

# Managing an Administrative Emergency: Establishing FEMA as an Independent Agency

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## INTRODUCTION

On November 10, 2018, as Californian families mourned the loss of their loved ones and homes to forest fires, President Trump tweeted a threat to withhold federal payments that could help those families rebuild.<sup>1</sup> Firefighters and lawmakers alike came out against this partisan attack, but that did not stop President Trump from doubling down in January and tweeting that he had ordered the Federal Emergency Management Agency (“FEMA”) to “send no more money” to California until they got their act together.<sup>2</sup> Despite the President’s claim that California could have prevented these fires by simply raking the forest floor more diligently,<sup>3</sup> the

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<sup>1</sup> Amir Vera, *President Trump’s tweet on California wildfires angers firefighters, celebrities*, (Nov. 12, 2018), <https://www.cnn.com/2018/11/11/politics/california-wildfires-trump-tweets/index.html>.

<sup>2</sup> Kevin Liptak and Maeve Reston, *Trump revives threats to withhold FEMA funds from California fire recovery*, (Jan. 10, 2019), <https://www.cnn.com/2019/01/09/politics/trump-california-fire/index.html>.

<sup>3</sup> CNN analysts review President Trump’s comments, *Trump says US should rake like Finland to avoid fires*, (Nov. 17, 2018), <https://www.cnn.com/videos/politics/2018/11/17/trump-leaves-wildfires-fox-intv-sot-newday-vpx.cnn>).

increased magnitude of forest fires in California is more likely attributable to human-made climate change. Coordinating the nation's response to emergencies will grow more important as the impact of climate change intensifies. Unfortunately, FEMA's position within the Department of Homeland Security ("DHS") often places national security concerns above the agency's responsibilities related to natural disasters.

FEMA was not always under the authority of DHS. President Jimmy Carter created the agency in 1978 through executive order.<sup>4</sup> The new agency was responsible for the coordination of civil defense and response to biological, chemical, and nuclear attacks.<sup>5</sup> More importantly, FEMA was responsible for coordinating the federal disaster relief response for incidents such as floods, hurricanes, earthquakes, wildfires, and hazardous material accidents.<sup>6</sup> FEMA's natural-disaster-related mission occupied the majority of the agency's time, but national security concerns have drained resources from that mission since the inception of the agency.

FEMA grew out of a line of executive actions dating back to the Cold War that focused on civilian mobilization in case of an attack by the Soviet Union.<sup>7</sup> From this lineage, the U.S. prioritized preparation for natural disasters below national security objectives. President Carter attempted to strengthen the nation's emergency response capabilities by establishing FEMA, but the agency frequently came up short in responding to natural disasters.<sup>8</sup> However, these failures were overshadowed on September 11, 2001, when the United States was hit by the most lethal terrorist attack in

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<sup>4</sup> The fundamental principles for the reorganization were articulated in a message to Congress. Federal Emergency Management Agency, 14 Weekly Comp. Pres. Doc. 1129, (Jun. 26, 1978). [hereinafter *FEMA Reorganization Plan*].

<sup>5</sup> *Id.* at 1130.

<sup>6</sup> *Id.*

<sup>7</sup> See E.O. 10186, *Federal Register*, vol. 15, Dec. 5, 1950, p. 8557 (established The Federal Civil Defense Administration ("FCDA") in the Office of Emergency Management ("OEM"); Civil Defense Act of 1950, 64 Stat. 1245 (established FCDA as an independent agency); E.O. 10427 *Federal Register*, vol. 18, Jan. 20, 1953, p. 407 (FCDA is given responsibilities related to assisting federal, state, and local agencies in developing plans for disasters); Presidential Reorganization Plan No. 1 of 1958 (All emergency management authorities of the FCDA are transferred to the Office of Defense and Civilian Mobilization, which was later renamed the Office of Emergency Preparedness ("OEP")); Disaster Relief Act of 1969, 83 Stat. 125 (Federal government's disaster relief responsibilities are expanded and delegated to OEP); Reorganization Plan No 1 of 1973, E.O. 11725, *Federal Register*, vol. 38, June 29, 1973, p. 17175 (Abolished OEP and transferred functions to various departments); Reorganization Plan No. 3 of 1978 (merged emergency management functions of five agencies from various departments into one new independent agency, The Federal Emergency Management Agency).

<sup>8</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO/RCED-93-186, DISASTER MANAGEMENT: IMPROVING THE NATION'S RESPONSE TO CATASTROPHIC DISASTERS (1993).

its history.<sup>9</sup> In the wake of the tragedy, the country sought the appropriate way for the government to respond to disasters caused by terrorism.

In response, Congress passed The Homeland Security Act of 2002 which overhauled the way the United States seeks to protect its citizens. As part of this new approach to security, Congress decided to dissolve FEMA and place the former agency's responsibilities within the Emergency Preparedness and Response Directorate of DHS to unify all disaster response within one office.<sup>10</sup> This proved to be a costly underestimation of FEMA's importance. The deprioritization of FEMA in favor of national security initiatives left New Orleans woefully unprepared when Hurricane Katrina struck in 2005.<sup>11</sup> This failure led to the reestablishment of FEMA in 2007, but it still fell under DHS's authority.<sup>12</sup>

FEMA's reestablishment within DHS did not solve the struggles of the United States to respond appropriately to the recurring threat of natural disasters. Hurricane Ike and the subsequent flooding killed more than 100 people when it struck Texas in 2008.<sup>13</sup> Hurricane Sandy hit the eastern seaboard in 2012, causing billions of dollars in damage and dozens of deaths.<sup>14</sup> In 2017, the Atlantic Ocean endured "one of the most active seasons" for hurricanes in U.S. history.<sup>15</sup> One year later, on the other side of the country, California was choked by devastating wildfires that burned more than one million acres over the course of several months.<sup>16</sup> Congress needs to address FEMA's consistent failure to adequately prepare communities for the challenges of a more extreme climate.

The changes to the Earth's climate grow more apparent each year as the country is struck by increasingly devastating natural disasters. FEMA's position within DHS is a modern iteration of the conflation

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<sup>9</sup> William Robert Johnston, *Worst terrorist strikes in the United States*, JOHNSTON'S ARCHIVE (Aug. 17, 2019), <http://www.johnstonsarchive.net/terrorism/wrjp255us.html>.

<sup>10</sup> Homeland Security Act, 6 U.S.C. § 313 (2007).

<sup>11</sup> See TOM DAVIS ET AL., A FAILURE OF INITIATIVE: THE FINAL REPORT OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA 158 (2006). [hereinafter *Hurricane Katrina Congressional Report*].

<sup>12</sup> Post-Katrina Emergency Reform Act, 6 U.S.C. § 315 (2006).

<sup>13</sup> *Hurricane Ike: 5 Fast Facts You Need to Know*, HEAVY.COM (Aug. 25, 2017), <https://heavy.com/news/2017/08/hurricane-ike-last-texas-track-deaths-category-damage-cost/>.

<sup>14</sup> FED. EMERGENCY MGMT. AGENCY, HURRICANE SANDY FEMA AFTER-ACTION REPORT at iii (2013).

<sup>15</sup> FED. EMERGENCY MGMT. AGENCY, 2017 HURRICANE SEASON FEMA AFTER ACTION REPORT at v (2017).

<sup>16</sup> Dale Kasler, *Worst wildfire year since when? More California acres have burned in 2018 than the past decade*, Sacramento Bee, (Nov. 16, 2018), <https://www.sacbee.com/latest-news/article221788220.html>.

between national security and disaster response objectives that has made the United States unable to properly prepare for and respond to natural disasters. This conflation makes FEMA vulnerable to political manipulation and unable to secure sufficient funding. Accordingly, Congress should remove FEMA from DHS and reestablish it as an independent agency.

To understand how FEMA would function after being reestablished, it is necessary to begin with a discussion of the general structure of federal agencies. This Note then presents an overview of the history of FEMA and emergency outcomes of the agency. Flaws in FEMA's administrative structure are then shown to be contributing factors to inadequate emergency response outcomes. Finally, this Note proposes an administrative structure for an independent FEMA that will enable the agency to prepare the United States to overcome the natural disasters of the twenty-first century.

## I. BACKGROUND INFORMATION

The responsibility to prepare the United States for tragedies of all kinds makes FEMA essential to the economic and physical health of the American people. Architects of FEMA have consistently given the agency the dual roles of addressing natural disasters and contributing to the nation's national security. This construction can be justified by certain rationales, but in practice, national security concerns have consistently trumped natural disaster preparedness and response. The incompatibility of these two missions must be addressed if the United States wants to protect its people from the rising threat posed by natural disasters.

### A. *General Administrative Framework*

Agencies have their roots in New Deal Era regulatory commissions designed to bring fact-based decision making to the burgeoning administrative state.<sup>17</sup> All agencies are "subject to presidential direction in significant aspects of their functioning, and [are] able to resist presidential direction in others."<sup>18</sup> The traditional distinction between executive and independent agencies is based largely upon three coincident statutory arrangements that characterize independent agencies: (1) for-cause

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<sup>17</sup> Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (And Executive Agencies)*, 98 CORNELL L. REV. 769, 771 (2013).

<sup>18</sup> Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 583 (1984).

removal protection, (2) specified tenure, and (3) partisan balance requirements.<sup>19</sup> This binary has been challenged by scholars who note there is no single feature that every independent agency shares.<sup>20</sup> A continuum ranging from most to least insulated from presidential influence more accurately describes modern agency structure.<sup>21</sup> Agencies fall along this continuum based on the presence of seven indicia of independence: (1) for-cause removal protection, (2) specified tenure, (3) partisan balance requirements, (4) multimember structure, (5) litigation authority, (6) budget and congressional communication authority, and (7) adjudication authority.<sup>22</sup> This continuum approach provides a useful set of factors to evaluate the historical independence of FEMA and suggest the terms of its reorganization.

