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After Katrina: A Critical Look at FEMA's Failure to Provide Housing for Victims of Natural Disasters

John K. Pierre*

Gail S. Stephenson**

*Nature gone insane,
Homes hammered by the hurricane*

.....
*Everybody's world changed,
After the storm.*¹

I. INTRODUCTION

On August 29, 2005, Hurricane Katrina, “the costliest and one of the five deadliest hurricanes ever to strike the United States,” struck the northern Gulf Coast region, making initial landfall in Louisiana, before moving across Mississippi and into Alabama.² Hundreds of thousands of people, many of them low-to-moderate-income residents, were forced to evacuate their homes.³

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1. HAWAIIAN STYLE BAND, *After the Storm*, on RHYTHM OF THE OCEAN (Top Flight Records 1994).

2. RICHARD D. KNABB ET AL., NAT'L HURRICANE CTR., TROPICAL CYCLONE REPORT: HURRICANE KATRINA 23–30 AUGUST 2005, at 1, 3, 4 (2005), available at http://www.nhc.noaa.gov/pdf/TCR-AL122005_Katrina.pdf.

3. *Disaster Response*, THE ADVOCATE (Baton Rouge), Oct. 23, 2005, at A1. Because they were concentrated in the lowest-lying areas of New Orleans, poor and black residents were disproportionately affected by Hurricane Katrina. Elijah Anderson, *Inadequate Responses, Limited Expectations*, in REBUILDING URBAN PLACES AFTER DISASTER: LESSONS FROM KATRINA 193, 195 (Eugenie L. Birch & Susan M. Wachter eds., 2006) [hereinafter REBUILDING].

Federal law, specifically, the Robert T. Stafford Disaster Relief and Emergency Assistance Act (the Stafford Act),⁴ guarantees that disaster victims will receive help through the Federal Emergency Management Agency (FEMA). The Act sets forth the type of help available and the conditions for obtaining that help, which may include financial assistance to rent housing or the direct provision of a trailer or mobile home.⁵ Soon after Hurricane Katrina struck, Congress approved \$62.3 billion in federal assistance to be administered primarily by FEMA.⁶ Much of the \$62 billion was earmarked for the temporary housing needs of disaster victims.⁷ Unfortunately for the victims of Hurricane Katrina, FEMA's administration of that assistance left much to be desired.

FEMA has existed since 1979. In the twenty-six years before Katrina, it has been charged with providing temporary housing to victims of numerous major disasters—other hurricanes, earthquakes, wildfires, and civil unrest. One might have expected that by the time Katrina struck, FEMA would have learned from these experiences and developed expertise at averting housing crises.

One might also have expected FEMA to be prepared for a catastrophic hurricane on the Gulf Coast. In a *Time* magazine article in 2000, Joe Suhayda, a water resources expert at Louisiana State University (LSU), warned that a Category 5 hurricane "barreling out of the Gulf of Mexico" would cause Lake Pontchartrain to overflow, "essentially destroy[ing] New Orleans."⁸ An October 2001 article in *Scientific American* cited other LSU scientists in predicting the "potential drowning of New Orleans" by a hurricane's direct hit, which the author termed "inevitable."⁹ For five days in July 2004, officials from fifty local, state, federal, and volunteer organizations that deal with emergencies, including FEMA, participated in "Hurricane Pam," an emergency preparedness drill predicated on a Category 3

4. 42 U.S.C. §§ 5121–5207 (2006 & Supp. 2007).

5. 42 U.S.C. § 5174 (2006).

6. Gerald Shields, *\$51.8 Billion More Approved*, THE ADVOCATE (Baton Rouge), Sept. 9, 2005, at A1.

7. *Id.*

8. Adam Cohen, *The Big Easy on the Brink*, TIME, July 10, 2000, at 91.

9. Mark Fischetti, *Drowning New Orleans*, SCI. AM., Oct. 2001, at 78.

hurricane striking southeastern Louisiana.¹⁰ The drill's purpose was to gain information to help FEMA and other agencies plan and prepare for the inevitable damage and subsequent events that would result from a real hurricane.¹¹ One of the anticipated problems was "[c]reating housing options, including trailer or tent villages, for the thousands likely to be left homeless for months after the storm."¹²

Did FEMA learn anything from past disasters? Did FEMA heed the dire predictions of scientists regarding the potential damage to Louisiana from a hurricane? Did it learn anything from Hurricane Pam? Did FEMA use information gained from that exercise to take precautions that would have alleviated some of the tragic suffering still felt by residents two years after Katrina?

Thousands of residents of Louisiana, Mississippi, and Alabama whose homes were destroyed or rendered uninhabitable or inaccessible as a direct result of the storm would answer those questions with a resounding chorus of "No." Barbara R. Arnwine, Executive Director of the Lawyers' Committee for Civil Rights Under Law, testified before a House Committee in December 2005 that several months after Hurricane Katrina struck, thousands of disaster victims still had not received desperately needed assistance from FEMA and, as a result, continued to suffer harm.¹³ On the

10. See U.S. GOV'T ACCOUNTING OFFICE, DISASTER ASSISTANCE: BETTER PLANNING NEEDED FOR HOUSING VICTIMS OF CATASTROPHIC DISASTERS 25 (2007), available at <http://www.gao.gov/new.items/d0788.pdf> [hereinafter GAO REPORT]; Jan Moller, *Hurricane Scenario Tests Officials' Disaster Readiness*, TIMES-PICAYUNE (New Orleans), July 24, 2004, at Nat'l 2.

11. Mark Schleifstein, *In Case of Emergency*, TIMES-PICAYUNE (New Orleans), July 20, 2004, at Nat'l 1.

12. *Id.* Post-hurricane housing problems should not have been that difficult for FEMA to predict. A 1998 report on housing issues involving low-income groups following the Loma Prieta earthquake in California stated, "[G]iven the national increase in homelessness, poverty, and demographic diversity, in combination with the decline of affordable housing, such post-disaster housing crises undoubtedly will be seen again." Brenda D. Phillips, *Sheltering and Housing of Low-Income and Minority Groups in Santa Cruz County After the Loma Prieta Earthquake*, in THE LOMA PRIETA, CALIFORNIA, EARTHQUAKE OF OCTOBER 17, 1989: RECOVERY, MITIGATION, AND RECONSTRUCTION D17, D27 (Joanne M. Nigg ed., 1998).

13. U.S. H. Select Bipartisan Comm. to Investigate the Preparation for and Response to Hurricane Katrina, 109th Cong. 6 (2005) (testimony of Barbara R.

one-year anniversary of the hurricane, David Scott, United States Representative from Georgia, stated, “[M]uch of the region remains devastated, government neglect and inefficiency persists, and residents continue to suffer from inadequate housing, health care, and other basic services”¹⁴ The United States Government Accountability Office concluded in a February 2007 report that FEMA’s “various catastrophic planning efforts prior to” the hurricane were incomplete and that FEMA was “overwhelmed” and “faced several challenges in providing temporary housing” to storm victims.¹⁵ To many, the failures of FEMA seemed unimaginable for a government capable, in a short period of time, of sending massive aid halfway around the world to tsunami victims or of deploying and housing hundreds of thousands of troops in Iraq.

Because the United States Treasury issued temporary housing assistance checks but FEMA mailed the instructions separately, many victims did not know the funds were to be spent only for housing. Many victims had already spent the funds for other needs when the instructions arrived.¹⁶ Thus, they found themselves potentially indebted to the federal government for using aid received from FEMA “to replace the necessities of life.”¹⁷ FEMA denied assistance to many other impoverished disaster victims “based upon a mechanical or arbitrary presumption of fraud” that arguably had no factual basis.¹⁸ Arnwine further testified that “[a]fter already seeing their communities, homes, and possessions destroyed, disaster victims [we]re now forced to sleep on the floors

Arnwine, Executive Director, Lawyers’ Committee for Civil Rights Under Law), available at <http://www.lawyerscommittee.org/2005website/home/images/features/testimony12.6.05.pdf> [hereinafter Arnwine]. Much of Arnwine’s testimony was based on the complaint filed in *McWaters v. FEMA*, see *infra* notes 97–98 and accompanying text.

14. *Rep. Scott Statement on Anniversary of Hurricane Katrina*, U.S. FED. NEWS, Aug. 29, 2006, available at 2006 WLNR 15084285.

15. GAO REPORT, *supra* note 10, at 25.

16. Sheila Crowley, *Where Is Home? Housing for Low-Income People After the 2005 Hurricanes*, in *THERE IS NO SUCH THING AS A NATURAL DISASTER* 121, 133 (Chester Hartman & Gregory D. Squires eds., 2006).

17. Arnwine, *supra* note 13, at 6.

18. *Id.*

of relatives, on pavements, in cars, and in tents, or [we]re bounced from shelter to shelter, seemingly abandoned and forgotten by FEMA.”¹⁹ Newspapers also reported victims living in barns and gutted houses, under dangerous and unhealthy conditions.²⁰

Each day housing assistance was denied or delayed to them, Katrina victims suffered unimaginable harm. Over 200,000 people were displaced and evacuated to distant places around the country,²¹ many to unfamiliar regions without housing assistance or the means to reunite with their families or to return to their communities.²² FEMA's failure and in some cases refusal to provide housing assistance to Katrina victims resulted in problems that still linger, including stress, anxiety, hunger, and instability.²³

19. *Id.*

20. Ellen Barry, *Homeless Katrina Victims Brace for Winter*, THE ADVOCATE (Baton Rouge), Oct. 28, 2005, at A6; Karen Turni Bazile, *Out in the Cold*, TIMES-PICAYUNE (New Orleans), Jan. 23, 2006, at Metro 1; Susan Roesgen, *Katrina Victims: 'Living in Barns'*, CNN.COM., Dec. 13, 2005, <http://www.cnn.com/2005/US/12/13/katrina.trailers/>.

21. JOHN MCQUAID & MARK SCHLEIFSTEIN, *PATH OF DESTRUCTION: THE DEVASTATION OF NEW ORLEANS AND THE COMING AGE OF SUPERSTORMS* 335 (2006).

22. Anderson, *supra* note 3, at 194. Four months after Katrina, over 250,000 evacuees continued to live in other states, and almost that many “were displaced within Louisiana and Mississippi.” John Valery White, *The Persistence of Race Politics and the Restraint of Recovery in Katrina's Wake*, in AFTER THE STORM: BLACK INTELLECTUALS EXPLORE THE MEANING OF HURRICANE KATRINA 41, 46 (David Dante Troutt ed., 2006) [hereinafter AFTER THE STORM]. See also Tatsha Robertson, *Many Katrina Victims Stranded Far Away from a Family Holiday*, BOSTON GLOBE COMMON DREAMS NEWS CTR., Nov. 24, 2005, <http://www.commondreams.org/headlines05/1124-03.htm>.

23. OVERVIEW OF BASELINE SURVEY RESULTS: HURRICANE KATRINA ADVISORY GROUP (2006), available at http://hurricanekatrina.med.harvard.edu/pdf/baseline_report%25208-25-06.pdf [hereinafter HARVARD STUDY]; Mary Foster, *Katrina May Still Be Claiming Victims*, THE ADVOCATE (Baton Rouge), June 3, 2007, at A28. In a recent letter to the editor, one elderly, disabled Louisiana resident who had received no help from FEMA stated plaintively, “My wife and I are doomed. I see no hope.” Robert J. Trosclair, Letter to the Editor, TIMES-PICAYUNE (New Orleans), May 31, 2007, at Metro-Editorial 6. Almost two years after Hurricane Katrina, a resident displaced from a New Orleans housing project burst into tears during a town hall meeting on housing, sobbing, “We are good citizens! We vote! We are tired; we are tired.” Allen Johnson Jr., *N.O. Frustration Surfaces*, THE ADVOCATE (Baton Rouge), July 8, 2007, at A26.

As one critic stated, FEMA's failure "compounded the hardship, confusion, and trauma of the people most in need of assistance."²⁴ Those lucky enough to receive FEMA housing vouchers had to deal with FEMA-shy landlords who refused to take the vouchers because of FEMA's "broken promises, unreasonable deadlines and mind-numbing bureaucracy."²⁵ Ronald D. Utt, a former senior official at the Department of Housing and Urban Development, commented about FEMA's failure to provide necessary relief to the hurricane's victims as follows: "This is not incompetence. This is willful. That is the only way I can explain it."²⁶

This article reviews the impact of disasters on victims, particularly low-income victims, whose homes are destroyed or rendered uninhabitable or inaccessible as a result of a disaster, when the federal government fails to carry out its statutorily mandated duty toward those victims. The article further analyzes the issues that may arise when lawyers attempt to seek legal redress against FEMA on behalf of those made homeless by disasters in the United States and suggests changes that could be implemented by the federal government to prevent a recurrence of such issues in the future.

