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July 2, 2013

Where The Heck's My Dec?

Filed under: Congress and HLS, Disaster, Legal Issues — by Christopher Bellavita on July 2, 2013

Quin Lucie wrote today's post.

When the President recently denied a request by the State of Texas for a Major Disaster declaration, the Mayor of West, Texas indicated his displeasure:

"I'm pissed off. I don't know what they expect a disaster to look like," said Muska to KRLD. "But I can show them in my backyard what a disaster looks like. And it looks like a place you'd see in Iraq or Afghanistan."



The mayor does raise an interesting question: what exactly does a disaster look like? Why aren't there objective standards so we can actually know what one looks like?

The answer is there aren't any objective standards.

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Why?

By law, Congress forbids the President, or FEMA, from establishing objective criteria to judge disaster declarations.

When FEMA was created in 1979, one of its first orders of business was to address the process under which the President decided whether to grant a major disaster or emergency declaration.

No President has ever delegated his authority to declare a major disaster or emergency. This authority is one of three sections of [the Stafford Act](#) the President has not currently delegated to FEMA through the DHS Secretary. The FEMA Administrator can only *recommend* a declaration be granted.

The relevant statute at the time was the Disaster Relief Act (DRA) of 1974 which would be renamed the Stafford Act in 1988. Driving FEMA was a General Accounting Office (GAO) report released in late 1981 on the need for FEMA to improve its process to evaluate requests for disaster assistance.

It was only in 1980 that the President, through FEMA, began requiring States to pay a share of the costs under Federal disaster declarations, beginning with the eruption of Mt. Saint Helens.

In response to the GAO report and other issues, including Federal austerity measures, FEMA embarked to change its regulations and establish objective standards for declarations under the Disaster Relief Act of 1974. However, it appears this effort was kept internal to FEMA and did not include its state partners or Congress.

In the spring of 1986, FEMA issued draft regulations to provide objective standards for the President to evaluate disaster declaration requests. Congress, and the states, especially the most populous ones, were less than enthused.

That summer, a Congressional subcommittee, chaired by James Oberstar of Minnesota, lashed out at FEMA in bipartisan fury. Led by future DHS Secretary Tom Ridge, and with guest appearances by Newt Gingrich, Trent Lott and Leon Panetta, various witnesses bashed FEMA for not working with Congress or their state partners while developing these standards, and of course, bashed the standards themselves.

The criteria FEMA developed would have been based in part on the population of states, meaning larger states would see the biggest decrease in declared disasters, thus earning the particular attention of the delegation from California who stood to lose the most money.

If those proposed regulations had been in place between October 1980 and December, 1985, less than half of the 111 disasters would have been declared – 61 of 111 to be exact.

After the hearing, FEMA shelved the proposed regulations. Congress, not satisfied, saw legislation introduced to ban FEMA’s “sliding scale”.

The legislation was unable to make its way to the President that year, but it did not go away. In 1988, it joined a much larger legislative package that renamed the Disaster Relief Act of 1974 as the Stafford Act and made significant changes to the DRA.

One result was Section 320 of the Stafford Act: “Limitation on Use of Sliding Scale. No geographic area shall be precluded from receiving assistance under this Act solely by virtue of an arithmetic formula or sliding scale based on income or population.”

Whether intentional or not, after 1988 the number and percentage of disaster

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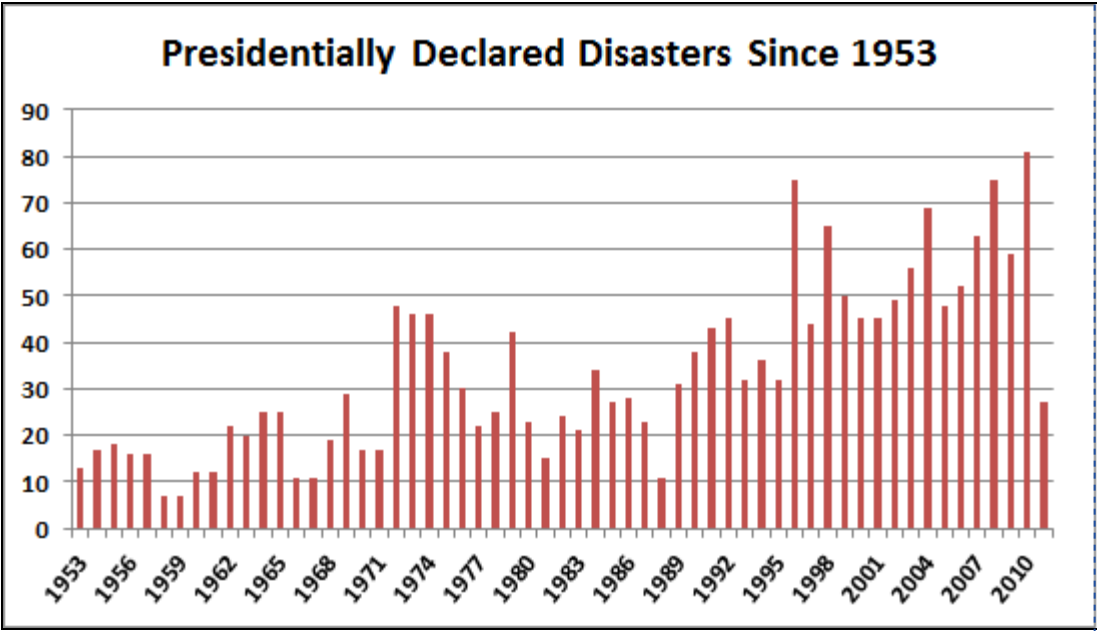
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declarations approved by the President skyrocketed.