### *1. Indicia of Independence Related to Agency Stability*

The seven indicia of independence are justified by various rationales. The first four indicia of independence allow the agency to operate free from political interference by the executive branch.

For-cause removal protection typically means that an official can only be removed for “inefficiency, neglect of duty, or malfeasance in office.”<sup>23</sup> For-cause removal protections increase the political costs of any decision to remove the head of an agency.<sup>24</sup> If the President chooses to invoke a for-cause removal provision, he risks increased political attention and susceptibility to a judicial challenge.<sup>25</sup> For-cause removal protection has traditionally been the touchstone for determining whether an agency is referred to as independent.

Congress can designate a specified tenure for the head of an agency. Limiting appointed agency head’s authority to a specified tenure allows the Senate to periodically review the officer’s performance and imposes a political cost on the President if they seek to remove the officer before the end of a specified term.<sup>26</sup> Perhaps more importantly, longer terms can

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<sup>19</sup> See Datla & Revesz, *supra* note 17, at 771.

<sup>20</sup> See *id.* at 772.

<sup>21</sup> *Id.* at 773.

<sup>22</sup> *Id.* at 772.

<sup>23</sup> *Id.* at 787.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Ten-Year Term for FBI Director: Hearing on S. 2106 Before the Subcomm. on FBI Oversight of the S. Comm. on the Judiciary*, 93rd Cong. 24 (1974) (statement of John T. Elliff, Assistant Professor, Dep’t of Politics, Brandeis Univ.) (“The effect of the 10-year term is to create an expectation as to what should constitute a normal period of tenure for

transcend presidential administrations, which further insulates appointed officers from executive pressure.<sup>27</sup> Although an official is not guaranteed to serve the full term of tenure, agencies led by directors with a specified tenure are empowered to pursue long-term initiatives.

Structuring an agency with a multi-member board rather than a single director can foster more deliberative decision-making based on a robust well of institutional memory and ensure continuity of policies across administrations.<sup>28</sup> Partisan balance requirements ensure that differing viewpoints are expressed and limit politically-motivated decision-making within an agency.<sup>29</sup> These two indicia of independence are important for agencies that need to make delicate policy considerations; however, the decentralization of authority can hinder the effectiveness of an agency in times of crisis.

Understanding the rationales behind these four indicia of structural independence reveals that agencies which lie closer to the independent end of the agency spectrum are better equipped to address long-term problems facing the country. Admittedly, these agencies are subject to less political control. However, an emergency response apparatus for the twenty-first century should not direct its efforts based on political pressure. A stable, well-supported FEMA will produce better emergency response outcomes regardless of variations in the political and global climate.

## 2. *Indicia of Independence Related to Agency Authority*

Litigation authority is the first of three independence factors related to agency authority. The Department of Justice handles the litigation for most agencies.<sup>30</sup> Agencies that hold some degree of litigation authority gain increased independence from the executive, but decreased independence from Congress.<sup>31</sup> The branch that exercises more control over an agency's litigation approach can direct the substantive impacts of policies.<sup>32</sup> Congress does not explicitly articulate the rationale for granting an agency independent litigation authority, but the executive branch

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the FBI Director. There is a binding quality about any fixed time period.”). Datla & Revesz, *supra* note 17, at 791.

<sup>27</sup> Leah A. Hamlin, *Qualified Tenure: Presidential Removal of the FBI Director*, 44 OHIO N.U. L. REV. 55, 56 (2018).

<sup>28</sup> Datla & Revesz, *supra* note 17, at 794.

<sup>29</sup> Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 103 (2000).

<sup>30</sup> Datla & Revesz, *supra* note 17, at 799.

<sup>31</sup> *Id.* at 801.

<sup>32</sup> *Id.* at 802.

zealously guards the Department of Justice’s litigation authority.<sup>33</sup> This dispute indicates that litigation authority is a particularly important facet of agency independence in some instances.

Budget and Congressional communication authority is another important signal of agency independence. The link between budget control and agency policymaking is undeniable.<sup>34</sup> No agency is completely exempt from the Office of Management and Budget (“OMB”) statutory controls, but agencies that are more insulated from presidential control typically receive less of their desired funding.<sup>35</sup> Since the Nixon administration, Circular A-19<sup>36</sup> has required all executive departments, independent agencies, and government corporations to submit proposed legislative programs, reports, and testimony for OMB coordination and clearance along with incorporation of OMB’s comments.<sup>37</sup> Congress has superficially acquiesced to this practice, while still requiring others to submit any material given to the OMB concurrently to Congress.<sup>38</sup> Budget and congressional communication authority allows an agency to assert independence from the executive while limiting the risk of retribution.

Adjudication authority is the final characteristic of agency independence. Whether an agency proceeds through formal or informal adjudication impacts the potential for political influence over the agency’s policymaking.<sup>39</sup> Legislation and regulations governing the individual agencies can provide “additional controls or prohibitions on ex parte contacts.”<sup>40</sup> Proceeding through adjudication generally allows agencies greater flexibility to effectuate desired policies free from executive interference.<sup>41</sup> Increased authority of an agency over the adjudications it effectuates leads to increased agency autonomy from the executive branch.

The seven factors listed above provide a framework for evaluating what degree of independence an agency should possess. Historically, FEMA has not possessed any of these indicia of independence. The

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<sup>33</sup> *Id.* at 803.

<sup>34</sup> Morton Rosenberg, *Presidential Control of Agency Rulemaking: An Analysis of Constitutional Issues That May Be Raised by Executive Order* 12,291, 23 ARIZ. L. REV. 1199, 1219 (1981).

<sup>35</sup> Datla & Revesz, *supra* note 17, at 806.

<sup>36</sup> OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-19, REVISED LEGISLATIVE COORDINATION AND CLEARANCE § 4 (1979).

<sup>37</sup> Datla & Revesz, *supra* note 17, at 807.

<sup>38</sup> *Id.* at 807-08.

<sup>39</sup> *Id.* at 810.

<sup>40</sup> *Id.* at 811.

<sup>41</sup> *Id.* at 812.



second-class status of the agency is a contributing factor to the consistently poor administration of natural disaster preparedness and relief.

### *B. Administrative Structure of FEMA*

FEMA's development can be divided into three stages. Originally, the agency was nominally independent. Congress then briefly dissolved FEMA with the passage of the Homeland Security Act, which incorporated its constituent parts into DHS. After Hurricane Katrina devastated the Gulf Coast, Congress finally reconstituted FEMA as an agency, but kept the agency in DHS. Ultimately, none of these arrangements placed FEMA in a position to succeed. Removing FEMA from DHS and establishing it as a truly independent agency would finally enable the agency to prepare the United States to meet the challenge posed by natural disasters.

#### *1. Original Agency Structure*

On February 28, 1978 the National Governors Association adopted a policy position that called for "consolidation of federal emergency preparedness and disaster relief responsibilities into one office [to] make the management and operation of the federal effort more effective and efficient."<sup>42</sup> The paper outlining their position implored that the director of this new agency be charged with the additional responsibility of coordinating federal agencies that deal with emergency prevention, mitigation, preparedness, and disaster response activities in other federal agencies.<sup>43</sup> In response to this showing by the National Governors Association, President Carter issued Reorganization Plan No. 3 of 1978 ("Reorganization Plan").

The Reorganization Plan created FEMA as an "independent establishment in the Executive Branch."<sup>44</sup> Despite that language, FEMA featured none of the seven traits that allow agency independence from executive oversight. The agency was to be headed by a director, "who shall be appointed by the President, by and with the advice and consent of the Senate," rather than a multimember, bipartisan board with a specified tenure.<sup>45</sup> Rather than providing for-cause removal protections, President Carter specifically explained that the director of this new agency would

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<sup>42</sup> Henry B. Hogue & Keith Bea, *Federal Emergency Management and Homeland Security Organization: Historical Developments and Legislative Options*, CRS REPORT FOR CONGRESS 13 (June 1, 2006), <https://fas.org/sgp/crs/homesecc/RL33369.pdf>.

<sup>43</sup> *Id.*

<sup>44</sup> *FEMA Reorganization Plan*, *supra* note 4, at 1131.

<sup>45</sup> *Id.*

“report directly to the President.”<sup>46</sup> This reorganization of previously disparate federal programs was based on several fundamental principles; the first of which was the idea that direct supervision by the president would improve performance and avoid excessive costs.<sup>47</sup> Additionally, the Reorganization Plan declared that the primary task of FEMA would be “to coordinate and plan for the emergency deployment of resources that have other routine uses,” and therefore “[t]here is no need to develop a separate set of Federal skills and capabilities for those rare occasions when catastrophe occurs.”<sup>48</sup> By July 1979, President Carter had transferred functions to FEMA from the Department of Commerce (fire prevention and control and certain Emergency Broadcast System functions); the Department of Housing and Urban Development (flood insurance and federal disaster assistance); the Executive Office of the President (other Emergency Broadcast System functions); the Departments of Defense (civil defense); the General Services Administration (federal preparedness); and the Office of Science and Technology Policy (earthquake hazards reduction).<sup>49</sup>

This ambitious reorganization of the nation’s emergency response apparatus did not properly assess the importance of supporting the newly consolidated agency. Four years after the reorganization, the General Accounting Office (“GAO”)<sup>50</sup> found that the reorganization hampered management of FEMA programs and resources.<sup>51</sup> Although agency effectiveness improved throughout the 1980s, another GAO report issued in 1991 found that FEMA was “not prepared to take over the state’s role” when the state’s resources were overwhelmed, and that the agency had not placed appropriate emphasis on preparing for long-term recovery from natural disasters.<sup>52</sup> FEMA floundered as a superficially independent agency for another decade, until the Homeland Security Act led to another massive reorganization of the agency’s emergency response system.

