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**MONTEREY, CALIFORNIA**

**THESIS**

**PREPARING FOR THE MUMBAI-STYLE ATTACK:  
INTERSTATE LAW ENFORCEMENT MUTUAL AID IN  
THE ABSENCE OF A DECLARED EMERGENCY**

by

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March 2014

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ENFORCEMENT MUTUAL AID IN THE ABSENCE OF A DECLARED  
EMERGENCY**

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## **ABSTRACT**

This thesis examined whether there is sufficient authority for interstate law enforcement mutual aid to respond to a Mumbai-style attack occurring in the United States. Several existing interstate mutual aid systems were examined to determine if they could be enacted on short notice and provide adequate authority and protections for the responding officers in a no-notice event. This thesis found that the existing systems for natural disasters and planned events were slow to implement and would not provide the authority and protections required for response to a no-notice event. Our conclusion is that the law enforcement community should create a new national compact that will facilitate the quick response of law enforcement across state lines when required for a notice or no-notice event.

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## **LIST OF ACRONYMS AND ABBREVIATIONS**

CRS	Congressional Research Service
DHS	Department of Homeland Security
EMAC	Emergency Management Assistance Compact
FBI	Federal Bureau of Investigation
FEMA	Federal Emergency Management Agency
ICDDC	Interstate Civil Defense and Disaster Compact
IED	improvised explosive devices
MCC	Major City Chiefs Police Association
MOA	memoranda of agreement
NIMS	National Incident Management System
NRF	National Response Framework
NSSE	national special security events
NYPD	New York Police Department
PDD	presidential decision directive
PPD-8	Presidential Preparedness Directive 8
SGA	Southern Governors' Association
SREMAC	Southern Regional Emergency Management Assistance Compact
USCG	U.S. Coast Guard
USMS	U.S. Marshals Service
USSS	U.S. Secret Service

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## **EXECUTIVE SUMMARY**

This thesis examines how law enforcement officers could be provided appropriate authority and legal protection to quickly and efficiently provide interstate mutual aid in a no-notice event, such as a Mumbai-style attack or other incidents that require a rapid law enforcement surge capacity.

Interstate mutual aid has improved significantly over the last 15 years through the adoption of compacts such as the Emergency Management Assistance Compact (EMAC), along with increases in capability and coordinated planning. These improvements have provided increased authority for mutual aid, assured workers compensation and other benefits for responders, and streamlined the mutual aid request process. Despite these improvements, gaps continue to be identified in disaster after action reports and are evident during special events. Some of these gaps are directly related to law enforcement authority.

Law enforcement mutual aid is different from other disciplines as it requires that officers have the proper law enforcement legal authority when they enter another jurisdiction. This authority comes from statutes and other laws, and it is usually specific rather than general in its enactment.

There are a number of systems in place for response to natural disasters. EMAC and the Interstate Civil Defense and Disaster Compact grant law enforcement powers, including the power of arrest, but only during the response to declared emergencies. Governors have used executive orders to extend law enforcement powers to respond to elevated then Homeland Security Advisory System threat levels. National special security events (NSSEs), such as the presidential nominating conventions, have required large numbers of extraterritorial law enforcement officers to secure the event. In order to grant law enforcement powers to responding law enforcement officers, the U.S. Secret Service deputized the officers as temporary federal marshals. Some states have laws that allow municipalities to enter into mutual aid agreements with out of state responders that will grant law enforcement powers. While each of these accomplishes the goal of providing

law enforcement authority, these approaches are applicable to limited circumstances and are not readily adaptable for short notice implementation that may be required for a Mumbai-style attack or other no-notice event.

Each of these systems is examined to determine if they provide a framework that includes

- quick implementation;
- implementation at the lowest level;
- seamless grant of law enforcement authority; and,
- resolution of issues of liability, pension, and workers compensation.

While each of the systems covers some of these elements, none of the systems are currently capable of providing for response to a no-notice event, either because they do not provide all of the elements or because they are not widespread enough.

Compacts, such as EMAC, require the declaration of an emergency, and they are not quick to implement or capable of being implemented at the lowest possible level. In addition, compacts do appear to provide a seamless grant of authority, yet some states have used a duplicative swearing when accepting aid under EMAC, questioning whether this grant of authority is effective. Compacts delineate responsibility for liability, workers compensation, and other benefits.

Executive orders are not quick to implement as a governor is required to enact the order. Because they are enacted by the governor, they do not allow implementation at the lowest possible level. Executive orders do provide a seamless grant of authority and for liability, workers compensation, and other benefits usually by having the responding state retain responsibility.

The system used for NSSE is not quick to implement nor implemented at lowest possible level as action by the federal government is required to grant the power. The NSSE system provides a limited grant of law enforcement authority through the use of deputation by the U. S. Marshals Service—a deputation that is limited in terms of the state and local laws that could be enforced. The NSSE system provides for liability, workers compensation, and other benefits by providing federal coverage.

State laws allow enactment and implementation at the lowest possible level as all necessary agreements and requests are made by the local governments who require the mutual aid. State laws provide a seamless grant of law enforcement authority; however, this grant will be different from state to state, based on the details of each state's law. State laws often require provisions to be included in memoranda of agreements detailing the coverage for liability, workers compensation and other benefits. However, the state laws are not universal throughout the nation and require action by many local governments to provide for an effective system.

In order to provide the proper legal framework to facilitate interstate response to no-notice events, such as a Mumbai-style attack, this thesis recommends that associations representing state, county, and local law enforcement agencies should develop a law enforcement compact that will address the concerns unique to law enforcement mutual aid. These associations are best suited to balance the interested of law enforcement agencies from different states and amongst the different types of law enforcement agencies. This new compact will need to be passed by at least two states and then submitted to Congress for approval. While this multi-layered legislative process may take a considerable amount of time; developing the core principles of the compact today will position law enforcement for quick adoption should opportunity present, such as after a major disaster.

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## I. INTRODUCTION

On November 28, 2008, 10 terrorists took the city of Mumbai, India, captive in an unprecedented and unparalleled terrorist attack. This meticulously planned attack has left open the question of whether such an attack could be launched in the United States. If the United States was attacked in this manner, would our law enforcement mutual aid system be capable of summoning the appropriate assistance from across state lines?

The 10 terrorists in Mumbai planted bombs and used small weapons such as handguns, rifles, improvised explosive devices (IEDs) and grenades to terrorize and kill while lighting buildings on fire in their wake (Rabasa et al., 2009, pp. 4–5). This attack overwhelmed the Mumbai law enforcement authorities, rendering them incapable of mounting a consolidated or integrated response (Shankar & Somayaji, 2008). The weapons and communication capabilities of the attackers were significantly superior to those immediately available to law enforcement. The chaos created by the attack and lack of organized communication capacity by law enforcement delayed both response and rescue. This attack resulted in 172 deaths and 293 injuries and terrorized Mumbai for 36 hours (New York Police Department [NYPD] Intelligence Division, 2008).

This attack was meticulously planned in Pakistan, and it was designed to render the response difficult and ineffective (Rabasa et al., 2009, p. 7). The terrorists arrived in Mumbai as one group and then proceeded to split into smaller groups. This created several attack teams moving around the city with multiple incident scenes. The terrorists also left bombs in taxi cabs that exploded significant distances from where they were originally placed in the cabs. This distributed attack methodology added to the first responders' confusion (NYPD Intelligence Division, 2008).

The police in Mumbai were unable to address the unfolding terrorist attack. They were outgunned, initially responding with only batons (Shankar & Somayaji, 2008). Once armed police responded, their weapons were still no match for the AK-56 assault rifles, grenades, and IEDs of the terrorists (Rabasa et al., 2009, p. 4). It took nearly 11 hours for the specialized commando team to respond from New Delhi nearly 900 miles away (Balachandran, 2010, p. 4). The Mumbai police had no effective command and control

structure to deal with the attack (Sullivan & Elkus, 2009, p. 2). The terrorists ultimately took their final stand in a number of locations spread throughout the city, stretching the police force to address multiple incident scenes.

What would happen if such an attack were launched in the United States? Would law enforcement be unable to efficiently counter the terrorists as in Mumbai? An attack such as this would require a law enforcement response that would likely exceed the capabilities that many local law enforcement agencies could muster themselves. Law enforcement mutual aid would be required to respond quickly and efficiently. If the closest mutual aid was across state lines, is there sufficient authority to allow the law enforcement officers<sup>1</sup> to respond without concern regarding what authority they possess, whether they would be covered for injuries sustained, or if their pension and insurance benefits would be available if they are injured or killed? If law enforcement agencies respond across a state border without proper legal authority, they could face potential lawsuits claiming unlawful arrest from innocent citizens detained during the response.

If the city of Philadelphia in the state of Pennsylvania were to be the target of such an attack, would the city of Camden, a mere half mile across the river in the state of New Jersey, be able to send law enforcement officers to provide mutual aid? The Camden officers are much closer to parts of Philadelphia than many other law enforcement agencies in Pennsylvania are, so their response would be faster. Were such an attack to occur and the Camden officers unable to respond, it would be hard to justify after the incident that the lack of planning prevented additional much needed resources from being rapidly summoned.

In the absence of a terrorist attack, there are many events and incidents that require law enforcement mutual aid across state lines, some of which provide solutions for interstate law enforcement mutual aid that work well for the specific type of event. National special security events (NSSEs), such as the presidential nominating conventions and inaugurations, regularly occur and often require significant law

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<sup>1</sup> The term “law enforcement officers” is used to refer to those government officials who are charged with providing day-to-day law enforcement in communities across the country. It is recognized that different states use different terminology to refer to such officers, such as police officers, peace officers, sheriffs or law enforcement officers, however for expediency the term law enforcement officers will be used.

enforcement mutual aid to properly address potential threats and security concerns. Severe weather and manmade hazards may also require response across state lines to save lives and protect public safety.

Terrorism and lone shooter events also demonstrate a need for interstate mutual aid. Elevated threat levels near or across state lines may require the seamless movement of law enforcement officers across the border on trains, ferries, or other modes of transportation. Recent lone wolf shooter incidents in schools and public places have demonstrated the need for large scale law enforcement response.<sup>2</sup>

While the solutions for natural disasters and planned events appear to work well for those events, are there adequate authorities for responding to the type of attack that was unleashed on Mumbai? Ideally, one solution would provide adequate law enforcement authority and protections both for natural disasters and no-notice terrorist attacks; however, there may not be one solution that fits all situations.

#### **A. PROBLEM STATEMENT**

As part of its post Hurricane Katrina preparedness mission, the Federal Emergency Management Agency (FEMA) includes mutual aid as a component of overall national preparedness. Mutual aid is recognized in the National Incident Management System (NIMS) as one of the elements contributing to an effective response capability (U.S. Department of Homeland Security [DHS], 2008b, p. 18). NIMS encourages first responders, policy makers, and elected officials to develop robust mutual aid capabilities (DHS, 2008b, p. 18). The *National Response Framework* (NRF) recognizes interstate mutual aid as a tool for providing necessary resources when an incident exceeds tribal, territorial, local or state capabilities (DHS, 2013, pp. 26–27).

The president, in *Presidential Preparedness Directive 8* (PPD-8) recognized that “national preparedness is the shared responsibility of all levels of government, the private and nonprofit sectors, and individual citizens” (White House, 2011, p. 1). PPD-8 directs

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<sup>2</sup> While the focus of this thesis is on the active response to events, specialized investigative units may also be required to respond as mutual aid once an event has been resolved. A robust mutual aid system will allow these types of assets to be shared, eliminating unnecessary duplication and saving diminishing grant funding for greater needs.

the creation of a national preparedness system designed to help prepare and equip national capabilities. One method for enhancing national preparedness is through the sharing of resources pursuant to mutual aid agreements.

It is important to note at the outset that law enforcement mutual aid is different from other disciplines as it requires the officers have the proper law enforcement legal authority when they enter another jurisdiction. This authority will come from statutes and other laws and is usually specific rather than a general in its enactment.

One form of mutual aid planning recognized by NIMS is a mutual aid agreement:

Mutual aid agreements and assistance agreements are agreements between agencies, organizations, and jurisdictions that provide a mechanism to quickly obtain emergency assistance in the form of personnel, equipment, materials, and other associated services. The primary objective is to facilitate rapid, short-term deployment of emergency support prior to, during, and after an incident. (DHS, 2008b, p. 18)

Properly drafted, a mutual aid agreement is one type of authority for mutual aid that could be used in a Mumbai-style attack or non-emergency event assuming it is based upon valid underlying legal authority. Elements that NIMS recommends be included in the mutual aid agreement include: procedures for requesting assistance, allocation of workers compensation, liability and immunities, and recognition of licenses and authorities (DHS, 2008b, p. 18).

The federal government has highlighted the necessity of interstate mutual aid planning as a homeland security building block. The Secretary of Homeland Security in the *FY 2013 National Preparedness Grant Program Vision Document* proposes to “require that resources, regardless of funding source, are complementary and that mutual aid and similar agreements allow for their use across jurisdictional boundaries for a wide range of threats and hazards” (DHS, 2012, p. 4). States will also be required to maintain membership in the Emergency Management Assistance Compact (EMAC) as a condition of receiving homeland security grant funds (DHS, 2012, p. 4).

While the federal government is highlighting the need for interstate mutual aid such as EMAC, states cannot enter into mutual aid agreements directly—congressional approval is required. This is due to the Article I, Section 10, Clause 3 of the United States

Constitution, commonly known as the Compact Clause, which provides, “No State shall, without the consent of Congress ... enter into any Agreement or Compact with another State” (U.S. Const. art. I, § 10).

