRISIS RESPONSE, *supra* note 2, at 85.

<sup>74</sup> *See* CRISIS RESPONSE, *supra* note 2, at 13.

<sup>75</sup> OLC Memo, *supra* note 33, at 2.

<sup>76</sup> *Emergency Support Function #13 (ESF #13 – RISC Briefing)*, FED. EMERGENCY MGMT. AGENCY 7, [http://www.fema.gov/media-library-data/20130726-1903-25045-2962/risc\\_meeting\\_esf\\_13\\_briefing\\_\\_01\\_12\\_13.pdf](http://www.fema.gov/media-library-data/20130726-1903-25045-2962/risc_meeting_esf_13_briefing__01_12_13.pdf) (last visited Oct. 13, 2013) [hereinafter *RISC Briefing*].

<sup>77</sup> COHN, *supra* note 8, at 321; OLC Memo, *supra* note 33, at 2.

<sup>78</sup> *RISC Briefing*, *supra* note 76, at 7.

<sup>79</sup> *Id.*

ESF #13 is a relatively new function, created with the National Response Plan in 2004.<sup>80</sup> While the Stafford Act has been used for decades to provide federal disaster assistance to the states, ESF #13 was not previously part of that effort. Accordingly, while the Stafford Act is generally well understood in the emergency management community, there is not as much history to support use of the Stafford Act as the legal basis for providing federal law enforcement assistance under ESF #13.

## 2. Supporting Element: The Senior Federal Law Enforcement Official

If an incident requires a large, centrally-managed federal law enforcement response, the Attorney General may designate a Senior Federal Law Enforcement Official (“SFLEO”).<sup>81</sup> As defined in the NRF:

The SFLEO is an official appointed by the Attorney General during an incident requiring a coordinated Federal response to coordinate all law enforcement, public safety, and security operations with intelligence or investigative law enforcement operations directly related to the incident . . . In the event of a terrorist incident, the SFLEO will normally be a senior FBI official who has coordinating authority over all law enforcement activities related to the incident, both those falling within the Attorney General’s explicit authority . . . and those otherwise directly related to the incident itself.<sup>82</sup>

In the event of a terrorist attack, the FBI would coordinate the ensuing investigation, on behalf of the Attorney General, as well as any other law enforcement activities to “detect, prevent, preempt, and disrupt” another attack.<sup>83</sup> Even in non-terrorist incidents, though, the SFLEO would likely come from the FBI, possibly leading

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<sup>80</sup> Compare the Federal Response Plan (FED. EMERGENCY MGMT. AGENCY, 1999), which does not identify a “public safety and security” function, with the National Response Plan (U.S. DEP’T OF HOMELAND SEC., 2004), which does.

<sup>81</sup> SENATE REPORT, *supra* note 5, at 453.

<sup>82</sup> NRF, *supra* note 54, at 68.

<sup>83</sup> Homeland Security Presidential Directive/HSPD-5 on Management of Domestic Incidents, 39 WEEKLY COMP. PRES. DOC. 280 (Feb. 28, 2003).

to conflict with the local U.S. Attorney, who is the chief federal law enforcement officer for his or her judicial district, and with ATF as the lead agency for coordinating ESF #13.<sup>84</sup>

Few disasters have been large enough to warrant appointment of an SFLEO (and there were actually two SFLEOs in Hurricane Katrina—one from DOJ, and one from DHS),<sup>85</sup> so this position as a single coordinator of the federal law enforcement response is largely untested. The SFLEO is just one more potential element in the complex system of a federal law enforcement response to a disaster.<sup>86</sup>

### C. *Alternative Statutory Authority: EFLEA*

As suggested earlier, the Stafford Act is not the only statute that can provide authority for federal disaster assistance under the NRF. Under EFLEA, the Attorney General can provide federal law enforcement resources to states suffering from a law enforcement emergency.<sup>87</sup> Under EFLEA, the Attorney General can send federal law enforcement personnel if “such assistance is necessary to provide an adequate response to a law enforcement emergency.”<sup>88</sup> Like the Stafford Act, EFLEA requires that requests for assistance come from

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<sup>84</sup> See CRISIS RESPONSE, *supra* note 2, at 14, 55.

<sup>85</sup> HOUSE REPORT, *supra* note 1, at 259.

<sup>86</sup> Yet another DOJ position—the Senior Civilian Representative of the Attorney General, or “SCRAG”—could be involved if military forces were to be used for domestic law enforcement purposes, but such activities are outside the scope of this paper.

<sup>87</sup> 42 U.S.C. § 10501 (2012); CRISIS RESPONSE, *supra* note 2, at 15; see also COHN, *supra* note 8, at 322 (recognizing the concurrent nature of EFLEA and the Stafford Act, but noting that assistance under EFLEA is not necessarily limited to emergencies or major disasters declared under the Stafford Act, nor even limited to public safety and security functions under ESF #13).

<sup>88</sup> 42 U.S.C. § 10501(c) (2012); see also HOMELAND SEC. COUNCIL, NATIONAL STRATEGY FOR PANDEMIC INFLUENZA – IMPLEMENTATION PLAN 157 (2006).

a state governor,<sup>89</sup> and is intended to be used only when states have exhausted their own resources.<sup>90</sup>

Unlike the Stafford Act, where the President approves a general request for disaster relief, EFLEA requires the Attorney General to approve each specific request for assistance, and approvals are based on strict criteria specified in the statute.<sup>91</sup> The statute and the corresponding regulations require a governor to specify, in writing, a description of the problem, exactly what federal resources are needed, and how they will be used.<sup>92</sup> According to the handbook for U.S. Attorneys on crisis response and related legal matters, when federal law enforcement personnel are deployed under EFLEA, it is “prudent to avoid potential authority and liability issues” by having state officials cross-deputize federal officers to enforce state laws.<sup>93</sup> Overall, EFLEA is very specific in its requirements, perhaps reflecting an understanding that, due to the separation of the state and federal criminal justice systems in the United States, providing federal law enforcement personnel to assist a state is unlike providing any other resource or commodity.

