

State Compacts vs. Emergency Powers

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The federal and state governments have been unable to reach a conclusion on which party is best suited to provide relief and aid in times of emergencies. There is evidence pointing toward fraudulent abuse of federal funds once being directed toward states for relief. Hurricane Katrina and the COVID-19 pandemic, reveal numerous cases of widespread fraud and abuse of federal emergency powers. State compacts represent a viable policy solution for mitigating natural disasters and health crises. The rate of success seen in state compacts was revealed throughout the COVID-19 pandemic.

It has been a continuous battle between state governments and the federal government on which party is best suited to provide relief and aid to citizens in times of natural disasters and public health crises. This paper will analyze the history of the state and federal government's involvement in providing aid and relief in times of national crises, as well as the Constitutional provisions for which party should take responsibility. Throughout the course of American history, the federal government has come to the rescue for state sovereignties in times of emergencies, such as natural disasters or public health crises. However, over the course of events, emergency powers have come under scrutiny by state governors and officials, citing a multitude of ways that they fail to adequately aid states in times of crisis. This paper explores the history of the state and federal government's involvement when mitigating natural disasters and public health crises. It is recommended that federal emergency powers be reformed, to include stricter measures for funds being directed to states in times of emergencies, to allow for state officials to have a greater voice, and finally to utilize state compacts more effectively among the states. There is no explicit provision in the Constitution for times of emergencies, therefore leaving this issue up to much debate. Historically, state compacts have been used to settle boundary disputes, however, at the end of World War II, the trend began to shift in how they were utilized. This paper discusses the viable policy solution that state compacts pose, as well as the secondary alternatives of reforming emergency powers. Action must be taken to combat excessive federal overreach, and federal bureaucracy when it comes to mitigating natural disasters and public health crises. State compacts ensure that the sovereignty of the state is enshrined, they protect against bureaucrats from states away, making the final decisions, and state compacts pose as a much more efficient and reliable route of mitigation when it comes to natural disasters and health crises.

Policy Problem

Throughout the course of American history, it is no surprise that state authorities and governors have abused and usurped their authority in times of state emergencies. The U.S. Constitution provides no explicit provision for emergencies, therefore leaving wide interpretation.¹ This has been the center of much debate throughout U.S. political history as state officials and presidential executives have fought for supreme power in national declarations of emergency. There are numerous examples of disasters, where the federal government proved to be little help and the state government was forced to solve its crisis.

In 1803, the Federal Government initiated its first involvement with mitigating disaster relief and offering financial aid to Portsmouth, NH after a fire.² It was not until 1992 that the

¹ Elizabeth Goitein, "Good Governance Paper No. 18: Reforming Emergency Powers," Just Security, October 31, 2020, <https://www.justsecurity.org/73196/good-governance-paper-no-18-emergency-powers/>.

² "Portsmouth Fire Relief Papers, 1802-1803 – MS071," *Portsmouth Athenaeum* (blog), July 12, 2017, <https://portsmouthathenaeum.org/portsmouth-fire-relief-71/>.

Federal Government established a route to provide disaster relief to state and local governments, with the *Robert T. Stafford Disaster Relief and Emergency Assistance Act*.³

A defining characteristic of the *Stafford Act* is that the governor of a state determines whether or not the state has the capacity to address the disaster at hand. “If that governor decides the state cannot handle the response, he or she must then ask the president for help and inform the president of the resources the state can commit. The president then decides whether to declare a major disaster and directs the assistance. A similar process takes place for emergencies. This top-down approach often does not include the perspective of people living in the disaster-affected area.”⁴ The *Stafford Act* fails to offer the states much room to address their own natural disasters or state emergencies. Instead, the *Stafford Act* leaves the decision-making process in the hands of bureaucrats who live states away from the present problem.

In the Supreme Court decision of *Youngstown Sheet & Tube Company versus Sawyer*, Justice Jackson famously said in his concurring opinion that the Constitutional framers, “knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies.” (Goitein, 2020). *The National Conference of State Legislatures* defines emergency powers as powers used “in times of war, disease or other extraordinary conditions, each state authorizes its governor to declare a state of emergency. Once an emergency has been declared, executive powers expand until the emergency ends. These powers include authority normally reserved for legislatures, such as the ability to suspend existing statutes or effectively create new laws-albeit temporarily and only as needed to respond to the emergency situation.”⁵

Within Article I, Section 8 Clause One, otherwise known as the General Welfare and Common Defense Clause, there is potential abuse for the federal government to extensively involve itself in natural disasters. Due to the broadness of this constitutional clause, many politicians and government officials have multiple different interpretations as to what “provide for the common Defense” pertains to. “The contemporary view is that Congress’s power to provide for the ‘general Welfare’ is a power to spend for virtually anything that Congress itself views as helpful.”⁶ Even at the origin of the U.S. Constitution, the Framers famously debated each other over the meaning of the “general welfare” and specific limitations to Congressional spending power.