So where does that leave us? Probably right where Congress likes it.

While FEMA has regulations that provide guidelines for declarations, they are not objective standards. [How else could you explain this?](#)

It also means Congress can avoid an even thornier issue: What level of responsibility do State governments have to pay for the losses of their citizens?

Texas currently [has \\$7 billion in its rainy day fund](#), more than enough to pay for the estimated \$100 million in estimated damages for the affected public entities. But should Texas be punished for having a financially prudent government?

What if instead of Texas, the West, Texas explosion had happened in my home State of Illinois, [which is a financial disaster in its own right](#)? Because of years of mismanagement, Illinois might not have the ability to pay for such a disaster.

Should the taxpayers of the other 49 States have to pay for the mess created by Illinois' own politicians?

What seems at first like an easy answer — just set an objective standard for disaster declarations so everyone knows where they stand — turns out to be extremely complicated.

Even who sets the standard would be a fight. Does Congress do it? Do they leave it to the President or FEMA? Throw in a dash of Federalism and States Rights and it's a public policy free-for-all.

Which in the end, is probably where Congress wants it, right square in the middle of our political processes, pulled in all directions.

Quin Lucie is an attorney with FEMA's Office of Chief Counsel Response Branch. His thesis recommending the Federal government shift to Unity of Command from Unit of Effort for its consequence management activities in a catastrophe is expected this summer from the Center for Homeland Defense and Security. As is usually the case, this post reflects the views of the author and does not necessarily reflect the views of FEMA, the Department of Homeland Security or the Federal

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COMMENT BY WILLIAM R. CUMMING

188647

July 2, 2013 @ 1:15 am

Thanks Quin! A great post and while wiling away some time in the Berkshires away from some of my records and unable to provide more detail. President Carter actually had the temerity to try for a 50-50 split in disaster outlays which ended in a statutory minimum of 75% federal contribution and with the 25% STATE share waivable by the President. A detailed study of waiver policy and circumstances has yet to be accomplished by anyone in or outside of government and the actual history of waivers.

What many fail to realize is that the Disaster Relief Act of 1974 [Public Law 93-288] wasnot totally replaced by the Robert T. Stafford Act [Public Law 100-707] but more complicated repealed in part, supplemented in part, and revised in part. Many sections of both statutes and later additions and substractions have never been supplemented by regulations, although if issued such regulations are subject to notice and comment rulemaking even though the implementation is largely through financial incentives in the form of grants to the STATES and grants are formally exempted otherwise from notice and comment rulemaking under the APA [Administrative Procedure Act]! Any regulation so issued is waivable by the President once adopted.

And the discretion of the President to declare is totally discretionary and see for example Kansas v. US [citation forgotten]!

Oddly perhaps in at least 3 instances with Congressional pressure funding from the DRF has occurred with no declaration ever issued.

So what is the importance of this mishmash of policy and statutory guidance and discretion.

The current system is long broken but few have the skills or competence to understand why. Many OMB Directors have been personnally involved in reviewing and approving or restricting specific damage survey reports and outlays from the DRF [Disaster Relief Fund].

Because of the restrictions of the deliberative process exception the disaster declaration packages have never been subject to FOIA and even GAO has been given access only on a restricted and sanitized basis.

The usual question of course is whether disaster relief politically administered? A silly question since all federal programs, functions, and activities are politically managed. It is just that disaster relief is the only Presidentially triggered grant program on a routine basis.

Citizens and residents of the USA have been denied adequate command and control and speed of response however for all events that may in fact be subject to a declaration. Why again?

TBC!