Also unlike the Stafford Act, which establishes the Disaster Relief Fund and associated processes for federal-state cost sharing, EFLEA by itself provides no separate, pre-identified funding stream or process for federal agencies to be reimbursed for costs they incur when providing disaster assistance.<sup>94</sup>

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<sup>89</sup> 42 U.S.C. § 10501(b) (2012) (“An application for assistance under this section shall be submitted in writing by the chief executive officer of a State to the Attorney General. . .”).

<sup>90</sup> U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, BJA FACT SHEET: THE EMERGENCY FED. LAW ENFORCEMENT ASSISTANCE PROGRAM 1 (Sept. 1996) [hereinafter BJA FACT SHEET], available at <https://www.ncjrs.gov/pdffiles/eflea.pdf>.

<sup>91</sup> These criteria include, among others, “[T]he nature and extent of the emergency . . . the availability of state and local criminal justice resources to resolve the problem, the cost associated with the increased Federal presence, and the need to avoid unnecessary federal involvement and intervention in matters primarily of State and local concern. . . .” 42 U.S.C. § 10501(c) (2012).

<sup>92</sup> 42 U.S.C. § 10501 (b), (c) (2012); 28 C.F.R. § 65.31 (2011).

<sup>93</sup> CRISIS RESPONSE, *supra* note 2, at 15.

<sup>94</sup> 42 U.S.C. § 10513 authorizes funding for EFLEA—up to \$20 million each fiscal year since 1984—but this money has never been appropriated. 42 U.S.C. § 10513



While the Stafford Act is invoked rather frequently, with FEMA often managing over 50 major disaster declarations each year,<sup>95</sup> EFLEA has been invoked only sporadically throughout history. DOJ provided financial assistance under EFLEA in 1989 to South Carolina for Hurricane Hugo and to California for the San Francisco earthquake; in 1993 to Texas for the Waco standoff; and in 1993 to California for the Rodney King riots, among a handful of other times.<sup>96</sup>

The use of EFLEA during Hurricane Katrina may have been one of the few applications of the statute since the creation of DHS.<sup>97</sup> In fact, the first time the federal government used ESF #13 in a major disaster was for Hurricane Katrina, and the federal government used EFLEA as the underlying legal authority for its disaster response.

#### IV. APPLICATION

##### A. *The Disaster of Katrina*

*DHS and DOJ's confusion about their roles and authorities prevented the Departments from bringing the full weight of their resources to bear until roughly a week after landfall.*

– SENATE COMMITTEE ON HOMELAND SECURITY AND  
GOVERNMENTAL AFFAIRS<sup>98</sup>

*Calls for help to the city's 911 system went unanswered. . . . [E]ven when police were present to restore law and order, they did not have the resources to arrest, book, and detain suspects . . . Many people originally apprehended for looting were just let go.*

– HOUSE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE  
PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA<sup>99</sup>

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(2012); see also Press Release, Rep. Corrine Brown, Congresswoman Corrine Brown Secures Twenty Million Dollars for Local Law Enforcement Emergencies (May 10, 2012) (on file with author).

<sup>95</sup> *Disaster Declarations by Year*, FED. EMERGENCY MGMT. AGENCY, <http://www.fema.gov/disasters/grid/year> (last visited Sept. 21, 2013).

<sup>96</sup> BJA FACT SHEET, *supra* note 90, at 3.

<sup>97</sup> See generally WHITE HOUSE REPORT, *supra* note 2.

<sup>98</sup> SENATE REPORT, *supra* note 5, at 453.

<sup>99</sup> HOUSE REPORT, *supra* note 1, at 246-47.

Hurricane Katrina was a devastating storm—one of the worst disasters in American history.<sup>100</sup> A poor federal response prompted numerous investigations and after-action reports, most notably from the White House, the U.S. Senate, and the U.S. House of Representatives.<sup>101</sup> These three reports all similarly concluded that law enforcement coordination failures and a basic lack of planning contributed to civil unrest and further delayed relief efforts.<sup>102</sup>

Police departments and sheriff's offices across the entire Gulf Coast region were crippled by the storm and struggled to maintain law and order.<sup>103</sup> As the House report described, “[h]undreds of New Orleans Police Department officers went missing—some for understandable reasons and some not—at a time they were needed most.”<sup>104</sup> The report continued, “This left the city unable to provide enough manpower and other resources to maintain law and order at shelters and on the streets.”<sup>105</sup> Three days into the disaster, New Orleans’ major newspaper ran an editorial describing the lawlessness and chaos, stating, “The lack of law enforcement presence is stunning . . . there seems to have been no strategy to get the hundreds of military and law enforcement officers on the ground who were needed to establish order immediately.”<sup>106</sup>

Poor law enforcement coordination, and a corresponding inability to assure citizens and first responders of their safety, affected the overall disaster response.<sup>107</sup> Concerns about responder safety delayed search and rescue missions and the restoration of critical communications infrastructure.<sup>108</sup>

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<sup>100</sup> WHITE HOUSE REPORT *supra* note 2, at 5-9 (detailing damage and comparing other storms throughout history).

<sup>101</sup> CRISIS RESPONSE, *supra* note 2, at ix.

<sup>102</sup> *Id.*; see generally WHITE HOUSE REPORT, *supra* note 2.

<sup>103</sup> See WHITE HOUSE REPORT, *supra* note 2, at 40, 57.

<sup>104</sup> HOUSE REPORT, *supra* note 1, at 246.

<sup>105</sup> *Id.* at 246-47.

<sup>106</sup> *Where Is the Cavalry?*, THE TIMES-PICAYUNE (New Orleans), Sept. 1, 2005, available at <http://www.nola.com/katrina/pages/090105/a15.pdf>.