II. OVERVIEW OF THE STAFFORD ACT AND ITS RELEVANCE TO HOUSING FOR VICTIMS OF NATURAL DISASTERS

When catastrophic natural disasters occur, the principal federal statute providing assistance to state and local governments, as well as to individuals, is the Stafford Act. Under the Stafford Act, FEMA is the federal agency principally charged to care for Americans who are victims of natural disasters.²⁷

FEMA was established in 1979 by President Jimmy Carter to "provide a single point of accountability for the federal

24. Crowley, *supra* note 16, at 126.

25. Editorial, *Solutions Before Deadlines*, TIMES-PICAYUNE (New Orleans), Dec. 2, 2005, at Metro-Editorial 6.

26. Eric Lipton, *\$11 Million a Day Spent on Hotels for Storm Relief*, N.Y. TIMES, Oct. 13, 2005, at A1.

27. 42 U.S.C. § 5195 (2006).

government's disaster response."²⁸ Carter hoped the new agency would end criticism of the government's handling of emergency management.²⁹ The mission of FEMA as set forth in the Stafford Act is to assist the efforts of the states "in expediting the rendering of aid, assistance, and emergency services, and the reconstruction and rehabilitation of devastated areas."³⁰ FEMA assists state and local governments "in carrying out their responsibilities to alleviate the suffering and damage" that result from major disasters and emergencies.³¹ FEMA, among other things, provides federal assistance programs for public and private losses and needs resulting from disasters.³²

Before FEMA can render assistance in any particular place and time, a governor of a state must request that the President of the United States declare the existence of a major disaster or emergency in the area.³³ The governor's request must be based on a determination that "the disaster is of such severity and magnitude that effective response is beyond the capabilities of the State," and local governments affected by the disaster and that "[f]ederal assistance is necessary."³⁴ Based on that request, the President may declare that a major disaster or emergency exists, thus triggering the availability of FEMA assistance.³⁵

If the President declares a major disaster or emergency, he or she may (1) direct federal agencies to use their authorities and resources granted under federal law to support state and local assistance efforts; (2) coordinate all disaster efforts between federal agencies and state and local governments; (3) provide technical and advisory assistance to state and local governments; (4) help state and local governments distribute medicine, food, other consumables, and emergency assistance; and (5) provide

28. Tom Mathews et al., *What Went Wrong*, NEWSWEEK, Sept. 7, 1992, at 22, 24.

29. TED STEINBERG, *ACTS OF GOD: THE UNNATURAL HISTORY OF NATURAL DISASTER IN AMERICA 185* (2000).

30. 42 U.S.C. § 5121(a)(2) (2006).

31. § 5121(b).

32. § 5121(b)(6).

33. 42 U.S.C. § 5170 (2006).

34. *Id.*

35. *Id.*

“accelerated” federal assistance and support.³⁶ Processing of applications for temporary housing assistance and for the distribution of federal benefits pursuant to the Stafford Act must be done in “an equitable and impartial manner, without discrimination on the grounds of race, color, religion, nationality, sex, age, disability, English proficiency, or economic status.”³⁷

The Act also authorizes federal aid to individuals and households. In particular, the Act provides that the President may provide temporary housing assistance to individuals and households “who are displaced from their pre-disaster primary residences or whose pre-disaster primary residences are rendered uninhabitable, or with respect to individuals with disabilities, rendered inaccessible or uninhabitable, as a result of damage caused by a major disaster.”³⁸ More specifically, the Act outlines two types of temporary housing assistance—financial assistance and direct services.³⁹ This aid is sometimes referred to as Section 408 assistance.⁴⁰ Financial assistance provides funds to rent alternate housing accommodations, as well as to pay utility bills, excluding telephone service.⁴¹ Direct assistance provides temporary housing units when there may be a lack of available housing resources for rent.⁴² Under the Act, the President is empowered to determine the appropriate types of housing assistance to be provided, based upon factors such as “cost effectiveness, convenience to the individuals and households, and such other factors as the President may consider appropriate.”⁴³

The purpose of financial assistance, sometimes known as “rental assistance,” is to enable victims of disasters “to rent alternate housing accommodations, existing rental units, manufactured housing, recreational vehicles, or other readily

36. § 5170a.

37. 42 U.S.C.A. § 5151(a) (Supp. 2007); *see also* 44 C.F.R. § 206.11(b) (2006).

38. 42 U.S.C.A. § 5174(b)(1) (Supp. 2007).

39. § 5174(a)(1).

40. This provision was enacted as Public Law 93-288, Title IV, § 408 (1988).

41. § 5174(c)(1)(A)(i).

42. § 5174(c)(1)(B)(i).

43. § 5174(b)(2)(A).

fabricated dwellings,” and to pay for utilities, other than telephone service.⁴⁴ FEMA commonly administers the rental assistance program by issuing a check to eligible individuals for an initial three-month period to cover the cost of rent and thereafter providing assistance beyond the three-month period upon proof of need.⁴⁵

Direct assistance, sometimes known as “trailer assistance,” enables disaster victims to receive actual temporary housing units, such as trailers or mobile homes.⁴⁶ Trailer assistance is available to victims who cannot use rental assistance because of, for example, a lack of rental housing.⁴⁷ The Stafford Act authorizes rental and trailer assistance, which is intended to be “temporary,” to both pre-disaster renters and homeowners. Under the Act, temporary housing assistance is available for eighteen months from the date that the President declared a disaster but may be extended beyond that time.⁴⁸ Contrary to popular belief, however, individual recipients of housing assistance are not *guaranteed* housing assistance for the full eighteen months from the date of declaration of a major disaster.⁴⁹

In addition to housing assistance, the Stafford Act authorizes the President to provide financial assistance to address “other needs.”⁵⁰ Specifically, the Act states that the President may provide financial assistance to victims of a major disaster “to meet disaster-related medical, dental, and funeral expenses,”⁵¹ or “to address personal property, transportation, and other necessary expenses or serious needs resulting from the major disaster.”⁵² By regulation, FEMA requires applicants for other needs assistance to apply for a disaster loan from the Small Business Administration

44. § 5174(c)(1)(A)(i).

45. After Katrina, FEMA provided checks for \$2,358 for three months of rent, based on “the national Fair Market Rent for a two-bedroom unit.” Crowley, *supra* note 16, at 132.

46. § 5174(c)(1)(B)(i).

47. *Id.*

48. 44 C.F.R. § 206.110(e) (2006).

49. § 206.114(a).

50. § 5174(e).

51. § 5174(e)(1).

52. § 5174(e)(2).

(SBA) to cover the expenses for which such assistance is sought.⁵³ One criterion of eligibility for other needs assistance is denial or inadequacy of an SBA loan.⁵⁴

The financial assistance to address other needs is known as the Individual and Family Grant Program (IFGP). In relation to both other needs assistance and temporary housing assistance, the Act provides that no “individual or household shall receive financial assistance greater than \$25,000,”⁵⁵ adjusted for inflation, “with respect to a single major disaster.”⁵⁶

The Act and corresponding regulations address duplicative benefits.⁵⁷ Hence, the Act requires that the President, in consultation with the head of each federal agency providing assistance under the Act, ensure that no one receives assistance for any part of a loss that is covered by any other source.⁵⁸ For example, FEMA regulations require an applicant for assistance under the Act to apply for insurance proceeds to cover any insured loss.⁵⁹ The regulations state that assistance for one temporary residence will generally be provided for each pre-disaster household.⁶⁰ This pre-disaster household provision is known as the “shared-household rule.”⁶¹

In addition to the standard temporary housing assistance explained previously, FEMA can provide emergency shelter under the Stafford Act when it is essential to meet immediate threats to life and property resulting from a major disaster.⁶² This short-term relief is sometimes referred to as Section 403 assistance.⁶³

The most recent example of FEMA’s creative use of funds to provide emergency shelter was in October 2005, in recognition of the huge displacement of individuals and families caused by

53. § 206.119(a)(1).

54. § 206.119(a)(2)–(3).

55. § 5174(h)(1)–(2); *see also* § 206.110(b).

56. § 5174(h)(2); § 206.110(b).

57. § 206.191.

58. 42 U.S.C. § 5155(a) (2006).

59. § 206.191(e)(2)(i).

60. § 206.117(b)(1)(i)(A), (ii)(B).

61. Crowley, *supra* note 16, at 135.

62. 42 U.S.C.A. § 5170b(a)(3)(B) (Supp. 2007).

63. Section 5170b was originally enacted as Pub. L. No. 93–288, Title IV, § 403 (1988).

Hurricane Katrina. Because of the massive disgorgement of residents from their homes due to Hurricane Katrina, the Red Cross began paying for hotel and motel stays of disaster victims who had run out of resources for shelter.⁶⁴ The Red Cross program quite clearly averted a homelessness crisis in the days and weeks immediately after the storm. FEMA took over the Red Cross special hotel and motel program in late October 2005.⁶⁵ FEMA was creative, in that it took over the Red Cross hotel and motel program to transition Hurricane Katrina evacuees from emergency shelters under Section 403 of the Stafford Act to temporary housing assistance under Section 408.⁶⁶ Furthermore, evacuees who had run out of resources remained in hotels and motels rather than be moved to makeshift emergency shelters until other housing or housing assistance could be secured.⁶⁷

III. FEMA'S FAILURES PRESENT AND PAST

A. 2005: Hurricane Katrina

Hurricane Katrina left a 250-mile path of destruction along the Gulf Coast.⁶⁸ Fifty levee breaches or breaks in the greater New Orleans metropolitan area, including three significant breaches, submerged the area in water as deep as twenty feet.⁶⁹ Eighty percent of Orleans Parish, ninety-nine percent of St. Bernard Parish, and forty percent of Jefferson Parish were flooded.⁷⁰ Two weeks later fifty-percent of New Orleans was still under water,⁷¹

64. Crowley, *supra* note 16, at 130.

65. *Id.*; Kevin McGill, *Red Cross Turns over Program for Katrina Evacuees to FEMA*, THE ADVOCATE (Baton Rouge), Oct. 25, 2005, at B3.

66. Crowley, *supra* note 16, at 131.

67. *Id.*

68. RISK MGMT. SOLUTIONS, HURRICANE KATRINA: PROFILE OF A SUPER CAT 1 (2005).

69. IVOR LL. VAN HEERDEN ET AL., THE FAILURE OF THE NEW ORLEANS LEVEE SYSTEM DURING HURRICANE KATRINA 2-3 (2006); KNABB ET AL., *supra* note 2, at 9; *Hurricane Katrina Timeline*, TIMES (Shreveport), Dec. 11, 2005, at A4.

70. VAN HEERDEN ET AL., *supra* note 69, at 2.

71. Cecilia M. Vega, *After Water Recedes, the Detritus of Disaster Emerges*, S.F. CHRON., Sept. 13, 2005, at A1.

and the water did not completely recede for forty-three days.⁷² The storm rendered over 100,000 families homeless.⁷³

Approximately ninety-percent of the buildings along the Mississippi Coast were destroyed⁷⁴ by storm surge believed to be as high as twenty-eight feet.⁷⁵ Water from the storm also submerged large sections of Mobile County, Alabama.⁷⁶

Approximately 1,500 fatalities were directly related to the hurricane, with about 1,300 of these deaths in Louisiana.⁷⁷ For those who did not die from drowning or otherwise as a result of the storm and the ensuing floods, evacuation was chaotic.⁷⁸ “Thousands of homes and businesses throughout entire neighborhoods in the New Orleans metropolitan area were destroyed by flood.”⁷⁹ Seventy-three percent of all homes in the areas most affected by the hurricane were damaged or destroyed, with the majority of the lost housing being low-income housing.⁸⁰ Katrina obliterated entire coastal communities in Mississippi.⁸¹ Many of these areas could take years to rebuild.⁸²

Many individuals failed to evacuate because of a lack of resources and were removed or rescued through a combination of federal, state, and local government efforts as well as efforts from private citizens and non-governmental organizations.⁸³ Many of

72. KNABB ET AL., *supra* note 2, at 9.

73. VAN HEERDEN ET AL., *supra* note 69, at 3.

74. *Around the Gulf*, NEWS-STAR (Monroe, La.), Sept. 1, 2005, at B3.