Most famously, James Madison was a proponent of Congress having explicit parameters surrounding the power to tax and spend and to prevent the possibility of Congress doing whatever it thinks best when it concerns the interest of the nation.⁷ The fires that ravaged the relatively new member of the Union, Savannah Georgia were one of the first instances where

³ “History of U.S Emergency Management,” accessed November 7, 2023, <https://www.weld.gov/Government/Departments/Office-of-Emergency-Management/History-of-U.S.-Emergency-Management>.

⁴ “The Stafford Act,” Center for Disaster Philanthropy, accessed November 7, 2023, <https://disasterphilanthropy.org/resources/the-stafford-act/>.

⁵ “National Conference of State Legislatures > NCSL Search Results,” accessed November 3, 2023, <https://www.ncsl.org/ncsl-search-results/topics/18>.

⁶ John C. Eastman, “Enough Is Enough: Why General Welfare Limits Spending,” The Heritage Foundation, accessed February 19, 2024, <https://www.heritage.org/the-constitution/report/enough-enough-why-general-welfare-limits-spending>.

⁷ Eastman.

Congress was to decide on what to do in times of natural disasters and request for aid. Representative Macon, in response to the proposal for federal aid and funds to be sent to Savannah, stated that at what specific part of the Constitution gave the House of Representatives the power and ability to offer monetary relief to Savannah's citizens?⁸ Representative Macon was quick to point out that numerous other cities had been consumed by fire and his question to the Congress was, "if the United States were to become underwriters to the whole Union, where must the line be drawn when their assistance might be claimed? Was it when three-fourths or four-fifths of a town was destroyed, or what other proportion? Insurance offices were the proper securities against fire. If the Government were to come forward in one instance, it must come forward in all, since every sufferer's claim stood upon the same footing."⁹ Regrettably, this policy position of being wary where the federal government deposits monetary aid and relief to states in request of it, has not been emphasized over the decades.

Relevant Evidence

There are numerous examples of state officials and governors, recognizing the multitude of institutionalized problems that federal emergency powers have when utilized in times of natural disasters or public health crises. Hurricane Katrina can be cited as the most famous example of when the federal government drastically failed the states. Hurricane Katrina in 2005 has been deemed by many as a massive federal failure. A *Washington Post* article from September 6, just a week after the hurricane made landfall, reported the following,

"Over the next few days [beginning two days after the hurricane hit], Wal-Mart's response to Katrina—an unrivaled \$20 million in cash donations, 1,500 truckloads of free merchandise, food for 100,000 meals and the promise of a job for every one of its displaced workers—has turned the chain into an unexpected lifeline for much of the Southeast. While state and federal officials have come under harsh criticism for their handling of the storm's aftermath, Wal-Mart is being held up as a model for logistical efficiency and nimble disaster planning, which have allowed it to quickly deliver staples such as water, fuel and toilet paper to thousands of evacuees."¹⁰

In times of desperate measures, the private sector, and state authorities rose to take responsibility when the federal government failed to do so. Under the Bush administration at the time of Hurricane Katrina, concerned citizens pointed to the consequences of a lack of unified response from the federal government and state authorities. Hundreds of lives were lost in flood waters in Louisiana and bodies remained uncollected, due to the lack of a cohesive federal response plan.¹¹ President Bush released multiple statements shortly after Katrina made landfall, "In terms of the management of the Federal response, our architecture of command and control mechanisms as well as our existing structure of plans did not serve us well. Command centers in the Department of Homeland Security (DHS) and elsewhere in the Federal government had

⁸ "Article 1, Section 8, Clause 1: House of Representatives, Relief to Savannah," 1, accessed February 19, 2024, https://press-pubs.uchicago.edu/founders/documents/a1_8_1s23.html.

⁹ "Article 1, Section 8, Clause 1: House of Representatives, Relief to Savannah."

¹⁰ Sheldon Richman, "Hurricane Katrina: Government versus the Private Sector | Sheldon Richman," October 1, 2005, <https://fee.org/articles/hurricane-katrina-government-versus-the-private-sector/>.