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COMMENT BY WILLIAM R. CUMMING

188652

July 2, 2013 @ 1:53 am

Let's do some history! The 1989 Exxon Valdez oil spill and the BP GOM disasters were never declared disasters. Perhaps some explanation can be accomplished by accessing my January 2009 letter to the Editor of the Natural Hazards Observer explaining the why no declaration of the first event above.

And fighting over the cost share and funding of disasters has long been subject to negotiation even while Rome burns. Hurricane Andrew is one of political significance to American history since the Florida Governor a Democrat and a federal Republican Administration in 1992 argued over cost share even while response was delayed. Oddly the abundance of aid in Andrew that showed up once the political significance of Florida was fully reflected on caused President George H.W. Bush to win Florida even while the delayed response helped defeat him nationally.

You can almost eliminate the many books written that argue that George H.W. Bush loss of Florida caused him to lose the national election because that fundamental flaw in the research behind the books is simply not accurate and reflects badly on a generation of researchers on disaster issues and policies.

Another fundamental flaw in the research on disasters is the notion that FEMA was created by Executive Order. It was not but instead by Reorganization Plan No. 3 of 1978 that was implemented in part by two key Executive Orders. EO 12148 bringing in the disaster relief programs, functions, and activities by delegation from the President by virtue of its issuance in July 1979!

Oddly there is still no official position on whether either the Reorganization Plan No. 3 of 1978 or O 12148 are still in effect even on a partial basis despite the enactment of the Homeland Security Act of 2002!

Well FEMA still cites both the Plan [which has the force and effect of a statute] and the EO in many of its submissions to Congress and writings.

And even the vaunted CRS seems not to understand the significance.

But as detailed in the Letter to the Editor referenced above FEMA is not the only player on disaster declarations. And in fact as there has never been a declaration of emergency or disaster for riot and civil disorder, although the LA Riots were declared for FIRE, DoJ, the Treasury Department, and OMB have a huge role in the disaster declaration process.

Perhaps more later perhaps not. Always remember no Director of FEMA while independent or General Counsel was so foolish to assign Bill Cumming full time to disaster programs, functions, or activities, but only when the proverbial S___T Hit the FAN to defend FEMA from either total or partial destruction by the forces of evil wherever they might exist. One example of course was the extensive and expensive effort to prepare for a core-melt nuclear power station accident at TMI in 1979 although that incident/event was never declared.

Oh! Did I mention that the George H.W. Bush Administration took the position that without statutory revision, the problems identified in Hurricane Andrew response could never be remedied. Of course no such revision has even occurred through the three administrations that followed.

AND DISCLOSURE: October 1st of this year I will have been retired 14 years from FEMA. In that time FEMA has invited me in or called me only once. The subject being a fastbreaking core melt accident at a nuclear power station. FEMA now with NRC has its off site nuclear power regulations under review for the first time in a comprehensive fashion in 32 years since first adoption. See FEMA docket 2012-0026!

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I told FEMA when asked by a now retired FEMA senior attorney that neither FEMA, NRC, or the STATES was prepared for a fast breaking accident and certainly there was no defined trigger on the FRERP although I long recommended a formal trigger at GENERAL ALERT and the regs as issued in 44 CFR and 10 CFR were silent on the fast breaker.

And Quin note! The on the record opinion of FEMA while independent was that the Stafford Act had NO repeat no application to a core melt accident. This was reflected in the President’s Report on a Catastrophic Nuclear Accident issued in I believe 1993 in response to a statutory mandate. And that position then reversed by issuance of an NRC document with FEMA concurrence numbered something like NUREG 1347 or NUREG 1437! Neither report or documents being signed off by me or anyone else that I know in the then independent FEMA OGC offices.

Well have fun all. Just remember the uncertainty of federal disaster relief remains a core policy drive on many other federal programs, functions, and activities and justifications for their existence and to pick just one out of the hat try the NFIP [National Flood Insurance Program] codified at 42 USC Sections 4001 and following.

And of course there are principles of statutory construction that apply such as Congress knows its own mind [which it does not]; statutes should be construed if possible not to conflict; and additional words purport additional meaning.

Oh and CRS has never done a report on the FRERP or REP! Nor really has GAO!

And the separate negotiation of the FEDERL-STATE agreements in each disaster slows down the response. I have suggested in my writings 100% federal share for declared disasters the first 90 days in order to avoid delays. This still leaves open when will if ever will the President declare a disaster! And for the next 180 days a 90-10 federal state sharing and after that total of 220 days a formal agreement on cost share for the formal recovery meaning those measures taken that will have a useful life of 3-5 years or more.

COMMENT BY WILLIAM R. CUMMING

188654

July 2, 2013 @ 2:03 am

And of course while it might well take years to prepare an OLC formal publically issued opinion on the interplay if any between the STAFFORD ACT and the Price-Anderson Act is long overdue.