75. KNABB ET AL., *supra* note 2, at 8–9.

76. *Id.* at 9.

77. *Id.* at 11.

78. Trymaine Lee, *Fifth District: Stranded But Still Standing*, TIMES-PICAYUNE (New Orleans), Dec. 18, 2005, at Nat’l 1; Wil Haygood & Ann Scott Tyson, ‘*It Was as if All of Us Were Already Pronounced Dead*’, WASH. POST, Sept. 15, 2005, at A1.

79. KNABB ET AL., *supra* note 2, at 11.

80. Crowley, *supra* note 16, at 124–25.

81. KNABB ET AL., *supra* note 2, at 12.

82. *Id.*

83. A FAILURE OF INITIATIVE, H.R. Rep. No. 109–377, at 111–12, 116 (2006), available at <http://www.a257.g.akamaitech.net/7/257/2422/27mar20061546/www.gpoaccess.gov/serialset/creports/pdf/hr109-377/evac.pdf>.

the rescued victims were placed on buses and airplanes bound for shelters, hotels, and motels in all fifty states in the United States.⁸⁴

Generally, “[d]isasters affect low-income victims more negatively than middle- or upper-class victims,”⁸⁵ and Katrina was no exception. The impact of the disaster was particularly devastating on minority and low-income individuals and families. Over 1,000,000 individuals living in those states struck hardest by Hurricane Katrina lived in poverty prior to the storm.⁸⁶ More than 90,000 individuals in the affected areas had incomes of less than \$10,000 a year.⁸⁷ Approximately one-third of the people who lived in areas hardest hit by the storm were African-Americans.⁸⁸ Over half of the poor African-American households in the affected area did not have an automobile.⁸⁹

Poverty statistics in New Orleans were even more abysmal than the general statistics for the Gulf Coast. Almost forty percent of families with children in Orleans Parish headed by females had incomes below the poverty line.⁹⁰ Twenty-eight percent of the residents of New Orleans were living in poverty prior to Hurricane Katrina.⁹¹ Sixty-five percent of poor elderly households in New Orleans did not have a vehicle.⁹² Thirty-five percent of African-American households in New Orleans did not have a vehicle.⁹³

84. As of September 23, 2005, Katrina evacuees residing in all fifty states, the District of Columbia, and Puerto Rico had filed applications for assistance with FEMA. Those numbers included 623 in Utah and 101 in Alaska. *Katrina's Diaspora*, N.Y. TIMES, Oct. 2, 2005 (Nat'l Special), at 24.

85. Phillips, *supra* note 12, at D18. Individuals in lower socio-economic classes are more likely to live in areas prone to natural disasters, such as flood plains, and are less likely to carry disaster insurance. *Id.*

86. ARLOC SHERMAN & ISAAC SHAPIRO, CTR. ON BUDGET & POLICY PRIORITIES, ESSENTIAL FACTS ABOUT THE VICTIMS OF HURRICANE KATRINA (2005), available at <http://www.cbpp.org/9-19-05pov.htm>.

87. *McWaters v. FEMA*, 408 F. Supp. 2d 221, 224 (E.D. La. 2005).

88. SHERMAN & SHAPIRO, *supra* note 86.

89. *Id.*

90. Avis A. Jones-Deweever & Heidi Hartmann, *Abandoned Before the Storms*, in *THERE IS NO SUCH THING AS A NATURAL DISASTER* 85, 95 (Chester Hartman & Gregory D. Squires eds., 2006).

91. SHERMAN & SHAPIRO, *supra* note 86.

92. *Id.*

93. *Id.*

Approximately sixty-seven percent of the displaced residents were renters.⁹⁴

More than 250,000 evacuees displaced by the destruction caused by the hurricane ended up in shelters, and most left with nothing other than the clothes on their back.⁹⁵ The Red Cross placed others into its “Direct Payment Hotel Motel Program,” which allowed evacuees with little or no resources to stay in hotels and motels paid for by the Red Cross until the evacuees could find more permanent housing.⁹⁶ In late October 2005, as previously discussed, FEMA took over the hotel and motel program, which became known as the “Short-Term Lodging Program.”

When *McWaters v. FEMA*, the first lawsuit against FEMA related to Hurricane Katrina, was filed on November 10, 2005, the plaintiffs alleged that FEMA “failed to fulfill its mandate before, during, and after Hurricane Katrina.”⁹⁷ The thirteen named plaintiffs in *McWaters*, on their own behalf and on behalf of a class of people similarly situated, alleged that FEMA had:

Failed to provide any temporary housing assistance to certain individuals and families, including those with disabilities, who applied for assistance as much as two months [prior to November 10, 2005];

Failed to provide basic information to disaster victims regarding the scope and conditions of the available temporary housing assistance, including how they [could] continue to receive financial assistance beyond an initial three month period [after Hurricane Katrina struck the Gulf Coast];

Denied temporary housing assistance to individuals who lived at the same address, but in a separate home as another, unrelated, person who also applied for housing assistance;

94. White, *supra* note 22, at 42.

95. *McWaters v. FEMA*, 408 F. Supp. 2d 221, 225 (E.D. La. 2005).

96. *Id.*

97. Complaint—Class Action for Injunctive and Declaratory Relief, *McWaters*, 408 F. Supp. 2d 221 (No. 05-5488), 2005 WL 3038551 at *1 [hereinafter *McWaters Complaint*].

Refused to provide additional temporary housing assistance to families that, because of their size, were entitled to more than the standard amount of housing assistance;
Required disaster victims to apply for Small Business Administration (“SBA”) loans as a condition for obtaining FEMA temporary housing assistance; and
Imposed retroactively inconsistent rules regarding funds some victims [received before November 10, 2005].⁹⁸

B. 1989: Loma Prieta Earthquake

Prior to *McWaters*, complaints against FEMA related to FEMA’s failure to provide temporary housing to victims of natural disasters were not new. On November 15, 1989, a coalition of over twenty San Francisco Bay Area organizations representing low-income individuals filed an administrative complaint seeking a high-level administrative review of FEMA’s failure to address the debilitating impact on low-income and minority individuals from the Loma Prieta earthquake.⁹⁹ That disaster, “the greatest earthquake to hit Northern California since 1906,” struck during the World Series between the San Francisco Giants and Oakland Athletics,¹⁰⁰ killing sixty-three people, damaging thousands of buildings, and destroying 1,018 homes and 366 businesses.¹⁰¹

The administrative petition protested:

(1) FEMA’s failure to provide adequate temporary housing assistance for thousands of earthquake victims; (2) FEMA’s discriminatory treatment of residential hotel tenants and seasonal workers, including improperly restrictive eligibility requirements and payment of only half or one-third the rental relief provided to other earthquake

98. *Id.*

99. Petition to Federal Emergency Management Agency—An Impending Disaster: FEMA’s Neglect of Low-Income Earthquake Victims (Nov. 15, 1989), available at <http://www.pilpca.org/docs/Petit.Loma.Prieta.pdf> [hereinafter Impending Disaster].

100. TIDES FOUNDATION, FIFTEEN SECONDS: THE GREAT CALIFORNIA EARTHQUAKE OF 1989, at 10 (1989).

101. Ingfei Chen, *Controller Says FEMA Still Lags in Quake Aid*, S.F. CHRON., Oct. 16, 1992, at A19.

victims; (3) FEMA's deficient application, appeal, and outreach procedures, including failures to inform applicants of their rights and to provide bilingual services; and (4) FEMA's failure to help coordinate, plan, and provide for urgently needed replacement housing.¹⁰²

The Loma Prieta earthquake made 16,000 housing units unlivable in the combined Monterrey-San Francisco Bay Area, including 13,000 in the Bay Area alone.¹⁰³ Much of the low-income housing in Oakland, San Francisco, Santa Cruz, Watsonville, and other disaster areas was damaged or destroyed.¹⁰⁴ The petition warned that absent changes in FEMA's management of the housing issues created by the disaster, a housing catastrophe was about to occur.¹⁰⁵ At least 18,200 houses and apartments were rendered unlivable, according to the petition, adding thousands of homeless residents to the approximately 45,000 individuals homeless in the Bay Area before the earthquake.¹⁰⁶

The emergency appeared to be even more catastrophic for low-income individuals. According to the Association of Bay-Area Governments (ABAG), the Bay Area had a shortage of 56,700 housing units affordable to very low-income households prior to the earthquake.¹⁰⁷ This situation was exacerbated by the earthquake. The earthquake ruined over a dozen single-room-occupancy hotels and low-income apartment buildings in Oakland totaling approximately 1,500 units.¹⁰⁸ These buildings were "the last affordable housing resource for many minority and elderly residents in an urban community [of] high property values, high rents, and few options for those at the bottom of the income

102. Impending Disaster, *supra* note 99, at 1.

103. ASS'N OF BAY AREA GOV'TS, THE PROBLEM: LOMA PRIETA AND NORTHRIDGE WERE A WAKE-UP CALL 2 (2003), <http://www.abag.ca.gov/bayarea/eqmaps/nightmare/problem2003.pdf> [hereinafter THE PROBLEM].

104. Impending Disaster, *supra* note 99, at 2.

105. *Id.* at 6.

106. *Id.*

107. *Id.* at 7.

108. Eugenie L. Birch, *Learning from Past Disasters*, in REBUILDING, *supra* note 3, at 132, 139; Kevin Fagan, *With Push from Activists, Loma Prieta Stirred Low Income Housing Renaissance*, S.F. CHRON., Oct. 3, 2005, at A1.

ladder.”¹⁰⁹ Two thousand, five hundred low-income residents thus were forced to seek refuge in crowded Red Cross shelters or crowded homes of friends or relatives.¹¹⁰ Unfortunately, FEMA’s programs are “geared toward the single family homeowner, [with] little funding available . . . for multifamily buildings.”¹¹¹

Fearing that disaster-related homelessness would become a permanent and irrevocable feature in the Bay Area, the petitioners cited specific problems in communities that would cause that outcome absent a commitment by FEMA to make post-disaster affordable temporary and permanent housing available. For example, petitioners noted Oakland Housing Authority’s long waiting list for Section 8 housing.¹¹² The ABAG reported that Oakland had a pre-disaster shortage of 2,662 units that people with very low income could afford.¹¹³

The earthquake damaged or destroyed 2,860 residences and 400 residential hotel units in the Santa Cruz-Watsonville area.¹¹⁴ Santa Cruz lost its entire downtown.¹¹⁵ The agricultural community of Watsonville, which had a pre-disaster population of 30,000, lost eight to ten percent of its housing stock, seventy-five percent of which was low-cost housing units.¹¹⁶ As a result of the enormous loss of housing stock in an already tight housing market, victims of the earthquake in the Santa Cruz-Watsonville area were forced to seek emergency shelter with friends or relatives and create makeshift tent cities that housed over 1,200 individuals.¹¹⁷ The petition alleged that landlords turned away low-income families from the scarce available housing units because those landlords feared that such families had either insufficient income

109. Mary C. Comerio, *Housing Repair and Reconstruction After the Earthquake*, in THE LOMA PRIETA, CALIFORNIA, EARTHQUAKE OF OCTOBER 17, 1989: BUILDING STRUCTURES C161, C161 (Mehmet Celebi ed., 1998), available at <http://pubs.usgs.gov/pp/pp1552/pp1552c/pp1552c.pdf>.

110. *Id.*; Fagan, *supra* note 108.

111. Comerio, *supra* note 109, at C162.

112. *Impending Disaster*, *supra* note 99, at 7.

113. *Id.* at 8.