¹¹ "Hurricane Katrina: Remembering the Federal Failures," Cato Institute, August 27, 2015, <https://www.cato.org/blog/hurricane-katrina-remembering-federal-failures>.

unclear, and often overlapping, roles and responsibilities that were exposed as flawed during this disaster.”¹²

During the climax of the COVID-19 pandemic, many states banded together and formed compacts with each other, to proactively work against the effects of the pandemic, especially when the federal government proved to be inefficient at the beginning of the pandemic. The *Washington Post* reported in 2020 that states were desperate to coordinate with each other because of the inefficiency occurring in the nation’s capital.¹³ As early as March 16, at the beginning of the COVID-19 pandemic, states were noticing discrepancies about the federal government’s incapacity to handle a large-scale crisis. “When the CDC first dispersed test kits in early February, it shipped them to a network of state and local government labs and restricted testing to people with virus symptoms who had recently traveled to China, where the virus first emerged, or had been exposed to a known case. Federal officials hoped the virus could be contained—even as they disputed alarms from those on the front lines that the CDC’s guidelines weren’t keeping up with the outbreak’s spread, emails between the U.S. agency and local officials show. The government left other laboratories on the sidelines for crucial weeks.”¹⁴

Yet another example of the discrepancy states was beginning to notice about the federal government, was when the CDC, “botched an initial test kit developed in an agency lab, retracting many tests. They resisted calls from state officials and medical providers to broaden testing, and health officials failed to coordinate with outside companies to ensure needed test-kit supplies, such as nasal swabs and chemical reagents, would be available, according to suppliers and health officials.”¹⁵ More times than not, the federal government fails to have a unified and efficient approach toward resolving and mitigating natural disaster relief and emergency aid. It is critical to analyze other viable policy alternatives, rather than only implementing federal emergency powers.

Alternative Policy Options: Widespread use of state compacts

The federal government in some cases proves to be inflexible in addressing state-wide problems, that are commonly shared between other states. A viable policy alternative towards combatting excessive federal bureaucracy, and the incapacity of the federal response to disasters, lies in the success of state compacts. State compacts have historically been another route for mitigating natural disasters and working efficiently with other states while avoiding the red tape that comes along with the federal government.

The Compact Clause is found in Article 1, Section 10, Clause 1 of the U.S. Constitution. “No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”¹⁶ With Congress’s consent, the freedom to form a state compact enshrines

¹² “Hurricane Katrina: Lessons Learned - Chapter Five: Lessons Learned,” accessed December 6, 2023, <https://georgewbush-whitehouse.archives.gov/reports/katrina-lessons-learned/chapter5.html>.

¹³ “Perspective | States Can Band Together to Fight the Virus — No Matter What Trump Does,” *Washington Post*, April 17, 2020, <https://www.washingtonpost.com/outlook/2020/04/15/states-coronavirus-agreements-reopen/>.

¹⁴ Christopher Weaver, Betsy McKay, and Brianna Abbott, “America Needed Coronavirus Tests. The Government Failed.,” *Wall Street Journal*, March 18, 2020, sec. US, <https://www.wsj.com/articles/how-washington-failed-to-build-a-robust-coronavirus-testing-system-11584552147>.

¹⁵ Weaver, McKay, and Abbott.

¹⁶ “Overview of Compact Clause | Constitution Annotated | Congress.Gov | Library of Congress,” accessed November 22, 2023, https://constitution.congress.gov/browse/essay/artI-S10-C3-3-1/ALDE_00013531/.

the sovereignty that states have over each other, as well as safeguarding national interests. *The Congressional Research Service* distinguishes between the duality of state compacts and agreements, “interstate compacts have dual functions: They operate simultaneously as contracts between states and, once approved by Congress, as federal law.”¹⁷ *The National Center for State Courts* provides another definition for compacts as being, “a tool reserved exclusively for the states, interstate compacts can provide states the means to address state problems with state solutions, avoiding federal intervention and preemption.”¹⁸

Since the end of World War II, over 150 compacts have been created with various purposes according to *The National Center for State Courts*. “Their purposes range from implementing common laws to exchanging information about common problems. They apply to a range of subject areas from conservation and resource management to civil defense, education, emergency management, energy law enforcement, probation and parole, transportation, and taxes.”¹⁹

The COVID-19 pandemic saw a rapid increase in states banding together to effectively combat the virus. One such example includes a bipartisan compact formed between Maryland, Louisiana, Massachusetts, Michigan, Ohio, and Virginia. The compact was formed along with *The Rockefeller Foundation*, “to expand the use of rapid point-of-care antigen tests to slow the spread of Covid-19 and continue safely reopening the states.”²⁰ Emergency powers today typically do not include much voice or authority to state governors and officials, as most of the authority is centralized in the control of the federal government.