Both the DHS GC and the NRC GC should be called to testify under oath before Congress on this issue and hopefully long before the USA’s version of FUKASHIM Dai Ichi occurs.

COMMENT BY WILLIAM R. CUMMING

188655

July 2, 2013 @ 2:07 am

And if asked I would state that FEMA has no authority to respond to riots and civil disorders under either the STAFFORD ACT or any other authority. DHS may have but no one knows because its role in such incidents/events has yet to be described in writing or provided by public analysis.

COMMENT BY WILLIAM R. CUMMING

188676

July 2, 2013 @ 9:03 am

The first Homeland Security Strategy [July 2002]; the Homeland Security Act of 2002

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Notices



[November 2002?]; and HSPD-5 all called for a merger of major response plans. The existing Federal Response Plan had been reissued in revision in 1999 and a copy of that document on the FAS/FEMA page.

Now of course we have FRAMEWORKS not plans. But I would argue that we have no idea whether any particular plan has a trigger point or whether it can be used absent a Presidential disaster declaration or emergency declaration! Why? Because no one cares that response is slowed down and people are injured or die and more property destroyed than necessary.

I always argued that the FEDERAL RESPONSE Plan could be utilized as an organizational plan even absent a declaration. Not sure now with the Stafford Act ending up as the primary authority for federal response planning but of course not the only plan witness the BP disaster.

Some rice bowls might get broken if the NSC and HSC straightened out this situation and reduced uncertainty. But it would require hard work. That seems to be absent as the federal government largely has moved into being primarily designed to respond rather than think through what can be thought through in advance.

And of course Congress largely lobotomized unless the lobbyists tell them to do something.

Again when the Senate goes Republican in 2014 hoping a new permanent committee on Homeland Security and Disaster poldisho

COMMENT BY [WILLIAM R. CUMMING](#)

188678

July 2, 2013 @ 9:17 am

CONTINUED: a new permanent Joint Committee on Homeland Security and Disasters!

ALWAYS REMEMBER THAT UNDER THE CURRENT COMMITTEE ARRANGEMENTS THE OVERSIGHT OF KEY STATUTES HOUSED IN DHS ARE NOT UNDER THE OVERSIGHT OF COMMITTEES LIKE THE PERMANENT COMMITTEE OF HOMELAND SECURITY IN THE HOUSE—EXAMPLE THE ROBERT T. STAFFORD ACT!

THIS MAKES NO SENSE!

COMMENT BY [WILLIAM R. CUMMING](#)

188683

July 2, 2013 @ 11:15 am

What you see is what you get, maybe?

OCC of FEMA has published a new comprehensive booklet incorporating the language of 42 USC Section 5101 and following replacing the earlier work horse the 2007 edition.

But the Stafford Act is long overdue for comprehensive revision. Some might like a statute that is divided into specific language concerning prevention, protection, preparedness, mitigation, response and recovery.

Others might like a version that breaks down the Act into financial assistance to States and their local governments, technical assistance to the same, the Preparedness

COMMENT BY [WILLIAM R. CUMMING](#)

188684

July 2, 2013 @ 11:23 am

CONTINUED: the disaster roles of other federal agencies and departments [OFAs] and whether when they have legal authority to conduct the action they must also exhaust all their appropriations under that authority before requiring a Mission Assignment from FEMA.

And certain miscellaneous language in Stafford Act should be reviewed for modification and/or repeal or updating. One such provision is the UnConstitutional Loyalty Oath provision in Stafford for all involed in administration and recipient of disaster funding or salaries or whatever that carries over from the old Civil Defense Act, [Public Law 920 of the 81st Congress] and long ago opined by DoJ as NOT Constitutional.

COMMENT BY [WILLIAM R. CUMMING](#)

188702

July 2, 2013 @ 3:00 pm

Did I mention that OMB for over 4 decades has had a faction that believes most disaster outlays reward States and their local governments for their own negligence perhaps even gross negligence? Jim Jordan and Susan Tanaka were two of that group! Both were FEMA budget examiners at OMB!

COMMENT BY [QUIN](#)

188703

July 2, 2013 @ 3:10 pm

Bill,

Thanks for all the comments! I'll certainly have some reading to do while I take the week off! It is interesting you bring up mission assignments. They have a prominent role in my thesis. As a preview, it is my view that is FEMA's regulations, not the Stafford Act or fiscal law, that prohibits FEMA from paying for work that could be performed by another Federal agency under their own authority. Mission assignments are a dramatically under resourced and misunderstood tool in FEMA and throughout the Federal government.

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