The Supreme Court found that this clause does not prevent agreements between the States on all subjects, just those that would increase the powers of the States. In *Virginia v. Tennessee*, the Court found:

It is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States. (*Virginia v. Tennessee*, 148 U.S. 503, 1893)

Mutual aid agreements provide, among other things, law enforcement officers from one state to another, thereby increasing the police power of the states.

Congress has approved many interstate compacts, but only a few that have directly impacted emergency mutual aid. According to the Council of State Governments, there were over 200 active compacts in 2012 (Council of State Governments, n.d.). Of these 200, only two provide for interstate mutual aid in emergencies: the Interstate Civil Defense and Disaster Compact (ICDDC) and EMAC.

Prior to September 11, 2011, authority for interstate mutual aid was sporadic and varied. The ICDDC, authorized in the 1950s, provided the framework for interstate mutual aid agreements (N.J.S. 38A:20-3). However, only half of the states adopted the compact (National Center for Interstate Compacts, 2011). By the early 1990s, it was clear this inconsistent and sporadic adoption rendered the ICDDC impotent to respond to a major national disaster.

Responding to Hurricane Andrew in August 1992, the emergency managers in Florida and other southern states discovered there was no standard mutual aid agreement adopted by the 50 states that allowed all of the needed assets to respond across state lines (National Emergency Management Association, n.d.). Following Hurricane Andrew, the governors and emergency management directors in the southeastern United States began to review how to improve response to large scale disasters. Governor Lawton Chiles of Florida requested that the Southern Governors’ Association (SGA) examine the ability of

the southern states to assist each other during emergencies (Cook, 2009). One recommendation from the SGA was to enact a mutual aid agreement amongst the southern states that would address issues such as tort liability of responders, the recognition of licenses from one state to another, and the ability to move much needed response assets across state lines. This agreement was initially known as the Southern Regional Emergency Management Assistance Compact,<sup>3</sup> the predecessor of EMAC.<sup>4</sup>

Since September 11, 2001, inter-state mutual aid has improved significantly through the adoption EMAC and through increases in capability and through coordinated planning. These improvements provide: increased authority for mutual aid; assuring workers compensation and other benefits for first responders; addressing tort liability; and streamlining the mutual aid request process. However, gaps still remain in the ability to provide mutual aid response, and these gaps have been identified in disaster after action reports, lessons learned, and are evident during special events.

Despite the improvements in mutual aid post September 11, when Hurricane Katrina hit the Gulf Coast, mutual aid was again the subject of much criticism and questioning (White House, 2006). Particularly criticized was the law enforcement mutual aid provided by federal, state, and local law enforcement agencies to the affected areas of Louisiana and Mississippi (Smith & Rojek, 2006). The White House, in its review of the response to Hurricane Katrina recognized:

The final structural flaw in our current system for national preparedness is the weakness of our regional planning and coordination structures. Guidance to governments at all levels is essential to ensure adequate preparedness for major disasters across the Nation. To this end, the Interim National Preparedness Goal (NPG) and Target Capabilities List (TCL) can assist Federal, State, and local governments to: identify and define required capabilities and what levels of those capabilities are needed; establish priorities within a resource-constrained environment; clarify and understand roles and responsibilities in the national network of homeland security capabilities; and develop mutual aid agreements. (White House, 2006, p. 53)

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<sup>3</sup> This agreement was never approved by Congress as required by the Compact Clause of the United States Constitution and therefore was not properly a compact.

<sup>4</sup> EMAC is a congressionally authorized compact among the states that allows mutual aid during disasters.

While the White House identified a need for mutual aid agreements post-Katrina, a congressional report recognized interstate mutual aid as one of the successes in the response:

Finding: EMAC and military assistance were critical for restoring law and order. The Emergency Management Assistance Compact (EMAC), the state to state assistance compact, facilitated the deployment of resources to the hardest hit regions. (U.S. House of Representatives, 2006, p. 249)

While in conflict, the White House and congressional reports both recognize the value of effective interstate mutual aid agreements.

Law enforcement mutual aid is different from other disciplines as it requires the officers have the proper law enforcement legal authority when they enter another jurisdiction. Law enforcement authority is granted, generally speaking, by state and federal laws.

Federal law enforcement officers derive their authority from federal law (Seitz, 2012). This can be broad in scope like the Federal Bureau of Investigation (FBI), which is able to enforce all criminal laws, or limited in scope like the U.S. Coast Guard (USCG), which enforces federal law on the water (14 U.S.C. 2). Federal law enforcement officers cannot enforce state laws unless there is specific state authorization to do so. In New Jersey, for example, certain federal law enforcement officers are empowered to enforce third degree or higher crimes (N.J.S. 2A:154-5). In practical terms, this means that federal law enforcement officers may not enforce misdemeanors or minor criminal violations in New Jersey. In New Jersey, this authority exists at all times, not just during emergencies. While not significant on a day-to-day basis, this could prove problematic in some circumstances such as during a disaster response when ability to enforce lesser crimes is required.

During Hurricane Katrina, the limitations on federal law enforcement officers were evident and created problems (Smith & Rojek, 2006). The issues were significant enough that the U.S. Attorney General Alberto Gonzalez, on May 31, 2006, wrote to the governors of all 50 states requesting that they review and update their laws to allow for federal law enforcement aid in the event of a disaster (Gonzales, 2007). Attorney General Gonzalez sought to create a federal law enforcement response that was better coordinated

and as expeditious as possible. Through pre-event planning, the attorney general desired to improve the federal response. Again in 2007 and 2012, the Justice Department reached out to the state attorneys general and requested that the states review its laws to assure that federal law enforcement could be provided post disaster (Gonzales, 2007).

State and local law enforcement officers receive their authority from state laws. These laws are limited in both scope and geographic jurisdiction (N.J.S. 40A:14-152.1). The scope of the authority is varied. For example, in some states, the officers possess law enforcement authority at all times throughout the state (N.J.S. 40A:14-152.1). Other states limit the geographic scope of law enforcement officers to particular counties. While compacts are approved by Congress, they must also be enacted by state legislatures to provide the state legal framework for the work to be performed by the compact.

Along with recognizing licenses and other powers, EMAC provides for state law enforcement authority, including the power of arrest—but only during a response to declared emergencies (Emergency Management Assistance Compact). These compacts require a declaration of an emergency prior to mutual aid being provided. An emergency declaration is not always available for interstate law enforcement mutual aid during no-notice events, such as a Mumbai-style attack or planned events, such as NSSEs. NSSEs, such as the presidential nominating conventions, have required large numbers of out-of-state law enforcement officers to secure the event (Reese, 2009, p. 2). In order to grant law enforcement powers to out-of-state law enforcement officers for NSSEs, the U.S. Secret Service (USSS) will usually request to have the officers deputized as temporary federal marshals (Connors, 2007). While accomplishing the goal of providing law enforcement authority, these approaches are applicable only to limited circumstances and are not readily adaptable for short notice implementation that would be required by an elevated threat levels or emerging incident, such as a Mumbai-style attack.

The improvements in interstate mutual aid over the last several years have focused on response to catastrophic events, such as Hurricane Katrina or the terrorist attacks of September 11, 2001. It is not clear that these improvements will assist with law enforcement mutual aid for a Mumbai-style attack, for special events, for law

enforcement activity due to elevated threat levels, or other prevention activity. The solutions for pre-emergency mutual aid are not expedient and, in some cases, may suffer legal infirmities. The development of solutions that provide the expedient provision of pre-emergency mutual aid that are solidly founded in law should be a homeland security priority. New solutions could fill the gaps in the current interstate mutual aid systems, which would allow state and local governments to plan effective responses to events and incidents across all of the homeland security mission areas. New solutions could also facilitate quicker implementation of protective measures required for elevated threat levels and other emergent conditions.

**B. RESEARCH QUESTION**

How can law enforcement officers be provided appropriate authority and legal protection to quickly and efficiently provide interstate mutual aid when required by no-notice events, such as a Mumbai-style attack, or similar events and incidents that require law enforcement surge capacity?

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## II. LITERATURE REVIEW

Interstate law enforcement mutual aid presents unique challenges for state and local governments since law enforcement authority is granted by state laws and does not easily transcend state borders. Events such as the response to Hurricane Katrina and orange threat levels on interstate transportation have highlighted the need for a smooth and efficient method to provide law enforcement assistance across state lines. While there seems to be sufficient authority for post-disaster response, the authority for prevention or protection activities is still lacking.

There is not a significant amount of literature on the subject of interstate law enforcement mutual aid. The available literature consists of legal source materials such as laws and compacts, along with after action reports and other operational analysis. The laws and compacts provide legal solutions for providing law enforcement assistance across state lines. The after action reports and other operational analysis generally analyze how aid was provided in response to a specific event. The literature mostly discusses post-disaster mutual aid not pre-event prevention capability demonstrating a larger gap for elevated threat levels, non-emergency aid, and special events.

Congress created the Office of State and Local Law Enforcement, a law enforcement advocacy office, within the Department of Homeland Security (DHS). One responsibility of this office is to:

Conduct, jointly with the Administrator, a study to determine the efficacy and feasibility of establishing specialized law enforcement deployment teams to assist State, local, and tribal governments in responding to natural disasters, acts of terrorism, or other man-made disasters .... (6 U.S.C. § 607, n.d.)

The office noted in its report to Congress:

Both the inter-State law enforcement surge to Katrina and the professional opinions of national law enforcement leadership make it clear that significant improvements to large scale inter-State law enforcement capability are both desirable and possible. (FEMA, 2009, p. 10)

This report to Congress was based upon a joint position paper developed by the Major City Chiefs and Major County Sheriffs. In this position paper, the authors

recognized that if law enforcement deployments teams are established, “Team members should carry weapons, and have the authority to detain or arrest and use force, including deadly force, if necessary” (Major City Chiefs, Major County Sheriffs Associations, 2007, p. 4).

The legal authorities are subcategorized into general categories: interstate compacts, executive orders, memoranda of understanding, and state laws. Each category approaches interstate law enforcement mutual aid in a different way. The interstate compacts provide ability to move assets including law enforcement across state lines. Generally, these focus on post-disaster aid as opposed to prevention or protection activities. Executive orders use a variety of state laws and gubernatorial powers to provide response into a state. The memoranda of understanding provide law enforcement mutual aid for large scale events in prevention or protection activities. The state laws focus on providing aid across common borders, either at a state or local levels.

#### **A. INTERSTATE COMPACTS**

The primary compact legal authority for post-disaster interstate mutual aid is EMAC, a national compact that applies to all forms of mutual aid and does provide specific authority for law enforcement:

Each party state shall afford to the emergency forces of any party state, while operating within its state limits under the terms and conditions of this compact, the same powers (except that of arrest unless specifically authorized by the receiving state), duties, rights, and privileges as are afforded forces of the state in which they are performing emergency services. (Emergency Management Assistance Compact, n.d.).

EMAC was modeled after the ICDDC, which contains the identical provision regarding law enforcement and the power of arrest. These sections require a specific grant of authority for the power of arrest, but they are silent as to how this is to be granted.

Post event after action reports generally tend to contain short mentions of successes or problems, with little detail of the underlying facts or law. The primary after action reports come from the responses to Hurricanes Katrina and Rita. For example, *A Failure of Initiative, the House Committee Report on Hurricane Katrina* recognized that

there were limitations on the ability of existing laws to provide law enforcement mutual aid:

The EMAC process was not always smooth. For example, a sheriff from Michigan and a sheriff from Alabama were at the Louisiana border but could not assist because no EMAC request had been made. The Jefferson Parish Sheriff had apparently not made a request through the state EOC for the assistance—a requirement for providing law enforcement assistance through EMAC. (U.S. House of Representatives, 2006, p. 252)

The difficulty in providing law enforcement assistance was not limited to state and local police; the federal officers responding to Katrina also had problems: “The process for federal law enforcement being deputized or sworn in as a peace officer under state law in Louisiana and Mississippi proved cumbersome for some entities.” (U.S. House of Representatives, 2006, p. 256). Similarly, the White House report on Hurricane Katrina found coordination of law enforcement powers to be lacking, and it characterized the federal deputation process as cumbersome and inefficient (White House, 2006, p. 58). Neither of these reports offers suggestions on how to deal with the “cumbersome” process to deputize out-of-state and federal law enforcement officers other than general suggestions to create better coordination.

Following Hurricanes Katrina and Rita, the administrators of EMAC conducted an after action conference to examine the operational successes and areas of improvement for the multi-state response. The *EMAC Hurricane After Action Report* found as one of the successes that: “Law enforcement officers, whose police powers remain in effect under EMAC, were also sworn as Louisiana officers, ensuring there would be no question regarding their legitimate authority” (National Emergency Management Association, 2006, p. 3–15). Another success touted that “Granting deployed law enforcement officers powers of arrest in Louisiana eliminated any potential doubt regarding the legitimacy of their authority” (National Emergency Management Association, 2006, p. 4–17). These after action findings beg the question why the officers needed to be deputized. On its face, the compact grants law enforcement power so why was the additional step of deputizing necessary? Does this mean that the post-disaster powers are not as robust as needed?

## **B. EXECUTIVE ORDERS**

Based upon the ICDDC, the governor of New Jersey issued executive orders to allow for interstate law enforcement efforts during orange threat levels.<sup>5</sup> Similarly, in the past the governor of New York used his emergency powers to waive law enforcement training requirements allowing out-of-state law enforcement officers to patrol trains and ferries into New York City. Both of these solutions have provided temporary fixes to the problem of providing law enforcement assistance across state lines.