Implementing the widespread use of state compacts, when it comes to mitigating natural disasters and public health crises, represents a far better policy option than distant bureaucrats mitigating through emergency power declarations. State compacts pose as a reliable alternative policy solution to the federal government mitigating help to states in times of emergencies.

Reforming Emergency Powers

A second viable policy alternative for combatting the bureaucratic red tape of federal emergency powers lies in reforming its provisions and acts. There is a plethora of ways to reform federal emergency powers, but implementing stricter measures for funds being directed to states in times of emergencies is recommended to prevent fraudulent waste. Hurricane Katrina offers a prime example of when funds from the federal government were wasted at the state level. “Federal auditors estimated that \$1 billion or more in aid payments for individuals were invalid. Other estimates put the waste at \$2 billion. An *Associated Press* analysis found that ‘people claiming to live in as many as 162,750 homes that did not exist before the storms may have improperly received as much as \$1 billion in tax money.’ The *New York Times* concluded: ‘Among the many superlatives associated with Hurricane Katrina can now be added this one: it

¹⁷ Stephen Mulligan, “Interstate Compacts: An Overview” (Congressional Research Service, June 15, 2023), <https://crsreports.congress.gov/product/pdf/LSB/LSB10807>.

¹⁸ John Mountjoy, “Interstate Compacts: An Alternative for Solving Common Problems Among States” (National Center for State Courts, 2003), file:///C:/Users/annme/Downloads/ctadmin_1293.pdf.

¹⁹ Mountjoy.

²⁰ “Governors of Six States Announce Major Bipartisan Compact for Three Million Rapid Antigen Tests,” *The Rockefeller Foundation* (blog), accessed November 29, 2023, <https://www.rockefellerfoundation.org/news/governors-of-six-states-announce-major-bipartisan-compact-for-three-million-rapid-antigen-tests/>.

produced one of the most extraordinary displays of scams, schemes and stupefying bureaucratic bungles in modern history, costing taxpayers up to \$2 billion.”²¹

Reports from the *New York Times* in 2006, wrote that officials in Washington estimate about 11% of the overall \$19 billion in relief aid, was used fraudulently over the course of Hurricane Katrina and its aftermath.²² The COVID-19 pandemic saw similar fraudulent abuse with the funds being distributed by way of Paycheck Protection Program. Seven individuals were recently sentenced to fifteen years in prison by the *Justice Department* “for fraudulently obtaining more than \$20 million in forgivable Paycheck Protection Program loans that the Small Business Administration guaranteed under the Coronavirus Aid, Relief, and Economic Security Act.”²³ The *Government Accountability Office* estimates that roughly 11-15% of all unemployment insurance benefits were fraudulent, and the *Department of Labor* investigated findings of \$5.3 billion in overpayments and fraudulent payments from 2020 to 2023.²⁴

There have not been many cases where federal emergency power funds have not been taken advantage of or directed toward fraudulent uses. The implementation of stricter measures for funds being directed to states in times of emergencies must be prioritized to avoid continuous cases of fraudulent abuse. The *Congressional Committee Report on Homeland Security and Governmental Affairs* wrote that, “among the many challenges we face when responding to disasters, the most difficult often involves balancing the tradeoff between ensuring a timely and effective response to those in need, and the responsibility to protect the fiscal integrity of the program.”²⁵ It can be argued, however, that fiscal integrity of an emergency program does not need to be such a dramatic tradeoff. Rather than accepting fiscal fraudulence, implementing a stricter set of measures for directing funds to the states in need of federal emergency aid results in a well-protected system.

Criteria

The criteria that have been selected to determine what the best alternative is consist of implementing a more efficient and cost-effective policy option that protects the sovereignty of the state. It is estimated that the widespread use of state compacts would greatly reduce the fraudulent abuse seen within federal emergency powers. Protecting the sovereignty of a state and its powers remains even more important in times of emergencies and natural disasters, and the federal emergency powers threaten to encroach upon a state and its citizens. “Imbalance in the federal–state relationship has profound effects on self-government. The U.S. Constitution unequivocally limits federal authority to impede the consolidation of power, as well

²¹ “Hurricane Katrina.”

²² Eric Lipton, “‘Breathtaking’ Waste and Fraud in Hurricane Aid,” *The New York Times*, June 27, 2006, sec. Washington, <https://www.nytimes.com/2006/06/27/washington/27katrina.html>.