<sup>107</sup> WHITE HOUSE REPORT, *supra* note 2, at 40.

<sup>108</sup> See SENATE REPORT, *supra* note 5, at 439; see also WHITE HOUSE REPORT, *supra* note 2, at 40, 57.

The Senate report declared that, in the area of federal law enforcement support to the states, the “initial response fell far short of what the Gulf Coast’s citizens could reasonably have expected.”<sup>109</sup> At least initially, no one at the federal or state level seemed to know the proper channels for federal law enforcement assistance or the underlying authority to invoke. Colonel Henry Whitehorn, the head of the Louisiana State Police, tried to request federal assistance the day after Katrina made landfall.<sup>110</sup> Perhaps not knowing where to turn, on August 30, 2005, he wrote to Robert Mueller, the Director of the FBI:

As you are aware, the city of New Orleans, Louisiana has suffered massive damage caused by Hurricane Katrina. We are currently utilizing all State assets to stabilize the situation; however, looting continues to be a significant problem. As the head of Louisiana State Police, I am requesting any assistance you can provide to this agency to assist with the issue to include deployment of available tactical teams.<sup>111</sup>

The request was passed to DOJ leadership but there was no immediate action.<sup>112</sup> As the Senate discovered, there was a “complete absence of planning—indeed a lack of a basic understanding of the Departments’ roles and obligations—on the part of DOJ and DHS.”<sup>113</sup> The report continues, “[i]n fact, DOJ did not assign anyone to coordinate the DOJ function until September 2,” which was four days after landfall.<sup>114</sup> This lack of planning delayed federal law enforcement support by several days, during which the situation continued to decay.<sup>115</sup> The Governor of Louisiana did not even formally request assistance through EFLEA until September 4.<sup>116</sup>

Confusion between DOJ and DHS over their respective roles and authorities prevented both Departments from responding swiftly

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<sup>109</sup> SENATE REPORT, *supra* note 5, at 440.

<sup>110</sup> *Id.* at 440, 446.

<sup>111</sup> *Id.* at 446.

<sup>112</sup> *Id.* at 440, 446.

<sup>113</sup> *Id.* at 440.

<sup>114</sup> *Id.*

<sup>115</sup> See WHITE HOUSE REPORT, *supra* note 2, at 40.

<sup>116</sup> *Id.* at 41 n.127.

and effectively.<sup>117</sup> At the time, DOJ and DHS shared responsibility for ESF #13,<sup>118</sup> and both Departments appointed a Senior Federal Law Enforcement Official—a DOJ official from the FBI, and a DHS official from Immigrations and Customs Enforcement (“ICE”)—creating confusion as to who was in charge.<sup>119</sup> It took over a week for the federal government to set up a Law Enforcement Coordination Center to manage the law enforcement personnel deployed to the region and coordinate necessary state deputation.<sup>120</sup>

Deputation was a debacle. A wide range of federal law enforcement agencies responded to assist, and each agency seemed to face a different process to get the necessary authority to enforce state law should they need to make arrests outside their federal authority (for example, when encountering looters).<sup>121</sup> Under existing Louisiana state law, FBI agents had qualified immunity only when assisting state officers or responding to a felony committed in their presence.<sup>122</sup> Deputy U.S. Marshals had far greater authority under state law than ATF agents or ICE agents.<sup>123</sup> FBI agents were deputized by the Louisiana Attorney General’s Office, while ICE agents were sworn in by the Louisiana State Police.<sup>124</sup> Border Patrol agents were deputized in Louisiana, but not in Mississippi.<sup>125</sup> In Mississippi, FBI agents were not deputized until September 9, eleven days after landfall.<sup>126</sup>

Even after the deputation processes were completed, communities across the Gulf Coast faced a patchwork of law

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<sup>117</sup> SENATE REPORT, *supra* note 5, at 453.

<sup>118</sup> See WHITE HOUSE REPORT, *supra* note 2, at 102; see also HOUSE REPORT, *supra* note 1, at 257.

<sup>119</sup> See SENATE REPORT, *supra* note 5, at 451-54.

<sup>120</sup> *Id.* at 453-54; see generally WHITE HOUSE REPORT, *supra* note 2.

<sup>121</sup> WHITE HOUSE REPORT, *supra* note 2, at 58; HOUSE REPORT, *supra* note 1, at 256-57; SENATE REPORT, *supra* note 5, at 452-53.

<sup>122</sup> HOUSE REPORT, *supra* note 1, at 256.

<sup>123</sup> See *id.* at 257; see also COHN, *supra* note 8, at 321-22.

<sup>124</sup> HOUSE REPORT, *supra* note 1, at 257.

<sup>125</sup> *Id.*

<sup>126</sup> SENATE REPORT, *supra* note 5, at 452 n.170.

enforcement officers from different agencies and different parts of the country, with varying protocols and little local knowledge.<sup>127</sup>

Overall, coordination failures and a lack of advance planning at all levels led to lawlessness that hindered emergency response efforts. State and local jurisdictions needed to understand the process to request federal law enforcement assistance, and be prepared to provide incoming officers with the appropriate legal authority; federal agencies needed to understand their own roles and responsibilities and the processes to send assistance quickly when asked.

#### 1. Use of EFLEA for Hurricane Katrina

Despite all the problems with the federal response to Hurricane Katrina, one bright spot seemed to be the Attorney General's use of EFLEA to provide federal law enforcement support to the affected states. The Attorney General approved requests for assistance under EFLEA from both Governor Barbour of Mississippi and Governor Blanco of Louisiana.<sup>128</sup> In his response to the Governor of Mississippi, the Attorney General issued a written order, stating:

[Y]our request is approved. . . . In providing this assistance, the [U.S. Marshals Service] personnel will be operating under the supervision of the United States Attorney for the Southern District of Mississippi, and will be coordinating with their state and local counterparts to make all necessary arrangements to ensure appropriate authority to conduct their assistance efforts in the State of Mississippi.<sup>129</sup>

The Attorney General also issued a similar order following a request for federal law enforcement assistance from the Governor of Louisiana:

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<sup>127</sup> WHITE HOUSE REPORT, *supra* note 2, at 58.

