



# Would an Influenza Pandemic Qualify as a Major Disaster Under the Stafford Act?

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December 15, 2009

Congressional Research Service

7-5700

[www.crs.gov](http://www.crs.gov)

RL34724

## Summary

This report provides a legal analysis of the eligibility of an influenza pandemic (flu pandemic) to be declared by the President as a major disaster under the Robert T. Stafford Disaster Relief and Emergency Assistance Act. Given the current influenza A(H1N1) pandemic, awareness has been raised regarding the potential effects of a severe flu pandemic occurring in the United States. In such an event, the Stafford Act could provide authority for federal assistance. Although it is widely agreed that emergency assistance under the Stafford Act could be provided by the President in the event of a flu pandemic, questions remain as to whether broader major disaster assistance would be available. An analysis of the text and history of the Stafford Act suggests that this question was not addressed by Congress when it drafted the current definition of a major disaster, and that neither inclusion nor exclusion of flu pandemics from major disaster assistance is explicitly required by the current statutory language.

In the 111<sup>th</sup> Congress, S. 2863 would amend the Stafford Act to explicitly make major disaster assistance available to respond to pandemics and terrorist attacks.

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During the summer of 2009, the World Health Organization declared that the worldwide spread of influenza A(H1N1) had reached pandemic proportions. Although a significant number of individuals have fallen seriously ill or died as a result of this influenza strain, it has not yet been as devastating as many feared it might be.<sup>1</sup> However, its occurrence and the earlier outbreak of a virulent strain of avian influenza (bird flu) in Asia raise the possibility of a more virulent global pandemic.

The Department of Health and Human Services (HHS) defines pandemic influenza as a “virulent human flu that causes a global outbreak, or pandemic, of serious illness. Because there is little natural immunity, the disease can spread easily from person to person.”<sup>2</sup> According to HHS, an influenza pandemic (flu pandemic), “unlike natural disasters or terrorist events,” could be widespread, affecting multiple areas of the United States and other countries at the same time. They postulate that a pandemic could be an extended event, with multiple waves of outbreaks in the same geographic area. HHS further maintains that each outbreak could last from six to eight weeks and waves of outbreaks may occur over a year or more.<sup>3</sup>

In such an event, the Stafford Act could authorize federal assistance for affected areas. Although it is widely agreed that emergency assistance under the Stafford Act could be provided by the President in the event of a flu pandemic, questions remain as to whether broader major disaster assistance would be available.

## **An Overview of the Stafford Act**

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (the Stafford Act)<sup>4</sup> authorizes the President to issue major disaster or emergency declarations in response to incidents that overwhelm state and local governments. Either type of declaration would authorize the distribution of a wide range of federal aid to individuals and families, certain nonprofit organizations, and public agencies, but major disaster and emergency classifications each trigger different kinds and amounts of assistance from the federal government.

Under the Stafford Act, a major disaster is defined as

*any natural catastrophe* (including any hurricane, tornado, storm, high water, winddriven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), *or, regardless of cause, any fire, flood, or explosion*, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this chapter to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.<sup>5</sup>

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<sup>1</sup> Earlier, in 1997, a virulent strain of avian influenza (bird flu) was discovered in Asia. Hundreds of people in Europe and Asia have suffered from severe illness caused by the virus, but the virus has not, at this time, developed the ability to spread easily from person to person. See <http://www.pandemicflu.gov>.

<sup>2</sup> *Id.*

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

<sup>4</sup> *Codified at* 42 U.S.C. § 5121 *et seq.*

<sup>5</sup> 42 U.S.C. § 5122(2) (emphasis added).

A major disaster declaration authorizes the President to offer a variety of federal assistance, although none is specifically required to be provided.<sup>6</sup> The types of general federal assistance available include directing federal agencies to support in assistance efforts, coordinating assistance efforts, providing technical and advisory assistance, and distributing supplies and emergency assistance. Under the major disaster classification, there are also more specific provisions, including repair and restoration of federal facilities, removal of debris, housing assistance, unemployment assistance, emergency grants to assist low-income migrant and seasonal farmworkers, food coupons and distribution, relocation assistance, crisis counseling assistance and training, community disaster loans, emergency communications, and emergency public transportation.<sup>7</sup>