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<sup>46</sup> *Id.* at 1129.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 1130.

<sup>49</sup> Hogue & Bea, *supra* note 42, at 14.

<sup>50</sup> Now known as the Government Accountability Office (“GAO”).

<sup>51</sup> U.S. GEN. ACCOUNTING OFFICE, GAO REPORT GGD-83-9, MANAGEMENT OF THE FEDERAL EMERGENCY MANAGEMENT AGENCY — A SYSTEM BEING DEVELOPED (1983), at i–v.

<sup>52</sup> U.S. GEN. ACCOUNTING OFFICE, GAO REPORT RCED-91-43, DISASTER ASSISTANCE: FEDERAL, STATE, AND LOCAL RESPONSES TO NATURAL DISASTERS NEED IMPROVEMENT (1991), at 66.

## 2. Agency Structure within DHS Prior to Hurricane Katrina

The Homeland Security Act of 2002 took bold steps to reorganize large parts of the federal government to protect the United States against terrorist attacks through the efforts of DHS.<sup>53</sup> The primary mission of the department is to “prevent terrorist attacks within the United States.”<sup>54</sup> The Homeland Security Act also provides that the DHS’s mission is to carry out all functions of the absorbed agencies, including “acting as a focal point regarding natural and manmade crises and emergency planning.”<sup>55</sup> However, the natural disaster directive has consistently been forced to the background in favor of DHS’s counterterrorism priorities.<sup>56</sup> FEMA’s independence within DHS was adjusted once in response to this concern,<sup>57</sup> however that change has proven inadequate to position FEMA to succeed in preparing the U.S. for increasingly severe natural disasters.

Beginning in 2003, the Homeland Security Act incorporated FEMA into DHS. The act placed responsibility for the nation’s emergency response in the hands of the Under Secretary for Emergency Preparedness and Response, who headed the new Directorate of Emergency Preparedness and Response.<sup>58</sup> This Under Secretary held no for-cause removal protections, or other indicia of independence.<sup>59</sup> One of the responsibilities of the new directorate was to consolidate “existing Federal Government emergency response plans into a single, coordinated national response plan.”<sup>60</sup> The response plans that emerged from this process followed what came to be known as the “all hazards” approach.<sup>61</sup> The “all hazards” approach does not properly account for substantial differences in the frequency of natural disasters compared to terrorist attacks, nor the different response capabilities that are required to respond properly to the two types of disaster.<sup>62</sup> The subordinate role of natural disaster preparedness in the new directorate proved costly when Hurricane Katrina struck the Gulf Coast in 2005.

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<sup>53</sup> See Homeland Security Act of 2002, Pub. L. No. 107-296 (codified in scattered titles of U.S.C.) [hereinafter Homeland Security Act].

<sup>54</sup> Homeland Security Act, 6 U.S.C. §111 (2012).

<sup>55</sup> *Id.*

<sup>56</sup> William C. Nicholson, *Seeking Consensus on Homeland Security Standards: Adopting the National Response Plan and the National Incident Management System*, 12 WIDENER L. REV. 491, 492–93 (2006).

<sup>57</sup> See *infra* Section I.B.3.

<sup>58</sup> Homeland Security Act, 6 U.S.C. §§311-312 (2000) (repealed 2006).

<sup>59</sup> *Id.*

<sup>60</sup> Homeland Security Act, 6 U.S.C. §312 (2000) (repealed 2006).

<sup>61</sup> Nicholson, *supra* note 56, at 495.

<sup>62</sup> See *infra* Section II.A.

The devastation of Hurricane Katrina compelled Congress to launch the House Select Bipartisan Committee on Katrina to investigate the circumstances that led to the unsuccessful emergency response by the federal government.<sup>63</sup> The committee found that long-standing weaknesses in FEMA's organizational structure and resource logistics contributed to the magnitude of damage caused by Hurricane Katrina.<sup>64</sup> The emergency management community forecasted these weaknesses and complained "that FEMA was being systematically dismantled, stripped of authority and resources, and suffering from low morale, in part because of the Department's focus on terrorism."<sup>65</sup> This issue is visible in the requirement that FEMA only use grants on equipment that could be used for both natural disasters and terrorist attacks.<sup>66</sup> After repeated complaints, DHS attempted to increase funding flexibility, but that attempt came with guidance that stated "[f]unding remains primarily focused on enhancing capabilities to prevent, protect against, respond to, or recover from [chemical, biological, radiological, nuclear and conventional explosives], agriculture, and cyber terrorism incidents."<sup>67</sup> The flaws in the funding apparatus led the emergency management community to issue repeated warnings that the de-emphasis of hazards other than terrorism weakened FEMA's ability to respond to major natural disasters.<sup>68</sup> These warnings went unheeded.

FEMA director Michael Brown was one of the chief critics of shifting agency responsibilities and the de-emphasis of its mission.<sup>69</sup> Brown identified "budget cuts and organizational changes he believed were harming FEMA's ability to perform its statutory responsibility" in a memo to DHS Secretary Chertoff in 2005.<sup>70</sup> Brown highlighted the 14.8 percent permanent reduction in FEMA's operational budget baseline since joining DHS in 2003, plus an additional reduction in their budget totaling \$170 million over the previous two fiscal years.<sup>71</sup> DHS officials argued that this was not a budget cut, but merely a transfer of FEMA functions to other arms of DHS.<sup>72</sup> The catastrophe caused by Hurricane Katrina highlighted the failures of these newly empowered subdivisions of DHS to administer

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<sup>63</sup> See generally *Hurricane Katrina Congressional Report*, *supra* note 11.

<sup>64</sup> *Id.* at 5.

<sup>65</sup> *Id.* at 151.

<sup>66</sup> *Id.* at 153.

<sup>67</sup> DEP'T OF HOMELAND SEC., FY 2006 HOMELAND SECURITY GRANT PROGRAM: PROGRAM GUIDANCE AND APPLICATION KIT 69 (2005).

<sup>68</sup> *Hurricane Katrina Congressional Report*, *supra* note 11, at 154.

<sup>69</sup> *Id.* at 154-55.

<sup>70</sup> *Id.* at 155.

<sup>71</sup> *Id.* at 155-56.

<sup>72</sup> *Id.* at 156.

effective disaster response and the irrationality of shifting FEMA's budget to those entities.

Even when crediting the DHS position that some emergency responsibilities are covered by institutions outside FEMA, FEMA was still charged with coordinating the response effort.<sup>73</sup> With only 2,500 employees left in the agency, this task proved impossible.<sup>74</sup> Reduced staffing forced FEMA to enlist the help of the Forest Service and local firefighters, but even that proved to be inadequate.<sup>75</sup> In addition to reduced staff numbers, the merger of FEMA with DHS caused a well-documented "brain drain" of experienced agency personnel who felt relegated to second-tier status.<sup>76</sup> The funding crunch also reduced the quality and training of FEMA's national emergency response teams.<sup>77</sup> FEMA's top disaster response operators warned FEMA director Brown that "national emergency response teams were unprepared because no funding was available for training exercises or equipment," but the cry for help was ignored.<sup>78</sup> The various reasons behind FEMA's personnel failures in the face of Hurricane Katrina all trace back to FEMA's parent agency's primary focus on terrorism rather than natural disaster mitigation and response.

### 3. *Agency Structure after the Post-Katrina Emergency Reform Act (2006)*

The House Committee Report, along with widespread criticism of FEMA following Hurricane Katrina, compelled Congress to attempt to fix the problem. The Post-Katrina Emergency Reform Act of 2006 significantly revised the emergency response provisions of the Homeland Security Act while keeping FEMA within DHS.<sup>79</sup> The 2006 law added provisions to FEMA's mission, including:

- (1) leading the nation's efforts to prepare for, respond to, recover from, and mitigate the risks of, any natural and man-made disaster, including catastrophic incidents;
- (2) implementing a risk-based, all hazards plus strategy for

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<sup>73</sup> Homeland Security Act, 6 U.S.C. §317 (2000) (repealed 2006).

<sup>74</sup> *Hurricane Katrina Congressional Report*, *supra* note 11, at 157.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 158.

<sup>78</sup> *Id.*

<sup>79</sup> CONGRESSIONAL RESEARCH SERVICE, SUMMARY OF POST-KATRINA EMERGENCY REFORM ACT OF 2006, <https://www.congress.gov/bill/109th-congress/senate-bill/3721> (last visited April 4, 2019) [hereinafter CRS SUMMARY OF POST-KATRINA EMERGENCY REFORM ACT].

preparedness; and (3) promoting and planning for the protection, security, resiliency, and post-disaster restoration of critical infrastructure and key resources, including cyber and communications assets.<sup>80</sup>

These additions to the mission statement attempted to address many of the issues raised by the Committee Report, while still maintaining the “all hazards” approach.

The act also sought to address the lasting concern that DHS’s primary focus on counterterrorism impaired FEMA’s natural disaster response efforts. FEMA is now statutorily required to “be maintained as a distinct entity within [DHS].”<sup>81</sup> Additionally, the DHS Secretary “may not substantially or significantly reduce the authorities, responsibilities, or functions of the Agency . . . except as otherwise specifically provided in an Act.”<sup>82</sup> Most importantly,

No [FEMA] asset, function, or mission of the Agency may be diverted to the principal and continuing use of any other organization, unit, or entity of the Department, except for details or assignments that do not reduce the capability of the Agency to perform its missions.<sup>83</sup>

This provision theoretically prevents the executive branch from diverting funds from FEMA to other agencies.