## **C. MEMORANDA OF AGREEMENT**

Over the years, the Congressional Research Service (CRS) has examined NSSEs several times, which the USSS is in charge of by statute (18 U.S.C. 3056(e), n.d.). One of the findings by CRS regarding reimbursement of law enforcement at these events is "... USSS did not have a mechanism to reimburse state and local law enforcement entities for NSSE costs." (Reese, 2009, p. 3). Similar findings were found in predecessor reports in 2008 and 2007 (Reese, 2007, p. 5; 2008, p. 13).

## **D. STATE LAWS**

Mutual aid laws enacted by individual states allow cross border law enforcement mutual aid. For example, a Montana statute allows law enforcement agencies to enter into mutual aid agreements with law enforcement agencies in other states. It states,

Mutual aid agreement may grant a peace officer of any party law enforcement agency acting within the territorial jurisdiction of any other party law enforcement agency authority to act as if he were a duly appointed and qualified peace officer of the law enforcement agency he is assisting. (Montana Code § 44-11-304, n.d.)

This statute, and the resulting mutual aid agreements, allow for mutual aid across state lines on a local basis.

As part of the Intelligence Reform and Terrorism Prevention Act of 2004, Congress created specific authority for mutual aid in the National Capitol Region. This act allows state and local governments in the region to take advantage of its provisions.

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<sup>5</sup> Orange threat level under the Homeland Security Advisory System, replaced by the National Threat Advisory System (DHS, n.d. b).

This act specifically authorizes grants of reciprocal powers across the various jurisdictions (Intelligence Reform and Terrorism Prevention Act of 2004). No other part of the nation has similar authority. The act specifically excludes “special events of national significance under section 3056(3) of title 18 United States Code, or other law enforcement functions of the United States Secret Service,” excluding many prevention and protection activities (Intelligence Reform and Terrorism Prevention Act of 2004).

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### III. METHOD

This thesis uses a policy options analysis, examining existing policy and proposing options for new policy. Examining the policy options would allow states and law enforcement agencies to develop solutions that could allow for quick and efficient mutual aid for future events. Existing systems for providing law enforcement mutual aid will be examined to determine if they could be used for a Mumbai-style attack.

These systems will be examined to determine if they provide a framework that includes:

- Quick implementation;
- Implementation at the lowest level;
- Seamless grant of law enforcement authority; and,
- Resolution of issues of liability, pension and workers compensation

In the absence of an existing solutions, alternative solutions developed by states or law enforcement agencies must have a sound legal foundation. This foundation must be defensible in court in the event of litigation. The foundation may include, but not be limited to: federal laws, interstate compacts, state laws, executive orders, or memoranda of agreement. Federal statutes, interstate compacts, and state statutes must be clear and unambiguous in granting law enforcement powers to responding officers. They must clearly state any limitations on the powers being granted, for example, the types of laws that may be enforced.

Executive orders must be based upon state laws that allow the signatory to grant the powers that the executive order is granting. If the person granting the power to law enforcement is not authorized to do so, any grant of power is meaningless and will likely be set aside in a criminal or civil proceeding. Generally speaking, the authority to enter the executive order will come from statutes and other laws.

Memoranda of agreement must also be backed by law, both that the person signing has sufficient authority to do so and for the powers granted (Lynn, 2005). If there is no underlying legal authority for granting power in the memoranda or the accompanying deputation, the grant of power will be ineffective. Similarly, if the person

signing the memoranda is not authorized to do so, the governing body can, and may be required to, repudiate the agreement after it has been relied upon.

There is little guidance available for the granting of law enforcement powers to responding mutual aid forces. There is no standardized metrics or criteria for measuring effectiveness or efficiency of any grant of power. However, there is general guidance for the drafting of mutual aid legislation or agreements, to include checklists of key parts that should be included (Stier, 2007). Key areas identified for drafting such laws or agreements include:

- agreement purpose or background
- organization and coordination
- *request and response procedures*
- licenses and permits
- *liability, immunity, and indemnity*
- costs and reimbursement
- *legal scope or effect*
- *workers' compensation, death benefits, and insurance dispute resolution*
- fees, funding, and appropriations
- supplemental agreements or parties amendments
- effective date, term of agreement, and withdrawal signatories
- definitions [emphasis added] (Stier, 2007).

This general guidance references licenses and permits as well as legal scope and effect. Both of these are directly relevant to law enforcement authority.

There are a number of existing solutions that will be reviewed. These include compacts (including EMAC and ICDDC), state laws, executive orders, and memoranda of agreement. State laws to be examined include laws from Montana, New Jersey, and New York. In addition, executive orders by the governors of New York and New Jersey providing law enforcement authority in the greater New York City area will be examined. Last, the USSS memorandum of agreement for NSSSEs will be examined along with the accompanying deputation process.

In order to determine whether the existing methods will work for a Mumbai-style attack, the following questions will be answered for each:

- Could mutual aid be implemented quickly and efficiently; does it require a declaration of emergency or other action that may delay response?
- Could mutual aid be implemented at the lowest possible level, such as the local police chief or sheriff? Does it require application to state or federal government officials to implement?
- Is a clear grant of seamless authority provided to the law enforcement agencies responding to a request for mutual aid?
- Does the solution delineate responsibility for liability, workers compensation and other benefits?

Answering these questions will provide insight as to whether the proposed mutual aid system is capable of providing a quick and effective response to a Mumbai-style attack.

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## **IV. ARGUMENT**

### **A. TENTATIVE SOLUTIONS**

Current methods for providing law enforcement mutual aid across state lines are varied and limited in application. This inconsistent approach makes the overall law enforcement mutual aid system inefficient and cumbersome. Most existing systems of providing interstate law enforcement mutual aid were designed for natural hazards or planned events, not for the sudden onslaught similar to a Mumbai-style attack. In order to provide quick and efficient mutual aid, a better method is needed.

State law enforcement officers derive their power from state statutes. Absent a grant of power, law enforcement officers do not have legal authority to enforce the law beyond that of any ordinary citizen. Federal law enforcement officers are empowered by federal law to enforce federal criminal law nationwide but, in the absence of a grant of authority by a state, are powerless to enforce state criminal law. Even when the authority is given to federal law enforcement officers to enforce state laws, the grant is often limited to specific types of crimes (N.J.S. 2A:154-5).

This limitation of state-based law enforcement authority is one of the basic constitutional tenets. Our founding fathers created a system in which the power to police was reserved to the states. In, *United States v. Morrison*, the Supreme Court recognized “[t]he principle that the Constitution created a Federal Government of limited powers while reserving a generalized police power to the States is deeply ingrained in our constitutional history” (*United States v. Morrison*, 529 U.S. 598, 2000)

State law enforcement officers are limited in authority by their empowering statutes. State statutes only provide authority within a state and do not extend beyond that state borders. Once state or local law enforcement officers cross a state line, they retain the right to carry a weapon but have no authority to enforce state laws in the state they have entered. The authority for officers to carry their weapons outside of their home jurisdictions was granted by Congress in the Law Enforcement Officers Safety Act (18 U.S. Code 926B and 926C, n.d.). While the act grants the right to carry weapons across state lines, it does not provide the power of arrest or grant law enforcement powers.

Concerns regarding liability, workers compensation protection, and the ability to prosecute cases necessitate that law enforcement officers are fully and legally empowered wherever and whenever they are called upon to operate outside their home jurisdiction (Major City Chiefs, Major County Sheriffs Associations, 2007). Each of these concerns must be addressed to fully facilitate the response of law enforcement officers. After the September 11 response and again after Hurricane Katrina, law enforcement officials questioned the coverage for workers compensation and pensions (Major City Chiefs, Major County Sheriffs Associations, 2007, p. 4). While some of the mutual aid systems discussed herein provide answers to these questions, law enforcement authority is an issue that must be addressed to have an effective system for meeting emergent incidents.

Concerns regarding liability are frequently voiced by law enforcement officials. Some of the mutual aid systems discussed herein address liability among the parties providing and receiving law enforcement mutual aid. However, the manner in which liability is addressed does not eliminate liability or immunize the officers. Instead liability is often retained by the responding party but any lawsuit must occur in the jurisdiction from which the responding officer came (Emergency Management Assistance Compact, n.d.). Retaining liability by the sending agency allows for the law enforcement officer to have the defenses, immunities, and protections the law provides for the officer's day-to-day activities. In other cases, liability is indemnified by the requesting state (Emergency Management Assistance Compact, n.d.).

Last, the authority to enforce the law must also be provided so that the law enforcement officers will not be violating the constitutional rights of persons within the requesting state. This protects the citizens, the officer, and the criminal justice system. If the out-of-state officers lacked proper authority many of the actions taken by them could be construed as a violation of state and federal constitutional rights. The lack of authority could also cause the dismissal of criminal cases for inability to prosecute arising from the officers' lack of proper law enforcement authority.

There are a number of existing methods of providing law enforcement mutual aid. Each has strengths, weaknesses, and may not apply to some circumstances. These

methods include congressionally-approved compacts, state statutes, executive orders and deputation.

EMAC and other compacts provide authority to law enforcement officers to render mutual aid during disasters and other emergencies. These compacts are limited to disasters declared by governors and are not applicable to pre-disaster prevention activities.<sup>6</sup> Despite language in EMAC, which give law enforcement officers' full powers while responding to mutual aid requests, Louisiana still deputized incoming officers during Hurricane Katrina. This gave the perception that Louisiana did not find the grant of authority in EMAC adequate leaving open the question whether the grant of authority in EMAC is truly effective.

Some states have used emergency powers and executive orders to provide authority to out-of-state law enforcement officers. In the years following the September 11 attacks in New York City, the governor of New York used amendments to his September 11 Emergency Declaration to waive statutes, thereby permitting New Jersey and Connecticut law enforcement officers to ride trains and ferries into and out of New York City to bolster security due to elevated threats (Executive Order 113.83, 2004). This allowed the responding state officers to provide seamless protection as they moved back and forth across the state lines on the trains and ferries. This solution requires a governor to declare a state of emergency (as happened in this example), which may not be legally possible or politically desirable in the absence of an imminent threat. Absent a warning of impending Mumbai-style attack (and it is likely there would not be much warning), there will unlikely be enough time to enact an executive order.

When the federal government requires assistance from state and local law enforcement for NSSEs, the USSS will enter into memoranda of agreement (MOA) with state and local law enforcement agencies. These MOAs do not grant law enforcement power; rather, they define the relationship between the agencies. In order to provide law enforcement power, the USSS will have the U.S. Marshals Service (USMS) deputize the

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<sup>6</sup> Some states have adopted amendments to the Interstate Civil Defense and Disaster Compact that purport to allow preventative activities. These amendments were not part of the originally congressionally approved compact language, leaving a question regarding the effectiveness and legal sufficiency of these sections. See e.g., NY CLS Unconsol Ch 106, § 15; N.J.S.A. 38A:20-3. Interstate Civil Defense and Disaster Compact.

state and local law enforcement officers as federal marshals to make them capable of enforcing federal law. The deputized federal marshals will only be able to enforce state laws if the state where they are operating has a statute that grants this power to federal marshals (N.J.S. 2A:154-5). While this system has been used by the USSS for a number of years, it can be cumbersome and has been shown to have problems, particularly with reimbursement of the costs incurred by the responding jurisdictions (Reese, 2009, p. 3). This system relies upon multiple steps to demonstrate the power granted beginning with the MOA, through the deputizing and then any state statute granting power, all of which could be exploited in litigation or criminal defense.

Some states have enacted statutes that allow municipalities to enter into mutual aid agreements with out-of-state law enforcement agencies granting full law enforcement power when requested on mutual aid. These laws tend to be limited in geographic scope and require advance planning and approval. In addition, these statutes are applicable to routine events making them flexible enough to address preventative operations. While these laws work well for adjacent communities, the logistics of every municipality in the country entering into individual mutual aid agreements makes this an impractical solution for large scale events.

In order to be effective and efficient, the method of providing interstate law enforcement mutual aid should:

- 1) Be implemented quickly and efficiently;
- 2) Be implemented at the lowest possible level;
- 3) Provide seamless authority across jurisdictional boundaries; and
- 4) Provide for liability, workers compensation and pension benefits/protections.

Any solution must be able to be implemented quickly and efficiently. The need to provide quick and efficient law enforcement surge capability in response to an unfolding event, such as a Mumbai-style attack, is self-evident. The need for a quick response is also required in other situations, such as an elevated threat of terrorist attack. In these situations, waiting for an executive order to be issued, waiting for a legislative body to approve a new law, or negotiating a contract could significantly delay response and jeopardize safety due to the delays inherent in adoption of laws and contracts.

The analysis of whether the solution could be quickly implemented requires consideration of whether a solution is currently in place and if so does that solution allows for quick execution. If the solution is not currently in place, it may be necessary for law enforcement agencies to consider, as a preparedness measure, to work with the appropriate legislative and executive bodies to enact new authority.

The solution must be capable of being implemented at the lowest possible level, such as the local chief of police or designee. This allows the law enforcement agency directly affected by the event to request directly to agencies that they want to provide mutual aid. If the solution required the local chief to request aid through the state, which in turn requests aid from the adjacent state, which then requests the local jurisdiction to respond, this would waste valuable time and discourage the use of the solution.

The solution must provide for seamless granting of law enforcement power to ensure that the responding officers are not concerned with determining whether they currently have authority or fall into a gap. Upon the request for aid, the legal framework must grant full law enforcement authority to responding officers. This will streamline operations and minimize questions of legal authority. To facilitate a response, it is necessary to remove doubt of the officers and create trust in the system.