In contrast the Stafford Act defines an emergency as

*any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.*<sup>8</sup>

An emergency declaration authorizes limited federal assistance when compared to a major disaster classification.<sup>9</sup> The emergency declaration would *not* authorize grants, unemployment assistance, food coupons, crisis counseling assistance and training, or community disaster loans as would be available through a major disaster declaration. An emergency declaration would authorize technical and advisory assistance to affected state and local governments for certain needs; emergency assistance through federal agencies; clearance of debris; housing assistance; and assistance in the distribution of medicine, food, and other consumable supplies. The total amount of assistance available is also limited in an emergency declaration to \$5 million, “unless the President determines that there is a continuing need; Congress must be notified if the \$5 million ceiling is breached.”<sup>10</sup>

In addition to assistance authorized under the Stafford Act, both an emergency or major disaster declaration could authorize the Secretary of HHS to waive certain regulatory requirements related to the provision of health care services, if there is a concurrent public health emergency as defined under the Public Health Service Act.<sup>11</sup>

## **Executive Branch Responses to Pandemics**

Although “neither disaster declarations nor congressional appropriations were issued for the 1957 Asian flu pandemic ... which resulted in almost 70,000 deaths in the United States [and] was one

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<sup>6</sup> Except in the case of food coupons and assistance to damaged federal facilities, the authority to determine what types of assistance to provide in the event of a major disaster declaration has been delegated to the Secretary of Homeland Security. Exec. Order No. 12148, § 4-203.

<sup>7</sup> 42 U.S.C. §§ 5172-5187.

<sup>8</sup> 42 U.S.C. § 5122(1) (emphasis added).

<sup>9</sup> 42 U.S.C. § 5192.

<sup>10</sup> CRS Report RL33053, *Federal Stafford Act Disaster Assistance: Presidential Declarations, Eligible Activities, and Funding*, by Keith Bea, at “Statutory Funding Limitations.”

<sup>11</sup> CRS Report R40560, *The 2009 Influenza Pandemic: Selected Legal Issues*, coordinated by Kathleen S. Swendiman and Nancy Lee Jones, at “Section 1135 Waivers or Modifications.”

of the deadliest catastrophes of its time,”<sup>12</sup> emergency declarations under the Stafford Act in the event of an outbreak of infectious disease are not unprecedented. In 2000, the detection of West Nile virus in New York and New Jersey was used as the basis of an emergency declaration under the Stafford Act.<sup>13</sup> Despite the lack of a disaster declaration during the 1957 pandemic, a flu pandemic would likely qualify under the broad category of “any occasion or instance” in the statutory definition of an *emergency*.<sup>14</sup>

However, recent history has led to uncertainty over whether a flu pandemic is eligible for *major disaster* assistance under the Stafford Act.<sup>15</sup> In 2005, various federal agencies participated in TOPOFF 3, a national level exercise that simulated various security-related events, including a biological attack causing an outbreak of pneumonic plague in the United States.<sup>16</sup> The Federal Emergency Management Agency (FEMA), the agency responsible for administering the Stafford Act, was among the participants in that exercise. During TOPOFF 3, as well as during an earlier exercise, FEMA interpreted “biological disasters” as ineligible for major disaster assistance because such incidents were not explicitly mentioned in the Stafford Act.<sup>17</sup>

Subsequently, in May of 2006, the Homeland Security Council issued its *Implementation Plan for the National Strategy for Pandemic Influenza*,<sup>18</sup> which stated that “the President could declare either an emergency or a major disaster with respect to an influenza pandemic,” potentially contradicting the earlier position adopted by FEMA during the TOPOFF exercises.<sup>19</sup> As discussed later in this report, it is debatable whether the Homeland Security Council’s broad interpretation is supported by the text and legislative history of the Stafford Act.

More recently, in March of 2007, FEMA issued a *Disaster Assistance Policy* (DAP) that “establishes the types of emergency protective measures that are eligible under the Public Assistance Program during a federal response to an outbreak of human influenza pandemic.”<sup>20</sup> It is unclear whether this DAP is a departure from FEMA’s prior assertions that biological disasters were ineligible for major disaster assistance. On one hand, the DAP states that it is “applicable to all major disasters and emergencies declared on or after the date of publication” and cites as authority the provisions of the Stafford Act authorizing major disaster assistance.<sup>21</sup> However, the

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<sup>12</sup> Keith Bea, *The Formative Years: 1950-1978*, in *EMERGENCY MANAGEMENT: THE AMERICAN EXPERIENCE* 81, 87 (Claire B. Rubin, ed., 2007).