The Post-Katrina Act also made a series of structural changes to the administration of the agency and distribution of relief for disasters and catastrophic damage determinations.<sup>84</sup> These changes had good intentions but failed to sufficiently improve FEMA’s natural disaster response. They also failed to shield the agency from political interference rooted in national security arguments. The nation is currently watching the inadequacy of this provision play out as the Trump administration continues to divert assets appropriated to FEMA by Congress in order to pay for the administration’s anti-immigrant agenda.<sup>85</sup>

FEMA’s internal and external structure has changed substantially since the agency’s inception. Over time, national security concerns grew to completely overshadow FEMA’s responsibilities regarding natural

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<sup>80</sup> *Id.*

<sup>81</sup> Post-Katrina Emergency Reform Act, 6 U.S.C. §316 (2012).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> CRS SUMMARY OF POST-KATRINA EMERGENCY REFORM ACT, *supra* note 79.

<sup>85</sup> Ron Nixon, *\$10 Million From FEMA Diverted to Pay for Immigration Detention Centers, Document Shows* (Sept. 12, 2018), <https://www.nytimes.com/2018/09/12/us/politics/fema-ice-immigration-detention.html>.

disasters. The subjugation of natural disaster preparedness and response in favor of national security objectives makes it impossible for the agency to meet the rising challenge posed by climate change.

### *C. Evaluating Emergency Response Outcomes for FEMA*

After all the structural changes to FEMA throughout the preceding forty-four years, the Obama administration released the National Preparedness Goal in 2011, and then a revised version in 2015.<sup>86</sup> This document was intended to guide current and future budget decisions to ensure that the various components of the U.S. government's disaster response apparatus allocate resources efficiently.<sup>87</sup> The National Preparedness Goal is based on five mission areas: prevention, protection, mitigation, response, and recovery.<sup>88</sup> These missions are achieved through the use of thirty-one "core capabilities," three of which span all five mission areas.<sup>89</sup> The Obama administration adopted this approach based on a comprehensive assessment of federal emergency management response in the past. These core capabilities provide a solid foundation for FEMA, but the agency needs to adapt implementation to changing world conditions, including climate change.<sup>90</sup> Climate change is causing "[r]ising sea levels, increasingly powerful storms, and heavier downpours [which] are already contributing to an increased risk of flooding," as well as an increased frequency and severity of droughts and wildfires.<sup>91</sup> The increasing threat of natural disasters, specifically hurricanes and floods,

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<sup>86</sup> FEDERAL EMERGENCY MANAGEMENT AGENCY, NATIONAL PREPAREDNESS GOAL, SECOND EDITION (Sept. 2015), [https://www.fema.gov/media-library-data/1443799615171-2aae90be55041740f97e8532fc680d40/National\\_Preparedness\\_Goal\\_2nd\\_Edition.pdf](https://www.fema.gov/media-library-data/1443799615171-2aae90be55041740f97e8532fc680d40/National_Preparedness_Goal_2nd_Edition.pdf).

<sup>87</sup> *Id.* at 21.

<sup>88</sup> *Id.* at 3.

<sup>89</sup> *Id.* at 4. The "core capabilities" are: planning; public information and warning; operational coordination; intelligence and information sharing; interdiction and disruption; screening, search, and detection; forensics and attribution; cybersecurity; physical protective measures; risk management for protection programs and activities; supply chain integrity and security; community resilience; long-term vulnerability reduction; risk and disaster resilience assessment; threats and hazards identification; infrastructure systems; critical transportation; environmental response/health and safety; fatality management services; fire management and suppression; logistics and supply chain management; mass care services; mass search and rescue operations; on-scene security, protection, and law enforcement; operational communications; public health, healthcare, and emergency medical services; situational assessment; economic recovery; health and social services; housing; natural and cultural resources.

<sup>90</sup> *Id.* at 3–5.

<sup>91</sup> *Id.* at 5.

demands substantial change to the deployment and coordination of federal emergency management responses.

FEMA’s authorizing statute allows the agency to respond to disasters, but it limits federal disaster relief money to rebuilding infrastructure as it was before the storm.<sup>92</sup> This is a critical flaw in the administration of disaster relief that Congress should address through legislation. A modern disaster relief act should incentivize the rebuilding of damaged areas to a standard based on modern principles of sustainable infrastructure and resilience.

### *1. Emergency Response Outcomes as an Independent Agency*

One of the first major storms to highlight the inadequacy of the United States’ preparedness for natural disasters was Hurricane Andrew in 1992. In total, the storm generated “an economic loss of about \$30 billion,” and compromised at least 75,000 homes and 8,000 businesses, leading to an increase of the homeless population by more than 160,000 people.<sup>93</sup> The GAO after disaster report found that “the Federal Response Plan is inadequate for dealing with catastrophic disasters,” and the coordination of federal response with officials in South Florida “suffered from miscommunication and confusion of roles and responsibilities.”<sup>94</sup> The report ultimately concluded that “the nation’s disaster response strategy—particularly for devastating, catastrophic disasters—needs substantial, across-the-board improvement.”<sup>95</sup> Unfortunately, major changes were not made until the Homeland Security Act created even more confusion regarding agency roles and responsibility.<sup>96</sup>

### *2. Emergency Response Outcomes under the Bush and Obama Administrations*

Hurricane Katrina made landfall near the southeast corner of Louisiana on August 29, 2005.<sup>97</sup> The storm affected the entire Gulf Coast region, with Alabama, Mississippi, and Louisiana enduring the most damage.<sup>98</sup> The National Weather Center predicted that the storm would

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<sup>92</sup> Alexia Fernandez Campbell & Umair Irfan, *Puerto Rico’s deal with Whitefish was shady as hell, new records show*, VOX (Nov. 15, 2017), <https://www.vox.com/policy-and-politics/2017/11/15/16648924/puerto-rico-whitefish-contract-congress-investigation>.

<sup>93</sup> U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 8, at 4–5.

<sup>94</sup> *Id.* at 5.

<sup>95</sup> *Id.* at 11.

<sup>96</sup> *Hurricane Katrina Congressional Report*, *supra* note 11, at 30.

<sup>97</sup> *Id.* at 71.

<sup>98</sup> *Id.*



cause “human suffering incredible by modern standards.”<sup>99</sup> Hurricane Katrina made landfall at strong Category 3 status, despite warnings that it could be Category 4.<sup>100</sup> Nevertheless, the predictions of catastrophe came true when several sections of the levee system broke.<sup>101</sup> These levees allow roughly half of one of the region’s largest cities to sit below sea-level.<sup>102</sup> At the peak of the flooding caused by the levee breach, roughly eighty percent of the city was under water.<sup>103</sup> This left many people stranded on top of their homes and caused many of the 1,100 hurricane-related deaths in Louisiana.<sup>104</sup>

The U.S. Army Corps of Engineers originally constructed the levees, but the operation and maintenance responsibilities were split among local organizations in accordance with standard practice for flood control projects nationwide.<sup>105</sup> This diluted responsibility structure is one of the factors that led the Select Bipartisan Committee on Katrina to conclude that the magnitude of devastation caused by the hurricane resulted from “inadequate preparation and response,” which the committee ascribed to “organizational and societal failures of initiative.”<sup>106</sup> The committee identified “an under-trained and under-staffed Federal Emergency Management Agency” as one of the causes of that failure.<sup>107</sup> Other aspects of the inadequate preparedness included incomplete emergency shelter, incomplete housing plans, and a poorly run system for acquiring and deploying urgently needed supplies.<sup>108</sup> Despite the numerous flaws in FEMA’s response to Hurricane Katrina, the experience provides valuable lessons for the agency moving forward. Attention to detail, sufficient funding, and institutional stability would produce operations management teams capable of handling immense challenges.

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<sup>99</sup> NWS New Orleans/Baton Rouge Sun Aug 28 2005 4:13 PM CDT Inland Hurricane Warning, NAT’L WEATHER SERV., (Aug. 28, 2005, 10:11AM), [https://www.weather.gov/lix/NPW\\_28\\_1613](https://www.weather.gov/lix/NPW_28_1613).

<sup>100</sup> *Hurricane Katrina Congressional Report*, *supra* note 11, at 12.

<sup>101</sup> *Id.* at 73.

<sup>102</sup> Richard Campanella, *Above-Sea-Level New Orleans The Residential Capacity of Orleans Parish’s Higher Ground*, Center for Bioenvironmental Research at Tulane and Xavier Universities (April 2017), [http://richcampanella.com/assets/pdf/study\\_Campanella%20analysis%20on%20Above-Sea-Level%20New%20Orleans.pdf](http://richcampanella.com/assets/pdf/study_Campanella%20analysis%20on%20Above-Sea-Level%20New%20Orleans.pdf).

<sup>103</sup> *Hurricane Katrina Congressional Report*, *supra* note 11, at 73.

<sup>104</sup> *Id.* at 74.

<sup>105</sup> *Id.* at 87.

<sup>106</sup> *Id.* at 359.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

The devastation caused by Hurricane Katrina prompted more congressional action than a mere bipartisan committee. It led to the passage of the Post-Katrina Emergency Reform Act.<sup>109</sup> The increased attention to natural disasters in the following years helped contribute to more effective administration of disaster relief between the federal government and states. When Hurricane Ike approached the coast of Texas, Governor Rick Perry issued a Disaster Declaration and concurrently requested a Presidential Disaster Declaration five days before landfall.<sup>110</sup> That preemptive action allowed the President to issue a Presidential Disaster Declaration on the same day the storm made landfall.<sup>111</sup> Nevertheless, Hurricane Ike, only at Category 2 status at landfall,<sup>112</sup> caused at least eighty-two direct or indirect deaths in Texas.<sup>113</sup> Hurricane Ike also resulted in flooding and damage to cities like Galveston and Houston, but sea walls and well-heeded evacuations helped mitigate the damage.<sup>114</sup> Hurricane Ike demonstrated that a coordinated, well-prepared response to a hurricane is effective. However, one should not construe this as an end to emergency preparedness and response issues considering this storm was less intense than Katrina<sup>115</sup> and struck an area already accustomed to seasonal storms rolling up from the Gulf of Mexico.

