



Memorandum

August 19, 2005

TO: House Committee on Homeland Security
Attention: Sue Ramanathan

FROM: Stephen R. Viña
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SUBJECT: A State's "Declaration of Emergency" for Border Security Purposes:
Selected Issues of Federal Assistance

Pursuant to your request, this memorandum discusses the implications (under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. §§ 5121 *et seq.*) hereafter referred to as the "Stafford Act") of the recent "state of emergency" announcements by the Governors of Arizona and New Mexico due to border security concerns.¹ In particular, this memorandum focuses on (1) whether border security concerns may qualify as an *emergency* under the Stafford Act, and if so, (2) the availability and type of federal assistance under the Stafford Act for such an emergency. This memorandum also discusses some of the possible roles that the Department of Homeland Security (DHS) may play in aiding the states of Arizona and New Mexico.

Background

On August 12 and 15, the Governors of New Mexico and Arizona respectively, declared "states of emergency" for various counties in their states due to the adverse consequences posed from the significant increases in unauthorized aliens coming to the United States through each state's borders. In New Mexico, the declaration was made through an Executive Order,² while in Arizona, the declaration was made through a "Declaration of

¹ This memorandum solely addresses the applicability of the Stafford Act to the situation in Arizona and New Mexico. Other federal authorities may also apply (*see e.g.*, 42 USC §10501 – Emergency Federal Law Enforcement Assistance), but are not discussed here in accordance with our telephone conversation.

² N.M. Exec. Order No. 2005-040 (Aug. 12, 2005) available at: [<http://www.governor.state.nm.us/press.php?id=119>].

Emergency” press release.³ The following bullets describe some of the findings made in the declarations.

- The Southern border of New Mexico has been devastated by the ravages and terror of human smuggling, drug smuggling, kidnapping, murder, destruction of property and the death of livestock (New Mexico).
- With the increase in unauthorized immigrants coming to Arizona, there has been a corresponding increase in the threat to public health and safety from gangs, coyotes, and others engaged in dangerous criminal activities along the Arizona – Mexico International border (Arizona).
- This situation constitutes an emergency condition with potentially catastrophic consequences (New Mexico).
- State and local law enforcement officials have utilized all available resources to combat border security concerns (New Mexico).
- The federal government has failed in its responsibility to secure the United States and Mexico border (Arizona).

These declarations were apparently made, in part, to secure additional state resources for the designated areas in each state and to possibly make the regions eligible to receive applicable federal assistance. The declarations of emergency, for example, call on each respective state government to provide emergency financial resources and to coordinate the responses and funding in certain manners. These steps may also qualify the designated regions for federal assistance under the Stafford Act.

Border Security Concerns and the Stafford Act

The Stafford Act provides authority by which the federal government can provide federal assistance to individual victims; state, territorial, and local governments; and nongovernmental entities after major disasters or applicable emergencies. Because the influx of unauthorized aliens would not likely qualify as a *major disaster*⁴ under the Stafford Act, the situation would necessarily need to be categorized as an *emergency* to qualify for assistance under the Act. In order to receive federal assistance, however, the President must determine that an *emergency* does in fact exist. 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

³ State of Ariz., Declaration of Emergency, *Arizona – Mexico International Border Security Emergency* (Aug. 20, 2005) available at: [<http://www.governor.state.az.us/press/August05/DE%7E081605%7EAZMEXBorderSecurity.pdf>].

⁴ A *major disaster* means 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 Act 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. 42 U.S.C. §5122(2).

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 (42 U.S.C. §5122(1)).

It appears that the border security concerns of Arizona and New Mexico, as articulated in the declarations, may meet the criteria of an *emergency* under the Stafford Act. As mentioned above, the states are seeking additional resources to supplement state and local efforts and capabilities. Moreover, the states claim that the significant increase in unauthorized aliens poses a threat to public safety, property, and health. Finally, it appears plausible to suggest that federal assistance could lessen or avert, what New Mexico describes as, the “potentially catastrophic consequences” brought by the mass influx of aliens. Consequently, it appears that the border security concerns outlined by the Governors may meet the criteria of an *emergency* under the Stafford Act, as the President determines what constitutes an *emergency*.