<sup>128</sup> CRISIS RESPONSE, *supra* note 2, at 55.

<sup>129</sup> Letter from Att'y Gen. Alberto R. Gonzales to Governor Haley Barbour (Sept. 3, 2005), in H. SELECT BIPARTISAN COMM. TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, A FAILURE OF INITIATIVE: SUPPLEMENTARY REPORT AND DOCUMENT ANNEX, H.R. Rep. No. 109-396, at 275 (Mar. 2006).

Department of Justice law enforcement personnel who are engaged in this mission shall have the authority to enforce the laws of the United States and to assist law enforcement officials in the State of Louisiana to enforce the laws of that State. All such officers engaged in this mission . . . shall be subject to the supervision of the United States Attorney for the Eastern District of Louisiana, who may delegate operational authority to appropriate Department of Justice officials.<sup>130</sup>

These orders showed the Attorney General's involvement in the decision to send federal law enforcement support, helped to clarify the authority of the federal personnel, and also specified that the federal personnel deployed were to operate under the supervision of the local U.S. Attorney. When the White House reviewed the federal response to Hurricane Katrina in the months that followed, it adopted the Attorney General's approach of relying on EFLEA:

(b) DOJ should develop a program to increase States' awareness of the procedures for requesting Federal law enforcement assistance under the Emergency Federal Law Enforcement Assistance Act. . . .

(d) DOJ and DHS should each develop, in coordination with the other, the capability to rapidly deploy a contingent of Federal law enforcement officers to prevent and respond to civil disorder. Consistent with the principle that law enforcement is the responsibility of local and State governments, this force should deploy only in the event that State authorities request Federal assistance pursuant to the Emergency Federal Law Enforcement Assistance Act, or as otherwise directed by the President.<sup>131</sup>

In May 2006, pursuant to these recommendations in the White House *Lessons Learned* report, the Attorney General wrote to all state governors and advised them of the procedures to request federal law enforcement assistance under EFLEA. His letter stated:

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<sup>130</sup> Att'y Gen. Order 2779-2005 (Sept. 4, 2005), available at <http://www.justice.gov/ag/readingroom/order-2779-2005.pdf>.

<sup>131</sup> WHITE HOUSE REPORT, *supra* note 2, at 103.

The Act requires that all requests be made in writing. The regulations, which closely track the statute, set forth information that must be contained in the request, including the nature and extent of the emergency, the availability of state and local criminal justice resources to address the emergency, and a specific statement of the funds, equipment, training, intelligence information, or personnel requested, and the intended use. . . .

In cases in which I direct federal law enforcement personnel to assist in the enforcement of state criminal law, it is prudent to avoid potential authority and liability issues by having the pertinent state and local officials deputize the federal officers to exercise state authority. While some state laws automatically empower certain federal law enforcement officers to act as state peace officers in specified emergency situations, the deputation process is more cumbersome in other states. To facilitate the most rapid response possible in future emergency situations, we strongly encourage states to examine their deputation processes and, if necessary, to seek ways to streamline those processes, through legislation if necessary.<sup>132</sup>

Not only was the use of EFLEA highlighted as an effective solution in Hurricane Katrina, but the Attorney General reiterated to state governors that this would be the procedure the federal government would use in the future to provide law enforcement assistance in a crisis, and he detailed the specific steps states should take to prepare.

## 2. Changes to ESF #13 After Katrina

As mentioned earlier, in Hurricane Katrina, DOJ and DHS shared the responsibility for leading ESF #13, which led to confusion over who was in charge.<sup>133</sup> Transitioning responsibility for ESF #13 solely to DOJ was a key recommendation in the White House *Lessons Learned* report, and became law with the passage of PKEMRA.<sup>134</sup> In

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<sup>132</sup> Letter from Att’y Gen. Alberto R. Gonzales to State Governors (May 31, 2006) (available from the Dep’t of Justice Exec. Secretariat).

<sup>133</sup> WHITE HOUSE REPORT, *supra* note 2, at 102; HOUSE REPORT, *supra* note 1, at 257; SENATE REPORT, *supra* note 5, at 453.

<sup>134</sup> ATF BUDGET REQUEST, *supra* note 65, at 27.

a memorandum dated October 16, 2008, the Deputy Attorney General formally designated ATF as the component within DOJ to lead the ESF #13 function.<sup>135</sup> Although designating one clear lead for ESF #13 was a considerable improvement, there remained some ambiguity over the underlying legal authority for carrying out the ESF #13 function.

*B. The Next Test After Katrina: Hurricanes Gustav and Ike*

*“Gustav, FEMA’s biggest test in New Orleans since Katrina.”*

–CNN, September 2, 2008

The second time the federal government used ESF #13 in a major disaster was for Hurricanes Gustav and Ike. Tropical Storm Gustav grew to a hurricane on August 26, 2008, exactly three years after Hurricane Katrina.<sup>136</sup> The City of New Orleans and parishes along the Louisiana coast planned large-scale evacuations.<sup>137</sup> Nearly two million residents evacuated, making this the first time in history that local officials along the entire coastline of Louisiana called for mandatory evacuations.<sup>138</sup>

Gustav made landfall on Monday, September 1, 2008. Torrential rain and high winds caused major damage, and nearly 70% of homes and business lost power.<sup>139</sup> The next morning, Louisiana Governor Bobby Jindal briefed the press from Baton Rouge. In his remarks, he stated:

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<sup>135</sup> ATF informally accepted responsibility for managing ESF #13 starting in 2006, but they were not formally delegated this responsibility in writing until October 2008. CRISIS RESPONSE, *supra* note 2, at 14; *see also* ATF BUDGET REQUEST, *supra* note 65, at 27.