The solution must also address concerns related to liability, workers compensation, and pension benefits. Addressing these concerns will allow the responding officers to have peace of mind while responding and would encourage law enforcement agencies to participate in the system. If officers have doubts about these issues, it could have an effect upon the officers, could impact their ability to be effective.

It may be feasible to modify one of the existing solutions to a broader range of situations; however, this could prove to be difficult. As discussed herein, in order to make EMAC applicable to non-disaster situations, it would require additional congressional approval and adoption by all of the states that have previously adopted EMAC. It may be possible to formulate an “outside the box” solution, such as a congressional enactment that would empower any state or territory that previously adopted EMAC to provide mutual aid under other circumstances.

There is congressional pre-approval for states to “enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies...” (4 U.S.C. 112). Given the congressional preapproval for such a compact, it would only require that states adopt a standard compact. This could prove difficult if the states cannot agree on language for the compact. More intriguing may be the language regarding “agreements,” as an agreement may not need formal adoption by state legislatures. Assuming that a mutual aid agreement could be crafted and pass a legal review in each of the states, such an agreement could meet each of the review criteria set forth herein. Similarly, the FEMA Administrator possesses broad authority to facilitate the creation and enactment of mutual aid compacts among the states with limited congressional approval.

Some states have successfully adopted laws that allow local governments to enact mutual aid provisions with local governments in neighboring states. Other states have used executive orders and declarations of emergencies to facilitate cross-border aid. While each of these solutions may work for some states, they may not work for all states.

Examination of each of these solutions will help determine if they are adaptable for a Mumbai-style attack. If they do not work well for the Mumbai-style attack, they may provide elements that could be used in a new solution. Ultimately, the new solution may require time to implement, such as delays for approvals by state legislatures and Congress. Given the lead time that may be required, identification of a solution in advance of an actual event is necessary.

## V. SIGNIFICANCE OF RESEARCH

Authority to provide law enforcement mutual aid is an issue that affects a significant number, if not all, of the states and will continue to arise in a variety of situations. Elevated terrorism threat levels, NSSE, and other multi-state events will continue to occur, and we cannot rule out the possibility of a Mumbai-style attack. While some of the existing solutions provide the necessary authority and protections, no one solution provides the authority and protections for all types of events. Having a single solution would allow law enforcement to concentrate on providing mutual aid and service to the public instead of worrying about how to acquire protection and authority.

As the terrorist threat continues to evolve and new situations occur, such as a Mumbai-style attack, it becomes more vital to have all of the frameworks in place that will allow for efficient and effective response. No government official or agency wants to be identified in a post event report, such as the Congressional post-Katrina report *A Failure of Initiative*, as failing to foresee the obvious need for mutual aid (U.S. House of Representatives, 2006). In order to prevent such short-sightedness, it is necessary to begin a dialog now with regard to the authorities needed to facilitate law enforcement response.

These current issues could be managed through interim solutions. However, the need to quickly implement mutual aid may render some of these solutions unworkable. This thesis will identify options to allow states and other jurisdictions seeking to improve mutual aid to develop new solutions that are capable of being implemented on short notice to address evolving threats.

This thesis will provide the analysis of the provision of law enforcement mutual aid and a roadmap for states to consider when the issue becomes more critical. Solutions may include MOAs, congressional enactments, and new state laws. While one solution that fits all situations might be ideal, it may not be possible to have such a universal tool. A solution that addresses the Mumbai-style attack alone may be the final conclusion.

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## VI. ANALYSIS OF EXISTING SOLUTIONS

### A. INTERSTATE COMPACTS—EMERGENCY MANAGEMENT ASSISTANCE COMPACT AND INTERSTATE CIVIL DEFENSE AND DISASTER COMPACT CASE STUDY

States have used interstate compacts to provide mutual aid for disaster response, notable examples include Hurricane Katrina in 2005 and Hurricane Sandy in 2012. While these responses were generally successful, there were issues with the use of interstate compacts for the law enforcement response to these storms. It is not clear that these disaster oriented compacts would provide the quick response required for a Mumbai-style attack.

States are required to use congressionally approved compacts when they want to enter into contractual arrangements with one another.<sup>7</sup> There are two primary nation-wide compacts that have been used for responding to disasters over the last 60 years—EMAC and ICDDC.<sup>8</sup> EMAC is a compact that was ratified by Congress on October 19, 1996 (P.L. 104-321). The original enactment of the EMAC included 10 states (Emergency Management Assistance Compact, n.d.). Prior to the September 11 terrorist attacks, adoption of EMAC was slow and sporadic. Since the September 11 attacks, all 50 states, District of Columbia, and several territories have adopted EMAC (National Emergency Management Association, n.d.).

Created after Hurricane Andrew in 1992, EMAC remedied shortfalls found in the interstate response to that hurricane. Beginning as the Southern Regional Emergency Management Assistance Compact (SREMAC) among 10 states, it was later changed to just EMAC and opened up to all the states. The primary considerations underlying adoption of SREMAC were related to natural disasters such as Hurricane Andrew, not terrorist attacks.

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<sup>7</sup> As noted above, Article I, Section 10, Clause 3 of the United States Constitution, commonly known as the Compact Clause, provides: “No State shall, without the consent of Congress ... enter into any Agreement or Compact with another State (U.S. Const. art. I, § 10). This requires states to have the consent of Congress to enter into a mutual aid agreement.

<sup>8</sup> Congress has approved other regional mutual aid compacts, such as the National Capital Region mutual aid system in the Intelligence Reform and Terrorism Prevention Act of 2004 (Public Law 108-458) which are not discussed as part of this thesis.

EMAC was utilized for the response to the attacks on September 11; however, due to the few number of states that had adopted EMAC, a number of different methods were used to facilitate the mutual aid response for the attack (Emergency Management Assistance Compact, 2007). As such, the September 11 response does not provide a good study for the use of EMAC.

Post September 11, EMAC was used on a number of occasions between 2002 and 2004 in response to hurricanes. The largest use of EMAC to date as well as the largest deployment of law enforcement under EMAC was the response to Hurricanes Katrina and Rita in 2005 (National Emergency Management Association, 2006). Thousands of law enforcement officers from throughout the United States provided mutual aid during these responses (Smith & Rojek, 2006).

EMAC provides a grant of law enforcement authority:

Each party state shall afford to the emergency forces of any party state, while operating within its state limits under the terms and conditions of this compact, the same powers (except that of arrest unless specifically authorized by the receiving state), duties, rights, and privileges as are afforded forces of the state in which they are performing emergency services. (Emergency Management Assistance Compact, n.d.)

Both the EMAC compact articles, and the implementing protocols adopted by the states, are silent as to how this power of arrest is to be granted leaving ambiguity on how to provide this authority (National Emergency Management Association, 2007).

During the response to Hurricane Katrina, the state of Louisiana elected to deputize all of the responding law enforcement officers as deputy sheriffs (National Emergency Management Association, 2006, p. 3–15). In light of the fact that EMAC provides for what appears to be full law enforcement powers, excepting arrest, it is unclear why the state of Louisiana determined it was required to also deputize the officers as deputy sheriffs. While this additional deputation provided additional certainty as to the officers' authority, it appears wholly unnecessary and superfluous. At a minimum, the action calls into question whether the statutory compact language grants full law enforcement powers.

EMAC assistance is generally requested by the state emergency management director that does not have the authority to grant law enforcement powers. EMAC provides responders with the same powers they have in their own state “except that of arrest unless specifically authorized by the receiving state” (Emergency Management Assistance Compact, n.d.). What is required for this power to be granted to responders? Does it need to be included in the governor’s emergency declaration or merely in the request for mutual aid? These answers will vary from state to state based upon state law.

EMAC has a number of benefits. First, EMAC is a national compact; all 50 states are members along with Puerto Rico, the U.S. Virgin Islands, Guam, and the District of Columbia. This nearly universal adoption allows movement of emergency response assets, people, and equipment throughout the country.

Article VII of EMAC provides for coverage of emergency responders for workers compensation:

Each party state shall provide for the payment of compensation and death benefits to injured members of the emergency forces of that state and representatives of deceased members of such forces in case such members sustain injuries or are killed while rendering aid pursuant to this compact, in the same manner and on the same terms as if the injury or death were sustained within their own state. Article VIII. (Emergency Management Assistance Compact, n.d.)

This provision also details the payment of pension and insurance should an officer become injured or killed, thereby addressing concerns that individual law enforcement officers may have.

Article VI of EMAC apportions liability among the responding and requesting states:

Officers or employees of a party state rendering aid in another state pursuant to this compact shall be considered agents of the Requesting State for tort liability and immunity purposes; and no party state or its officers or employees rendering aid in another state pursuant to this compact shall be liable on account of any act or omission in good faith on the part of such forces while so engaged or on account of the maintenance or use of any equipment or supplies in connection therewith. Good faith in this article shall not include willful misconduct, gross negligence, or

recklessness. (Emergency Management Assistance Compact, n.d., article VI)<sup>9</sup>

These articles provide standardization and assurance to responders that they are protected should an accident occur or should they be sued while in another state.

For all its benefits, EMAC does have some weaknesses. For law enforcement specifically, the fact that most law enforcement assets are owned by local governments presents a challenge to deployment under the state-to-state compact. Article VI of EMAC limits liability protections to “Officers or employees of a party state” (Emergency Management Assistance Compact, n.d.). Regarding the licenses and powers extended to responders, Article IV of EMAC limits them to “the emergency forces of any party state” (Emergency Management Assistance Compact, n.d.). According to Article IX, reimbursement under EMAC is limited to “Any party state rendering aid” (Emergency Management Assistance Compact, n.d.). These provisions require that the sending state possess the authority to utilize the local assets as part of the overall state response otherwise the protections may not apply.

Response under EMAC is limited to incidents where the governor of the requesting state has declared a state of emergency. The requirement for a declaration of emergency can be particularly limiting in a situation such as a Mumbai-style attack in which a quick response while the attack is ongoing is necessary. In the early stages of such an attack, state officials may be unaware of the attack or the severity of the attack and may not be prepared to declare a state of emergency. Thus, the EMAC law enforcement authority, benefit protections, and liability apportionment would be unavailable.

A compact similar to EMAC is ICDDC, which was authorized by Congress in 1951 and adopted by approximately half of the states. EMAC was based upon the ICDDC, the provisions of EMAC are nearly identical to the ICDDC with a few differences. One significant difference is that the ICDDC does not expressly require a governor’s declaration of emergency in order to request mutual aid as EMAC does.

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<sup>9</sup> This provision is internally conflicted, it makes the responders agents of the requesting state appearing to shift liability to the requesting state, yet in the next sentence appears to hold the responders immune from liability. Regardless, the liability is shifted off of the responders.

While there is no explicit requirement for a declaration of emergency, when read as a whole, the ICDDC clearly intended that a governor's declaration is required. Assuming that the lack of express declaration language makes the ICDDC different from EMAC, it may be possible to use this compact instead of EMAC for law enforcement response to a Mumbai-style attack.

ICDDC has nearly identical provisions that provide for coverage of emergency responders for workers compensation as EMAC:

Article 7. Each party state shall provide for the payment of compensation and death benefits to injured members of the civil defense forces of that state and the representatives of deceased members of such forces in case such members sustain injuries or are killed while rendering aid pursuant to this compact, in the same manner and on the same terms as if the injury or death were sustained within such state. (National Center for Interstate Compacts, n.d.)

Similar to EMAC, this provision provides for the payment of pension and insurance should an officer become injured or killed.

The ICDDC has a broader liability immunity provision than EMAC:

Article 5. No party state or its officers or employees rendering aid in another state pursuant to this compact shall be liable on account of any act or omission in good faith on the part of such forces while so engaged, or on account of the maintenance or use of any equipment or supplies in connection therewith (National Center for Interstate Compacts, n.d.).

This provision immunizes responding forces from liability rather than transferring the liability to the requesting state. While an absolute immunity may be better than a transfer of liability to the requesting state, because it removes any possibility of a liability finding, both serve the purpose of providing liability coverage for the responding forces.

The ICDDC is not active in as many states as EMAC is. The ICDDC is currently enacted in less than half of the United States.<sup>10</sup> As an immediate solution for providing law enforcement mutual aid, this limited enactment presents challenges to using the

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<sup>10</sup> It is difficult to determine all of the states in which the ICDDC is currently effective as it is not listed as authority in plans nor do legal research companies accurately track the compact. A number of states attempted to rescind the ICDDC when adopting EMAC, however, the terms of the ICDDC requires notification by the withdrawing state to notify the other members of the withdrawal. It is not clear that any of the states that attempted to rescind have taken this extra step.

ICDDC. Some states have adopted sections or amendments that were not part of the original congressional enactment of the ICDDC. New York and New Jersey have adopted an Article 15 of the ICDDC that purports to extend the reach of the compact to include:

Incidents, or the imminence thereof, which endanger the health or safety of the public and which require the use of special equipment, trained personnel or personnel in larger numbers than are locally available in order to reduce, counteract or remove the danger. (N.J.S. 38A:20-3.1)

Similarly, Arizona purports to be “a signatory to Southwestern Caucus Supplement to the ICD & DC which provides for mutual aid between Arizona, California, Colorado, Nevada, New Mexico and Utah. Currently, Nevada and Utah are not signatories” (Arizona Division of Emergency Management, n.d.). This Arizona supplement is identical to the New York and New Jersey amendment, excepting its title. Both the Southwestern and New York/New Jersey amendments purport to be effective in any state that has adopted the amendment, thereby increasing the number of states that are subject to both.