<sup>13</sup> CRS Report RL33579, *The Public Health and Medical Response to Disasters: Federal Authority and Funding*, by Sarah A. Lister, at n.10 and accompanying text; and 65 Fed. Reg. 63589, 67747.

<sup>14</sup> Because declarations are ultimately subject to Presidential discretion, it is possible that some qualifying events may not be declared an emergency or a major disaster.

<sup>15</sup> See CRS Report RL33579, *The Public Health and Medical Response to Disasters: Federal Authority and Funding*, by Sarah A. Lister, at 9-11.

<sup>16</sup> DEP’T OF HOMELAND SECURITY, *A Review of the Top Officials 3 Exercise* (Nov. 2005), available at [http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG\\_06-07\\_Nov05.pdf](http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_06-07_Nov05.pdf).

<sup>17</sup> *Id.* at 30.

<sup>18</sup> HOMELAND SECURITY COUNCIL, *Implementation Plan for the National Strategy for Pandemic Influenza*, at [http://www.whitehouse.gov/homeland/nspi\\_implementation.pdf](http://www.whitehouse.gov/homeland/nspi_implementation.pdf). This document “describes more than 300 critical actions, many of which have already been initiated, to address the threat of pandemic influenza.”

<sup>19</sup> *Id.* at 212.

<sup>20</sup> FEDERAL EMERGENCY MANAGEMENT AGENCY, *Emergency Assistance for Human Influenza Pandemic*, Disaster Assistance Policy 9523.17, at 1 (Mar. 31, 2007).

<sup>21</sup> *Id.* However, this language and cited authority is not unique to this DAP and may simply be boilerplate used by the drafters.

only types of assistance offered by the DAP in the event of a flu pandemic are Emergency Protective Measures (Category B) provided by FEMA's Public Assistance Program.<sup>22</sup> Notably, Category B assistance may be offered during emergency declarations, and is not limited to major disaster incidents.<sup>23</sup> In fact, Category B assistance was precisely the type of assistance authorized during the emergency declarations for West Nile virus in 2000.<sup>24</sup> Therefore, this DAP is not necessarily inconsistent with the view that biological disasters are ineligible for major disaster assistance. Other guidance issued by FEMA does not mention flu pandemics, but may still be relevant. For example, the most recent working draft of the National Disaster Housing Strategy notes that quarantine and isolation facilities may be necessary "to meet the demands of major or catastrophic disasters."<sup>25</sup>

With respect to the current pandemic, no Stafford Act declaration of either variety has been issued, and, consequently, no assistance has been provided under the Stafford Act.<sup>26</sup> The President has issued a national emergency declaration under the National Emergencies Act,<sup>27</sup> which provides an alternative avenue to the waiver of certain regulatory requirements related to the provision of health care services.

In summary, FEMA has historically excluded biological incidents from major disaster declarations under the Stafford Act, but questions regarding the eligibility of pandemic incidents for major disaster assistance may remain.

## Recent Legislative Activity

As a result of this confusion, legislation has been proposed to clarify the scope of the Stafford Act. In the 111<sup>th</sup> Congress, the Emergency Response Act of 2009, S. 2863, would amend the Stafford Act to define a major disaster as

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<sup>22</sup> Category B assistance offers reimbursement to state or local entities for, among other things, the purchase and distribution of medicine and other consumables; management, control, and reduction of immediate threats to public health and safety; emergency medical care and temporary medical facilities; communicating health and safety information to the public; storage and internment of unidentified human remains; and recovery and disposal of animal carcasses. *Id.*

<sup>23</sup> See 42 U.S.C. § 5170b(a)(3) (authorizing specific emergency protective measures to save lives and protect property) and 42 U.S.C. § 5192(b) (generally authorizing the President to provide assistance to save lives, protect property and public health and safety during an emergency declaration).

<sup>24</sup> 65 Fed. Reg. 63589, 67747.

<sup>25</sup> FEDERAL EMERGENCY MANAGEMENT AGENCY, *National Disaster Housing Strategy: Working Draft*, July 17, 2008, at 31.