<sup>136</sup> STATE OF LOUISIANA, HURRICANES GUSTAV & IKE AFTER ACTION REVIEW AND PREPAREDNESS PLAN 4-5 [hereinafter LOUISIANA STATE AAR], *available at* [http://www.ohsep.louisiana.gov/plans/Gustav\\_Ike\\_aar.pdf](http://www.ohsep.louisiana.gov/plans/Gustav_Ike_aar.pdf); Press Release, U.S. Dep’t of Justice, Hurricane Gustav – ATF Takes the ESF-13 Lead to Coordinate Federal Law Enforcement Assistance (Sept. 5, 2008) [hereinafter ATF Press Release], *available at* <http://www.atf.gov/press/releases/2008/09/090508-atf-takes-lead-in-hurricane-assistance.html>.

<sup>137</sup> *See* LOUISIANA STATE AAR, *supra* note 136, at 4; *see also* ATF Press Release, *supra* note 136.

<sup>138</sup> LOUISIANA STATE AAR, *supra* note 136, at 4.

<sup>139</sup> *Id.* at 5.



We have activated ESF #13. What that means is last night, I requested from the federal government and they have approved the request, additional federal law enforcement agents. . . . 400 federal law enforcement agents are on their way. They'll be coming to Louisiana. They've approved the request to help us maintain security in many of these areas that have been hit very, very hard.<sup>140</sup>

ATF set up a National Coordination Center to coordinate ESF #13 requests from the state. Personnel from an array of agencies, including the U.S. Marshals Service, Federal Protective Service, U.S. Customs and Border Protection, and ICE, provided support.<sup>141</sup> In total, nearly 400 federal law enforcement personnel deployed.<sup>142</sup>

In Louisiana, the ESF #13 group assigned to the Joint Field Office found themselves in the same former department store in downtown Baton Rouge used during Hurricane Katrina.<sup>143</sup> “We were walking into the same place, and facing a situation that everyone feared would be similar to Katrina,” said Supervisory Special Agent Matt Chapman of the FBI Critical Incident Response Group.<sup>144</sup> Fortunately, the response this time was much smoother, but there were still issues with coordination and deputation.

On the same day that Gustav hit Louisiana, Tropical Storm Ike formed in the Atlantic, becoming a hurricane two days later. Hurricane Ike made landfall at Galveston, Texas, on September 13, 2008, less than two weeks after Gustav.

In both storms, there was initial confusion over who would have to be deputized and how the process would work. Would

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<sup>140</sup> Governor Bobby Jindal, Press Briefing (Sept. 2, 2008) (transcript available at <http://transcripts.cnn.com/transcripts/0809/02/cnr.02.html>).

<sup>141</sup> See FBI Part of Joint Federal Response to Gustav, Fed. Bureau of Investigation (Sept. 5, 2008) [hereinafter FBI News], available at <http://www.fbi.gov/news/stories/2008/september/gustav090508>.

<sup>142</sup> ATF Press Release, *supra* note 136.

<sup>143</sup> See ATF Press Release, *supra* note 136; see also FBI News, *supra* note 141.

<sup>144</sup> See FBI News, *supra* note 141. At the time, ATF only had a few people dedicated to ESF #13, so other DOJ personnel provided support.

federal agents have to be cross-deputized by the state? Would certain federal agents first have to be sworn in as Special Deputy U.S. Marshals?<sup>145</sup> Who had to approve requests for assistance? Did the Attorney General have to sign anything? Could federal agencies provide support directly to a local agency, or did they have to work through the state? And once federal agents arrived to assist a state, who would have operational control over them, and what rules of engagement and use of force policies would they use? Many of the questions that had come up during Hurricane Katrina came up again with Gustav and Ike. They were resolved, but in the midst of the crisis, and with urgent calls back to Washington to make quick policy decisions in the moment.<sup>146</sup> In the end, the Louisiana State Police deputized almost 200 federal law enforcement officers as Special Officers of the Louisiana State Police, granting them state law enforcement authority.<sup>147</sup>

During the storms, no one seemed to know whether the federal law enforcement support to the States of Louisiana and Texas would be provided through the EFLEA provisions, as had been done during Katrina, or whether that support could be provided through the Stafford Act alone. DOJ ultimately decided, as federal officers were about to deploy, that federal law enforcement assistance through ESF #13 would be provided under the Stafford Act. This meant the Attorney General never received a formal written request for law enforcement assistance from the governors of those states, as required by EFLEA, and the Attorney General also never issued an order to approve the federal law enforcement assistance. The assistance was provided as a mission assignment through ESF #13,

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<sup>145</sup> See COHN, *supra* note 8, at 321-22 (“The U.S. Marshals Service . . . is considered to possess the broadest authorities of all federal law enforcement agencies. As a result, federal law enforcement officers assigned to public safety and security functions are typically deputized by the U.S. Marshals Service at the time of their assignment in order to provide them with the broadest possible federal law enforcement authorities.”).

<sup>146</sup> U.S. DEP’T OF JUSTICE, U.S. ATTORNEY’S OFFICE FOR THE MIDDLE DISTRICT OF LA., CRITICAL INCIDENT AFTER-ACTION REPORT (Dec. 2008).

<sup>147</sup> Press Release, U.S. Dep’t of Justice, Federal Agents Deputized as Special Officers of the Louisiana State Police (Sept. 5, 2008), *available at* <http://www.atf.gov/press/releases/2008/09/090508-doj-federal-agents-deputized.html>.

presumably approved by supervisors at ATF and FEMA, similar to requests for other types of disaster assistance under the Stafford Act.