Under §501(a) of the Stafford Act (42 U.S.C. §5191(a)), all requests for a declaration by the President that an emergency exists are to be made by the Governor of the affected state. Such a request is to be based on a finding that the situation is of such severity and magnitude that effective response is beyond the capabilities of the state and the affected local governments and that federal assistance is necessary. An affected state must also take appropriate emergency action under state law and direct execution of the state’s emergency plan before it can receive emergency assistance under the Stafford Act. Here, it appears that both Arizona and New Mexico have taken (or will take) the necessary state emergency actions for the President to declare an emergency for the affected regions within each state. Moreover, the severity of the situation and lack of adequate local resources, as described in the declarations, would seem to meet the criteria under this provision. However, a review of the Federal Register indicated that §501(a) emergency declarations have mostly been used for fires and explosions and extreme weather conditions (e.g., flooding, heavy rains, and high winds).⁵

Irrespective of a Governors’ request for a Presidential declaration of emergency under §501(a), the President at his discretion may — under §501(b) of the Stafford Act (42 U.S.C. §5191(b)) — provide federal assistance under the Act for an emergency that he determines the primary responsibility for response rests with the United States because the emergency involves a subject area (under the Constitution or laws of the U.S.) for which the United States exercises exclusive or preeminent responsibility and authority. A review of the Federal Register found three situations where a §501(b) *emergency* was declared: (1) the emergency conditions relating to the loss of the Space Shuttle Columbia on February 1, 2003, over the states of Texas and Louisiana; (2) the fires and explosions on September 11, 2001, in Virginia; and (3) the explosion at the federal courthouse in Oklahoma City, on April 19, 1995.⁶ In all three instances, the declarations were made, in part, because of the federal property or programs at issue.

⁵ See e.g., Notice, 66 Fed. Reg. 49674 (Sept. 28, 2001) (fires resulting from the 9/11 Attacks in New York affecting New Jersey); Notice, 63 Fed. Reg. 37880 (July 14, 1998) (fires in Texas); Notice, 64 Fed. Reg. 26756 (May 17, 1999) (fires in Florida). Notice, 61 Fed. Reg. 57873 (Nov. 8, 1996) (extreme weather conditions and flooding in Massachusetts); Notice, 61 Fed. Reg. 58191 (Nov. 13, 1996) (severe storm in Maine). See also Notice, 61 Fed. Reg. 65577 (Dec. 13, 1996) (major water main break in Rhode Island).

⁶ Notice, 66 Fed. Reg. 48682 (Sept. 21, 2001) (9/11 Attacks in Virginia); Notice, 68 Fed. Reg. 9667 (Feb. 28, 2003) (Space Shuttle); Notice, 60 Fed. Reg. 22579 (May 8, 1995) (Oklahoma City Bombing).

Preventing the entry of unauthorized aliens into the United States is apparently an area that the federal government exercises preeminent authority, given that the Constitution (Art. I, §8, cl. 3) provides that it is the responsibility of the Congress to “establish a uniform Rule of Naturalization.” Indeed, courts have found that the power to prescribe rules as to which aliens may enter the United States and which aliens may be removed solely resides with the federal government.⁷ To implement its plenary power, Congress has enacted and amended the Immigration and Nationality Act (INA; 8 U.S.C. §§ 1101 *et seq.*)—a comprehensive set of rules for legal immigration, naturalization, deportation, and enforcement. Accordingly, the President would likely be authorized under §501(b) to provide federal assistance under the Stafford Act to assist Arizona and New Mexico in the prevention of unlawful entries by aliens into the United States. In deciding whether to declare a §501(b) emergency for border security purposes, it appears that the President, as the examples above seem to suggest, would likely consider the extent to which federal property and programs are concerned.

Federal Assistance Available under the Stafford Act

Section 502(a) of the Stafford Act (42 U.S.C. §5192(a)) authorizes the President to deliver different types of federal assistance. For example, in this particular situation, the President might seek to: (1) direct a Federal agency to utilize its authorities and resources (including personnel, equipment, supplies, facilities, and managerial, technical and advisory services) in support of state and local emergency assistance efforts to save lives, protect property and public health and safety, and lessen or avert the threat of a catastrophe; or (2) provide technical and advisory assistance for the management, control, and reduction of immediate threats to public health and safety. Each of these authorities would seem to hold potential to alleviate some of the border security concerns of Arizona or New Mexico, since such assistance could possibly include the addition of more federal personnel and resources (e.g., immigration officers or equipment) or tactical support (e.g., reconnaissance assistance). In addition, if assistance under §502(a) is inadequate, the President at his discretion under §502(b), may also provide assistance with respect to efforts to save lives, protect property and public health and safety, and lessen or avert the threat of a catastrophe. Section 502(b) does not specify what type of assistance is authorized to meet the stated objectives.