114. *Id.*

115. Birch, *supra* note 108, at 139.

116. Comerio, *supra* note 109, at C162.

117. *Impending Disaster*, *supra* note 99, at 8; Phillips, *supra* note 12, at D17, D22.

to pay rent or believed that those families were too large to accommodate.¹¹⁸

The petition further alleged that FEMA initially wanted to wait to provide temporary housing in the Santa Cruz-Watsonville area until it could determine if the existing housing was sufficient. Local officials had to intervene in early November 1989 to convince FEMA to send what could be termed only as a woefully inadequate 122 mobile homes.¹¹⁹ Two years later, eighteen-percent of the multifamily dwellings had not been rebuilt or repaired, and "complete recovery took almost seven years."¹²⁰

The petition set forth the following dismal statistics for San Francisco. The ABAG estimated that the city was 5,617 units short of low-income housing before the earthquake.¹²¹ The disaster destroyed or damaged 3,500 low- and moderate-income housing units.¹²² Nine hundred eight of those units were immediately declared unsafe for occupancy.¹²³ Within one month of the disaster, seven apartment buildings containing 282 units were demolished.¹²⁴ The earthquake damaged at least four hotels that served very low-income residents.¹²⁵

The preceding discussion illustrates that low-income individuals in the Bay Area were affected by the "no room at the inn" syndrome after the earthquake. With winter approaching, low-income residents faced a disaster-housing market that had no room and worse had no easily accessible, affordable housing. One might ask: How could policies and decisions by FEMA, the agency mandated to meet the needs of individual disaster victims, adversely affect low-income victims, arguably the hardest hit by the Bay Area earthquake?

The answer, at least to advocates representing low-income individuals throughout the Bay Area disaster region, lay in FEMA's failure to fulfill its statutory obligations to assist low-

118. Impending Disaster, *supra* note 99, at 8.

119. Phillips, *supra* note 12, at D24.

120. THE PROBLEM, *supra* note 103, at 5.

121. Impending Disaster, *supra* note 99, at 9.

122. *Id.* at 8.

123. *Id.*

124. *Id.* at 9.

125. *Id.*

income individuals affected by the earthquake. For example, the advocates pointed out that FEMA officials claimed, despite evidence to the contrary, that affordable replacement housing was available to low-income residents displaced by the earthquake.¹²⁶ The essence of the criticism leveled against FEMA officials related to the failure to realistically assess and address the substantial loss of low-income housing stock in the Bay Area.¹²⁷

Critics lambasted FEMA for apparently concluding that despite the loss of thousands of low-income units due to the earthquake, no additional replacement housing was needed in the Bay Area because, according to FEMA, sufficient units existed within a twenty-five to fifty-mile radius of the disaster.¹²⁸ That conclusion, if true, did not factor in problems faced by an overwhelming majority of low-income residents. Many Bay Area residents did not own vehicles and were dependent on public transportation to get to work.¹²⁹ It would seem counterintuitive from a policy perspective to dislocate victims of a disaster and move them to geographical areas that did not have access to public transportation.

In the petition, advocates raised more salient questions regarding FEMA's apparent conclusion that affordable housing was available within a twenty-five to fifty-mile radius of the disaster. Would a move to potentially unoccupied units within a twenty-five to fifty-mile radius of the disaster be economical after factoring in daily transportation costs?¹³⁰ In areas where the pre-disaster housing market was already tight, would rents not rise as displaced residents moved into an already tight housing market?¹³¹ Would a potentially large increase in rents displace tenants who were not previously displaced?¹³²

The coalition's petition raised many troubling questions that were not immediately resolved by FEMA. The coalition hoped that FEMA, on its own, would change policies and practices and

126. *Id.*

127. *Id.* at 9–10.

128. *Id.* at 10.

129. *Id.*

130. *Id.* at 11.

131. *Id.* at 13.

132. *Id.* at 11.

thus avert what critics of FEMA asserted was a foreseeable crisis that would be exacerbated by FEMA's mismanagement.

While the coalition sought an administrative review as an alternative to litigation, litigation against FEMA was eventually initiated to challenge the systematic failures of FEMA.¹³³ The class action complaint for injunctive and declaratory relief also sought relief against the California Department of Social Services (DSS) for violating the Stafford Act in its administration of the IFGP, which reimbursed individuals for personal possessions lost or damaged by the earthquake.¹³⁴

With respect to FEMA, the class action complaint alleged that FEMA failures violated the Stafford Act and the United States Constitution.¹³⁵ The statutory and constitutional claims asserted that (1) FEMA adopted policies that prevented low-income victims from receiving temporary housing assistance;¹³⁶ (2) FEMA had no formal review and appeal process; and (3) FEMA failed to tell successful applicants about all the benefits to which they were entitled.¹³⁷

With respect to DSS, the plaintiffs raised statutory and constitutional claims. The plaintiffs alleged that while the Stafford Act specifically stated that applicants have sixty days to appeal any decision by FEMA, DSS had granted applicants only twenty days to appeal an IFGP denial or award determination.¹³⁸ Shortly after

133. Class Action Complaint for Injunctive and Declaratory Relief, *Jimmie Smith v. FEMA*, No. C-90-0161 EFL (N.D. Cal. Jan. 9, 1990), available at <http://www.pilpca.org/docs/Smith.v.FEMA.Complaint.pdf> [hereinafter *Smith Complaint*].

134. *Id.* ¶ 4.

135. *Id.* ¶ 3.

136. *Id.* One such policy was the shared-household rule. An example of the effect of that policy is found in the following newspaper account. FEMA gave disaster aid to a Watsonville family who had rented a house with two other families before the quake. FEMA later demanded the money be returned because one of the other families had already collected disaster relief. David Tuller, *Some Victims Find FEMA Help a Disaster*, S.F. CHRON., Oct. 17, 1990, at A4.

137. *Smith Complaint*, *supra* note 133, ¶ 3.

138. *Id.* ¶ 4.

the Loma Prieta suit was filed, the plaintiffs and FEMA were able to settle the dispute.¹³⁹

As part of the settlement, FEMA agreed: (1) to the extent requested by local governments and nonprofits, to fund replacement of shelter units made uninhabitable by the earthquake and to fund replacement of low-income housing units that contained a private sleeping room in each unit; (2) to fund reimbursement to local governments for special housing vouchers for interim temporary housing for those denied temporary housing benefits; (3) to provide housing assistance benefits to those persons whose claims were initially denied under the shared-household rule; (4) to inform those who did not initially receive notice of their appeal rights; and (5) to promulgate appeal guidelines.¹⁴⁰

Despite the settlement between the plaintiffs and FEMA in February 1990, criticism of FEMA's management of the Loma Prieta disaster was renewed a year-and-a-half after the earthquake. FEMA apparently had a change of heart when it learned that the shelter units and other low-income housing it had agreed to replace numbered more than 2,000.¹⁴¹ A coalition of community advocates lodged a second administrative complaint against FEMA,¹⁴² alleging that "many Bay Area residents [were] still living in homes with leaking roofs and unstable foundations"; many Bay Area homes had "serious structural damage caused by the earthquake that [had] still not been repaired"; FEMA and DSS had denied low-income homeowners "their fair share of relief"; FEMA's home damage inspectors performed "sloppy, incomplete inspections," and spent little time in low-income neighborhoods or with non-English speaking residents; "low income homeowners often did not have their damages verified and were awarded little

139. STEINBERG, *supra* note 29, at 189; Settlement Agreement and Order Preliminarily Approving Settlement, Jimmie Smith et al. v. FEMA, No. C-90-0161 EFL (N.D. Cal. May 4, 1990), available at <http://www.pilpca.org/docs/Smith.v.FEMA.Settle.Agreement.pdf> [hereinafter Settlement].

140. Settlement, *supra* note 139, at 3-4.

141. STEINBERG, *supra* note 29, at 189.

142. Petition to FEMA, et al.: The Continuing Disaster, Disaster Relief Agencies Fail Low Income Earthquake Victims (1991), available at <http://www.pilpca.org/docs/Petition.FEMA.IFG.Loma.Prieta.Doc.pdf> [hereinafter Continuing Disaster].

or no money for repairs” because FEMA inspectors were not thorough; low-income Bay-Area residents “lived through two disasters” because FEMA’s practices never let them effectively recover from the earthquake; and FEMA’s and IFGP’s price lists used for awarding money were “far below actual repair costs” in the Bay Area.¹⁴³

Community advocates pointed with specificity to FEMA failures that affected post-disaster housing for earthquake victims. They alleged that the problem was twofold. First, “IFGP adopted and FEMA approved a repair cost list with low, outdated values”; and second, “FEMA inspectors made cursory, incompetent inspections and often reported damage inaccurately.”¹⁴⁴ As a result of these failures, low-income homeowners continued to live in substandard housing conditions. These examples of the small amounts of money received by FEMA and IFGP recipients were listed in the complaint:

In Watsonville, a single mother with a disabled child received \$10,588 to completely restore her heavily damaged home. The cost for the materials alone was \$21,274.93.

An elderly couple continue[d] to live with light in only half of their home and almost no heat. They ha[d] to place newspaper around the base of their toilet to prevent leakage. The Small Business Administration (SBA) estimated that it would cost \$17,054 to repair the house, yet the combined IFGP and FEMA grant was only \$1,212.

Another homeowner received \$195 for real property repairs for IFGP. Her chimney cracked and her fireplace cracked and pulled away from her home. As a result, her home flooded and received water damage when it rained. The earthquake also broke the sewage lateral running underneath the garage floor from the house to the street. Consequently, whenever the toilet was flushed or someone took a shower, water percolated up through the garage floor and flooded it. Of the \$195 grant, \$130 was for patching the damage to the plaster and the fireplace and \$65 was for

143. *Id.* at Summary of Petition.

144. *Id.* at 2.

replacing the toilet. Her toilet was not even damaged. A licensed contractor estimated that it would cost over \$10,000 to remove and replace the fireplace wall.

One man received \$2,878 from FEMA and IFGP to replace 65 square feet of foundation, repair and replace plaster, remove and replace the exterior chimney, trim and refit two doors, and replace four square feet of window glass. A private contractor determined that it would cost \$9,875 to fix only the foundation of [the] home.¹⁴⁵

A second major complaint was that "IFGP developed and FEMA approved real property repair cost data, included in the California State Administrative Plan," with prices much lower than Bay Area market-rate prices, which made it "virtually impossible for homeowners to make necessary repairs."¹⁴⁶ An auditor for the city of San Francisco's Budget Analyst office echoed the complaint regarding FEMA's under-calculation of repair costs, stating that FEMA used national indexes to estimate construction costs rather than the higher local unit costs.¹⁴⁷

The third major complaint lodged was that the inspectors hired by FEMA and IFGP to report damage from the Loma Prieta earthquake "were careless and incompetent" and that their inspection reports "were cursory and unreliable."¹⁴⁸ Victims reported to the Legal Aid Society of Alameda County that inspections of their homes lasted no more than ten or fifteen minutes.¹⁴⁹

The petition asserted that "FEMA inspectors were inadequately trained to inspect for earthquake damage and often overlooked damage that [was] typically caused by an earthquake."¹⁵⁰ Allegedly, inspectors frequently failed to check foundations or roofs.¹⁵¹ The petition alleged that IFGP failed to award money to a Watsonville family to replace their home's foundation because the

145. *Id.* at 2-3 (citations omitted).

146. *Id.* at 3.

147. Clarence Johnson, *S.F. Short \$220 Million for Earthquake Repairs*, S.F. CHRON., Dec. 10, 1992, at A24.

148. Continuing Disaster, *supra* note 142, at 5.

149. *Id.* at 5-6.

150. *Id.* at 6.

151. *Id.*

FEMA inspector refused to look under the house, despite being informed by the family that the floor was shaking.¹⁵²

The impact of alleged FEMA failures was especially felt in low-income and minority communities. One report noted that “the emergency response to the earthquake left many victims with the perception that services were financially and racially biased.”¹⁵³ Inspectors were purportedly “inadequately prepared to work with a racially and economically diverse population.”¹⁵⁴ One elderly black gentleman reported that a FEMA inspector insulted him by calling him “boy.”¹⁵⁵ The petition alleged that inspectors’ “biases against people of color and their fear and mistrust of low-income neighborhoods caused them to perform superficial inspections in minority and low-income residences.”¹⁵⁶ The absence of translators for non-English-speaking people left the inspectors unable to communicate with some victims.¹⁵⁷ These biases and mistrust resulted in “more denials and low grants for people of color and low-income people than for white and wealthy people,” according to the petition.¹⁵⁸

According to community advocates, the problems were further compounded because inspectors were paid per inspection rather than per hour, which gave them no incentive to be thorough.¹⁵⁹ This combined with the biases and mistrust described above made “the initial inspections an insurmountable obstacle for many low-income applicants.”¹⁶⁰

152. *Id.*

153. Comerio, *supra* note 109, at C162.

154. Continuing Disaster, *supra* note 142, at 6. Mary Comerio noted the insensitivity problem extended to Red Cross shelter volunteers. She concluded that the problem was “a function of the pool of volunteers (locally and nationally) who are predominantly white and middle class and who have no training in working with people from culturally diverse backgrounds.” Comerio, *supra* note 109, at C163.