In 2006, the Attorney General had sent a memorandum to all state governors regarding the appropriate procedures for requesting federal law enforcement support under EFLEA,<sup>148</sup> but then those EFLEA procedures were ignored in favor of the Stafford Act. Presumably this was so agencies deploying personnel could take advantage of funding from the Disaster Relief Fund: under the Stafford Act, federal agencies can be reimbursed by FEMA for providing disaster assistance, but under EFLEA, there is no provision for reimbursement. This decision to use the Stafford Act ran counter to lessons learned from Katrina, however, which highlighted the use of EFLEA as an effective practice.

In the foreword to the *State of Louisiana After-Action Report and Improvement Plan* for Hurricanes Gustav and Ike, the Director of the Louisiana Office of Homeland Security and Emergency Preparedness commented:

The 2008 hurricane season for Louisiana proved to be busy in ways paralleling the 2005 season with Hurricanes Katrina and Rita. . . . The improvements that were recommended and put in place following Hurricanes Katrina and Rita were tested and in most cases proved a success.<sup>149</sup>

There was little mention of law enforcement or ESF #13. That might seem like a success story, but during Gustav and Ike, the affected states and localities perhaps were not stressed to the point that they needed to rely on federal law enforcement support. In Katrina, for example, within the first week after landfall, almost 2,000 officers had deployed from DOJ and DHS combined, rivaling the size of an entire police department for many cities.<sup>150</sup> Eventually, over

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<sup>148</sup> See Letter from Att'y Gen. Alberto R. Gonzales to State Governors, *supra* note 132.

<sup>149</sup> LOUISIANA STATE AAR, *supra* note 136 (statement of Mark Cooper, Dir., Governor's Office of Homeland Security and Emergency Preparedness).

<sup>150</sup> WHITE HOUSE REPORT, *supra* note 2, at 40-41 n.126.

3,500 law enforcement personnel deployed during Katrina; in contrast, Gustav and Ike required a federal force one-tenth the size.<sup>151</sup>

Even then, Gustav and Ike demonstrated problems with coordination, challenges of working within the NRF incident management structure while engaging DOJ leadership, and a need to clarify legal authorities and processes. At the time, few of the recommendations from Hurricane Katrina had actually been implemented.

*C. Comparing Katrina with Ike and Gustav – A Quick Synopsis*

Hurricane Katrina was catastrophic, but one of the bright spots of the response was that DOJ used EFLEA as the legal basis to provide federal law enforcement support to the states. The White House *Lessons Learned* report highlighted that practice, and recommended it for future responses. The reforms following Katrina designated DOJ as the single lead agency for ESF #13, eliminating confusion over duplicative responsibilities and who was in charge.

Hurricanes Gustav and Ike were both smaller storms. In Gustav and Ike, the federal government departed from the recommendations in the White House *Lessons Learned* report, and relied on the Stafford Act, instead of EFLEA, as the legal basis to deploy federal law enforcement personnel under ESF #13. The deployment was far smoother, and funded out of the Stafford Act's Disaster Relief Fund; however, legal questions about deputation still remained.

In sum, under the Stafford Act, a governor requests federal assistance through FEMA; the President declares an emergency or major disaster; and FEMA coordinates the federal response by issuing mission assignments to other federal agencies, reimbursing them out of the Disaster Relief Fund. Under EFLEA, a governor requests federal law enforcement assistance directly from the Attorney General. Although EFLEA still does not authorize federal law enforcement personnel to enforce state laws, the process to

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<sup>151</sup> *Id.* at 188 n.129.

request assistance is more specific, and can prompt the governor to identify legal issues and deputation processes that may be overlooked when using the Stafford Act and treating law enforcement requests like requests for any other resource.

#### *D. An Ongoing Challenge*

The law of federal emergency management continues to evolve as the government incorporates the lessons of each disaster. Just last year, ATF sought a legal opinion from the Justice Department's Office of Legal Counsel regarding whether federal law enforcement officers could legally accept state deputation in an emergency and make state law arrests.<sup>152</sup> If ATF, as the ESF #13 coordinating entity, was unsure about the authority of federal law enforcement officers in an emergency, this seems to be an unsettled area of law. DOJ, FEMA, and all other agencies with a role in ESF #13 still need to come together to work through the complex legal issues surrounding deputation, deployment, and funding.

### III. THE WAY FORWARD

#### *A. Policy Solutions to Legal Complexities*

At first blush, one way to address many legal complexities could be to avoid them altogether, using policy solutions as a workaround to legal problems. For example, from a practical perspective, federal law enforcement officers could be paired with state or local officers who know the local jurisdiction and who could make state arrests without complications. Federal personnel could be used as force multipliers, simply to assist state or local officers, while the state or local officers perform actual arrests. Another practical solution would be for the federal government to facilitate the deployment of teams of local uniformed law enforcement officers from other areas of the country, instead of federal personnel, much like the FEMA National Urban Search and Rescue Response System (which essentially federalizes teams of local firefighters and

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<sup>152</sup> See generally OLC Memo, *supra* note 33.

paramedics to deploy to disaster areas).<sup>153</sup> Such teams still may need to be cross-deputized if they cross state lines, but the process might be more palatable than deputizing federal agents as state officers. Such a system would have the added bonus of bringing in officers who may be more accustomed to the type of police work needed in a post-disaster environment, such as patrolling the streets and making arrests for misdemeanor offenses.

Both approaches, while they may be practical, are incomplete. In a truly catastrophic incident, all of the collective resources from all levels of government may be needed to respond appropriately. There may not be enough state or local officers available to form federal-state teams, and nearby teams of local law enforcement officers may already be engaged in their own response efforts or already deployed through mutual aid agreements. It remains critical to work through the legal issues of providing federal law enforcement officers with the appropriate authority to support state and local efforts to maintain public safety and security in a post-disaster environment.