These provisions would, on the surface, appear to allow the use of the ICDDC for a Mumbai-style attack. However, these additional articles were never approved by Congress raising the question of whether it is ultra vires. As such, it could not be relied upon without further legal analysis.

The congressional authorization for the ICDDC was a part of the Civil Defense Act of 1950, which was repealed in 1981. This raises significant questions if the remaining state enactments of the ICDDC are legally effective.<sup>11</sup> Notwithstanding, those states that have enacted the ICDDC may be able to utilize it to respond to a Mumbai-style attack.

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<sup>11</sup> This thesis reaches no conclusion on this question and assumes for the purposes of discussion that all enactments in accordance with the Civil Defense Act of 1950 are effective.

**1. Could Mutual Aid Be Implemented Quickly and Efficiently; Does It Require a Declaration of Emergency or Other Action That May Delay Response?**

The provisions of EMAC require the governor to declare a state of emergency in order to activate its provisions (Emergency Management Assistance Compact, n.d.).<sup>12</sup> Whether this can be completed in a timely manner will depend upon the type of event requiring the EMAC aid. In the case of a hurricane, a governor will ordinarily have plenty of warning and opportunity to have a declaration of emergency prepared. In fact, depending on the severity, some governors declare states of emergency prior to the hurricane making landfall (DiSanto, 2012). In these situations, EMAC is a quick and efficient means to facilitate the aid. Since the declaration of emergency is in place pre-landfall or quickly post landfall, the state is able to request aid quickly. Other states may anticipate the need for pre-and post-hurricane aid and have resources pre-identified and staged. Hurricane response is one of the most effective uses of EMAC for both general emergency management and law enforcement (National Emergency Management Association, 2006).

However, a Mumbai-style attack has very little in common with a hurricane. Generally speaking, such an attack will strike without warning. In the event of an attack, it is unlikely that a governor would have a declaration of emergency ready to go, especially one with sufficient specificity to address the type of attack and the city where the attack occurs. It is equally unlikely that other states would have anticipated the need to provide aid and have resources pre-identified and staged.

EMAC may also be unnecessarily bureaucratic and complex in its execution for events that are largely local in nature. As discussed below, multiple steps are required for the simplest aid request, which may lead to time delays in implementing the mutual aid request. Unless EMAC could be implemented through a police department to police department request, it will likely be inefficient for a no notice mutual aid event such as a Mumbai-style attack.

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<sup>12</sup> This thesis does not address the Adjutant General (TAG) to TAG agreements that purport to use EMAC as their basis. These agreements indicate that several of the articles of EMAC do not apply to the agreement including the requirement for a governor's declaration of emergency. Whether an agreement can waive a statutory requirement on its face appears to be ultra vires.

The ICDDC's lack of a requirement for a governor's declaration of emergency provides an advantage over EMAC with regard to the speed of enactment. Since the governor does not have to formally declare an emergency, ICDDC could be activated over the phone or through emergency communications channels. This would allow emergency assets to be responding instead of waiting. It would also be more likely that a governor would be willing to delegate authority to enact the ICDDC than to declare a state of emergency. This could facilitate an even faster response, especially in the states where the Southwestern and New York/New Jersey amendments are effective, assuming they are legal. However, given the legal questions surrounding the ICDDC and the amendments, reliance upon ICDDC may be misplaced.

Notwithstanding the speed advantage that the ICDDC has over EMAC, it is also subject to challenges as a solution to providing quick mutual aid to a Mumbai-style attack. Most significantly, due to its limited adoption, the ICDDC is only available to those states that have it currently adopted. In the example of an attack in Philadelphia, if both New Jersey and Pennsylvania do not have the ICDDC currently enacted, it is unavailable as a solution.

Given what has been laid out above, neither EMAC nor ICDDC could be implemented quickly for rapid local law enforcement mutual aid. This makes this solution incapable of being quickly and efficiently implemented.

**2. Could Mutual Aid Be Implemented at the Lowest Possible Level, Such as the Local Police Chief or Sheriff? Does It Require Application to State or Federal Government Officials to Implement?**

EMAC is a state-to-state compact. This means that requests cannot be implemented at the local level; all requests must go through the state. Using the Philadelphia example, once the attack commences, the Governor of Pennsylvania must declare an emergency and then the city of Philadelphia must request that the Pennsylvania Emergency Management Office request mutual aid. The state of Pennsylvania Emergency Management Office would then make a request of the state of New Jersey who would in turn request the city of Camden to provide the aid. If the city of Camden agrees, the state of New Jersey would enter into a contract, known as a "Req-

A” with the state of Pennsylvania. Once the contract is signed, the aid may proceed (National Emergency Management Association, n.d.). This process demonstrates that EMAC cannot be implemented at the lowest possible level.

The ICDDC does not have standing procedures for implementation, but were such procedures developed, they would likely be similar. ICDDC is also a state-to-state compact and therefore would still require the states to be involved in its execution. Since both of these compacts are state-to-state, neither is capable of being implemented at the lowest level (local). The provisions of the compacts require that the state request aid from other states. This would prevent a quick response across state lines from the lowest level, such as police chief to police chief.

### **3. Is a Clear Grant of Seamless Authority Provided to the Law Enforcement Agencies Responding to a Request for Mutual Aid?**

It is not clear that EMAC provides adequate law enforcement authority across state lines. During Hurricane Katrina, the State of Louisiana deputized law enforcement officers responding pursuant to EMAC (National Emergency Management Association, 2006, p. 3–15). More recently, during the response to Hurricane Sandy, the State of New Jersey held a swearing in ceremony for out-of-state law enforcement officers responding under EMAC (State of New Jersey, 2012). In neither case is it clear why the state found it necessary to deputize or swear in the responding officers in addition to utilizing EMAC.

If the EMAC articles provide for the provision of law enforcement authority, including the power of arrest when specifically authorized, why would it be necessary to take the extra step of deputizing or swearing in the responding officers? The Major City Chiefs Police Association (MCC) recognized this infirmity in developing a concept paper for *Law Enforcement Deployment Teams* (Major City Chiefs, Major County Sheriffs Associations, 2007, p. 1). The MCC recommended creation of pre-event law enforcement surge teams to provide support during natural disasters, terrorist attacks, and high threat situations (Major City Chiefs, Major County Sheriffs Associations, 2007). These teams are recommended to be deployed under EMAC. However, MCC observes:

Wherever legally permissible, Requesting States and jurisdictions should have procedures in place to have responding officers sworn in by the

Requesting State or jurisdiction upon arrival, granting them the same authority, rights and immunities applicable to officers of the Requesting State or jurisdiction whether established under local, state or federal law. (Major City Chiefs, Major County Sheriffs Associations, 2007, Appendix A, p. ii)

This again raises questions as to whether the provisions of EMAC are sufficient to allow for law enforcement mutual aid, particularly in regards to the authority under which the law enforcement officers operate. As the ICDDC language is virtually identical to the provisions of EMAC, it too suffers from the same questions regarding cross jurisdictional empowerment. It would not provide an alternative to EMAC for the grant of law enforcement powers. Given that states have questioned the grant of law enforcement authority during EMAC responses, it is not clear that these compacts provide a seamless grant of law enforcement power across state lines.

#### **4. Does The Solution Delineate Responsibility for Liability, Workers Compensation and Other Benefits?**

As noted above, both EMAC and the ICDDC have provisions that provide for liability, workers compensations, pension benefits, and protection. Each compact addresses the issues differently, but they both address them in a manner that a responding law enforcement agency would have certainty regarding these issues.

Immunity from liability is provided by both compacts through their congressionally approved articles. While there may be a question whether EMAC provides an outright immunity or merely transfers all liability to the requesting state, it is clear that the officers and employees of the responding state are free from liability concerns. In addition, personal injury, death benefits and pensions are all retained by the responding state as if the individual responders were in their home state. This allows the responding law enforcement officers to be certain about their benefits should something unfortunate happen.

Generally speaking, compacts provide a seamless grant of authority, notwithstanding the duplicative swearing in some states have utilized under EMAC. Compacts also delineate responsibility for liability, workers compensation, and other benefits. However, the compacts require the declaration of an emergency and are not

quick to implement or capable of being implemented at the lowest possible level. While amendments to EMAC or the adoption of a new compact would remedy these issues, such action would require adoption by all members of the compact and possible congressional action.

**B. EXECUTIVE ORDERS—NEW JERSEY, CONNECTICUT AND NEW YORK CASE STUDY**

In order to overcome some of the shortfalls presented by interstate compacts, some states have used executive orders to extend law enforcement powers to out-of-state law enforcement responding to a specific or general threat. These executive orders are intended to allow the seamless movement of law enforcement forces across state lines in response to elevated threat levels and other events. The executive orders have generally worked well for their desired purpose; however, it is not clear that these executive orders would provide the quick response required for a Mumbai-style attack.

In March 2003, intelligence and information indicated that Al Qaeda was considering an attack on the New York City commuter rail system (*Department of Homeland Security*, 2006). Also during this time, the United States was preparing to engage in war in Iraq. Based on these events, the Department of Homeland Security raised the threat level to orange (DHS, n.d. a). The rail attack was believed to involve hydrogen cyanide gas, and it was expected to occur in mid to late March (*Department of Homeland Security*, 2006). Given the nature of the metropolitan New York commuter rail system, it was impossible to know where the terrorists would access the system. Hundreds of stations feed the system spread across three states: New Jersey, Connecticut, and New York.

In New York City, there is an underground subway system along with a number of regional rail systems that enter the New York underground and connect with the subway in common or linked stations (Metropolitan Transportation Authority, n.d.). The commuter rail systems board passengers outside of New York City and discharge many of the passengers in terminals in New York City. The New Jersey Transit and Long Island Rail Road systems bring passengers into Pennsylvania Station in New York City. This is also the location of a Metropolitan Transportation Authority Subway Station.

Both New Jersey and New York state officials wanted to have law enforcement officers on board the trains to help secure the system and deter or prevent a terrorist attack. However, the state grant of law enforcement authority in New Jersey, Connecticut and New York terminates at their respective state's border. This means New Jersey or Connecticut law enforcement officers would lose their state granted law enforcement authority upon reaching the state border. In the case of New Jersey, that border was encountered in train tunnels deep beneath the Hudson River, offering no opportunity to depart the train at the border. The dilemma presented was whether to disembark the train at the last stop in New Jersey or continue into New York City, in full uniform, and hope that law enforcement action was not required until the officer was safely back in New Jersey. Were an officer to be required to take action while riding the train outside of the officer's home state, it is unclear what authority may be exercised.

In order to remedy this situation, then New York Governor Pataki declared a state of emergency<sup>13</sup> and deputized New Jersey and Connecticut law enforcement officers as New York State Railroad Police Officers<sup>14</sup> (Executive Order 113.83, 2004). Governor Pataki waived statutory requirements regarding recruitment and training of railroad police officers in order to make this grant of power effective (Executive Order 113.83, 2004) In addition to the typical command and control emergency powers, the governor of New York has the ability to waive statutes in order to best respond to the emergency. In this case, it was determined that deputizing the out-of-state law enforcement officers as railroad police was the best way to provide seamless protection on the trains into New York City. Governor Pataki recognized that complete police authority was important when he stated, "The order I have signed today will allow both uniformed and plain-clothes officers from Connecticut and New Jersey to ride the PATH and Metro North

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<sup>13</sup> Governor Pataki modified the existing September 11, 2001 emergency that had been continued in effect until this time.

<sup>14</sup> Railroad police obtain authority under a hybrid of state and federal laws. Many railroad police officers, regardless of which state they are empowered by, have full law enforcement authority along the entirety of the rail system (N.J.S. 48:3-38). Inadequacies in federal pensions and other benefits have caused many states to convert the federal railroad police forces into state railroad police with the grant of authority ending at the state border. While not addressed here, the model of authority granted presents another possible solution to the interstate law enforcement dilemma.

with complete police authority in New York State” (Office of Media Relations, New York State, 2003).

The suspected attack did not materialize. Regardless, the leadership of New Jersey, Connecticut, and New York realized that partnership was required to protect rail transit as it crossed state borders. This was not the only time that the governor of New York used a declared emergency to provide for law enforcement authority on interstate transportation with New Jersey and Connecticut.

Later in 2003, a threat for the Times Square New Year’s Eve celebration required similar grants of law enforcement authority. In mid-December 2003, intelligence and information again indicated that there were threats of attacks within the United States, which caused the Department of Homeland Security to raise the threat level to orange (DHS, n.d. a). Then Secretary of Homeland Security, Tom Ridge, stated that the risk of attack was at perhaps the highest since September 11, 2001 (Minnis, 2003). On the heels of this dire warning and in recognition of the increase in holiday travel into and around New York City, the governors of New Jersey and New York took action to increase the police presence on mass transit. This time, it was not just New York that entered an executive order.

Governor Pataki again used the September 11, 2001 declaration of emergency to deputize New Jersey and Connecticut law enforcement officers as railroad police officers (Executive Order 89, 2003). New Jersey Governor, James McGreevey, also used his executive powers to convey a grant of authority to New York law enforcement officers issuing an executive order declaring a state of emergency. This executive order used EMAC and ICDDC to request mutual aid of New York and grant full law enforcement powers to New York law enforcement officers riding trains into the state of New Jersey (Executive Order 89, 2003). Unlike a typical EMAC response, the executive order and grant of power did not provide for reimbursement of the responding forces costs nor did it require a specific request or mission to be accomplished. Instead, the out-of-state law enforcement officers were given full discretion to determine when and where they would ride on the trains.