In October of 2012, Hurricane Sandy affected the entirety of the East Coast and states as far inland as Ohio.<sup>116</sup> The storm killed at least 162 people, destroyed hundreds of thousands of homes, and left more than 8.5 million people without power.<sup>117</sup> The unusual trajectory of the storm gave it an extremely broad impact area, which created the opportunity for such significant damage despite striking the East Coast as only<sup>118</sup> a post-tropical cyclone.<sup>119</sup> Despite FEMA's best efforts to prepare for and respond to the storm, "challenges in how the agency coordinates with

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<sup>109</sup> See *infra* Section I.B.3.

<sup>110</sup> Tracy Hughes, *The Evolution of Federal Emergency Response Since Hurricane Andrew*, FIRE ENG'G. (Feb. 1, 2012), <https://www.fireengineering.com/articles/print/volume-165/issue-2/features/the-evolution-of-federal-emergency-response-since-hurricane-andrew.html>.

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

<sup>112</sup> Robbie Berg, *Tropical Cyclone Report Hurricane Ike 1*, NAT'L. HURRICANE CTR., [https://www.nhc.noaa.gov/data/tcr/AL092008\\_Ike.pdf](https://www.nhc.noaa.gov/data/tcr/AL092008_Ike.pdf) (updated Mar. 18, 2014).

<sup>113</sup> *Id.* at 9.

<sup>114</sup> *Id.* at 10.

<sup>115</sup> *Id.* at 1.

<sup>116</sup> HURRICANE SANDY FEMA AFTER-ACTION REPORT, *supra* note 14, at 4.

<sup>117</sup> *Id.* at iii.

<sup>118</sup> The wind speed of a tropical cyclone is lower than that of a Category 1 Hurricane on the commonly used Saffir-Simpson Hurricane Wind Scale.

<sup>119</sup> HURRICANE SANDY FEMA AFTER-ACTION REPORT, *supra* note 14, at 4.

Federal partners, supports state and local officials and disaster survivors, ... and prepares and deploys its workforce” continued to plague the agency.<sup>120</sup>

Another area of improvement that the FEMA After Action Report<sup>121</sup> identified was coordination and communication with senior federal leadership in response and recovery operations.<sup>122</sup> Although the Obama administration was well intentioned in the efforts of senior leaders “to anticipate and address the needs of state, local, and tribal partners,” these actors did not always properly communicate with FEMA leading to inadequate cooperation.<sup>123</sup> These actions undermine existing systems of response and recovery, adding to the stress on FEMA when clarity is needed most. The lack of formal mechanisms for communication and coordination between senior federal leaders and operation centers is an annoyance when a natural disaster directly impacts federal leaders in Washington, D.C. The inadequate framework becomes a crisis when an emergency primarily impacts people outside of the Beltway.

### *3. Emergency Response Outcomes under the Trump Administration*

Although Hurricanes Ike and Sandy caused immense loss of property and life, the changes made through the Post-Katrina Emergency Reform Act seemed to improve the coordination between local actors and federal authorities. Alternatively, this improvement in coordination could be attributed to lessons genuinely learned by the Bush administration from the tragic mishandling of Hurricane Katrina. Intense media scrutiny, active executive involvement, and relatively calm storm patterns during the Obama administration explain the lack of an administrative crisis in responding to the massive scope of Hurricane Sandy. Unfortunately, when President Trump replaced President Obama in 2017, the Atlantic seaboard faced a record-breaking hurricane season that brought destruction unseen since Hurricane Katrina.

In 2017, three Category 4 hurricanes struck the United States.<sup>124</sup> Hurricanes Harvey, Irma, and Maria struck Texas, Florida, and Puerto

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<sup>120</sup> *Id.* at iii.

<sup>121</sup> FEMA After Action Reports are typically published following major disasters. The agency provides a self-assessment of performance and areas for improvement based on their response. *See generally id.*

<sup>122</sup> *Id.* at 10.

<sup>123</sup> *Id.*

<sup>124</sup> Chris Dolce, *Three Category 4 Hurricanes Have Made a U.S. Landfall in 2017*, THE WEATHER CHANNEL (Sept. 20, 2017, 12:30 PM), <https://weather.com/storms/hurricane/news/hurricane-maria-irma-harvey-three-united-states-category-4-landfalls>.

Rico, respectively.<sup>125</sup> This was the first time that two storms of such magnitude made landfall in the United States in the 166-year weather record.<sup>126</sup> These storms, plus another five hurricanes during the season, made 2017 one of the top ten all-time most active seasons in the Atlantic.<sup>127</sup> Category 4 storms themselves are rare in the Atlantic, with only twenty-seven documented since 1851.<sup>128</sup> The unprecedented strength of this trio tested FEMA's effectiveness in different ways with each storm.

On August 25, 2017, Hurricane Harvey made landfall in Rockport, Texas as the strongest storm to hit the United States in over a decade with winds of 130 miles per hour.<sup>129</sup> The storm carried a record breaking twenty-seven trillion gallons of rain as it lingered over Texas and Louisiana for almost a week.<sup>130</sup> The National Hurricane Center estimated that Hurricane Harvey caused approximately \$125 billion in damages, tying Hurricane Katrina in sheer monetary devastation.<sup>131</sup> Although the property damage was costly, challenges related to human health and safety exacted an even greater toll on communities.

Hurricane Harvey will likely cause long-lasting effects on the lives of people who endured the storm.<sup>132</sup> Flooding puts stress on water sanitation systems, leads to contamination from hazardous waste sites, and crowds people together in shelters.<sup>133</sup> These conditions can facilitate the

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

<sup>126</sup> Chris Dolce, *Hurricanes Irma and Harvey Mark the First Time Two Atlantic Category 4 U.S. Landfalls Have Occurred in the Same Year*, THE WEATHER CHANNEL (Sept. 10, 2017, 11:00 AM), <https://weather.com/storms/hurricane/news/hurricane-irma-harvey-landfall-category-4-united-states-history>.

<sup>127</sup> Johnathan Erdman, *2017 Atlantic Hurricane Season Among Top 10 Most Active in History*, THE WEATHER CHANNEL (Oct. 02, 2017, 5:00 AM), <https://weather.com/storms/hurricane/news/2017-atlantic-hurricane-season-one-of-busiest-september>.

<sup>128</sup> Dolce, *supra* note 124.

<sup>129</sup> David Inserra et al., *After the Storms: Lessons from Hurricane Response and Recovery in 2017*, THE HERITAGE FOUND. (April 16, 2018), <https://www.heritage.org/homeland-security/report/after-the-storms-lessons-hurricane-response-and-recovery-2017>.

<sup>130</sup> *Id.*

<sup>131</sup> National Hurricane Center, *Costliest U.S. Tropical Cyclones Tables*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., <https://www.nhc.noaa.gov/news/UpdatedCostliest.pdf> (updated Jan. 26, 2018).

<sup>132</sup> Aaron E. Carrol & Austin Frakt, *The Long-Term Health Consequences of Hurricane Harvey*, THE NEW YORK TIMES (Aug. 31, 2017), <https://www.nytimes.com/2017/08/31/upshot/the-long-term-health-consequences-of-hurricane-harvey.html>.

<sup>133</sup> *Id.*

spread of communicable respiratory and gastrointestinal disease.<sup>134</sup> Other studies have found that diabetes-related complications increase in storm and flood conditions as well.<sup>135</sup> The complications that give rise to both these correlations illustrate the wider phenomenon that health care access and effectiveness declines as a result of natural disasters like floods and hurricanes. One example of this broad-based stress is the forty-seven percent increase in mortality rate observed in New Orleans for the first half of the year following Hurricane Katrina.<sup>136</sup> The effects of flooding linger in the lives of disaster victims long after the news cameras leave town. Once people affected by natural disasters fall out of the news cycle, ever-present national security concerns reemerge to consume the funding needed to help communities rebuild.

While the country was still reeling from Hurricane Harvey, Hurricane Irma passed through the Caribbean islands, including Puerto Rico, at Category 5 strength around September 6, 2017.<sup>137</sup> The intensity of Hurricane Irma helped encourage people to heed government warnings, leading to the evacuation of about 7 million people from the southeast United States.<sup>138</sup> When the hurricane made landfall in Southern Florida on September 10, Jacksonville and the Florida Keys endured record flooding.<sup>139</sup> The FEMA After Action Report estimated \$50 billion in damage from Hurricane Irma,<sup>140</sup> but other estimates range as high \$100 billion.<sup>141</sup> The storm resulted in the deaths of at least seventy-five people in Florida, and the displacement of more than five hundred thousand people from their homes.<sup>142</sup> Hurricane Irma's impact on Puerto Rico is more difficult to measure because a greater threat to the island followed close behind.

Hurricane Maria made landfall in Puerto Rico on September 20, 2017, roughly two weeks after Hurricane Irma.<sup>143</sup> Maria, the tenth most

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> Inserra et al., *supra* note 129, at 4.

<sup>138</sup> *Id.*

<sup>139</sup> Staci Spanos, *The Flood and Fury of Hurricane Irma*, NEWS 4 JAX (Aug. 29, 2018), <https://www.news4jax.com/weather/hurricane-irma/the-flood-and-fury-of-hurricane-irma>.

<sup>140</sup> 2017 HURRICANE SEASON FEMA AFTER ACTION REPORT, *supra* note 15, at 1.

<sup>141</sup> *AccuWeather predicts economic cost of Harvey, Irma to be \$290 billion*, ACCUWEATHER (Sept. 11, 2017), <https://www.accuweather.com/en/weather-news/accuweather-predicts-economic-cost-of-harvey-irma-to-be-290-billion/70002686>.

<sup>142</sup> Inserra et al., *supra* note 129, at 4.