Under §503 of the Stafford Act (42 U.S.C. §5193), the federal government’s share for assistance is to be equal to and not less than 75% of the eligible costs. Total assistance for a single emergency is not to exceed \$5 million, but the President may exceed that amount if he determines that, among other things, there is a continuing and immediate risk to lives, property, public health or safety.

A Possible Role for the Department of Homeland Security

The Department of Homeland Security has the primary responsibility for enforcing U.S. immigration laws, as well as administering most provisions of the Stafford Act. Within DHS, the Bureau of Customs and Border Protection (CBP) and the Bureau of Immigration and Customs Enforcement (ICE) carry out immigration enforcement functions within the proximity of the border and within the interior of the country respectively. Although CBP

⁷ De Canas v. Bica, 424 U.S. 351, 355 (1976). *See also* Gonzalez v. City of Peoria, 722 F.2d 468, 474 (9th Cir. 1983) (“We assume that the civil provisions of the Act regulating authorized entry, length of stay, residence status, and deportation, constitute such a pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration.”).

is charged with overall border enforcement, immigration enforcement *between* the points of entry is primarily handled by the U.S. Border Patrol of CBP.

Section 103 of the INA provides that the Secretary of Homeland Security “shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens. . . .” While the enforcement of immigration law within the proximity of the border rests with the CBP and the Border Patrol, the Secretary of DHS has the authority to delegate these enforcement functions to other individuals, including:

- **Any Employee of CBP, ICE, or DHS.** Section 103(a)(4) of the INA authorizes the Secretary to require or authorize any employee of CBP, ICE, or DHS to perform or exercise any of the powers, privileges, or duties conferred or imposed by the INA or regulations issued thereunder.
- **Any Employee of the United States.** Section 103(a)(6) of the INA authorizes the Secretary to confer or impose upon any employee of the United States, with the consent of the head of the department under whose jurisdiction the employee is serving, any of the powers, privileges, or duties conferred or imposed by the INA or regulations issued thereunder upon officers or employees of CBP or ICE.
- **State and Local Law Enforcement Officers.** Section 103(a)(8) of the INA allows the Secretary of DHS, in the event the Secretary determines that an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border, presents urgent circumstances requiring an immediate Federal response, to authorize any State or local law enforcement officer, with the consent of the head of the department under whose jurisdiction the individual is serving, to perform or exercise any of the powers, privileges, or duties conferred or imposed by the INA or regulations issued thereunder upon officers or employees of CBP or ICE.⁸

Under these authorities, it would appear that the Secretary of DHS — notwithstanding any other law to the contrary — could shift personnel from DHS or request the help of other federal or state departments and agencies to address the significant increases of illegal immigration along the international borders of Arizona and New Mexico. Moreover, the President, under the Stafford Act, could direct DHS to deliver personnel, equipment, and supplies in support of the state efforts to save lives and to protect property and public safety.

Conclusion

The types of concerns voiced by the Governors of Arizona and New Mexico appear to fall within the parameters of the term *emergency* as defined in the Stafford Act. Thus, federal assistance under the provisions of the Stafford Act discussed herein, would appear to be available to Arizona and New Mexico, provided the President declares an emergency. Such federal assistance could fall under §501(a) if both Governors submit the appropriate requests and have taken the appropriate state actions, or under §501(b), since border security concerns related to immigration would likely be considered primarily a federal responsibility. In either case, the President possesses broad discretion to provide assistance and to determine whether an emergency exists. Even if the President does not declare an emergency for the

⁸ See also INA §287(g) (authorizing the Secretary of DHS to enter into agreements with state and local law enforcement officers to carry out the investigation, apprehension, or detention of aliens in the United States).

affected regions of Arizona and New Mexico, it would appear that the Secretary of DHS — as the primary official charged with protecting our borders from illegal entry — has the authority to shift resources within DHS or to request personnel from elsewhere in government to address these areas of concern. Whether he would do so, likely would depend on other demands for these resources.

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