155. Continuing Disaster, *supra* note 142, at 6.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 6–7.

160. *Id.* at 7.

C. 1992: Riots, Wildfires, Hurricanes

Complaints regarding FEMA's failures in managing disaster relief continued unabated through the early 1990's. In 1992, public interest attorneys from California, Florida, and Hawaii filed an administrative petition on behalf of disaster victims from those states seeking immediate and high-level review of unlawful and inadequate disaster relief by FEMA.¹⁶¹ The petition sought "prompt corrective action in order to avert further, unnecessary harm to disaster victims."¹⁶²

The petition alleged that an obvious pattern emerged "[s]ix months after civil unrest destroyed homes and businesses in Los Angeles, more than two months after Hurricane Andrew devastated communities in Florida and Louisiana and wildfires raged through Northern California, and nearly six weeks after Hurricane Iniki tore apart islands of Hawaii."¹⁶³ The petition further asserted that FEMA's mismanagement "inevitably compounded" the harm suffered by the victims of those and other disasters, such as Hurricane Hugo in South Carolina¹⁶⁴ and the Loma Prieta earthquake in Northern California.¹⁶⁵ Specifically, FEMA and the federal government were accused of having

161. Petition to Admin. & FEMA: FEMA's Bureaucratic Disasters: Unlawfully Mismanaging Disaster Relief from Florida to California to Hawaii (1993), <http://www.pilpca.org/docs/Petition.FEMA.Mismanagement.Florida.CA.Hawaii.pdf> [hereinafter *Bureaucratic Disasters*].

162. *Id.* at 1.

163. *Id.*

164. MICHAEL ALLABY, *DANGEROUS WEATHER: A CHRONOLOGY OF WEATHER* 50–51 (1998). Hurricane Hugo struck Charleston, South Carolina, on September 21, 1989. Five days after Hugo, federal officials had not provided food and water to the rural poor in towns such as St. Stephen and Ridgeville, outside Charleston. FEMA took ten days to open a disaster center in Berkeley County, South Carolina. Nine months after Hugo, approximately 1,200 families in South Carolina still needed assistance. STEINBERG, *supra* note 29, at 186. Senator Ernest "Fritz" Hollings of South Carolina was so incensed by FEMA's mismanagement after Hugo that he referred to FEMA as "the sorriest bunch of bureaucratic jackasses I've ever known." Patrick S. Roberts, *FEMA After Katrina*, 137 *POL'Y REV.* 15, 19 (2006).

165. *Bureaucratic Disasters*, *supra* note 161, at 1.

delayed in authorizing certain benefit programs, delayed in processing initial grants, delayed in implementing entire programs for housing recovery and to avoid home foreclosures and/or evictions, failed to supervise and coordinate relief, denied applications for relief without fair process, [and] provided exceedingly low grants for victims in dire need¹⁶⁶

Petitioners alleged that FEMA failed to use fair process when it denied or declared ineligible forty to fifty percent of the Florida and California applicants seeking temporary housing assistance or mortgage and rental assistance.¹⁶⁷ Petitioners also asserted that less than five percent of the IFGP applicants had received assistance in Hawaii, and that many victims in Los Angeles and Florida waited for months to receive disaster benefits.¹⁶⁸ Average grant levels in each area were said to be “completely inadequate to enable victims to actually replace necessities and/or complete immediate repairs on their homes.”¹⁶⁹

FEMA’s practices were criticized as being in contravention of the fundamental purpose of the Stafford Act, “to alleviate the suffering and damage resulting from disasters.”¹⁷⁰ Petitioners accused FEMA of failing “to carry out these obligations or implement” mandates under the Stafford Act and “fail[ing] to assure a coordinating and planning role for housing recovery with federal, state[,] and local agencies and the private sector.”¹⁷¹

“Prompt review and action correcting FEMA’s mismanagement” was sought “to avert [alleged] further harm to disaster victims.”¹⁷² The petitioners demanded that FEMA:

1. Adopt standards, forms, and practices to notify victims of all available benefits;
2. Eliminate unnecessary delays in processing and providing disaster relief;

166. *Id.*

167. *Id.* at 2.

168. *Id.*

169. *Id.*

170. *Id.* at 3.

171. *Id.*

172. *Id.*

3. Eliminate inequitable and overly restrictive conditions on the Individual Family Grant, Temporary Housing[,] and Mortgage and Rental Assistance programs;
4. Provide continuing rental or mortgage assistance to victims for up to eighteen months in the absence of adequate replacement housing or in the wake of continuing financial hardship;
5. Acknowledge the critical shortage of affordable housing in the disaster areas and exercise full powers to establish and implement a housing recovery plan with the Departments of Housing and Urban Development and Agriculture, other state and local agencies and the private sector;
6. Provide fair and meaningful hearings in the event of denial of assistance, and immediately grant aid to an applicant when he or she cures the deficiency in the application which formed the basis for the denial; and
7. Respond, with concrete remedies, to each of the aforementioned grievances within ten days.¹⁷³

The circumstances surrounding the complaints related to FEMA's alleged failures are noteworthy. On May 2, 1992, following three days of riots and fires described as "the nation's deadliest urban disturbance since the Civil War era,"¹⁷⁴ Los Angeles was declared a federal disaster area.¹⁷⁵ This declaration qualified thousands of individuals from a broad spectrum of stricken communities and ethnic groups for federal disaster relief programs. Although FEMA was allocated \$300 million for disaster relief,¹⁷⁶ the petitioners asserted that "[d]espite the fanfare, the promises, and FEMA's continued presence," in six months

173. *Id.* at 3-4.

174. *Officers Tell of Confus[ion] and Indecision in L.A. Riots*, S.F. CHRON., May 7, 1992, at A1.

175. FEMA, 1992 Federal Disaster Declarations, <http://www.fema.gov/news/disasters.fema?year=1992> (last visited June 7, 2007) (listing all Federal Disaster Declarations in 1992).

176. SENATE SPECIAL TASK FORCE ON A NEW LOS ANGELES, NEW INITIATIVES FOR A NEW LOS ANGELES (1992), available at <http://www.usc.edu/libraries/archives/cityinstress/newinit/part8.html> [hereinafter A NEW LOS ANGELES].

FEMA disbursed less than seven percent of that amount.¹⁷⁷ Petitioners accused the federal government of failing “to make good on the promised funds and programs to ‘rebuild’ Los Angeles or even to begin meaningful recovery for thousands of individuals whose livelihoods were destroyed during the fires and violence.”¹⁷⁸ A response to a request under the Freedom of Information Act showed that FEMA “denied thousands of applications for disaster housing assistance, including mortgage and rental assistance.”¹⁷⁹

The unrest left many Los Angeles communities crippled. The County of Los Angeles estimated that 960 structures were damaged and 613 were destroyed.¹⁸⁰ Property damage was estimated to total one billion dollars.¹⁸¹ Dun & Bradstreet estimated that as many as 4,500 businesses were affected and that forty percent of the businesses damaged during the civil unrest in Los Angeles had permanently closed.¹⁸²

According to a newspaper account, four months after the disaster “[d]enial rates for nearly all of the federal grant and loan programs [we]re running at 50 percent or more, leaving many victims and their advocates with the sense that the aid process [wa]s not working.”¹⁸³ Of the 20,114 applications for disaster assistance received as of October 22, 1992, FEMA found only 7,571 households (thirty-eight percent) eligible to receive assistance.¹⁸⁴ Petitioners criticized FEMA for denying over sixty percent of the completed applications for mortgage and rental assistance, as well as other types of temporary housing assistance and alleged that several months after the riots, “thousands of people [were] left without . . . the prospect of any assistance.”¹⁸⁵

In Los Angeles, many homeowners whose businesses were burned or destroyed feared losing their homes as well through

177. Bureaucratic Disasters, *supra* note 161, at 5.

178. *Id.*

179. *Id.*

180. A NEW LOS ANGELES, *supra* note 176.

181. *Id.*

182. *Id.*

183. Carla Rivera, *Many L.A. Riot Victims Say Aid Hasn't Come: Half of Applications for Relief Turned Down*, S.F. CHRON., Aug. 25, 1992, at A13.

184. Bureaucratic Disasters, *supra* note 161, at 5.

185. *Id.* at 6.

foreclosure.¹⁸⁶ These homeowners alleged that they were denied mortgage and rental assistance in some cases because their businesses were funded with second mortgages.¹⁸⁷ Unfortunately, as advocates pointed out, “[m]any victims were either uninsured for their business losses or grossly underinsured.”¹⁸⁸ One can easily imagine that the victims of the civil unrest wondered if any meaningful recovery would occur for them in Los Angeles.

The petition asserted that in addition to its problems assisting disaster victims following the hurricanes and riots, FEMA responded slowly and inadequately when wildfires struck in Northern California following six years of drought.¹⁸⁹ The Dry Gulch Fire started on August 17, 1992,¹⁹⁰ and the Fountain Fire started a few days later.¹⁹¹ The President declared the area a federal disaster area on August 29, 1992.¹⁹² However, the petition alleged that FEMA did not open a Disaster Assistance Center until September 3, 1992.¹⁹³

The fires devastated local communities. The Fountain Fire alone destroyed 307 homes.¹⁹⁴ Between the two fires, more than 82,000 acres, 267 buildings other than homes, and 600 million board feet of timber worth \$86 million were destroyed.¹⁹⁵

The petition asserted the following facts about the fires and FEMA’s ponderous response. Shasta County, hardest hit by the fires, was “an isolated, rural area of primarily low-income

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 7.

190. Erin Hallissy, *Wildfire Chars 2,000 Acres in Mother Lode Country*, S.F. CHRON., Aug. 18, 1992, at A1.

191. Ann Bancroft & Edward W. Lempinen, *New Major Wildfire Blaze near Redding Is Bigger Than Gold Country Inferno*, S.F. CHRON., Aug. 22, 1992, at A1.

192. FEMA, *supra* note 175.

193. Bureaucratic Disaster, *supra* note 161, at 7.

194. Bill Wallace, *Wind Gives New Life to Shasta Blaze: Firefighters Can't Predict Where It Will Flare Next*, S.F. CHRON., Aug. 25, 1992, at A1.

195. *Id.* See also Rick DeVecchio, *'Hotshot' Teams Contain Fire: Federal Forces' Success Points Up Rivalries with State Agency*, S.F. CHRON., Aug. 22, 1992, at A14.

families.”¹⁹⁶ Two hundred sixty-two individuals applied for federal and state assistance in Shasta County, and FEMA processed their applications very slowly.¹⁹⁷ Many victims lived in tents without basic necessities such as running water, toilets, heat, or telephones.¹⁹⁸ FEMA failed to notify applicants in writing regarding their eligibility for benefits, and nearly two months after the disaster, many applicants were still waiting for a decision.¹⁹⁹

The petition further alleged that “FEMA’s benefit decisions were highly inconsistent and arbitrary”; that FEMA workers gave conflicting information regarding the types of available relief; and that FEMA workers completed applications for the victims and included incomplete or incorrect information, through no apparent fault of the victims.²⁰⁰

The most stinging criticism leveled in the petition was that despite FEMA’s opportunity for advance planning and preparation in Northern California, the relief effort was “plagued with the same delays in initial relief, grant processing, coordination, and lack of program implementation experienced by victims of other disasters,” highlighting systemic problems that “require[d] significant changes by FEMA and the Administration to make the program responsive to people’s disaster needs.”²⁰¹

The criticism against FEMA reached a crescendo when Hurricane Andrew struck Florida with incredible force. Winds in excess of 160 miles per hour and driving rains damaged or destroyed over 130,000 homes and 10,000 businesses and left 350,000 people temporarily homeless.²⁰² Overnight, hundreds of thousands of Florida residents lost their homes, and their surroundings became unrecognizable.²⁰³

196. Bureaucratic Disasters, *supra* note 161, at 8.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 8–9.

202. DEMOCRATIC STAFF OF H. SMALL BUS. COMM., 109TH CONG. REPORT ON TRENDS AND ANALYSIS OF SBA DISASTER LOAN PROGRAM 1992–2006, at 4 (2006), available at http://www.house.gov/smbiz/democrats/Reports/disaster_loan2006.pdf.