*B. The Stafford Act, EFLEA, and Attorney General Authorization*

The Stafford Act offers an important mechanism for federal agencies to be reimbursed for costs incurred when providing disaster assistance. However, providing federal law enforcement assistance to a state government is unlike providing food, water, or any other service or commodity.<sup>154</sup> If a state runs out of bottled water, the federal government can deliver more water and share part of the cost with little complication; but if a state's police force is overwhelmed

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<sup>153</sup> See WHITE HOUSE REPORT, *supra* note 2, at 17 (“<sup>153</sup> The operational teams that FEMA is responsible for administering . . . are State and local first responders from around the country that volunteer to be activated, deployed, and reimbursed by FEMA for their help during response activities. FEMA enforces standards, certifications, and qualifications for participation in such programs and provides funding for equipment and training.”).

<sup>154</sup> See OLC Memo, *supra* note 33, at 6 (observing that activities specified in the Stafford Act such as “debris removal,” “search and rescue,” “clearance of roads,” and “demolition of unsafe structures” are different in kind than the enforcement of state criminal laws).

by an incident, a federal force moving in to assume basic state law enforcement functions tears at the heart of state police power, raises issues of federalism, and even poses potential constitutional problems. EFLEA sets out a strict process to ensure federal law enforcement assistance is handled carefully and deliberately.

One way to address the legal issues surrounding the deployment of federal law enforcement officers could be to follow the EFLEA process in all cases and require an order from the Attorney General. Normally, when coordinating federal disaster assistance to states, FEMA issues mission assignments to other federal agencies pursuant to the Stafford Act. In the case of federal law enforcement assistance, however, at least in Hurricane Katrina, the Attorney General relied on EFLEA. As discussed earlier, the Attorney General approved requests for assistance under EFLEA from both Mississippi Governor Barbour and Louisiana Governor Blanco, and issued written orders detailing that federal law enforcement personnel deployed to assist the states would be operating under the supervision of the local U.S. Attorney.<sup>155</sup> The process likely prompted all of the parties involved to think through how federal personnel would be used and the related legal issues.

There were no such orders issued for Hurricanes Gustav or Ike, so perhaps the idea of using EFLEA should be revisited. However, EFLEA lacks a mechanism to provide reimbursement to federal agencies for the disaster assistance they provide. Although EFLEA was used well in Hurricane Katrina, and the Attorney General later reminded state officials of the associated procedures, there is still disagreement over whether federal law enforcement support should be approved and coordinated through EFLEA or as part of the overall federal response effort based on the Stafford Act.<sup>156</sup>

However, EFLEA and the Stafford Act are not necessarily mutually exclusive.<sup>157</sup> Federal law enforcement officers could deploy under the Stafford Act, using the associated funding from the

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<sup>155</sup> CRISIS RESPONSE, *supra* note 2, at 55.

<sup>156</sup> *Id.* at 57; *see also* COHN, *supra* note 8, at 322-24.

<sup>157</sup> *See* COHN, *supra* note 8, at 322 (recognizing the concurrent nature of the Stafford Act and EFLEA).

Disaster Relief Fund, and draw their legal authority from an authorization under EFLEA. The specific requirements in EFLEA could add additional guidance and structure to the Stafford Act process, which, as mentioned earlier, was not originally intended for law enforcement purposes.

Until Congress or the Attorney General settles on a preferred approach, however, DOJ and the federal law enforcement agencies providing support under ESF #13—and, of course, those requesting assistance—will have to be prepared to operate under either of the two legal frameworks.

### C. *Law Enforcement Takes More Than Guns and Badges*

Although DHS, FEMA, the FBI, and ATF all have important roles in emergency response, these agencies alone cannot maintain law and order in a disaster.<sup>158</sup> Providing public safety and security requires “more than deploying officers with guns and badges, assuming arrestees are to be charged, held, tried, convicted, and sentenced.”<sup>159</sup> U.S. Attorneys’ offices and the federal courts play critical roles in the criminal justice process and can help address issues of legal authority unique to their districts.<sup>160</sup> Assuming the federal government upholds the Constitution even in the most catastrophic incident, the criminal justice system requires facilities to house arrestees, prosecutors to screen cases, judges, public defenders, and even access to a grand jury.<sup>161</sup> Supporting these parts of the criminal justice system is not addressed by ESF #13, so it must be addressed through careful advance coordination and planning across agencies.<sup>162</sup>

In addition, since neither the Stafford Act nor EFLEA provides sufficient legal authority for federal law enforcement officers to make state arrests—and since the relevant state deputation

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<sup>158</sup> CRISIS RESPONSE, *supra* note 2, at 5.

<sup>159</sup> *Id.*

<sup>160</sup> *See id.* at 4-5, 11.

<sup>161</sup> *Id.* at 11.

<sup>162</sup> *See* WHITE HOUSE REPORT, *supra* note 2, at 57-58 (describing that pre-event planning and coordination would have improved the response to Katrina).



laws vary from state to state<sup>163</sup>—the U.S. Attorneys’ offices across the country could play a critical role in facilitating deputation processes and assisting with other legal aspects of an ESF #13 deployment in their districts. ESF #13 does not provide for legal advisors in each of the FEMA regions, but there are ninety-four U.S. Attorneys’ offices located throughout all fifty-four U.S. states and territories that could provide critical advice.

Following Hurricane Katrina, Congress took an important step in moving responsibilities for law enforcement functions in a disaster to DOJ, but there is still much work to be done in this area. Although ATF has made great strides in furthering the ESF #13 mission, DOJ overall needs to coordinate this safety and security piece with other law enforcement activities across the Department, including investigative activities of the FBI, the potential role of an SFLEO, and the prosecutory mission of the U.S. Attorneys’ offices, among other considerations. If DOJ does not have the necessary resources, Congress may need to step in to authorize and appropriate funding for a small, high-level law enforcement emergency management coordination office within the Office of the Deputy Attorney General that has a broader mission than ESF #13, that can coordinate across ATF, FBI, the U.S. Marshals Service, and the U.S. Attorneys’ offices in a steady state, and that can interface with the federal courts and other parts of the criminal justice system.<sup>164</sup>

#### IV. CONCLUSION

The federal law enforcement response to hurricanes shows room for improved coordination, and yet the federal response to an

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<sup>163</sup> OLC Memo, *supra* note 33, at 6-7.