Again, this threat failed to materialize, the threat level was lowered and the amendment to the New York executive order was allowed to lapse. While the New York executive order in effect expired after 30 days, New Jersey had no similar provision and this executive order has not been repealed.<sup>15</sup> This was not the last time the three states needed to address law enforcement authority on interstate transportation. Another threat in the summer of 2005 brought about the entering of more executive orders.

In July 2005, terrorists conducted a coordinated attack on the London Underground and bus system, killing 56 and injuring over seven hundred (BBC News, 2005). Two weeks later, a second coordinated terrorist attack was attempted on the London transit system, however, this attack failed and the bombs did not detonate as expected (BBC News, 2005). These attacks concerned the governors of New Jersey and New York enough that they issued another set of executive orders to address transit security. Governor Pataki again used the September 11, 2001 emergency declaration and issued an executive order that deputized New Jersey and Connecticut law enforcement officers as railroad police to allow them to ride the trains in and out of New York City (Executive Order No. 113.99, 2005). Acting Governor Richard Codey of New Jersey also issued an executive order; however, this executive order was directed at security on ferries<sup>16</sup> (Executive Order 43, 2005). The recitations of the executive order referenced an increase in the USCG maritime security or MARSEC level as part of the grounds upon which the order was based. Governor Codey's executive order has not been rescinded and remains in effect.<sup>17</sup>

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<sup>15</sup> As of February 1, 2011, Executive Order 89 (McGreevey) has not been repealed, although the underlying threat and the Orange Homeland Security Advisory System (HSAS) level upon which the emergency was declared had abated. Additionally, the federal government is moving away from a color based HSAS to a localized warning based National Terrorism Alert System (DHS, n.d. b). It is unclear if this order can be relied upon in 2011.

<sup>16</sup> There was no mention of the executive order entered by Governor McGreevey in the press release that accompanied Governor Codey's executive order or press coverage. It is assumed that this order was believed to still be in effect and conveyed a valid grant of power on the trains in and out of New York.

<sup>17</sup> As of July 11, 2013, Executive Order 44 (Codey) has not been repealed, although the underlying threat and MARSEC level upon which the emergency was declared has abated. It is unclear if this order can be relied upon in 2014.

Subsequent executive orders have been entered by governors of New York to provide for law enforcement presence on trains in and out of New York City.<sup>18</sup> Most recently in 2010, then Governor Paterson declared an emergency based upon terrorist targeting of mass transit, the recent attempted bombing in Times Square by Faisal Shahzad and the increased ridership due to the holiday season (State of New York, 2010). As part of the declaration of emergency, Governor Paterson waived the recruitment and training requirements to allow law enforcement officers to patrol the trains (State of New York, 2010). This executive order differed from the prior New York orders as it did not rely upon the September 11, 2001, emergency declaration for its authority and instead declared a state of emergency.

As a solution to providing law enforcement authority across state lines, executive orders have proved effective for the last eight years but present interesting legal and policy concerns. With the exception of 2010 issuance, each of the New York executive orders was an amendment to the September 11, 2001 declaration of emergency. As the time between the original emergency declaration and the subsequent statute waiver increases, the risk that a court could find the waiver invalid increases. It is difficult to see how a current security threat is related to the September 11, 2001, attacks, which raises the question of whether the use of these executive orders for current response is valid.

**1. Could Mutual Aid Be Implemented Quickly and Efficiently; Does it Require a Declaration of Emergency or Other Action That May Delay Response?**

While executive orders prove effective for the response to the terrorist threats facing the New York metropolitan area, they require the governor to issue an executive order. Governors may be hesitant to enact an executive order based upon uncertain intelligence as public perception may be that issuance of an executive order gives credibility to the threat of an attack and may cause panic. Therefore, an attack may be underway before a governor could issue the executive order. However, if a governor could enact an order as a preparedness measure when there was no immediate threat, this

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<sup>18</sup> It should be noted that these are only select examples; other executive orders have been entered for this same purpose.

could mitigate the perception of credibility. This would require that the state laws allow for such a pre-event order.

The issuance of executive orders takes time. Even where a governor has a template order prepared, the order must be conformed to the current situation, cleared, and then signed by the governor. Once signed, the order may then be acted upon once it has been communicated to the responders in the affected areas. In the event two states have standing reciprocal orders, such as those in New Jersey and New York, the time delay is largely eliminated and the response can be implemented quickly.

**2. Could Mutual Aid Be Implemented at the Lowest Possible Level, Such As The Local Police Chief Or Sheriff? Does It Require Application to State or Federal Government Officials to Implement?**

A governor's executive order cannot be implemented at the local level. Police departments must reach out to the governor's office, often through several levels of bureaucracy such as counties or the state emergency management agency. While this may be convenient for anticipated events, it would not be convenient for a Mumbai-style attack when quick mutual aid is required.

However, was a governor to have a standing executive order that was not threat dependent, local police departments could be empowered to act quickly without waiting for gubernatorial action. In the New Jersey/New York example, the law enforcement agencies were able to respond as needed. While the duration of the New York order was limited, while it was in effect it allowed implementation at all levels of government.

In order to have a standing executive order, a governor would need to have the authority to issue such an order granting law enforcement power. This authority would need to allow the governor to issue the order in the absence of an emergency or active threat.

**3. Is a Clear Grant of Seamless Authority Provided to the Law Enforcement Agencies Responding to a Request for Mutual Aid?**

As executive orders involve action by the chief executive of a state, the governor, they should provide seamless authority across the state lines. However, this assumes that

the governor is empowered to grant this authority.<sup>19</sup> Executive orders provide for seamless authority as the governor is extending the authority of that governor's state to the responding forces. In order to demonstrate that the governor is authorized to extend authority and that the executive order provides a seamless grant of authority, a legal analysis or memorandum from the state attorney general or legal officer would likely be required. This could be a one-time opinion that would provide the foundation for the grant of authority.

#### **4. Does the Solution Delineate Responsibility for Liability, Workers Compensation and Other Benefits?**

Indirectly executive orders provide certainty for liability, workers compensation, and pension benefits by having the sending jurisdiction retain all of them. The responding officers remain employed by the sending agency and would be covered by their agency's workers compensation and pension policies and systems.<sup>20</sup>

In terms of liability, however, this solution leaves some questions. While operating in their home state, law enforcement officers are protected by a variety of laws, such as the state tort claims act. Once that officer crosses into a different state, the home state liability laws and protections may no longer apply. Home state tort claims act protections may no longer apply. The officer may be subject to the requesting state's liability laws and protections. However, it would be for a court to determine whether the responding officer could utilize the requesting state liability protections. This could have the unintended consequence of having states, local jurisdictions, and their law enforcement officers subject to foreign laws and without protection.

On the surface, executive orders from a governor provide a seamless grant of authority. While not necessarily explicitly expressed, the executive orders provide for liability, workers compensation and other benefits by having the responding state retain responsibility. Executive orders are generally not quick to implement as a governor is

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<sup>19</sup> In order to determine the authority of the governors, a state-by-state analysis would need to be conducted. For the purposes of this discussion, it is assumed that the governor has such power.

<sup>20</sup>This thesis only provides an overview of legal concepts and should not be relied upon as legal advice. As laws vary from state-to-state and in local jurisdictions, you should consult legal counsel for legal advice.

required to enact the order. Because they are enacted by the governor, they do not allow implementation at the lowest possible level.

### **C. MEMORANDA OF AGREEMENT—NATIONAL SPECIAL SECURITY EVENT CASE STUDY**

Memoranda of agreement (MOA) can provide for liability, workers compensation, and other benefits by providing federal coverage. Some MOA, such as those used for NSSEs, can provide a limited grant of law enforcement authority through the use of deputation, such as by the USMS; however, a deputation that is limited in terms of the state and local laws that can be enforced. MOAs are not quick to implement they must be approved by government officials, such as town councils or county boards of commissioners, to properly grant the power. This system is quite good for the planned events it is designed for, but it does not provide any benefits for no notice events.

NSSEs are events that the Secretary of Homeland Security determines require enhanced security due to the threat of terrorism or other criminal action (DHS, 2008a). This determination is based upon: attendance by government officials and dignitaries; the overall size of the event; and the significance of the event. Once an event is determined to be a NSSE, the USSS is the lead agency for planning the security for the event (*Information Sharing, 2007*).

The USSS is authorized by statute and presidential directive to provide security for events of national significance. President Clinton originally assigned this responsibility to the USSS in a classified presidential decision directive (PDD) (White House, 1998).<sup>21</sup> According to the USSS, PDD 62 “formalized and delineated the roles and responsibilities of federal agencies in the development of security plans for major events” (*Information Sharing, 2007*). This included making the USSS the lead agency for what is now known as NSSEs. This directive was superseded by a classified appendix to *National Security Presidential Directive 46/Homeland Security Presidential Directive 15*

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<sup>21</sup> PDD 62 is a classified document and has not been reviewed as part of this thesis, the statements regarding PDD 62 are based upon the unclassified White House fact sheet and other unclassified sources cited.

(NSPD46/HSPD15),<sup>22</sup> which maintains the “USSS responsibility in planning, coordinating, and implementing security operations at NSSEs” (Reese, 2009).

This duty was further bolstered in the Presidential Protection Act of 2000 that gave the USSS the ability to “participate ... in the planning, coordination, and implementation of security operations at special events of national significance...” (Presidential Threat Protection Act of 2000, Pub.L. 106-544, 1999). While this act does not provide a direct USSS leadership role in NSSE, read in conjunction with the unclassified interpretations of PDD 62 and NSPD46/HSPD15, it is clear the USSS is responsible for leading the planning of NSSE.

The Secretary of Homeland Security, as directed by the president, designates events as NSSE and the USSS assumes its role as the coordinator of the security for the event (Reese, 2009, p. 1). As noted previously, events that are typically designated as NSSE include Presidential inaugurations, Presidential funerals, Presidential nominating conventions, international economic summits, and major sporting events (Reese, 2007, p. 4).

Once an NSSE is designated, the USSS coordinates with federal, state, local, and tribal law enforcement and public safety agencies in the jurisdiction where the NSSE will take place (*Information Sharing*, 2007; Narr, Toliver, Murphy, McFarland, & Ederheimer, 2006). If additional law enforcement is needed, the USSS will work with the host jurisdiction to provide federal law enforcement and mutual aid from other states (Narr et al., 2006). The state and local law enforcement officers are deputized as federal marshals to provide extraterritorial law enforcement authority (Reese, 2009). Prior to 2012, the U.S. Department of Justice provided reimbursement to the out-of-state law enforcement partners (Reese 2009). Beginning in fiscal year 2012, FEMA was appropriated limited funding to “provide supplemental federal assistance to state, local, tribal, and territorial governments for certain actual costs of providing emergency management, public safety, and security during the preparation and conduct of an NSSE” (FEMA, 2013).

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<sup>22</sup> Similarly, the classified portions of NSPD46/HSPD15 have not been reviewed as part of this thesis, rather all statements regarding the NSPD/HSPD are based upon the unclassified sources cited.

This is the method that has been used for numerous events over the years and has proved a workable solution to planned events. While it does take some time to put all the pieces in place, the USSS has optimized the process and made it fairly easy to implement. There have been approximately 40 NSSEs or equivalent events since the enactment of PDD-62 in 1998. This has allowed the USSS to memorialize the process and replicate it throughout the country.

A typical NSSE is designated several months to a year prior to the event. Upon designation of the event as a NSSE, the USSS will meet with the relevant state, local, tribal, and territorial stakeholders to begin the planning process (Narr et al., 2006). A number of committees are formed to plan for the various contingencies that could be present during the NSSE. While the committees vary from event to event, typically law enforcement, health and medical, media and public affairs, and legal committees are used.

The public safety sub-committee determines the amount of law enforcement that would be required for the event and then works with the host jurisdictions to identify sufficient assets to meet this need. The USMS enters into a MOA with the sending agency that details law enforcement authority, benefits, liability, and funding.

For the 2009 presidential inauguration, the “USSS obtained assistance from nearly 30,000 law enforcement officers from 58 federal, state, and local law enforcement agencies for the events” (U.S. Department of Homeland Security Office of Inspector General, 2009, p. 3). This required 58 separate MOAs to coordinate all these law enforcement agencies, a daunting task that is achievable when there is sufficient lead time.

The USMS has authority to deputize state and local law enforcement officers as Special Deputy U.S. Marshals (28 U.S.C. § 561). This deputation provides the deputized officer with the authority to enforce federal laws, protect foreign dignitaries, and other typical powers provided to USMS (Narr et al., 2006). What is not provided is the express ability to enforce state and local laws as this power is granted by the states. While limited, this deputation eliminates the need for a state grant of law enforcement authority.

The 2009 Presidential Inauguration MOA provided:

#### B. Deputation

All local and state law enforcement personnel designated to the PITF [Presidential Inauguration Task Force] will be subject to background inquiry and will be federally deputized, with the United States Marshals Service securing the required deputation authorization. These deputations will remain in effect throughout the tenure of each officer's assignment to the PITF or until termination of the PITF, whichever occurs first. Each individual deputized as a Special U.S. Marshal will have all necessary law enforcement authority as provided by 28 U.S.C. 566(c) and (d); 28 U.S.C. 564, 18 U.S.C. 3053, 28 C.F.R. 0.112, and the deputation authority of the Deputy Attorney General. The Special Deputy U.S. Marshals will be responsible for 1) performing necessary law enforcement steps to keep the peace of the United States; 2) enforcing federal law (e.g., 18 U.S.C. 112, 1116, and 878, as well as other provisions of that title); 3) protecting visiting foreign officials, official guests, and internationally protected persons; 4) taking necessary law enforcement steps to prevent violations of federal law, and; 5) enforcing District of Columbia law as a result of the deputation (see D.C. Code and 28 U.S.C. 564). (Narr et al., 2006)

This provides for both the enforcement of federal law and law pursuant to Washington, DC.