<sup>26</sup> Whether a Stafford Act declaration is appropriate for a pandemic incident may currently be the subject of some debate. Compare Kevin Robillard, Officials Say Swine Flu Vaccine is Coming, CQ HOMELAND SECURITY, July 9, 2009 (quoting DHS Secretary Janet Napolitano as observing that "the [Stafford] act and the flu do not match up well.") with Comments of DHS Deputy Secretary Jane Holl Lute, U.S. Congress, House Committee on Homeland Security, *Beyond Readiness: An Examination of the Current Status and Future Outlook of the National Response to Pandemic Influenza*, 111<sup>th</sup> Cong., 1<sup>st</sup> sess., July 29, 2009 (indicating that DHS has planned for contingencies in which the Stafford Act is invoked in response to a pandemic).

<sup>27</sup> See <http://www.whitehouse.gov/the-press-office/declaration-a-national-emergency-with-respect-2009-h1n1-influenza-pandemic-0>.

any natural disaster (including pandemics), act of terrorism, or other manmade disaster, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this Act ...<sup>28</sup>

This provision would differ from the existing definition of a major disaster, not only because it explicitly includes pandemics and terrorist attacks, but also because it does not provide a list of example events that might constrain the scope of major disaster assistance. Instead, S. 2863 would appear to give the President the authority to provide major disaster assistance in almost any type of event, based solely on the severity and magnitude of damage that is caused. Because of the expanded discretion provided to the President, this definition appears very similar to the definition of a major disaster that was in use prior to enactment of the Stafford Act.<sup>29</sup>

## Analysis

Under the standard procedure for a declaration under the Stafford Act, the governor of an affected state submits a request for either an emergency or major disaster declaration.<sup>30</sup> The Federal Emergency Management Agency then evaluates the incident and makes a recommendation to the President, with whom lies the ultimate discretion to make a declaration.<sup>31</sup> The Stafford Act precludes any judicial review of that decision.<sup>32</sup> Therefore, even though “it is emphatically the province and duty of the judicial department to say what the law is,”<sup>33</sup> a requesting governor or other affected party that disagrees with the executive’s interpretation of what constitutes a major disaster is unlikely to be successful seeking a judicial remedy. Denials of declaration requests may be appealed and resubmitted to the President, but, again, there is no possibility of judicial review.<sup>34</sup>

Nevertheless, questions may arise among policymakers and other stakeholders as to which of the dueling interpretations of the Stafford Act are legally permissible: that is, whether the Stafford Act requires the conclusion that flu pandemics are either eligible or ineligible for major disaster assistance. The validity of an executive branch construction of a statute can be evaluated using the two-prong test laid out by the Supreme Court in *Chevron v. Natural Resources Defense Council*.<sup>35</sup> First, if the text and legislative history of the statute demonstrate that Congress has spoken directly on the issue, then that statutory language or history must control. However, under the second prong, “if ... Congress has not directly addressed the precise question at issue,” the agency’s interpretation will stand so long as it is a reasonable one.<sup>36</sup>

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<sup>28</sup> S. 2863, § 2. *See also* S. 3721, 109<sup>th</sup> Cong., § 210.

<sup>29</sup> *See infra* at “Legislative History.”

<sup>30</sup> 42 U.S.C. § 5170, 5191; 44 C.F.R. §§ 206.35-6.

<sup>31</sup> 44 C.F.R. § 206.37; Exec. Order No. 12148, § 4-203.

<sup>32</sup> 42 U.S.C. § 5148. *See, also, Kansas v. U.S.*, 748 F. Supp. 797, 799-800 (D. Kan. 1990) (holding that federal courts have no jurisdiction to review Stafford Act declaration decisions made by the President).

<sup>33</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

<sup>34</sup> 44 C.F.R. § 206.46.

<sup>35</sup> *Chevron v. Nat’l Resources Def. Council*, 467 U.S. 837, 842-845 (1984). *See, also, Hawaii v. FEMA*, 294 F.3d 1152, 1159 (9<sup>th</sup> Cir. 2002) (applying *Chevron*’s two-prong test to FEMA’s interpretation of provisions of the Stafford Act).

<sup>36</sup> *Id.* Although this analysis uses a judicially created framework for evaluating an interpretation of a statute by the executive branch, this should not be taken to mean that FEMA or the President could be sued in state or federal court for failing to designate a flu pandemic as a major disaster. This analysis is solely included to provide a context with (continued...)



Both positions regarding the eligibility of flu pandemics for major disaster assistance are evaluated below using this two-prong test. But, regardless of what result the application of Supreme Court jurisprudence is likely to have in this case, it is important to note that Congress may come to its own conclusions as to whether a particular type of incident *should or should not* be considered a major disaster, and may amend the statutory definition if it deems it appropriate to do so.