203. Tom Morganthau & Karen Springer, *Storm Warnings*, NEWSWEEK, Sept. 14, 1992, at 24.

Dade County became a "zone of ruination that stretched on for miles and miles."²⁰⁴ The county was immediately declared a disaster area,²⁰⁵ but help for the victims did not follow as quickly. *Newsweek* described FEMA's relief effort as "brain dead."²⁰⁶ United States Senator Barbara Mikulski of Maryland criticized FEMA's response as "pathetically sluggish and ill-planned."²⁰⁷ Three days after the hurricane and frustrated over the lack of help, Kate Hale, director of Dade County's Office of Emergency Management, held a nationally televised press conference. She asked, "Where the hell is the cavalry on this one? We need water. We need people. For God's sake, where are they?"²⁰⁸

Before Andrew, Dade County was an area where "population outstripped social infrastructure."²⁰⁹ The number of homeless in the area before the hurricane was estimated to be from 6,000 to 15,000.²¹⁰ Florida is dependent on migrant farm workers for its agricultural industry, but the hurricane destroyed almost all of the housing for migrant farm workers.²¹¹ Even those people who thought they were fully insured could not repair their homes because they discovered they were underinsured; they needed substantial assistance from FEMA to repair or rebuild.²¹²

In Dade County, 63,000 homes were destroyed²¹³ and as many as 27,000 more were damaged or rendered uninhabitable by the hurricane.²¹⁴ Many of the poor and elderly in Dade County lived in mobile homes; ninety-seven percent of more than 10,000 mobile homes were destroyed.²¹⁵ The petition stated that those

204. *Id.*

205. FEMA, *supra* note 175.

206. Mathews et al., *supra* note 28, at 24.

207. David Tuller, *FEMA Fights Mounting Criticism: Agency's Slow Reaction to Storm Budget for Natural Disasters Assailed*, S.F. CHRON., Sept. 15, 1992, at A3.

208. Mathews et al., *supra* note 28, at 23.

209. *Id.* at 24.

210. Bureaucratic Disasters, *supra* note 161, at 9.

211. *Id.* at 9-10.

212. *Id.* at 10.

213. Mathews et al., *supra* note 28, at 23.

214. Morganthau & Springer, *supra* note 203, at 26. A total of 90,000 homes were damaged or destroyed. *Id.*

215. STEINBERG, *supra* note 29, at 92.

communities desperately needed “immediate temporary housing and money to repair existing dwellings, until permanent replacement housing [could] be built for residents and for the migrant workers.”²¹⁶ The petition alleged that two months after the disaster declaration, FEMA had “virtually ignore[ed] the more extensive, long-term needs that [would] require building thousands of units of affordable housing stock in South Dade County.”²¹⁷ Instead, FEMA concentrated on short-term, limited forms of assistance.

The petition asserted many other complaints regarding FEMA’s conduct following Hurricane Andrew. Although FEMA belatedly agreed to provide hurricane victims with temporary housing assistance, those checks were of little help when their houses or apartments were destroyed or unlivable, scant housing was available for rent, and rent for the meager available housing skyrocketed after the storm. FEMA failed to notify those persons who had already applied for housing assistance (approximately 110,000) that mortgage and rental assistance was available. FEMA provided an inadequate number of mobile homes to the victims.²¹⁸

Terry Coble, an attorney with Legal Services of Greater Miami at the time of Hurricane Andrew, complained, “What we have learned is that FEMA has a pattern of coming into a disaster area, providing minimal relief and then folding up the tent.”²¹⁹ In the case of Hurricane Andrew, FEMA quite literally folded up the tent. The petition alleged that by the two-month anniversary of the storm, FEMA had dismantled the tent cities that had housed thousands, leaving no safety net for the hurricane victims without adequate housing.²²⁰

Another complaint made by victims was that FEMA required applicants for temporary housing “to apply for SBA loans and be rejected in order to establish eligibility for federal aid despite the applicant[s’] patently obvious inability to repay such a loan.”²²¹

216. Bureaucratic Disasters, *supra* note 161, at 10.

217. *Id.*

218. *Id.* at 11.

219. STEINBERG, *supra* note 29, at 190.

220. Bureaucratic Disasters, *supra* note 161, at 11.

221. *Id.*

Furthermore, elderly and uneducated people were effectively denied assistance because they could not fill out the complicated paperwork that FEMA required.²²²

The petition also criticized FEMA for ignoring its own regulations that permitted interim assistance to victims with insurance if they agreed to repay FEMA from insurance proceeds when and if they received them.²²³ Instead, FEMA denied assistance to the insureds, “even when they experienced inordinate delays in recovering from the insurance company.”²²⁴

Three weeks after Hurricane Andrew, on September 11, 1992, Hawaii was ravaged by Hurricane Iniki.²²⁵ Three of the islands—Oahu, the Big Island of Hawaii, and Kauai—suffered significant damage, with Kauai suffering the most extensive losses.²²⁶ The entire state was declared a federal disaster area on September 12, 1992.²²⁷

Five hundred sixty-three homes on Oahu were damaged or destroyed and over 7,000 Hawaiians were made homeless by the damage or destruction of 14,340 homes²²⁸—approximately one-third of the homes on Kauai.²²⁹ Fewer than ten percent of the almost 10,000 hotel and vacation rental units were habitable.²³⁰

In addition to those whose homes were destroyed by the hurricane, many more were evicted so their landlords could make repairs. Initially, FEMA provided vouchers only to those directly affected; those evicted during repairs received no help. Not “until

222. *Id.* at 11–12.

223. *See* 44 C.F.R. § 206.191(c)(1) (2006).

224. Bureaucratic Disasters, *supra* note 161, at 12.

225. Nat'l Weather Serv. Cent. Pac. Hurricane Ctr., The 1992 Central Pacific Tropical Cyclone Season, <http://www.prh.noaa.gov/cphc/summaries/1992.php#Iniki> (last visited Oct. 28, 2007).

226. *Id.*

227. FEMA, *supra* note 175, at 1.

228. HAW. NAT'L GUARD, HURRICANE INIKI AFTER-ACTION REPORT 3 (1992), <http://cgsc.cdmhost.com/cgi-bin/showfile.exe?CISOROOT=/p4013coll11&CISOPTR=59&filename=60.pdf>.

229. Tom Morganthau et al., *A Quick Response to Hawaii's Hurricane Iniki*, NEWSWEEK, Sept. 21, 1992, at 51.

230. Bureaucratic Disasters, *supra* note 161, at 13.

outrage over the policy forced FEMA to change it, some 10 months after the calamity,” did those evicted for repairs get help.²³¹

As there was no rental housing available to the displaced Kauaians, FEMA’s remedy, five weeks after the hurricane, was to provide tents, stoves, and lanterns, and to relocate the victims to condominiums or hotels on the other islands.²³² FEMA did not offer mortgage and rental assistance to Hawaiians until a month after the hurricane.²³³

D. Failure to Learn from Mistakes

As the preceding discussion illustrates, FEMA’s failures in the late 1980’s and early 1990’s appeared to be numerous. After the Loma Prieta earthquake, United States Representative Norman Mineta from California complained that FEMA’s response to that earthquake was fraught with “confusion, constantly busy telephones, misinformation and computer glitches.”²³⁴ Sixteen years later, the same complaints surfaced after Hurricane Katrina. Senator Mary Landrieu stated in December 2006, “FEMA has clearly learned very little from its mistakes, let alone basic math or a sense of fundamental fairness.”²³⁵ The failures of the federal government to provide disaster relief efficiently after Hurricane Andrew may have forewarned of the bureaucratic disaster that accompanied FEMA’s response to the victims of Hurricane Katrina. It is ironic that the government’s slow response to aiding victims of Hurricane Andrew may have contributed to the election loss of then President George H.W. Bush in the 1992 presidential campaign.²³⁶ It is equally ironic that over a decade later, President George W. Bush had to acknowledge that FEMA’s failures could

231. STEINBERG, *supra* note 29, at 190.

232. Bureaucratic Disasters, *supra* note 161, at 14.

233. *Id.* at 28.

234. Carolyn Lochhead, *Rep. Stark Wants FEMA Abolished*, S.F. CHRON., Sept. 18, 1992, at A2.

235. Press Release, Office of Senator Mary Landrieu, FEMA: Mississippi to Get Four Times More Housing Money Than Louisiana, U.S. FED. NEWS, Dec. 21, 2006, available at 2006 WLNR 22356880.

236. See Michael Hoover, *Rowboat Federalism: The Politics of U.S. Disaster Relief*, MRZINE, Feb. 12, 2005, <http://mrzine.monthlyreview.org/hover021205.html>.

not be ignored and were unacceptable in response to Hurricane Katrina.²³⁷

With thousands of Americans stranded for several days without food, water, or electricity, it became difficult to comprehend the United States government's lack of preparation and ineffective initial response to a hurricane that had been predicted for decades. It was particularly troubling to understand these failures in light of dire warnings regarding the hurricane that had been given for days.

The enormity of the disaster caused by Hurricane Katrina called for disaster assistance and relief by FEMA that would be unprecedented in United States history. Unfortunately, FEMA seemed to fail the victims of the storm in many ways. United States Senator Susan Collins stated, "In Katrina, this system broke down. And the result was the very deprivation and suffering this structure was designed to avoid."²³⁸

Problems with the Short-Term Lodging Program caused the victims to "become pinballs in a FEMA game of rotating hotel evictions."²³⁹ The plaintiffs in *McWaters* alleged in their lawsuit that FEMA failed to provide adequate information and temporary housing assistance to victims of Hurricane Katrina; FEMA took too long to open disaster relief centers where hurricane victims could meet face-to-face with FEMA personnel, and other federal, state, and volunteer agencies to discuss their disaster-related needs, register for assistance, update their registration information, ascertain the status of their applications, and otherwise go for help; and FEMA failed to provide victims with accurate and necessary information regarding rental assistance for which the evacuees were eligible.²⁴⁰

237. Tom Raum, "I Take Responsibility", *THE ADVOCATE* (Baton Rouge), Sept. 14, 2005, at A1.

238. Gerald Shields, *FEMA Outlines La. Failures*, *THE ADVOCATE* (Baton Rouge), Dec. 9, 2005, at A1.

239. David Dante Troutt, *Many Thousands Gone, Again*, in *AFTER THE STORM*, *supra* note 22, at 3, 20.

240. *McWaters v. FEMA*, 408 F. Supp. 2d 221, 225-27 (E.D. La. 2006).

These alleged failures created among many evacuees a sense of misery and lost hope. To many evacuees, FEMA had become another bad four-letter word.²⁴¹

IV. LITIGATION AGAINST FEMA TO ENFORCE HOUSING RIGHTS

The preceding discussion illustrates the problems faced by victims of natural disasters who are forced from their homes when those residences are severely damaged or otherwise made uninhabitable. While FEMA attempts to provide aid to individual victims and families when these survivors are rendered homeless and will not regain permanent housing for a significant amount of time, victims who are left without homes immediately after a disaster sometimes must turn to public interest attorneys to help weave through an elaborate web of rules under the Stafford Act, understand their rights under the Stafford Act, and protect those rights when FEMA fails to provide adequate disaster relief as required by law.

Taking judicial action against FEMA for disaster victims, many of whom are low-income, to secure temporary housing assistance is difficult, at best. The difficulty lies in the Stafford Act's non-liability provision.²⁴² Pursuant to that non-liability provision, the federal government is not liable for any claim based on the exercise or performance of a discretionary function or duty in carrying out the provisions of the Stafford Act. Because Congress included specific language in the Stafford Act precluding liability with respect to discretionary actions, absent a waiver of sovereign immunity, a court would lack subject matter jurisdiction over claims against FEMA for exercising a discretionary function.²⁴³ The government of course would argue that the

241. Joe Gyan Jr., *FEMA Rapped on Hotel Plans*, THE ADVOCATE (Baton Rouge), Feb. 24, 2006, at B1 (describing a scene during one of the hearings in the *McWaters* case in which evacuees and housing rights groups demonstrated outside the courthouse carrying signs that read, "FEMA is a 4-letter word!").

242. 42 U.S.C. § 5148 (2006).

243. See *Dureiko v. United States*, 209 F.3d 1345 (Fed. Cir. 2000), *aff'd*, 162 Fed. Appx. 976 (Fed. Cir. 2006); *Graham v. FEMA*, 149 F.3d 997 (9th Cir. 1998); *Rosas v. Brock*, 826 F.2d 1004 (11th Cir. 1987).

Stafford Act precludes all judicial review because all of its acts are discretionary.