²³ “Office of Public Affairs | Leader of \$20M COVID-19 Relief Fraud Ring Sentenced to 15 Years | United States Department of Justice,” October 3, 2023, <https://www.justice.gov/opa/pr/leader-20m-covid-19-relief-fraud-ring-sentenced-15-years>.

²⁴ U. S. Government Accountability Office, “Unemployment Insurance: Estimated Amount of Fraud During Pandemic Likely Between \$100 Billion and \$135 Billion | U.S. GAO,” September 13, 2023, <https://www.gao.gov/products/gao-23-106696>.

²⁵ Committee on Homeland Security and Governmental Affairs, “Hurricane Katrina: A Nation Still Unprepared,” Congressional Committee Report (Washington D.C.: Authenticated U.S. Government Information), accessed December 7, 2023, <https://www.govinfo.gov/content/pkg/CRPT-109srpt322/pdf/CRPT-109srpt322.pdf>.

as to maximize political accountability, policy innovation, and civic participation.”²⁶ The policy alternative that best protects the sovereignty of the state and results in the least amount of federal overreach and oversight, is the implementation of the widespread use of state compacts when mitigating natural disasters and public health crises.

Projected Outcomes

The projected outcomes of these policy proposals are a more coordinated effort between the federal government and state government in times of natural disasters and public crises. This produces benefits in the long run even outside of times of emergency. The estimated outcome of utilizing state compacts, instead of declaring national emergencies, creates a more coordinated effort between state officials and their governments when resolving natural disasters and public health crises. The prioritized goal of reforming federal emergency powers is to reduce levels of fraudulent abuse that have resulted in billions of federal funds being wasted. A set of stricter implication methods are recommended when determining how much, and where federal funds should be directed toward states in need of relief.

Tradeoffs

Potential tradeoffs for implementing the widespread use of state compacts, create a more unified approach for state officials to work in cooperation with other states, to effectively resolve impending natural disasters and public health crises. Another potential tradeoff is the rapid decrease in widespread fraud. The *Government Accountability Office* has not estimated the entirety of fraudulent unemployment insurance benefits resulting from the COVID-19 pandemic, as it stands now, over \$5.3 billion were deemed fraudulent. Taxpayers at the time of Hurricane Katrina were burdened with over \$2 billion in taxes, and researchers estimate that as many as “162,750 homes that did not exist before the storms may have improperly received as much as \$1 billion in tax money.”²⁷ The potential tradeoffs of implementing the widespread use of state compacts will greatly reduce the vastness of fraud seen throughout multiple different federal emergencies.

General Recommendations

It has been found that in very few instances, the use of federal emergency powers has not resulted in widespread fraud or resulted in bureaucratic overreach into a state’s sovereignty. Almost two decades later, policymakers and American citizens still deem Hurricane Katrina as the most disastrous example of what happens when the federal government takes control of a situation. “The results were tragic loss of life and human suffering on a massive scale, and an undermining of confidence in our governments’ ability to plan, prepare for, and respond to national catastrophes.”²⁸ The only effective route to avoiding vast levels of fraud, and to protect the sovereignty of the state is to implement the widespread use of state compacts. Policymakers can point to the success state compacts had at the time of the COVID-19 pandemic, and the rate of success they had as compared to the delayed response of the federal government.

Relevant Stakeholders

Due to the nature of advocating for the widespread use of state compacts, many different state legislatures and state associations would champion this policy proposal. The nature of this

²⁶ Diane Katz, “Federalism in Crisis: Urgent Action Required to Preserve Self-Government,” The Heritage Foundation, accessed December 7, 2023, <https://www.heritage.org/conservatism/report/federalism-crisis-urgent-action-required-preserve-self-government>.

²⁷ “Hurricane Katrina.”

²⁸ Committee on Homeland Security and Governmental Affairs, “Hurricane Katrina: A Nation Still Unprepared.”

proposal enshrines a state's sovereignty and capability to solve a problem either on its own or with the help and aid of another state. The *National Conference of State Legislatures* and the *National Center for State Courts* are other relevant stakeholders to consider when proposing these policy alternatives.

Conclusion

Substantial research points toward the disparities found within the federal emergency powers. Disregarding the fact that both the state and federal governments have debated for decades over which party is best suited to mitigate natural disasters and public health crises, the effectiveness of state compacts cannot be ignored. Gradually over the years, state compacts have been utilized increasingly more and their effectiveness reveals few disparities when contrasted to federal emergency powers. It is recommended that federal emergency powers be reformed, to include stricter measures for funds being directed to states in times of emergencies, to allow for state officials to have a greater voice, and finally to utilize state compacts more effectively among the states.

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