## **Ambiguity of Congressional Intent**

The first prong of the *Chevron* test asks whether Congress has directly spoken on the issue. If Congress has spoken, then the analysis ends, and the agency's interpretation must comport with that congressional intent. In this case, the inquiry is whether the statutory text and legislative history of the Stafford Act demonstrate that Congress addressed whether the definition of a major disaster includes a flu pandemic.

## **Statutory Text**

The statutory definition of a major disaster confines its scope to “natural catastrophes ... or, regardless of cause, any fire, flood, or explosion.” A flu pandemic is not a fire, flood, or explosion under the ordinary meaning of those three words. Therefore, a flu pandemic cannot qualify as a major disaster unless it can be considered a natural catastrophe, as that term is defined for purposes of the Stafford Act.

The text of the Stafford Act provides concrete examples of natural catastrophes,<sup>37</sup> but it does not appear to provide an exhaustive list of all qualifying events.<sup>38</sup> Based on a plain reading of the phrase, it is not clear whether a flu pandemic would be considered a natural catastrophe. Neither the Stafford Act nor any other provision of the U.S. Code provides a legal definition of a catastrophe. Dictionary definitions of a catastrophe range from “a momentous tragic, usually sudden, event marked by effects ranging from extreme misfortune to utter overthrow or ruin”<sup>39</sup> to a “sudden disaster, wide-spread, very fatal, or signal,”<sup>40</sup> either of which would seem to be applicable in the case of a flu pandemic. Additionally, many media reports colloquially refer to a pandemic as a catastrophe.<sup>41</sup> But, even though a pandemic likely has the potential to cause sufficient harm to meet the ordinary understanding of a *catastrophe*, the event would still need to be considered *natural* in order to be eligible for major disaster assistance.

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(...continued)

which policymakers and other stakeholders may view this issue.

<sup>37</sup> *Id.* (“any hurricane, tornado, storm, high water, winddriven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought” qualifies as a natural catastrophe).

<sup>38</sup> Note that the phrase natural catastrophe *includes* the enumerated incidents, but is arguably not limited to those events. *Id.*

<sup>39</sup> WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 351 (1976).

<sup>40</sup> OXFORD ENGLISH DICTIONARY (Sept. 2008), available at <http://www.oed.com>.

<sup>41</sup> *E.g.*, Diane Stafford, *Preparing for Catastrophe; Most U.S. Businesses are not ready for avian flu outbreak*, KANSAS CITY STAR, Dec. 13, 2005, at 1; Sabin Russell, *Statewide flu plan ready for public input*, SAN FRANCISCO CHRONICLE, Jan. 19, 2006, at B1; Lawrence K. Altman, M.D., *With Every Epidemic, Health Officials Face Tough Choices*, NEW YORK TIMES, Mar. 28, 2006, at 5.

The Stafford Act does not elaborate on the meaning of natural, but various dictionaries define it as “formed by nature; not subject to human intervention, not artificial,”<sup>42</sup> and “occurring in conformity with the ordinary course of nature.”<sup>43</sup> As has been recently observed with the H5N1 strain of avian influenza, it is possible for virulent flu strains to develop without human intervention, and once infection occurs, the virus can continue to propagate and spread absent human intervention by virtue of the innate biological processes present in living persons. In response, one could argue that the widespread dispersal of a flu pandemic is likely dependent upon human vectors.

Recent attention garnered by actual and potential biological terrorism attacks raises the question whether an entirely man-made disease epidemic could be rightly described as a *natural* catastrophe. Initially, one should note that it is not necessary to conceptually view randomly occurring flu pandemics in the same category as intentional biological attacks. However, even if one were to treat all biological incidents as the same, other examples of known natural catastrophes are not necessarily disqualified because they may be partially caused by human actions. For example, landslides are statutorily identified as natural catastrophes,<sup>44</sup> even though human development may precipitate their occurrence.<sup>45</sup>

Textual arguments for excluding a flu pandemic from major disaster assistance may also be made. One could conclude from the statutory definition that a flu pandemic is not natural in the same way that a tornado or a hurricane is natural. *Ejusdem generis* is a canon of construction stating that “when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed.”<sup>46</sup> Applying this canon of construction, one interpretation is that the list following the phrase “natural catastrophe” limits its scope to geologic or climatic events that have the potential to cause extensive physical property damage. Furthermore, there is evidence that the threat of infectious outbreaks was not alien to Congress, specifically in light of its response to cholera and yellow fever during the latter half of the 19<sup>th</sup> century.<sup>47</sup> Consequently, the omission of infectious diseases from the list of explicit natural catastrophes bolsters the argument that outbreaks of infectious disease were seen by Congress as distinct from natural catastrophes.