<sup>143</sup> Brian Resnick & Eliza Barclay, *What Every American Needs to Know About Puerto Rico's Hurricane Disaster*, VOX (Oct. 16, 2017), <https://www.vox.com/science->

powerful hurricane on record, struck an island that was still attempting to restore power to as many as 60,000 people who were disconnected from the grid by the last storm.<sup>144</sup> President Trump visited the island about two weeks after the Hurricane, at a time when the official death toll was only sixteen people.<sup>145</sup> This number became the subject of controversy shortly after President Trump departed, when the governor announced that the death toll rose to thirty-four.<sup>146</sup>

In the following months, estimates by funeral homes, *The New York Times*, and a team published in *The New England Journal of Medicine* forecasted that the actual number of people that died directly or indirectly because of the storm ranged into the thousands.<sup>147</sup> Then on August 8, 2018, the Puerto Rican government stated in a report to Congress that 1,427 more deaths than “normal” occurred in the four months after the storm.<sup>148</sup> A report commissioned by the government and conducted by George Washington University, in conjunction with the University of Puerto Rico, was published on August 27, 2018.<sup>149</sup> This report asserted that the “total excess mortality” from September 2017 through February 2018 ranged from 2,658 to 3,290 people.<sup>150</sup> The number of lives lost due to Hurricane Maria exceeds even the devastation caused by Hurricane Katrina more than a decade ago.

Much like New Orleans in 2005, Puerto Rico was virtually destroyed by the hurricane it endured. After the storm flattened the island, one-hundred percent of the island’s residents were without power.<sup>151</sup>

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and-health/2017/9/26/16365994/hurricane-maria-2017-puerto-rico-san-juan-humanitarian-disaster-electricity-fuel-flights-facts.

<sup>144</sup> *Id.*; Jonathan Erdman, *Hurricane Maria Was One of the 10 Most Intense Atlantic Basin Hurricanes on Record*,

THE WEATHER CHANNEL (Sept. 20, 2017, 02:30 PM), <https://weather.com/storms/hurricane/news/hurricane-maria-one-of-most-intense-atlantic-hurricanes>.

<sup>145</sup> Ray Sanchez, *How Puerto Rico’s death toll climbed from 64 to 2,975 in Hurricane Maria*, CNN (Aug. 29, 2018, 2:56 PM), <https://www.cnn.com/2018/08/29/us/puerto-rico-growing-death-toll/index.html>.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Milken Institute School of Public Health, *Ascertainment of the Estimated Excess Mortality from Hurricane Maria in Puerto Rico*, GEORGE WASHINGTON UNIVERSITY, <https://publichealth.gwu.edu/sites/default/files/downloads/projects/PRstudy/Acertainment%20of%20the%20Estimated%20Excess%20Mortality%20from%20Hurricane%20Maria%20in%20Puerto%20Rico.pdf> (last visited April 4, 2019).

<sup>150</sup> *Id.*

<sup>151</sup> Lydia O’Connor, *7 Numbers That Explain How Much Puerto Rico Is Still Suffering*, HUFFINGTON POST (Nov. 20, 2017, 7:30 PM),

Unfortunately, Puerto Rico’s location and economic constraints inhibited adequate delivery and administration of crucial aid.<sup>152</sup> The largest blackout in U.S. history lingered for months because Puerto Rico could not maintain the sort of mutual aid agreement with other states which allowed Texas and Florida to marshal thousands of utility workers from nearby states that quickly restored those power grids.<sup>153</sup> To address this crisis, Puerto Rico’s bankrupt utility company signed a \$300 million contract on October 17, 2017 with Whitefish Energy.<sup>154</sup> Whitefish Energy is a Montana based company, with no experience administering disaster relief to a tropical island.<sup>155</sup> According to records submitted to congressional investigators, Whitefish subcontracted with public utility companies<sup>156</sup> and then overcharged the Puerto Rican utility company for the labor.<sup>157</sup> The Puerto Rican governor ultimately cancelled the contract on October 29, 2017, but records reveal that the terms of the contract fell far below FEMA standards.<sup>158</sup> The Puerto Rican utility company ignored the advice of outside attorneys and failed to include required provisions related to labor standards, environmental regulations, and anti-lobbying efforts.<sup>159</sup> The company hoped to be reimbursed through FEMA’s emergency bidding process, so the contract was not pre-approved by the agency.

Some Puerto Ricans endured powerlessness for hundreds of days until power was finally completely restored to the island on August 15, 2018.<sup>160</sup> While the island was without power, vital dialysis machines

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[https://www.huffingtonpost.com/entry/puerto-rico-maria-by-the-numbers\\_us\\_5a134c85e4b0c335e996b89d](https://www.huffingtonpost.com/entry/puerto-rico-maria-by-the-numbers_us_5a134c85e4b0c335e996b89d).

<sup>152</sup> Eliza Barclay et al., *Hurricane Maria: 4 ways the storm changed Puerto Rico — and the rest of America*, VOX (Sept. 20, 2018, 12:40 PM), <https://www.vox.com/2018/9/20/17871330/hurricane-maria-puerto-rico-damage-death-toll-trump>.

<sup>153</sup> *Id.*

<sup>154</sup> Alexia Fernandez Campbell & Umair Irfan, *Puerto Rico’s deal with Whitefish was shady as hell, new records show*, VOX (Nov. 15, 2017, 10:30 AM), <https://www.vox.com/policy-and-politics/2017/11/15/16648924/puerto-rico-whitefish-contract-congress-investigation>.

<sup>155</sup> *Id.*

<sup>156</sup> These are the same companies that typically supply emergency response crews through mutual aid agreements. *See id.*

<sup>157</sup> *Id.* at 154.

<sup>158</sup> *Id.*

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

<sup>160</sup> Alexia Fernandez Cambell, *It took 11 months to restore power to Puerto Rico after Hurricane Maria. A similar crisis could happen again.*, VOX (Aug. 15, 2018, 12:40 PM), <https://www.vox.com/identities/2018/8/15/17692414/puerto-rico-power-electricity-restored-hurricane-maria>.

could not run, insulin spoiled, and water pumps shut off.<sup>161</sup> The inability to meet basic human needs also caused reported suicide attempts to increase by 246 percent from November 2017 to January 2018.<sup>162</sup> Inadequate preparation by the Puerto Rican government undoubtedly contributed to the infrastructure crisis caused by Hurricane Maria, but more active involvement from FEMA could improve recovery and strengthen communities to endure the inevitable next storm.

## II. FEMA’S CURRENT POSITION WITHIN DHS COMPROMISES THE ABILITY OF THE AGENCY TO RESPOND TO NATURAL DISASTERS

Every year, natural disasters cause immense damage to the United States. Proper preparation, effective communication, and adequate funding can help mitigate this destruction. The choice to incorporate FEMA into DHS created a dynamic where counterterrorism and other national security concerns consistently impede FEMA’s fulfillment of its responsibility to manage the nation’s response to natural disasters. The lack of agency independence from DHS and the executive grows increasingly problematic when the president seeks to manipulate the agency to serve political purposes.

### *A. The Department-Level Focus on National Security Undermines Aspects of FEMA’s Mission Related to Natural Disasters*

The subversion of FEMA’s emergency response mission is most apparent in subsections 101(b)(1)(A) through 101(b)(1)(C) of the Homeland Security Act, which outline the top three mission priorities of the Department, all of which are exclusively focused on counterterrorism.<sup>163</sup> This statutory conflation has effectively drafted FEMA into the war on terrorism due to the labeling of major disasters and emergencies of any type as incidents of national significance, which makes them matters of national security.<sup>164</sup> Although natural disasters can impact

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<sup>161</sup> Barclay et al., *supra* note 152.

<sup>162</sup> The suicide rate was compared to the same period the year before. Alexia Fernández Campbell, *6 months after Hurricane Maria, Puerto Rico has a suicide crisis and a housing shortage*, VOX (Mar. 20, 2018, 1:50 PM). <https://www.vox.com/policy-and-politics/2018/3/20/17138990/puerto-rico-hurricane-maria-6-months>.

<sup>163</sup> Homeland Security Act of 2002 §§ 101(b)(1)(A)-(C), 6 U.S.C. § 101 (2018).

<sup>164</sup> Richard T. Sylves. *Shelter From the Storm: Repairing the Emergency Management System After Hurricane Katrina*. 604 ANNALS 288, 292 (2006).



national security, the causes and consequences differ significantly from terrorist attacks. Rather than coordinating with government intelligence agencies to prevent disasters, FEMA needs to rely on scientific modeling to mitigate the inevitable, because natural disasters follow natural cycles and impact predictable areas.<sup>165</sup> FEMA's subjugation to national security objectives impacts its budget and planning in ways that hinder preparation for natural disasters.

The warnings that the conflation of missions would hurt the United States proved prescient in the wake of the destruction brought by Hurricane Katrina. The Senate Committee on Homeland Security and Governmental Affairs conducted hearings in the aftermath of Hurricane Katrina, finding "several reasons for FEMA's lack of preparedness, including unqualified political leadership, budget shortages, inadequate workforce, FEMA's inclusion within DHS, and underdeveloped and inadequate response capabilities."<sup>166</sup> These congressional findings are supported by statements of past FEMA directors who have argued that putting FEMA under DHS has minimized its effectiveness in planning and responding to natural disasters.<sup>167</sup>

#### *B. FEMA's Position within DHS Makes the Agency Budget Vulnerable to Diversion on National Security Grounds*

The state of fear that gripped the country after the September 11th terrorist attacks affected the administration of the entire government apparatus. This fear led to consolidation of the federal budget and direction toward preventing future terrorist attacks. State and local officials no longer had access to the funding streams they relied on to prepare their communities for natural disasters. Nevertheless, their emergency responsibilities increased, and "officials, working in state and local governments to plan and prepare their communities for the worst, feel their budgets and in some cases their very existence being squeezed by what

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<sup>165</sup> JULIE L. DEMUTH, NAT'L RESEARCH COUNCIL, COUNTERING TERRORISM: LESSONS LEARNED FROM NATURAL AND TECHNOLOGICAL DISASTERS 2 (2002).