In order to determine the extent of the USMS ability to enforce state or local law, it is necessary to examine the state laws where the event or incident is taking place. In New Jersey, for example, crimes of the third degree<sup>23</sup> or higher may be enforced by USMS pursuant to statute (N.J.S 2A:154-5). The law provides this power absent a trigger, it is granted to all USMS all the time (N.J.S. 2A:154-5). In practical terms, this means that the deputized officer may enforce state laws that are of the third degree or higher but may not enforce fourth degree crimes, such as shoplifting, or disorderly persons offenses (N.J.S. 2C:20-11). New Jersey law allows law enforcement officers to enforce orders issued by the governor during a declared state of emergency. A violation

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<sup>23</sup> New Jersey uses degrees to tier its crimes. The New Jersey Judiciary explains this:

A First degree crime carries the potential penalty of 10-20 years in prison. A Second degree crime carries a potential penalty of 5-10 years. Defendants who are convicted of first and second degree crimes face a presumptive term of incarceration. It is assumed that they will be sentenced to serve time in prison. A Third degree crime may result in 3-5 years if convicted, while Fourth degree crimes carry a potential penalty of up to 18 months in jail. There is a presumption [sic] of non-custodial sentences on 3rd and 4th degree offenses. (2014)

of these orders is a disorderly person's offense or a minor crime usually punishable by fine and less than eighteen months in jail (N.J.S. App A:9-49). Under this construct, a special deputy federal marshal can enforce serious crimes and federal law but enforcement of disorderly person's offenses, such as the governor's emergency orders, is beyond the special deputy federal marshal's authority (N.J.S. App A:9-49).

**1. Could Mutual Aid Be Implemented Quickly and Efficiently; Does It Require a Declaration of Emergency or Other Action That May Delay Response?**

As the USSS has been planning for NSSEs or equivalent since 1998, it has developed a streamlined system that allows for the large surge in law enforcement required for the NSSEs. For these events, the USSS has the luxury of time and planning in developing procedures and methods to accomplish planning such events for maximum effectiveness. Given the complexity of the layered approach, the NSSE system cannot be implemented quickly. Even were it possible to designate an attack or other unplanned event as an NSSE, the MOA, deputation, and state law reliance may not be in place to allow the response. None of these can easily be implemented as an event is unfolding.

The system used for an NSSE to provide law enforcement mutual aid provides a clear chain of command and structure for the responding mutual aid. Built as a team, the NSSE provides clear structure as the team members know their position in the organization. Each jurisdiction is included in the overall plan that outlines roles and responsibilities (Narr et al., 2006). The MOA also defines the roles and responsibilities of the jurisdictions and for the operational command of the units. This provides for a clear chain of command for the event. The NSSE MOA and planning system works extremely well for planned events, however, due to the requirement for local authorities to engage the USSS and USMS, it does not provide the quick and efficient implementation required for response to a Mumbai-style attack.

**2. Could Mutual Aid Be Implemented at the Lowest Possible Level, Such as the Local Police Chief or Sheriff? Does It Require Application to State or Federal Government Officials to Implement?**

Since deputation by the USMS is required, along with MOAs spelling out the terms and conditions of the deputation, this solution cannot be implemented at the lowest

level. A local police department would be reliant upon USMS or USSS to enter into the MOA and then to provide the deputation implementing the cross border grant of authority. In order to address an unplanned and rapidly unfolding event such as a Mumbai-style attack, the local police department would either need a standing MOA with USMS/USSS or it would need to reach out to the USMS/USSS as the event was occurring to attempt to negotiate a MOA.

It is reasonable to assume that the USMS would not want to have permanent deputation of law enforcement officers nationwide. However, this presents challenges in responding to unexpected events. If the deputation of the responding officers could not be completed in advance, it would be necessary for local police departments to contact the USMS before responding to an attack in another state in order to get deputized. This is impractical and would delay the response. The MOA and deputation cannot be implemented at the lowest level as action by the USSS and USMS is required in order to provide the deputation. This makes the MOA process for NSSE untenable for required implementation at the lowest level in the event of a Mumbai-style attack.

### **3. Is A Clear Grant Of Seamless Authority Provided To The Law Enforcement Agencies Responding To A Request For Mutual Aid?**

The NSSE system provides a clear grant of law enforcement authority through the deputation from the USMS. While the deputation may be limited to certain types of crimes, it is clear, unambiguous, and supported by statutory authority (28 U.S.C. § 561). The NSSE system is complex and relies upon a series of MOA and actions by local, state, and federal officials to create the authority and protections. In order to enforce state and federal law, the responding jurisdiction must have:

- 1) A memorandum of agreement detailing the roles and responsibilities of the requesting and responding jurisdictions;
- 2) Deputation by the USMS and,
- 3) A state law that allows enforcement of state and local laws by USMS.

It is extremely unlikely that all of these will be in place on a routine basis in anticipation of an event such as a Mumbai-style attack.

The most significant hurdle to the NSSE approach is that the ability to enforce laws is limited by the authority of USMS and the grant to the USMS by state laws. Since the USMS only have organic authority to enforce federal law, examination in advance of the state law grant to the USMS is required. In New Jersey, as discussed above, this power is limited to third degree or higher crimes.

During the response to Hurricane Katrina, the Department of Justice discovered that the grant of state law enforcement power to federal officers was not as broad as had been previously anticipated. After the immediate response was over, the Attorney General requested that all the governors examine their laws to assure that federal law enforcement could enforce state and local laws should they be needed in an emergency (Gonzales, 2007). It is unclear whether states took action to remedy any gaps in their laws.

Given that a special deputy federal marshal can only enforce those laws that are authorized by the requesting state statutes; the deputation will be limited and varied. While the authority of the USMS to deputize is clear and unambiguous, the extent of the laws permissible to be enforced is not clear. This ambiguity makes the grant of authority provided under the MOA and deputation insufficient for response to a Mumbai-style attack.

#### **4. Does the Solution Delineate Responsibility for Liability, Workers Compensation and Other Benefits?**

The NSSE system provides for some coverage for injuries sustained through the MOA signed by all parties. The MOA provides for federal coverage for death or disability:

Individuals deputized as Special Deputy U.S. Marshals pursuant to this MOA who suffer a disability or die as a result of personal injury sustained while in the performance of his or her duty during the assignment shall be treated as a federal employee as defined by Title 5 U.S.C. Section 8101. Any such individuals who apply to the U.S. Department of Labor for federal workers' compensation under Section 3374 must submit a copy of this MOA with his or her application. All applicants will be processed by the U.S. Department of Labor on a case by case basis in accordance with applicable law and regulation. (Narr et al., 2006)

The MOA is silent as to liability and workers compensation protection short of disability. It is reasonable to infer that this coverage remains with the sending jurisdiction. The MOA provides that liability remains with the sending jurisdiction unless covered by the Federal Tort Claims Act (Narr et al., 2006).

As the designation and coordination of a NSSE is a duty of the Secretary of Homeland Security, this is not an option available to a state or local law enforcement agency should a sudden emergency arise. The NSSE designation is for planned events (DHS, 2008a).

NSSE memoranda of agreement provide for liability, workers compensation, and other benefits by providing federal coverage. In addition, the NSSE MOA provide a limited grant of law enforcement authority through the use of deputation by the USMS—a deputation that is limited in terms of the state and local laws that can be enforced. The NSSE MOA are not quick to implement as action by the federal government is required to grant the power. It also does not allow implementation at the lowest possible level as the facilitation of mutual aid is provided for through the federal government. This system is quite good for the planned events it is designed for, but it does not provide any benefits for no notice events such as a Mumbai-style attack.

#### **D. STATE LAWS—EXAMPLE: MONTANA**

State laws that allow for the establishment of mutual aid agreements across state lines could be quick to implement provided the local jurisdictions have enacted the appropriate MOA in advance of the no notice event. State laws allow enactment and implementation at the lowest possible level as all necessary agreements and requests are made by the local governments. Additionally, state laws provide a seamless grant of law enforcement authority; however, this grant will be dependent upon each state's law. Furthermore, state laws often require provisions to be included in MOAs detailing the coverage for liability, workers compensation, and other benefits. Provided that the requesting state has the appropriate laws enacted and the local jurisdictions have enacted MOAs, this approach would be good for a Mumbai-style attack.

A number of states have enacted laws permitting local jurisdictions within the state to enter into mutual aid agreements with communities in other states. This allows a one-on-one mutual aid relationship between local law enforcement agencies in different states. Some of the laws are limited to communities along the state border such as Tex.Crim. Pro. § 2.124. Others are broader and could extend to any law enforcement agency in any state, such as (Montana Code § 44-11-301 et seq.). The mutual aid relationship will only be one way- into the state that has enacted the law.

One example of this type of law is the Montana Interstate Law Enforcement Mutual Aid Act that allows for cross border mutual aid. The Montana Act allows any law enforcement agency in the state of Montana to enter into mutual aid agreements with any law enforcement agency in another state. The agreement and the state law give the out-of-state agency providing mutual aid full law enforcement authority within the requesting Montana jurisdiction.

The purpose of the Montana Act is:

to permit ... law enforcement agencies of this state to enter into mutual aid agreements, ... with one or more law enforcement agencies of any other state or the United States **in order to facilitate and coordinate efficient, cooperative enforcement efforts directed at mutual law enforcement problems transcending jurisdictional boundaries** and to insure the prompt and effective delivery of law enforcement and emergency services in areas that, due to geographic remoteness, population sparsity, and economic and other factors are in need of an increased law enforcement presence [emphasis added]. (Montana Code § 44-11-302).

While this act is designed to supplement the sparse law enforcement resources in rural areas of Montana, the broad language would facilitate law enforcement response in most, if not all, circumstances within the state.

The Montana law requires a written mutual aid agreement approved by the governing bodies of the jurisdictions in which each law enforcement agency is located<sup>24</sup> (Montana Code § 44-11-304, n.d.). The act requires the “agreement must fully set forth

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<sup>24</sup> The Montana Act provides: “If required by applicable law, the agreement must be authorized and approved by the governing body of each party to the agreement.” For the purposes of this analysis it is assumed both jurisdictions require governing body approval as this would be the more difficult option to implement.

the powers, rights, and obligations of the parties to the agreement” (Montana Code § 44-11-304, n.d.). Once enacted, the mutual aid agreement will grant to the responding party the same law enforcement powers as the requesting party while operating within the requesting party’s jurisdiction (Montana Code § 44-11-304, n.d.).

The mutual aid agreement is required to include:

- the duration of the agreement;
- the precise organization, composition, and nature of any separate legal entity created thereby;
- the purpose of the agreement;
- the manner of financing the agreement and establishing and maintaining a budget therefor;
- the method to be employed in accomplishing the partial or complete termination of the agreement and for disposing of property upon such partial or complete termination;
- provision for administering the agreement, which may include creation of a joint board responsible for such administration;
- the manner of acquiring, holding, and disposing of real and personal property used in the agreement;
- the minimum standards for law enforcement personnel implementing the provisions of the agreement;
- the respective liability of each party to the agreement for the actions of law enforcement officers when acting under the provisions of the agreement;
- the minimum insurance required of each party to the agreement;
- the exact chain of command or delegation of authority to be followed by law enforcement officials acting under the provisions of the agreement;
- the precise enforcement authority that the peace officers of each party law enforcement agency may exercise; and
- any other necessary and proper matters. (Montana Code § 44-11-305, n.d.)

Once completed, the agreement must be filed in the office of “(1) each clerk and recorder of each county of this state where the principal office of one of the parties to the agreement is located; and (2) the secretary of state” within 20 days of enactment (Montana Code § 44-11-310, n.d.). This statutory construct provides much of the needed structure for a cross border response to a Mumbai-style attack. It provides for quick implementation at the local level, grants law enforcement authority, and determines

liability and insurance in advance. Notwithstanding the benefits of such a legal framework, this system is not capable of being developed and implemented without advance planning.

In order for a system such as this to work, the state that is requesting the aid must enact the authority for this type of mutual aid into its statutes. Once the law is passed, then the individual jurisdictions, the county or local governments, must negotiate the mutual aid agreement that provides for all of the terms and conditions required by the law. This agreement must be passed by the governing bodies on each side of the border and then filed with the appropriate state officials. Only after all of this has been completed and the agreement is in place would it be available to be used in a Mumbai-style attack. While not impossible, it is highly improbable that such a system could be adopted in less than a week, let alone in the crucial hours after an attack begins.

**1. Could Mutual Aid Be Implemented Quickly and Efficiently; Does It Require a Declaration Of Emergency or Other Action That May Delay Response?**

Once enacted by the jurisdictions, state laws allows for quick implementation of law enforcement mutual aid at the local level where the immediate aid is required. In the example of Camden and Philadelphia, either city would be able to call directly on the other to obtain law enforcement mutual aid. Neither would be required to go through a bureaucratic chain of command to obtain the mutual aid. Assuming that the requesting state had the proper laws in place and the local jurisdictions have an MOA enacted, this state law construct would be efficient in providing response to a Mumbai-style attack.