## Legislative History

Insofar as the text of the major disaster definition is susceptible to more than one interpretation, it may be helpful to examine the legislative history to further interpolate Congress’s intent in drafting the provision. The current definitions of emergencies and major disasters were enacted in 1988 with passage of the Stafford Act. Prior to that, the definitions for both major disasters and

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<sup>42</sup> OXFORD ENGLISH DICTIONARY (Sept. 2008) available at <http://www.oed.com>.

<sup>43</sup> WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1506-7 (1976).

<sup>44</sup> See *supra* note 35.

<sup>45</sup> See FEMA, *Landslide and Debris Flow (Mudslide)*, available at <http://www.fema.gov/hazard/landslide/> (noting that landslides may be activated by “steepening of slopes caused by erosion or human modification”).

<sup>46</sup> See CRS Report 97-589, *Statutory Interpretation: General Principles and Recent Trends*, by Larry M. Eig and Yule Kim, by Yule Kim, at n.49 and accompanying text. In this case, the general phrase “any natural catastrophe” actually precedes the list of specific examples, but the same interpretive principle applies.

<sup>47</sup> See, e.g., An Act granting additional quarantine powers and imposing additional duties upon the Marine-Hospital Service, ch. 114, 27 Stat. 449 (1893).

emergencies declarations were contained in the Disaster Relief Act of 1974 (Disaster Relief Act), and had applied to

any hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, drought, fire, explosion, *or other catastrophe*.<sup>48</sup>

Conspicuously, the pre-Stafford definitions did not limit emergency or major disaster declarations to *natural* catastrophes. In 1980, a review of past emergency and major disaster declarations found that “Presidential authority to extend disaster assistance has been exercised almost exclusively in cases where damage was caused by or was closely related to some act of nature.”<sup>49</sup> However, it appears likely that the amended definitions in the Stafford Act, which limited major disasters to natural catastrophes and created a new definition for emergencies, were partly enacted in response to the presidential use of the Disaster Relief Act authority to deal with certain man-made incidents.<sup>50</sup>

For example, in 1980, a large number of people fled Cuba and arrived in southern Florida. President Carter directed FEMA to provide temporary housing and shelter for these refugees, apparently under the authority of the Disaster Relief Act.<sup>51</sup> Also in 1980, FEMA assisted with the temporary relocation of families affected by the toxic waste deposits in the Love Canal neighborhood of Niagara Falls, New York.<sup>52</sup> Similarly, in 1983, FEMA assisted with the relocation of residents of Times Beach, Missouri, after the area had been contaminated with dioxin.<sup>53</sup> These incidents generated controversy in Congress, which expressed concern that

in some instances aid has been extended by the President in *situations which resulted primarily, if not entirely, from human activity* rather than natural hazards.... Broadening the scope of the [Disaster Relief] Act to cover *both natural and non-natural* catastrophes has strained the capacity of programs designed to respond only to natural catastrophes.<sup>54</sup>

Following these declarations, an amendment to the definition of both emergencies and major disasters under the Disaster Relief Act was proposed, limiting such declarations to “physical or natural catastrophe[s].”<sup>55</sup> Although this amendment was not enacted, the debate regarding the amendment suggested that a chemical spill would have been considered a physical catastrophe,

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<sup>48</sup> P.L. 93-288, 88 Stat. 143, at § 102 (emphasis added). Under the Disaster Relief Act, emergencies and major disasters were primarily distinguished by the severity of the incident.

<sup>49</sup> See, 126 CONG. REC. 27664-6 (1980) (statement of Sen. Edward Zorinsky) (citing CRS Report LTR80-1646, “*Other Catastrophe*” Statutory Authority for Major Disaster Declarations, by Clark Norton).

<sup>50</sup> U.S. GENERAL ACCOUNTING OFFICE, *Requests for Federal Disaster Assistance Need Better Evaluation*, CED-82-4, Dec. 7, 1981, at 39-40, available at <http://www.gao.gov/cgi-bin/getrpt?CED-82-4>.