<sup>166</sup> STAFF OF S. COMM. ON HOMELAND SEC. AND GOVERNMENTAL AFFAIRS, HURRICANE KATRINA: A NATION STILL UNPREPARED, S. REP. NO. 109-322, at 213 (2006).

<sup>167</sup> *The Homeland Security Departments Plan to Consolidate and Co-Locate Regional and Field Offices: Improving Communication and Coordination: J. Hearing Before the Subcomm. On Energy Policy, Nat. Res. and Regulations Affairs and the Subcomm. On Nat'l Sec., Emerging Threats and Int'l Relations of the H. Comm. on Gov. Reform*, 108th Cong. 93 (2004).

some say is a myopic focus on terrorism.”<sup>168</sup> In 2004, appropriation of Emergency Management Performance Grants decreased by \$9 million.<sup>169</sup> These deficiencies led directly to the personnel and coordination problems that plagued the 2005 response to Hurricane Katrina.<sup>170</sup> The vulnerabilities of FEMA’s budget grow increasingly apparent in an administration that takes an aggressive stance on executive power.

### *C. Issues with FEMA Appropriations in the Trump Administration*

The Trump administration is not afraid to challenge standing U.S. law based on national security concerns. This executive approach led the administration to divert money from FEMA to support the extended detention of children conducted by Immigration and Customs Enforcement.<sup>171</sup> DHS documents list a \$9.8 million transfer from FEMA’s operations and support budget to Immigration and Customs Enforcement, which amounts to roughly one percent of FEMA’s overall budget.<sup>172</sup> More recently, President Trump threatened to withhold federal payments for California forest fire relief in a Tweet.<sup>173</sup> These recent actions by the Trump administration expose long-lasting flaws in the administrative structure of FEMA. FEMA’s vulnerability to executive interference, and the conflation of natural disaster response with national security concerns, could be remedied by legislation that removes the agency from DHS and reestablishes it as a standalone agency.<sup>174</sup>

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<sup>168</sup> Shaun Waterman, *Analysis: Fear of Being Eclipsed by Terror* (Mar. 22, 2004, 1:40 AM), <https://www.upi.com/Defense-News/2004/03/22/Analysis-Fear-of-being-eclipsed-by-terror/18201079937635/>.

<sup>169</sup> See Karin Fischer, *Anti-Terrorism Focus Could Hurt State Cuts Would Affect Ability to Respond to Natural Disasters*, CHARLESTON DAILY MAIL (Feb. 27, 2004), <https://www.highbeam.com/doc/1P2-9908863.html>.

<sup>170</sup> See *infra* Section I.B.3.

<sup>171</sup> See WILLIAM PAINTER, CONG. RESEARCH SERV., R44919, *COMPARING DHS COMPONENT FUNDING, FY2018: IN BRIEF* (2018); WILLIAM PAINTER, CONG. RESEARCH SERV., R45262, *COMPARING DHS COMPONENT FUNDING, FY2019: IN BRIEF* (2019).

<sup>172</sup> Michelle Mark, *The Trump Administration Diverted \$10 Million from FEMA to Support ICE*, BUS. INSIDER (Sept. 12, 2018, 11:58 AM), <https://www.businessinsider.com/10-million-from-fema-to-ice-trump-administration-documents-2018-9>.

<sup>173</sup> Matt Viser & Seung Min Kim, *For Trump, even disaster response is colored in red and blue*, WASHINGTON POST (Nov. 13, 2018, 7:59 PM), [https://www.washingtonpost.com/politics/president-trump-again-blames-california-for-a-natural-disaster-adding-to-his-public-denunciations-of-the-strongly-democratic-state/2018/11/12/811626de-e6ab-11e8-bbdb-72fdbf9d4fed\\_story.html?utm\\_term=.3c4e3f1a32f3](https://www.washingtonpost.com/politics/president-trump-again-blames-california-for-a-natural-disaster-adding-to-his-public-denunciations-of-the-strongly-democratic-state/2018/11/12/811626de-e6ab-11e8-bbdb-72fdbf9d4fed_story.html?utm_term=.3c4e3f1a32f3).

<sup>174</sup> Counterterrorism responsibilities should remain with DHS.

### III. REESTABLISH FEMA AS AN INDEPENDENT AGENCY WITH INCREASED AUTONOMY FROM THE EXECUTIVE

It is important that FEMA attain greater independence from DHS and executive authority so emergency response relief can be administered consistently at the highest level possible. Therefore, Congress should pass legislation to remove FEMA from DHS and reestablish it as an independent agency insulated from executive interference. The agency should be led by a senate-confirmed FEMA director, with for-cause removal protection, and a specified tenure of six years. The new agency should not possess litigation authority but should possess budget and congressional communication authority and adjudication authority.

#### A. *Single Agency Director*

The newly established agency should be led by a single agency director. The high stakes of natural disaster management demand that a single person hold ultimate decision-making power and responsibility. A clear leadership structure also helps effectuate for-cause removal protection, if the president wishes to exercise that power.<sup>175</sup> Proponents of multimember agency leadership boards point to the continuity of policy as a supposed benefit.<sup>176</sup> However, the people of the United States pay a terrible price when FEMA does not function properly.<sup>177</sup> Continuity of policy is not a benefit when agency mistakes lead to billions of dollars of damage and thousands of deaths.<sup>178</sup> It is important for the people to be able to exercise control over agency policy through political pressure on the executive. Consolidating authority into a single FEMA director would best serve FEMA functionally, and best serve the people of the United States.

The unitary director of the Office of the Special Counsel demonstrates the value of a singular leadership position.<sup>179</sup> The Office of Special Counsel's "primary mission is to safeguard the merit system by protecting federal employees and applicants from prohibited personnel

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<sup>175</sup> See *infra* Section III.B.

<sup>176</sup> Datla & Revesz, *supra* note 17, at 795.

<sup>177</sup> See *infra* Section I.B.

<sup>178</sup> *Id.*

<sup>179</sup> 5 U.S.C. § 1211 (2018).

practices, especially reprisal for whistleblowing.”<sup>180</sup> The agency also enforces the Hatch Act’s prohibitions on partisan political activity by government employees.<sup>181</sup> These responsibilities require independence from executive interference because whistleblowers or government employees will sometimes be part of the executive branch. The centralization of authority in a director creates a clear command and reporting structure for an agency whose investigators are prime targets for political pressure.<sup>182</sup> Placing ultimate agency authority in the hands of the director also makes the ineffective administration of the agency’s mission attributable to a single source. Then, despite the five-year term of the director’s appointment, if a new president is elected and finds that the agency is mismanaged, they can remove the responsible individual from that position to effectuate a change in policy immediately.

The new, independent FEMA should place ultimate authority in the hands of a single director. This person would be empowered to lead with a clear mandate in times of crisis. A director could also be held responsible if the agency fails to properly prepare for, or recover from, natural disasters.

### *B. For-Cause Removal Protection*

The director of the newly constituted FEMA should have for-cause removal protection. For-cause removal protection would allow FEMA directors to publicly raise the concerns they hold about the co-option of the agency for counterterrorism purposes while they were in office, rather than in a book published after their term ends.<sup>183</sup> Directors would be emboldened to speak out because for-cause removal protections increase the political costs of a president’s decision to remove an agency head.<sup>184</sup> The increasing threat of natural disasters will make the mission of FEMA increasingly important, so the FEMA director should be empowered to call out executive inaction without fear of removal.

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<sup>180</sup> OFFICE OF THE SPECIAL COUNSEL, *About*, <https://osc.gov/Pages/about.aspx> (last visited Mar. 15, 2019).

<sup>181</sup> *Id.*

<sup>182</sup> 5 U.S.C. § 1216(a) (2012) (statutory responsibility of the Special Counsel to investigate prohibited political activity).

<sup>183</sup> Elizabeth Chuck, *Where Is Disgraced Former FEMA Chief Michael Brown Now?*, NBC NEWS (Aug. 26, 2015), <https://www.nbcnews.com/storyline/hurricane-katrina-anniversary/heck-job-brownie-where-disgraced-fema-head-now-n400436>; MICHAEL D. BROWN & TED SCHWARTZ, *DEADLY INDIFFERENCE: THE PERFECT (POLITICAL) STORM: HURRICANE KATRINA, THE BUSH WHITE HOUSE, AND BEYOND* (2011).

<sup>184</sup> Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 30 (2010).

For-cause removal protection first received constitutional approval in *Humphrey's Executor v. United States*,<sup>185</sup> and this indicium of independence has traditionally been considered the hallmark of an independent agency.<sup>186</sup> Continuing the example above, if a new president came into office and wanted to make an immediate change to the administration of the Office of the Special Counsel in order to protect a political ally, they could only remove the head of the agency for “inefficiency, neglect of duty, or malfeasance in office.”<sup>187</sup> The “neglect of duty or malfeasance in office” language is common to the removal provisions of various other agencies.<sup>188</sup> Regardless of the language of a for-cause removal provision, the practical effects are largely the same.<sup>189</sup> Recent presidents have not removed a single head of an independent agency for cause, and the lack of litigation surrounding the issue makes presidents hesitant to invoke the provisions.<sup>190</sup>

Despite the apparent protection conferred by for-cause removal protections, the effectiveness of these provisions can still be challenged given the frequency of “voluntary” resignations and general turnover in executive agencies.<sup>191</sup> Heads of agencies who the president appoints are obviously more likely to implement the policies of that administration, but for-cause removal protection would create an avenue for the director of FEMA to express dissent should the executive branch fail to meet its responsibility to prepare the nation for natural disasters. At the same time, the scope of issues surrounding natural disaster response and mitigation is so great that inadequate performance by the FEMA director would supply sufficient grounds for dismissal, or strongly suggested voluntary departure. For-cause removal protection will empower the FEMA director to act in the nation’s best interest but will not prevent the removal of a bad leader.

