

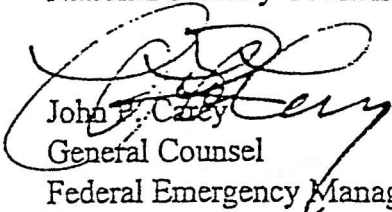


Federal Emergency Management Agency

Washington, D.C. 20472

NOV 21 1996


MEMORANDUM FOR: Richard A. Clarke, Chair
Special Assistant to the President for
Multilateral and Global Affairs
National Security Council

FROM: 
John P. Casey
General Counsel
Federal Emergency Management Agency

SUBJECT: FEMA's Role in Advance of a Terrorist Incident

Your memorandum of October 16, 1996 to Lacy Suiter, Executive Associate Director for Response and Recovery of the Federal Emergency Management Agency (FEMA), asked FEMA to clarify its position concerning an amendment to the Stafford Act to authorize predeployment of Federal resources in anticipation of a terrorist incident. The crux of the inquiry is whether to seek explicit legislative authority under the Stafford Act [Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended, 42 U.S.C. § 5121 *et seq.*] to expend funds out of the President's Disaster Relief Fund for contingency planning, consequence management preparedness, and predeployment of Federal, State or local government resources before the President declares an emergency or major disaster under the Stafford Act.

Our position distinguishes between emergency preparedness funded under the normal budget and appropriations cycles of affected Federal departments and agencies (including anticipated special events) and emergency conditions requiring a presidentially authorized response to a disaster or to a credible, significant, or imminent threat of disaster, whatever the source of the disaster. In brief, our position is: (1) emergency preparedness functions of Federal departments and agencies should be funded under their normal statutory authorities and budget and appropriations processes and not under the President's Disaster Relief Fund, absent a disaster or credible, significant, or imminent threat of disaster; and (2) the President has existing authority under the Stafford Act to authorize and reimburse Federal departments and agencies to respond to disasters and to credible, significant, or imminent threats of disasters.

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Questions Concerning Amendment of the Stafford Act

In this section, I repeat your questions followed by a statement of FEMA's position.

A. Would not an amendment obviate any barrier created by current laws and regulations?

William C. Tidball's memorandum of September 24 gave two reasons why FEMA felt it was inappropriate to amend the Stafford Act to fund predeployment of Federal resources. The first issue was that response to disasters and emergencies is primarily the responsibility of State and local governments. The second issue was the potentially unbounded drain on Stafford Act funds if that statute were to be used as the authority for all Federal agencies to fund their emergency preparedness activities, including predeployment of Federal personnel and resources in advance of catastrophic events.

The primary responsibility of State and local governments reflects basic principles of federalism under the Constitution of the United States that have been applied to Federal disaster relief since at least 1803, and carried over into organic disaster relief authorizing legislation since 1950. The primary intent of the Stafford Act is to provide supplemental assistance to State and local governments. No amendment to the Stafford Act could set aside the constitutional principles. Where the Governor of an affected State and the President formally agree that Federal personnel and resources may be deployed in a State in anticipation of a disaster then predeployment is possible. We contend that the Congress already has granted such authority to the President under § 201 of the Stafford Act (42 U.S.C. § 5131).

The second concern would not be alleviated by the proposed amendment. The proposed amendment would undermine a basic budgeting and planning principle that Federal departments and agencies fund their own emergency preparedness planning and programs through their normal authorizing legislation and budgeting/appropriations procedures. These particular activities are part of the agencies' normal planning and budget cycle. Most Federal departments and agencies have consistently funded emergency preparedness activities through the normal budgeting/appropriations process, not through the President's Disaster Relief Fund. At a time when the Congress is requiring FEMA to report on its plans to reduce disaster relief expenditures and to improve management controls on the Disaster Relief Fund, it does not appear likely to FEMA that the Congress will change its basic legislative approach to authorize the President to fund Federal departments' and agencies' preparedness activities and predeployment costs through the Disaster Relief Fund.

B. Did not the 1988 amendments allow FEMA to act in areas where "the primary responsibility for response rests with the United States" rather than a State or local government?

The 1988 amendments authorized the President to act where the primary responsibility for response rests with the United States. Section 501(b) of the Stafford Act (42 U.S.C. § 5191(b)) specifically provides:

(b) Certain emergencies involving Federal primary responsibility—

The President may exercise any authority vested in him by section 5192 of this title or section 5193 of this title with respect to an emergency when he determines that an emergency exists for which the primary responsibility for response rests with the United States because the emergency involves a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority. In determining whether or not such an emergency exists, the President shall consult the Governor of any affected State, if practicable. The President's determination may be made without regard to subsection (a) of this section.

★ The determination whether a particular catastrophe is a uniquely Federal responsibility is within the discretion of the President, in consultation with the Attorney General.

C. Does FEMA believe that it has adequate authority, sufficient funding, and a satisfactory program to conduct deployments and other preparations for consequence management on a major terrorist incident in advance of such an incident? If so, why were there such difficulties in doing so in connection with the Atlanta Olympics? If not, what does FEMA propose to correct the current deficiencies?

1996 Summer
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The President has broad general authority under § 201(a) of the Stafford Act (42 U.S.C. § 5131) “. . . to establish a program of disaster preparedness that utilizes services of all appropriate agencies and includes — (1) preparation of disaster preparedness plans for mitigation, warning, emergency operations, rehabilitation, and recovery; . . .” That authority is adequate should it be necessary to exercise it. For example, in the budget cycle before the Olympics FEMA did not budget for certain expenses to predeploy specific resources in case of a terrorist incident. Initially FEMA adjusted its Fiscal Year 1996 appropriation to absorb the costs of the new requirements. When the requirement expanded far beyond FEMA's own ability to fund it out of its existing appropriation, FEMA consulted with the cognizant committees of the Congress which agreed that the requirement should be paid out of the Disaster Relief Fund. Both FEMA and the Congress understood that the circumstances were unique, that the requirement was urgent, and that normally such expenses would not have been paid out of the Disaster

Relief Fund!

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