<sup>51</sup> Margot Hornblower, *Cuban Refugees Hold Emotional Mass, First Ever for Many*, WASHINGTON POST, May 5, 1980, at A2. See, also, Sen. Quentin Burdick, “Disaster Relief Acts of 1980,” Senate debate, Congressional Record, vol. 126, part 21 (Sept. 26, 1980), at 27662.

<sup>52</sup> ENVIRONMENTAL PROTECTION AGENCY, *Press Release: EPA, New York State Announce Temporary Relocation of Love Canal Residents*, May 21, 1980, available at <http://www.epa.gov/history/topics/lovecanal/03.htm> (noting that “the temporary relocation will be assisted by the Federal Emergency Management Agency”).

<sup>53</sup> ENVIRONMENTAL PROTECTION AGENCY, *Press Release: Joint Federal/State Action Taken to Relocate Times Beach Resident*, Feb. 22, 1983, available at <http://www.epa.gov/history/topics/times/02.htm>.

<sup>54</sup> S.Rept. 100-524 at 2 (1988) (emphasis added).

<sup>55</sup> S. 3027, 96<sup>th</sup> Cong., § 2 (as reported in Senate).

but not a natural one.<sup>56</sup> Further attempts to amend the definitions of major disasters and emergencies were introduced several times during the 1980s and permitted only “natural catastrophes.” The definition was ultimately successfully amended by the 100<sup>th</sup> Congress as part of the passage of the Stafford Act in 1988.

An examination of this legislative history reaffirms the conclusion that the 100<sup>th</sup> Congress’s principal intent in limiting major disaster assistance to “natural” incidents was to deny major disaster assistance to incidents that were caused by human activity. Furthermore, the legislative history provides at least two clear examples of Presidential declarations for which Congress likely found natural causes lacking: the mass arrival of political refugees and instances of chemical contamination. Nevertheless, it is likely inaccurate to say that by excluding these two types of incidents from major disaster assistance Congress clearly addressed the issue of flu pandemics or other biological incidents under the Stafford Act.

## **Reasonableness of Executive Branch Interpretations**

The preceding analysis of the text and legislative history indicates that Congress did not directly address whether a flu pandemic is a natural catastrophe for purposes of the Stafford Act. Under the framework laid out by the Supreme Court in *Chevron*, the remaining question is whether a particular executive branch interpretation is “a reasonable choice within a gap left open by Congress.”<sup>57</sup>

In this case, interpreting a flu pandemic as either a natural or non-natural catastrophe is arguably reasonable. On the one hand, the manner in which a flu pandemic is likely to propagate does not require human intervention. Making flu pandemics eligible for major disasters makes the maximum amount of resources available to avert the loss of life, human suffering, and loss of income that is likely to occur in the event of a flu pandemic. Some types of assistance that are only available in a major disaster declaration may be particularly useful in a flu pandemic. For instance, a flu pandemic is likely to result in a significantly reduced workforce as victims fall ill and others stay home to take care of them. The provision of unemployment assistance and emergency public transportation under the Stafford Act both may be an appropriate response, but are only available under a major disaster declaration.

On the other hand, a pandemic is substantially different than the climatic and geologic natural catastrophes listed by the Stafford Act, and many types of major disaster provisions, such as assistance to repair buildings or clear debris, are not likely to be necessary during a flu pandemic. Restricting flu pandemics to only emergency assistance arguably limits the burden on federal disaster relief funds. Additionally, other federal responses may be more appropriate to deal with a pandemic, such as the authority of the HHS Secretary to declare a public health emergency,<sup>58</sup> or impromptu legislation to provide assistance with respect to a particular incident.

Finally, it should be noted that the reasonableness of either interpretation is being evaluated under current law. Were Congress to conclude that flu pandemics categorically should or should not be

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<sup>56</sup> S.Rept. 96-891 at 3 (1980).

<sup>57</sup> *Chevron*, 467 U.S. at 866.

<sup>58</sup> For a more detailed discussion of authority and funding for public health emergencies, see CRS Report RL33579, *The Public Health and Medical Response to Disasters: Federal Authority and Funding*, by Sarah A. Lister, at 4-7, 16-18.

eligible for major disaster assistance, it may amend the statute to explicitly say so. In that case, the clearly expressed intent of Congress would render any evaluation of an executive branch interpretation unnecessary, and Congress's intent would control.

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## **Acknowledgments**

Sadena Thevarajah contributed to portions of this report during her time as a law clerk in the American Law Division of the Congressional Research Service.