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<sup>185</sup> *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

<sup>186</sup> Datla & Revesz, *supra* note 17, at 814.

<sup>187</sup> 5 U.S.C. § 1211(b) (2018).

<sup>188</sup> 29 U.S.C. § 153(a) (2018) (National Labor Relations Board); 15 U.S.C. § 41 (2018) (Federal Trade Commission); 42 U.S.C. § 902(a)(3) (2018) (Social Security Administration).

<sup>189</sup> Datla & Revesz, *supra* note 17, at 788.

<sup>190</sup> *Id.* at 788–89.

<sup>191</sup> Barkow, *supra* note 184, at 30; Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1138 (2000).

### C. Specified Tenure of Six Years

A statutorily specified term length of six years for the FEMA director will enable the agency to achieve long-term objectives and further insulate the agency from political interference. Mandating a term of tenure for an agency director ensures that the Senate will have a chance to review the individual's performance.<sup>192</sup> Should the president choose to dismiss an agency director before their term of tenure expires, the administration will face increased scrutiny.<sup>193</sup> Agency officials with longer term lengths are more insulated from political pressure because there is less need to seek renomination and confirmation by political officials.<sup>194</sup> This insulation from political pressure makes long tenures beneficial for agency officials who need to prioritize long-term goals that may be politically unpopular in the short term.

The escalating intensity of hurricanes demands a comprehensive response from the United States. Storms will continue to batter the Gulf States and tear down power lines, flood entire cities, and destroy peoples' lives. To meet this challenge, FEMA will need to implement plans to modernize the storm infrastructure in vulnerable areas. Projects, like repairing the levees of New Orleans, take years to resolve and involve multibillion-dollar settlements.<sup>195</sup> Interactions between the federal government and local municipalities are always contentious, but the circumstances demand robust action. Mayors and state congress members will pressure their federal counterparts for certain contracts or for exemptions from certain actions that FEMA takes. If this political pressure is allowed to impede the mission of the agency, the consequences will be catastrophic. The scope of the challenge that FEMA will face in the coming decade necessitates that the director be insulated from political pressure through a six-year term that exceeds the length of a presidential administration.

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<sup>192</sup> Datla & Revesz, *supra* note 17, at 791.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 791–92.

<sup>195</sup> The Times-Picayune Editorial Bd., *FEMA infrastructure money is needed to repair what the levees broke: Editorial*, THE TIMES-PICAYUNE | THE NEW ORLEANS ADVOCATE (July 28, 2017, 4:01 PM), [https://www.nola.com/opinions/article\\_877ae0f1-e1c6-502e-b99a-71e3f46cd3ae.html](https://www.nola.com/opinions/article_877ae0f1-e1c6-502e-b99a-71e3f46cd3ae.html).

#### *D. No Litigation Authority*

The newly established FEMA should not possess litigation authority. Most agencies conduct litigation through the Department of Justice.<sup>196</sup> This arrangement decreases oversight by Congress but increases the control that the executive branch can exercise over an agency.<sup>197</sup> Despite this dynamic, Congress and the executive do not battle over litigation authority because it is rarely important.<sup>198</sup> The primary way the executive exercises control over agency action through litigation authority is when the Department of Justice simply declines to take a case.<sup>199</sup> Regardless of structural delegations of litigation authority, both Congress and the executive can find ways to influence the process so the actual impacts of varying litigation authority are limited.<sup>200</sup> The authority to litigate independent of the Department of Justice is immaterial for the effectiveness of FEMA.

#### *E. Budget and Congressional Communication Authority*

Budget and congressional communication authority should be provided for the newly established FEMA. Budget control is undeniably intertwined with policy making.<sup>201</sup> Despite statutory requirements that independent agencies abide by the OMB process, some agencies bypass executive control through requirements that the agency concurrently submit its budget to Congress and the OMB.<sup>202</sup> While presenting Congress with an undoctored budget request may benefit the agency, a lack of presidential support can simultaneously decrease the chance of a successful budget result.<sup>203</sup> Modern agencies with the authority to bypass executive oversight for their budget submissions are still subject to comments from the executive branch, but can at least present a complete picture of the budget required to fulfill their statutory mandate.

It is essential that an independent FEMA possess budget and congressional communication authority. A substantial portion of elected

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<sup>196</sup> Datla & Revesz, *supra* note 17, at 799–800.

<sup>197</sup> *Id.* at 801.

<sup>198</sup> Neal Devins & Michael Herz, *The Battle That Never Was: Congress, the White House, and Agency Litigation Authority*, 61 LAW AND CONTEMP. PROBS. 205, 208 (1998).

<sup>199</sup> *Id.* at 210.

<sup>200</sup> *Id.* at 215.

<sup>201</sup> Morton Rosenberg, *Presidential Control of Agency Rulemaking: An Analysis of Constitutional Issues That May Be Raised by Executive Order 12,291*, 23 ARIZ. L. REV. 1199, 1219 (1981).

<sup>202</sup> See 52 U.S.C. § 30107(d) (2018).

<sup>203</sup> Datla & Revesz, *supra* note 17, at 806.

officials in the United States, including the current president, deny that human-made climate change is causing a global crisis.<sup>204</sup> An independent FEMA will not be able to meet the challenges of responding to natural disasters in the twenty-first century if it does not receive sufficient funding. Budget and congressional communication authority will allow the agency to submit an accounting of its needs to address the increasing threat of natural disasters, unaltered by executive interference. One would think that an agency with a universal mandate, such as FEMA, would be free from partisan political interference, but President Trump has already demonstrated that he is willing to compromise the ability of FEMA to respond to natural disasters in favor of funding for immigration detention and removal.<sup>205</sup> Budget and congressional communication authority needs to be part of the newly established independent FEMA.

#### *F. Adjudication Authority*

FEMA should possess independent adjudication authority. Agencies with independent adjudication authority are insulated from executive interference by virtue of restrictions against ex parte contact during formal adjudications.<sup>206</sup> If the executive unlawfully contacts an agency decision maker during this process, the agency action can be vacated, or at the very least, the undue influence is exposed and exerts a political cost on the executive.<sup>207</sup> Agencies that possess independent adjudication authority can also enact long-term policy changes through steady use of enforcement actions against violators.<sup>208</sup> This form of policymaking allows the agency to implement change without drawing the political attention inherent in the Administrative Procedure Act rulemaking process.<sup>209</sup> The power to adjudicate claims free from executive interference is essential to the impartial function of any agency.

Adjudication authority will be especially important for FEMA to properly prepare the nation for natural disasters. In certain circumstances, the current system utilizes private contractors to fulfill the obligation of the agency to help communities rebuild after natural disasters.<sup>210</sup> When

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<sup>204</sup> See Brandon Miller, *Trump tweets climate change skeptic in latest denial of science*, CNN (Mar. 12, 2019), <https://www.cnn.com/2019/03/12/us/trump-climate-change-tweet-patrick-moore/index.html>.

<sup>205</sup> Nixon, *supra* note 85.

<sup>206</sup> Datla & Revesz, *supra* note 17, at 810.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 812.

<sup>209</sup> 5 U.S.C. § 553(b) (Notice and comment rulemaking requirements).

<sup>210</sup> Thomson Reuters, *\$156M FEMA contract called for 30 million meals in Puerto Rico — and only 50,000 were delivered*, AOL (Feb. 6, 2018),



Hurricane Maria struck Puerto Rico, FEMA awarded a \$156 million contract to a company that only delivered just fifty thousand of the expected thirty million meals.<sup>211</sup> That same storm led the controversial Whitefish Energy Deal.<sup>212</sup> Whitefish Energy is located in the Montana hometown of former U.S. Interior Secretary Ryan Zinke.<sup>213</sup> The potential for undue political influence in the adjudications surrounding this contract is obvious. Contracts are distributed based on relationships when an emergency strikes. This makes it important that FEMA retain independent adjudication authority so that it may enforce its policies ethically and free from executive interference.

## CONCLUSION

The conflation of national security objectives with natural disaster mitigation and response compromises the ability of FEMA to respond effectively. Removing FEMA from DHS and reestablishing it as an independent agency exclusively focused on natural disasters is the best way to prepare the United States for the escalating threat of climate change. All counterterrorism functions of FEMA should remain the responsibility of DHS, but FEMA should still coordinate closely with DHS for disaster relief if the nation is struck by a terrorist attack.

The new agency should be led by the FEMA director who possesses statutory, for-cause removal protection for a specified term of six years. Congress should ensure that the newly established FEMA can adjudicate matters free from executive interference, can effectively communicate with Congress, and can obtain the funds required to protect the nation from increasingly deadly natural disasters. However, the Department of Justice can faithfully litigate on FEMA's behalf.

These changes would allow FEMA to execute long-term objectives to reshape the United States' approach to emergency preparedness and response. States that coordinate disaster response on the local level would know the nature and extent of assistance flowing from a stable, nonpartisan FEMA. The agency itself would know that its policy goals are being faithfully represented to Congress and implemented through adjudication. Most importantly, the American people would know that the

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<https://www.aol.com/article/news/2018/02/06/156-million-fema-contract-called-for-30-million-meals-in-puerto-rico-and-only-50000-were-delivered/23354544/>.

<sup>211</sup> *Id.*

<sup>212</sup> Campbell & Irfan, *supra* note 154.

<sup>213</sup> Reuters, *supra* note 210.

increasing danger posed by natural disasters is being met by the full capabilities of an independent Federal Emergency Management Agency.