<sup>164</sup> Some other federal departments have high-level offices that can coordinate emergency management and crisis response functions across the entire department—for example, the Department of Health and Human Services has an Assistant Secretary for Preparedness and Response, and the Department of Transportation has an Office of Intelligence, Security, and Emergency Response within the Office of the Secretary. See *Public Health Emergency*, U.S. DEP’T OF HEALTH AND HUMAN SERV., <http://www.phe.gov/about/pages/> (last visited Oct. 7, 2013); see also *Intelligence, Security, and Emergency Response*, U.S. DEP’T OF TRANSP., <http://www.dot.gov/mission/administrations/intelligence-security-emergency-response> (last visited Oct. 7, 2013).

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act of terrorism would be even more complicated. In the event of a terrorist attack or other man-made incident, there would not be simpler chains of command; if anything, the added dynamic of a national security incident, and the potential for a massive criminal investigation aimed at detecting, deterring, and defeating follow-on attacks, would bring in additional players and further complicate command and control. As history has shown us, when federal support is desperately needed, conflicts between federal agencies and confusion over legal authorities or processes can have disastrous human consequences.

This area of crisis management could potentially benefit from Congressional action to (1) clarify the roles between DOJ and DHS, and update legislation to clearly define respective legal authorities; (2) review whether federal law enforcement support to states should be processed through the Stafford Act or EFLEA, or a combination of both; (3) amend EFLEA to work within the Stafford Act, or add a new provision in the Stafford Act for federal law enforcement support; (4) consider appropriating funding for EFLEA; and/or (5) create a high-level emergency management office in the Department of Justice vested with the appropriate authority to meet the recommendations provided in the Hurricane Katrina after-action reports. The DOJ office also should have authority to interface with DHS on crisis response issues, coordinate federal law enforcement activities across agencies during a crisis, and perform the necessary planning, preparedness, training, and exercise activities between disasters. The challenges of law enforcement coordination during a disaster need to be resolved now, before another large crisis occurs and triggers a disorganized or ineffective federal response.

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ADDENDUM: HURRICANE SANDY AND RECENT ORGANIZATIONAL IMPROVEMENTS

DOJ and ATF have made great progress in recent years by adding new staff to work on the ESF #13 function, but the underlying legal complexities outlined in this paper remain.<sup>165</sup>

Hurricane Sandy, which hit the Northeast in late October 2012, was the second-largest Atlantic storm on record; however, no major ESF #13 problems surfaced, and by most accounts, the overall disaster response to the storm went well.<sup>166</sup> Success for ESF #13 was likely due to a number of factors, including the level of preparedness of the affected cities and states, but it was also because ATF was better prepared and better organized to execute the ESF #13 function.

The ESF #13 organization at ATF has matured in the years since Hurricanes Gustav and Ike, and now includes a national staff to work on planning, logistics, and the legal and administrative aspects of the program, as well as an advisory board to provide policy guidance.<sup>167</sup> An interagency steering committee comprised of roughly 85 departments and agencies now meets regularly to coordinate ESF #13 planning and provide input on procedures, operations, and best practices.<sup>168</sup> Also, there is now a designated “Regional Law Enforcement Coordinator” in each of the ten FEMA regions to lead the ESF #13 function and work on preparedness matters during a steady state; each of these regional coordinators is supported by a contractor who can assist with planning.<sup>169</sup> These

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<sup>165</sup> See generally *RISC Briefing*, *supra* note 76.

<sup>166</sup> See *Hurricane Sandy FEMA After-Action Report*, FED. EMERGENCY MGMT. AGENCY i, <http://www.fema.gov/media-library/assets/documents/33772> (last visited Nov. 23, 2013).

<sup>167</sup> *RISC Briefing*, *supra* note 76, at 5.

<sup>168</sup> *Emergency Support Function (ESF) #13 – FEMA Region III Fact Sheet*, FED. EMERGENCY MGMT. AGENCY [http://www.fema.gov/media-library-data/20130726-1903-25045-1174/esf\\_\\_13\\_fact\\_sheet.pdf](http://www.fema.gov/media-library-data/20130726-1903-25045-1174/esf__13_fact_sheet.pdf) (last visited Nov. 23, 2013).

<sup>169</sup> Five of the regional coordinators are ATF agents, and five are from other DOJ law enforcement agencies. *Id.* See also U.S. DEP’T OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, CONGRESSIONAL BUDGET SUBMISSION FOR FISCAL YEAR 2014 46-47 (2013), available at <http://www.justice.gov/jmd/2014justification/pdf/atf-justification.pdf>.

new personnel help give the ESF #13 management team more visibility into FEMA operations, providing a critical link to overall disaster response operations that was previously missing. The regional coordinators can also work during a steady state to identify the legal authorities and deputation issues for the states in their assigned region and put agreements and processes in place before disasters strike.<sup>170</sup> ATF has even identified that one of the key functions of its National Coordination Center during a disaster is to ensure state law enforcement authority is granted to federal officers deployed under an ESF #13 mission.<sup>171</sup>

The underlying legal issues identified in this paper continue to remain, however. EFLEA and the Stafford Act both still provide alternative sources of authority for the federal government to provide law enforcement assistance to disaster-stricken states, but through different processes; federal officers continue to need appropriate state authority to make arrests for state offenses; and effective law enforcement still takes more than deploying agents with guns and badges. In conclusion, while ATF has made great strides to improve ESF #13, there is still room for more robust coordination across DOJ and the rest of the criminal justice community for emergency management issues broader than ESF #13, and this remains an area that would benefit from congressional action.



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<sup>170</sup> *RISC Briefing, supra* note 76, at 15.

<sup>171</sup> *Id.* at 8.