Does that bar of sovereign immunity actually preclude all review of FEMA's decisions? In *Lockett v. FEMA*,²⁴⁴ a class action lawsuit filed against FEMA after Hurricane Andrew, the plaintiffs contended that FEMA: (1) failed to provide victims of the hurricane with housing as required by the Stafford Act; (2) failed to notify victims of the hurricane about the various types of housing available to them under the Stafford Act; and (3) implemented the Stafford Act and its regulations "in an arbitrary and illegal manner by denying assistance based on a finding that another individual in the pre-disaster household received assistance."²⁴⁵

The plaintiffs sought declaratory and injunctive relief raising statutory and constitutional claims.²⁴⁶ As to those constitutional claims, the court opined that while discretionary acts are precluded from judicial review, courts have jurisdiction over claims alleging constitutional violations.²⁴⁷ The rationale for this conclusion is that Congress has never "commit[ted] to an agency's discretion the question of whether or not to act constitutionally" and that "adherence to constitutional guidelines is not discretionary, it is mandatory."²⁴⁸

Thus, the *Lockett* court found that the plaintiffs asserted constitutional claims over which it could assume jurisdiction.²⁴⁹ Those claims were: (1) FEMA failed to provide temporary housing assistance to otherwise eligible disaster victims as provided for in the Stafford Act, in violation of the Due Process Clause of the Fifth Amendment, by arbitrarily denying victims their entitlement to assistance; (2) FEMA's policy and practice of denying temporary housing assistance to otherwise eligible hurricane victims based on a finding that another person in the pre-disaster housing unit received assistance is contrary to the Equal Protection Clause of the Fifth Amendment because the policy violates the

244. 836 F. Supp. 847 (S.D. Fla. 1993).

245. *Id.* at 850.

246. *Id.* at 851.

247. *Id.* at 854.

248. *Id.* (quoting *Rosas*, 826 F.2d at 1008).

249. *Id.*

statutory rights of low-income victims to not be subjected to economic discrimination; and (3) FEMA's failure to provide victims with statutory and regulatory notices violated their due process rights guaranteed under the Fifth Amendment.²⁵⁰

The court's opinion in *Lockett* is important because it substantiated a policy favoring judicial review of administrative action. Courts, as a third branch of government, should presume that they have the right to judicially review an administrative action when a person suffers a legal wrong because of an agency action within the meaning of a relevant statute. In the context of the Stafford Act, courts should review the complaints of persons adversely affected by actions of FEMA and dismiss only those claims in the complaint that involve a discretionary function.

The defense of sovereign immunity was the government's primary defense in the *McWaters* case, where the plaintiffs in November 2005 sought a temporary restraining order and preliminary injunction challenging: (1) FEMA's authority to unilaterally terminate the Short-Term Lodging Program; (2) FEMA's application of the shared-household rule whereby many disaster victims were denied temporary housing or other disaster assistance on the basis that they lived or shared the same address or phone number with another applicant for disaster assistance; (3) FEMA's failure to grant temporary housing assistance to victims because they refused to apply for an SBA loan; (4) FEMA's failure to give timely notice to victims who received a preliminary payment of \$2,358 under the temporary housing provisions of the Stafford Act that such monies were to be spent solely on rent and that the failure to do so would prevent the victims from receiving further assistance from FEMA; and (5) FEMA's delay in processing over 80,000 claims for assistance that were still listed as pending.²⁵¹

The government's response to the plaintiffs' claims in *McWaters* was that the alleged acts and/or omissions were all discretionary in nature and consequently immune from all judicial review.²⁵² Amazingly, it was also the government's position that

250. *Id.* at 854–55.

251. *McWaters v. FEMA*, 408 F. Supp. 2d 221, 225–27 (E.D. La. 2006).

252. *Id.* at 228.

FEMA may commit unconstitutional acts and omissions that are likewise not subject to judicial review based upon the immunity provision set forth in the Stafford Act.²⁵³ This incredulous claim of statutory immunity from even constitutional violations is clearly contrary to the intent of Congress and federal judicial precedent.

After conducting a hearing on December 9, 2005, regarding the plaintiffs' motion for temporary restraining order and preliminary injunction, the court, in granting the motion in part, held that FEMA's sovereign immunity defense was precluded as to two of the plaintiffs' causes of action: failing to notify victims that they did not have to apply for SBA loans as a condition to qualify for temporary housing assistance,²⁵⁴ and arbitrarily cutting off financing for victims staying in hotels prior to resolving their assistance claims.²⁵⁵

With respect to the SBA loan issue, the court found that FEMA had "either misinformed or not fully informed" applicants for temporary housing assistance that they did not need to apply for an SBA loan and that an SBA loan application was required only if an applicant sought other needs assistance (e.g., medical and dental).²⁵⁶ This finding led the court to conclude that FEMA "violated a mandatory duty" under the Stafford Act "through the mis-communication or inartful communication of the protocol for receiving Temporary Housing Assistance by causing some applicants to believe that an SBA loan application [wa]s a necessary pre-requisite to receiving temporary housing assistance."²⁵⁷

The court was highly critical of FEMA in denying its sovereign immunity defense as it related to FEMA's arbitrary decision to cut off financing for victims staying in hotels prior to resolving their assistance claims. The court noted that FEMA's actions in reference to its subsidy of hotels and motels were "notoriously erratic" and "numbingly insensitive."²⁵⁸ The court was "bewildered" as to the rationale for the termination of hotel and

253. *Id.*

254. *Id.* at 232.

255. *Id.* at 235.

256. *Id.* at 232.

257. *Id.*

258. *Id.* at 233.

motel benefits and expressed disbelief that FEMA's termination of benefits was directly aimed at victims who had virtually no resources.²⁵⁹

The court related the poignant testimony of one of the plaintiffs regarding her struggles to find housing and justified its criticism of FEMA with the following facts. The decision by FEMA to arbitrarily terminate hotel and motel payment benefits was neither equitable nor impartial as required by the Stafford Act. The majority of the victims affected by FEMA's decision to terminate hotel and motel benefits would have been the most disadvantaged victims of the disaster. They were the individuals who "lost virtually all of their property, economic livelihood, and in some cases, family members as a result of Hurricane Katrina and its aftermath."²⁶⁰ Their plight was different from those who had already received federal assistance and who had places to live—in their own homes or with friends or relatives—or were able to afford replacement housing.²⁶¹ Most of the victims still living in hotels or motels on December 9, 2005, had not been homeless before Hurricane Katrina and were not living in those hotels and motels by choice.²⁶²

While the hurricane did not discriminate based on economics, those individuals with resources and access to alternate housing were generally not among the victims who were living in hotels or motels more than three months after the hurricane struck. Without a doubt, the economic status of individuals in hotels or motels on December 9, 2005, was in general far less than those victims who were not in hotels. FEMA's decision to terminate hotel and motel benefits for individuals who were disadvantaged by the disaster violated a congressional mandate to provide relief and assistance in an equitable and impartial manner without discrimination on the grounds of economic status.

One can only imagine the anxiety and fear that many victims living in hotels and motels subsidized by FEMA must have experienced in believing that they might be homeless after having

259. *Id.* at 234.

260. *Id.*

261. *Id.*

262. *Id.*

lost their jobs, homes, cars, worldly possessions, and in some cases family members and friends.²⁶³ The federal government's insensitivity to this plight was both alarming and sad. The court noted that the government on at least two occasions during the hearing stated that citizens thought that "every problem in the United States [was] a federal problem and that the federal government [was] responsible for them."²⁶⁴ While it is impossible to know if the government's assertion is true, it is certainly clear that Section 5121(b) of the Stafford Act makes the federal government responsible to provide "an orderly and continuing means" to help state and local governments alleviate the suffering and damage that result from natural disasters. This sensible policy undergirding the Stafford Act is based on these congressional findings:

- (1) because disasters often cause loss of life, human suffering, loss of income, and property loss and damage; and
- (2) because disasters often disrupt the normal functioning of governments and communities, and adversely affect individuals and families with great severity; special measures, designed to assist the efforts of the affected States in expediting the rendering of aid, assistance, and emergency services, and the reconstruction and rehabilitation of devastated areas, are necessary.²⁶⁵

In a later opinion dated June 16, 2006, the court in *McWaters* affirmed its earlier decision with respect to the sovereign immunity issue.²⁶⁶ The court, in affirming its earlier opinion, rejected FEMA's position that "under the aegis of sovereign immunity, FEMA may commit unconstitutional acts and not be subject to any judicial review."²⁶⁷ The court recognized that the Stafford Act's non-liability provision did not expressly shield FEMA from

263. A Harvard study of Katrina survivors found pervasive anxiety and pessimism. HARVARD STUDY, *supra* note 23.

264. *McWaters*, 408 F. Supp. 2d at 234.

265. 42 U.S.C. § 5121(a) (2006).

266. 436 F. Supp. 2d 802, 812 (E.D. La. 2006), *aff'g* 408 F. Supp. 2d 221.

267. *Id.*

constitutional violations or violations of mandatory duties.²⁶⁸ It should be an extremely rare circumstance that would prompt Congress to enact a federal statute that precludes judicial review of colorable constitutional claims. The structure of our constitutional form of government would be severely compromised or jeopardized if Congress could act unconstitutionally and then shield its action from review by inserting sovereign immunity provisions that precluded all judicial review of serious constitutional claims.

Perhaps the most important ruling made by the court in *McWaters* was that under certain circumstances, victims of natural disasters have a property interest in temporary housing assistance created by the Stafford Act that is protectable under the Due Process Clause.²⁶⁹ In making that ruling, the court had to determine whether the Stafford Act or its implementing regulations placed substantive limitations on the official discretion of FEMA administrators or employees in their decision-making roles. In essence, the court had to decide whether, under current regulations, hurricane disaster victims who met the statutory qualifications for temporary housing assistance were automatically entitled to receive such assistance.²⁷⁰ If FEMA had discretion to choose which hurricane victims it assisted from among otherwise eligible victims, it could insist that no constitutionally protected interest in disaster assistance existed.²⁷¹

In finding that a constitutionally protected right to temporary housing assistance existed, the court made the following determinations: (1) FEMA by its own admission as an agency has no discretion in providing temporary housing assistance to eligible persons and families; (2) FEMA's provision of monetary resources must be done in an equitable and impartial manner, without discrimination on the grounds of race, color, religion, nationality, sex, age, or economic status; (3) the Stafford Act provides that a person or family is deemed eligible for temporary housing assistance solely on the basis of being a person or member of a

268. *Id.* at 813.

269. *Id.* at 816.

270. *Id.*

271. *Id.*

household who is displaced from a pre-disaster primary residence or whose pre-disaster residence is rendered uninhabitable as a result of the damage caused by a major disaster; (4) FEMA admitted that all persons meeting the impartial eligibility criteria established in the Stafford Act are entitled to temporary housing assistance, and that all such persons would receive temporary housing assistance; (5) most claims for temporary housing are automatically determined eligible or ineligible by the NEMIS computer system, requiring no human intervention or approval such that eligible applicants essentially “automatically qualify” for assistance and then are paid automatically via either a computer-generated check or electronic-funds transfer; and (6) FEMA had sufficient resources to provide assistance to all eligible applicants.²⁷²

Because the mandatory and non-discriminatory policies and regulations pursuant to the Stafford Act require FEMA to automatically provide assistance to all applicants deemed eligible, “a reasonable expectation of the benefit” of temporary housing assistance is created.²⁷³ Thus, this “expectation rises to the level of a property interest protectable under the Due Process Clause,” and as such disaster victims have a “legitimate claim of entitlement” related to temporary housing assistance necessary to create a constitutionally protected property right.²⁷⁴ Hence, the court found that under the Constitution, by virtue of the automatic, nondiscretionary assistance existing in both practice and the Stafford Act and its implementing regulations, eligible disaster victims have a constitutionally protected property interest in the receipt of temporary housing assistance.²⁷⁵

FEMA continues to argue sovereign immunity in housing assistance cases with limited success. In *Association of Community Organization for Reform Now (ACORN) v. FEMA*,²⁷⁶ the court referred to FEMA’s sovereign immunity defense as “at best, a stretch.”²⁷⁷ In that suit, hurricane evacuees sought

272. *Id.* at 817–18.

273. *Id.* at 818.

274. *Id.*

275. *Id.*

276. 463 F. Supp. 2d 26 (D.D.C. 2006).

277. *Id.* at 31.