**2. Could Mutual Aid Be Implemented at the Lowest Possible Level, Such as the Local Police Chief or Sheriff? Does it Require Application to State or Federal Government Officials to Implement?**

State laws provide for quick implementation at the local level where the immediate aid is required; this is assuming that the law was passed and the mutual aid agreements were entered into prior to the event. Given the time needed for implementation of such a system, this method does not assist in the response to a Mumbai-style attack unless it was previously been adopted. However, for those

jurisdictions with such a framework in place, this is an excellent solution to the challenges of law enforcement mutual aid that can be enacted at the lowest level.

**3. Is a Clear Grant of Seamless Authority Provided to the Law Enforcement Agencies Responding To a Request for Mutual Aid?**

State laws, such as those in Montana, grant seamless law enforcement authority to the officers responding by providing “the precise enforcement authority that the peace officers of each party law enforcement agency may exercise” (Montana Code § 44-11-305, n.d.). Montana’s law allows a grant of law enforcement authority to the officers responding under the mutual aid agreements (Montana Code § 44-11-304, n.d.). The Montana Act provides the grant of law enforcement authority:

(3) Subject to 44–11-308, a mutual aid agreement may grant a peace officer of any party law enforcement agency acting within the territorial jurisdiction of any other party law enforcement agency authority to act as if he were a duly appointed and qualified peace officer of the law enforcement agency he is assisting. (Montana Code § 44-11-304, n.d.)

In order to work efficiently for a Mumbai-style attack, both Camden and Philadelphia would need the authority to enter into these mutual aid agreements, to allow the officers to cross the border in either direction. If only Philadelphia had such authorization, Camden could not rely upon the response from Philadelphia despite, its ability to respond in the opposite direction.

**4. Does the Solution Delineate Responsibility for Liability, Workers Compensation and Other Benefits?**

The Montana law requires the mutual aid agreement to provide for “the respective liability of each party to the agreement for the actions of law enforcement officers when acting under the provisions of the agreement” assuaging the concerns regarding liability (Montana Code § 44-11-305, n.d.). While this provision would provide the local governments and law enforcement officers with certainty regarding liability, it could lead to some confusion if there is not a standardized MOA in place. For example, if in one state, three separate communities each use their state statutes to enter into mutual aid agreements with the same community in a second state; it is possible that they would have several different MOAs with several different liability provisions. This could result

in there being several different scenarios for liability when responding across the border, possibly in the same event. This gets even more complicated as additional communities also enter into agreements.

State laws, such as Montana's, provide for the establishment of mutual aid agreements across state lines that are quick to implement in local jurisdictions that have enacted MOAs. State laws allow enactment and implementation at the lowest possible level as all necessary agreements and requests are made by the local governments who require the mutual aid. State laws provide a seamless grant of law enforcement authority; however, this grant would be different from state-to-state based on the details of each state's law. State laws often require provisions to be included in MOAs detailing the coverage for liability, workers compensation and other benefits. Provided that the requesting state has the appropriate laws enacted and the local jurisdictions have enacted MOAs, this approach would be good for a Mumbai-style attack.

## VII. DISCUSSIONS OF EXISTING SOLUTIONS

Given the challenges presented by a Mumbai-style attack, there is currently no universal solution that would allow for the quick implementation of interstate law enforcement mutual aid. Each of the systems examined in this thesis presents challenges and requires advanced planning to be capable of being implemented in a no notice situation.

Existing compacts, such as the ICDDC and EMAC, provide a seamless grant of authority, notwithstanding the duplicative swearing in some states have utilized. These compacts also delineate responsibility for liability, workers compensation, and other benefits. However, the compacts are not quick to implement as a governor's declaration of emergency is required. Furthermore, the compacts do not allow implementation at the lowest possible level as the facilitation of mutual aid is provided for through the state. In order to remedy these issues, the states would need to request Congress to amend the compact<sup>25</sup> or develop state level authorities to allow quick and low level implementation.

Executive orders provide a seamless grant of authority as they are enacted by the governor, presumably with proper legal authority, thereby providing a grant of law enforcement authority at the state level. While not necessarily explicitly expressed, the executive orders provide for liability, workers compensation, and other benefits by having the responding state retain responsibility. Executive orders are not quick to implement as a governor is required to enact the order. They do not allow implementation at the lowest possible level as the facilitation of mutual aid is provided for through the state. Arguably, a governor could enact an executive order that would provide local officials with the authority to request and provide the mutual aid. If such an executive

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<sup>25</sup> State Attorneys General may want to consider whether Congress intended to allow the states to modify the articles of EMAC to facilitate local level response. The adoption of EMAC by Congress provides: "The Congress consents to the Emergency Management Assistance Compact entered into by .... The compact reads **substantially** as follows..." Does the use of the word "substantially" allow for amendment by the States without further Congressional Action? While Congress expressly reserved the right to alter or amend the joint resolution approving EMAC, they also stated that it "shall ... (3) be construed as understanding that the first paragraph of Article II of the compact provides that emergencies will require procedures to provide immediate access to existing resources to make a prompt and effective response..." P.L. 104-321 (n.d.). The State Attorneys General may want to consider whether this provision allows for local implementation which would render the compact both quick and efficient and capable of being implemented at the lowest level.

order were permanently in place, this would allow for quick and efficient implementation at the lowest possible level.

NSSE MOA provide for liability, workers compensation, and other benefits by providing federal coverage. The NSSE MOA provides a limited grant of law enforcement authority through the use of deputation by the USMS—a deputation that is limited in terms of the state and local laws that can be enforced. The NSSE MOA are not quick to implement as action by the federal government is required to grant the power. It also does not allow implementation at the lowest possible level as the facilitation of mutual aid is provided for through the federal government. This system is quite good for the planned events it is designed for, but it does not provide any benefits for no notice events.

State laws provide for liability, workers compensation and other benefits by setting it forth in the MOA between the parties. State laws could provide a seamless grant of law enforcement authority dependent upon terms each state's law. State laws are quick to implement provided the local jurisdictions have enacted the appropriate MOA in advance of the no notice event. State laws allow for implementation at the lowest possible level as the request for mutual aid is done by the local governments. This system could be quite effective at addressing a Mumbai-style attack, provided enough cross border jurisdictions adopt mutual aid MOA based on adopted state laws.

## VIII. ANALYSIS OF OTHER ALTERNATIVES

One alternative to using existing solutions is to create a new one. Given the limitations of the Compact Clause, most new alternatives would require congressional approval and adoption by state legislatures. This could be a long process and an uncertain one as only about four percent of the bills introduced in Congress are passed each year (Analysis Methodology, n.d.). However, a compact would provide the strongest framework granting responding officers authority and protections.

Eliminating congressional approval would speed the process significantly. The FEMA Administrator has been given broad powers to facilitate the creation of mutual aid compacts between the states. Section 611(h)(2) of the Stafford Act directs the Administrator to work with states to develop emergency preparedness compacts (42 U.S.C. § 5196). Once adopted by the states, these compacts become law unless Congress objects or overturns the proposed compact. This section also directs the Administrator to work with the states to develop reciprocal legislation to address emergencies.

The intent of this section of the Stafford Act is to develop emergency preparedness compacts and legislation that will facilitate the response to events that cannot be handled in their entirety by the assets of one jurisdiction (42 U.S.C. § 5196). This is precisely the type of preparedness and pre-planning that is required for a Mumbai-style event. An interstate compact that would facilitate the quick movement of law enforcement assets across state lines would facilitate the quick response to events requiring increased law enforcement assets.

The broad powers of 42 USC 611(h) that detail the power of the FEMA administrator to negotiate and approve preparedness compacts between the states are:

- (2) The Administrator may
  - (A) assist and encourage the States to negotiate and enter into interstate emergency preparedness compacts;
  - (B) review the terms and conditions of such proposed compacts in order to assist, to the extent feasible, in obtaining uniformity between such compacts and consistency with Federal emergency response plans and programs; ...
- (3) A copy of each interstate emergency preparedness compact shall be transmitted promptly to the Senate and the House

of Representatives. The consent of Congress is deemed to be granted to each such compact upon the expiration of the 60-day period beginning on the date on which the compact is transmitted to Congress.

- (4) Nothing in this subsection shall be construed as preventing Congress from disapproving, or withdrawing at any time its consent to, any interstate emergency preparedness compact. (42 U.S.C. § 5196)

This amounts to congressional pre-approval for interstate preparedness compacts. The Stafford Act defines preparedness for this section to include response and recovery actions (42 U.S.C. § 5195a).

Similarly, Congress granted consent to compacts between the states for certain law enforcement purposes. Specifically, 4 USC § 112, Compacts between States for Cooperation in Prevention of Crime; Consent of Congress, provides:

- (a) The consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts. (4 USC § 112)

This provision is typically used by states for compacts and agreements<sup>26</sup> regarding detainees, or the laws related to detention and extradition of criminals across state lines. However, both the prevention of crime and the enforcement of criminal laws would be part of the response to a Mumbai-style attack.

Either of these statutes could be used to create a new compact between the states that would allow for law enforcement mutual aid without the declaration of an emergency. Neither would require the congressional approval associated with a compact. Provisions similar to those in the Montana statute could form the basis of this new compact. If the compact was to extend to other first responders, the Stafford Act provisions would be most appropriate. However, if it is limited solely to law enforcement, either may apply.

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<sup>26</sup> It is not clear whether the agreements referenced in this section are required to be approved by state legislatures.

Were several of the states to develop the framework for an interstate law enforcement compact, it could “sit on the shelf” until an opportunity to rush it forward were presented. EMAC was adopted by a number of the states between 1996 and 2001, but after the attacks of September 11, the remaining legislatures passed the compact in the months following the attacks. Congress seems to be more willing to take quick action on emergency related legislation in the months after a major disaster. For example, in 2013, both houses of Congress passed the Sandy Recovery Improvement Act containing many pieces of legislation that had been unable to garner enough support to pass absent the disaster (Scholtes, 2013). The next major disaster could be an opportunity to pass law enforcement mutual aid legislation.

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## **IX. FINDINGS AND RECOMMENDATIONS**

The current systems in place that allow for law enforcement mutual will not provide quick interstate aid during a Mumbai-style attack. As detailed above, none of the mutual aid systems currently in use would allow for response to a Mumbai-style attack. Compacts such as EMAC do not allow for quick response as a governor must declare a state of emergency before the mutual aid may proceed. Executive orders require action by a governor and would not be quickly implemented in response to a Mumbai-style attack. MOAs, such as the one used by the USSS for NSSE, are limited in scope and authority and do not provide quick implementation or a clear and seamless grant of authority. State laws show promise, but they are complex and can result in inconsistent results if standardized templates are not developed and enacted.

Some local jurisdictions may be able to rely upon the state laws and accompanying MOA that allows for interstate law enforcement mutual aid, but these are the minority. Furthermore, without significant expansion of these systems, there is no clear method for law enforcement to respond to a Mumbai-style attack across state lines. While many law enforcement agencies may elect to respond despite lack of legal authority, there will be significant challenges and other legal issues that follow.

In order to provide the proper legal framework facilitating interstate response to no-notice events, such as a Mumbai-style attack, those associations representing state, county, and local law enforcement agencies should develop a law enforcement compact that will address the concerns unique to law enforcement mutual aid. These associations are best suited to balance the interested of law enforcement agencies from different states and amongst the different types of law enforcement agencies. Associations, such as the International Association of Chiefs of Police, the National Sheriffs' Association, and the Major Cities Chiefs Police Association, would be best positioned to take the lead on development of this new national compact.

This new compact would need to be passed by at least two states and then submitted to Congress for approval, pursuant to the Compact Clause. While this multi-layered legislative process may take a considerable amount of time the development of

the core principles of the compact today will position law enforcement for quick adoption should opportunity present, such as after a major disaster.

The compact framework must contain the key elements necessary to facilitate quick interstate mutual aid. As laid forth in this thesis, the new compact must be capable of being implemented quickly and efficiently without bothersome delay of requesting permission through multiple layers of government. The new compact must be capable of being implemented at the lowest possible level—aid must be able to be requested from police chief to police chief<sup>27</sup> or mayor to mayor. Streamlining the method by which the mutual aid is requested will help achieve order during chaos. This compact must provide a clear and seamless grant of law enforcement authority across jurisdictional boundaries and make it clear that the responding officers have full law enforcement powers. This compact must provide clear understanding of liability, workers compensation, and pension benefits, including which agency provides or retains each of these. Providing the responding officers with clear authority and an understanding of their protections will allow them to fully engage in the response without worrying about their legal exposure.

This new compact should consider the familiar provisions of the EMAC as a known and tested framework. These provisions could be adapted to meet the law enforcement community's needs for responding to a no-notice event. Using similar, if not identical provisions, would also allow the new compact to work in concert with EMAC when appropriate. The new compact should not adopt EMAC's requirement that the governor declare a state of emergency. While developing the terms of the compact, the associations representing state, county, and local law enforcement agencies should consider whether the new compact could enhance the law enforcement mutual aid response to planned events, natural disasters, and other law enforcement needs.

State associations representing law enforcement agencies may want to consider pursuing adoption of state laws that allow for local cross-border mutual aid agreements while a comprehensive national solution is being enacted. This would allow for shorter term solutions in areas that may be at higher risk of a Mumbai-style attack.

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<sup>27</sup> The term police chief is used to represent the leader of the state, county or local law enforcement agency. It should be read to include Sheriffs, superintendents, commissioners or other law enforcement agency heads.

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