“declaratory and injunctive relief requiring FEMA to provide adequate, written notice for any decisions to deny housing assistance” and “the continuation, or restoration, of temporary housing assistance until such notice and opportunity to appeal is provided.”²⁷⁸ In *Ridgely v. FEMA*,²⁷⁹ a suit seeking to enjoin FEMA from terminating Section 408 assistance without due process, the court adopted the reasoning of *McWaters* in rejecting FEMA’s sovereign immunity defense.²⁸⁰ In *Armstead v. Nagin*,²⁸¹ however, the sovereign immunity defense was successful; the plaintiff’s claims against FEMA for monetary damages were dismissed because all of the acts complained of in that suit fell under FEMA’s discretionary functions under the Stafford Act.²⁸²

The *ACORN* and *Ridgely* cases also addressed the issue of whether the plaintiffs possessed a constitutionally protected right to housing assistance. In *ACORN*, the District of Columbia Circuit Court agreed with the *McWaters* court, finding that the hurricane evacuees have “a protectable property right in the housing assistance administered by FEMA, which cannot be deprived without due process of law.”²⁸³ The *Ridgely* court found that the plaintiffs, all of whom had been deemed eligible for Section 408 benefits, incurred a property right “with their legitimate claim of entitlement.”²⁸⁴ The court stated that it saw “no relevant difference between the plaintiffs’ property rights to Section 408 benefits and

278. *Id.* at 28–29.

279. No. 07-2146, slip op. (E.D. La. June 13, 2007).

280. *Id.* at 5.

281. *Armstead v. Nagin*, No. 05-6438, slip op. (E.D. La. Dec. 29, 2006).

282. *Id.* at 6. The court noted that FEMA had reversed its denial of housing assistance to the Armsteads and thus the plaintiffs’ housing assistance claim was either “moot, [wa]s barred by the APA until FEMA renders a final agency action unfavorable to plaintiffs or fails to state a claim for violation of the Due Process Clause because plaintiffs have a meaningful post-deprivation remedy for their losses through the administrative appeals process.” *Id.* at 7.

283. 463 F. Supp. 2d at 34.

284. No. 07-2146, slip op. at 6 (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

those rights belonging to the plaintiffs” in cases involving Social Security benefits, welfare, and public housing.²⁸⁵

V. RECOMMENDATIONS FOR CHANGE IN FEMA POLICIES AND PRACTICES

The administrative complaints and litigation initiated against FEMA discussed herein were filed with the goal of persuading FEMA to correct its mismanagement of disaster relief efforts and avoid post-disaster bureaucratic blunders. One needs only to observe what occurred with respect to FEMA's Short-Term Lodging Program during the aftermath of Hurricane Katrina to see that FEMA was ineffective. On October 24, 2005, FEMA took over the Red Cross' "Direct Payment Hotel Motel Program," which allowed evacuees with few resources to stay in hotels and motels paid for by Red Cross until such time as the evacuees were able to find more permanent housing.²⁸⁶ On November 15, 2005, FEMA announced that December 1st was the deadline for evacuees to move out of hotels, although Louisiana's and Mississippi's governors had the option of requesting exceptions in two-week increments.²⁸⁷ Some time after counsel for the plaintiffs in *McWaters* filed an amended complaint on November 18, 2005, FEMA extended this deadline to either December 15, 2005, or January 7, 2006, with extensions being granted on a state-by-state basis and depending upon the number of evacuees in hotels or motels in each state.²⁸⁸ Moreover, only the ten states that housed the greatest number of evacuees at that time were eligible to apply for the January 7, 2006, extension.²⁸⁹ On December 9, 2005, the date of the hearing on the motion for a temporary restraining order and injunctive relief in *McWaters*, FEMA again modified the

285. *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Thompson v. Washington*, 497 F.2d 626 (D.C. Cir. 1973); *Caulder v. Durham Hous. Auth.*, 433 F.2d 998 (4th Cir. 1970)).

286. McGill, *supra* note 65, at B3.

287. Sonya Kimbrell, *Evacuees in Hotels Get FEMA Deadline*, THE ADVOCATE (Baton Rouge), Nov. 16, 2005, at B1.

288. Emily Kern, *FEMA Says Evacuees Get Longer Lodging*, THE ADVOCATE (Baton Rouge), Nov. 23, 2005, at B1.

289. *Id.*

deadline.²⁹⁰ FEMA's vacillations, which the trial judge termed "erratic and bizarre," were inexcusable.²⁹¹

To make matters worse, FEMA appeared to have a callous attitude toward providing housing assistance to Hurricane Katrina victims. FEMA's position was that every person ultimately had to take care of himself.²⁹² This position exhibited a high degree of insensitivity, especially when one considers that approximately two weeks before Christmas, many disaster victims had a very real fear of being homeless during the holidays.²⁹³ This degree of insensitivity was extremely troubling when one considers that almost three months after the storm 84,470 applications were still deemed "pending."²⁹⁴ Furthermore, the decision to arbitrarily cease funding the "Short-Term Lodging Program" was especially cruel in that as of December 5, 2005, the number of hotel and motel rooms being subsidized was approximately 41,800,²⁹⁵ and FEMA admitted that it could not process all of the pending applications by January 7, 2006.²⁹⁶

Judge Helen G. Berrigan was especially critical of FEMA's attitude toward Katrina victims in the *Ridgely* decision. She described FEMA's response to the victims' inability to understand FEMA's "byzantine" procedures as "cavalier," stating that FEMA appeared "to treat the plaintiffs' and their prospects of homelessness and the despair and stress of such added worries as if

290. *FEMA to Let Evacuees Extend Louisiana Hotel Stays*, THE ADVOCATE (Baton Rouge), Dec. 10, 2005, at 1A.

291. *McWaters v. FEMA*, 408 F. Supp. 2d 221, 234 (E.D. La. 2006).

292. *Id.* at 235.

293. One woman testified at the December 9, 2005, hearing in *McWaters*: "I was panicking because I was going to be homeless. My nerves was bad; I couldn't sleep." Jodi Wilgoren, *Judge Orders an Extension of FEMA Aid*, N.Y. TIMES, Dec. 13, 2005, at A30. Another woman tearfully testified that before the hurricane, "We had a life. We had stability. My son is looking forward to Christmas, I can't even give him a Christmas." Kevin McGill, *Evacuee Testifies in Suit on FEMA Hotel Program*, THE ADVOCATE (Baton Rouge), Dec. 10, 2005, at B8.

294. *McWaters*, 408 F. Supp. 2d at 232.

295. *Id.* at 233 & n.16 (citing Declaration of Michael Hirsch, para. 42, Rec. Doc. No. 32).

296. *Id.* at 235.

[they] were gnats to be brushed away while the defendants busy themselves with creating more bureaucratic regulations."²⁹⁷

The bureaucratic bumbling with respect to the Short-Term Lodging Program is but one example of the many blunders committed by FEMA in disaster relief efforts since 1989. Another example is FEMA's application of the shared-household rule.

As discussed above, under the shared-household rule, FEMA treats everyone thought to be part of the same pre-disaster household as a single unit for purposes of temporary housing assistance. Hence, FEMA's policy appears to be that people who live together in one residence before a disaster are expected to continue to live together after a disaster. In essence, each pre-disaster household is treated as a single unit in providing post-disaster assistance.

This policy has been criticized as "based on middle-class norms inapplicable in places where extended family members or unrelated people teamed up to pay the rent."²⁹⁸ The shared-household rule can have a disproportionately detrimental effect on low-income victims of natural disasters who may be part of large or extended families sharing a single home. If a large or extended family shares a single home, is it reasonable to expect that after a major natural disaster, one capable of destroying hundreds or thousands of homes or an entire city, such large and extended families would remain intact? In the case of major natural disasters, families may disintegrate and become separated through no fault of their own such that they are no longer able to share a single household. If that occurs, what should FEMA policy be if members of the same family are forced to evacuate in different directions to different places?

The policy should be to apply the shared-household rule in a flexible manner so as to not be rigid and punitive against large or extended families. FEMA is authorized to provide assistance to "individuals and households"²⁹⁹ and thus is not prohibited from aiding more than one household when disasters disintegrate

297. *Ridgely v. FEMA*, No. 07-2146, slip op. at 2, 6 (E.D. La. June 13, 2007).

298. STEINBERG, *supra* note 29, at 190.

299. 42 U.S.C. § 5174(a)(1) (2006).

families such that they are no longer able to share a single household. Hence, FEMA could treat such families as multiple households for purposes of receiving trailer assistance or rental assistance. This treatment of very large or extended families would recognize that such households merit more temporary housing assistance than a “standard” smaller household. Granting more temporary housing assistance could also mean providing very large or extended families with larger trailers instead of smaller standard-sized trailers. Currently, FEMA specifications prohibit trailers larger than fourteen feet wide or sixty feet long. FEMA purchased 2,360 larger trailers after Katrina but left them to sink into the mud in Arkansas because their size exceeded those specifications.³⁰⁰

A rigid application or misapplication of the shared-household rule can seem even more punitive if FEMA or some other governmental agency has haphazardly evacuated families who were victims of natural disasters by sending different members of the same family to different locations. Finally, the shared-household rule if applied rigidly or misapplied can result in the denial of benefits to otherwise eligible disaster victims who are not members of the same family. For example, if multiple unrelated individuals or families lived at the same address, such as in a multi-dwelling building, rooming house, boarding house, or other common facility, temporary housing assistance could be denied to individuals who shared an address with other individuals and households who had previously applied for and received benefits.

Denying temporary housing assistance based upon the shared-household rule makes sense to deter fraud in some cases. However, presuming that everyone at a shared address must be part of a single household for disaster-assistance purposes without investigating the details could lead to dire consequences for disaster victims. The plaintiffs in *McWaters v. FEMA* alleged that FEMA treated the elderly or ill who lived with a caregiver, those who lived in a group home, or those who shared a room or

300. S. Comm. on Homeland Security & Governmental Affairs, 109th Cong. 7–8 (2006) (statement of Richard L. Skinner, Inspector Gen., U.S. Dep’t of Homeland Security), *available at* <http://www.dhs.gov/xlibrary/assets/Skinner-021306.pdf> [hereinafter Skinner].

telephone number as part of the same household for purposes of receiving temporary housing assistance.³⁰¹ One can clearly see that the application of the shared-household rule under those circumstances would appear to be punitive and result in egregious hardship on low-income individuals. In that many low-income disaster victims may share housing prior to a disaster to reduce housing costs, it is not unrealistic to determine that these individuals maintain separate households.

For example, in *McWaters v. FEMA*, plaintiff Beatrice McWaters alleged that she was denied temporary housing assistance because she lived in the same home as her brother and mother, who had also applied for assistance, notwithstanding the fact that she paid rent to her mother.³⁰² William Davis, one of the plaintiffs in *McWaters*, was denied temporary housing assistance allegedly because his brother, who had been temporarily staying with him, applied for temporary housing assistance using William Davis's address. Although William Davis had been in Louisiana since Hurricane Katrina, he believed his brother was somewhere in Texas.³⁰³

The problems with rigidly applying or misapplying the shared-household rule can be exacerbated when FEMA applies the rule inconsistently.³⁰⁴ The plaintiffs in *McWaters* contended that FEMA had waived the shared-household rule for some but not for others.³⁰⁵ FEMA was criticized for allegedly changing the policy while not publicizing those changes, leaving the agency free to apply the policy inconsistently. Of course, such inconsistent application could lead to due process violation claims by victims of natural disasters. The due process violation argument has particular merit because nothing in the statute expressly permits the denial of benefits to individuals or families who, as a matter of economic necessity, are forced to share housing with others. The shared-household rule arguably is inconsistent with the Stafford Act and could be deemed an administrative policy or rule that

301. *McWaters Complaint*, *supra* note 97, at 11–12.

302. *Id.* at 8, 32.

303. *Id.* at 15–16, 31, 32.

304. Cheryl Smith, *FEMA's Flood Tide*, AUSTIN CHRON., Feb. 24, 2006, at 31, available at <http://www.austinchronicle.com/download/2006-02-24/chronicle.pdf>.

305. *McWaters Complaint*, *supra* note 97, at 54.

frustrates the intent of congressional policy, which is to provide temporary housing assistance to families and individuals who have lost their homes because of a natural disaster and who do not have insurance to cover living expenses.³⁰⁶

In 2006, Senators Susan Collins and Joseph Lieberman proposed changes to the Stafford Act that included modification of the shared-household rule.³⁰⁷ That bill was unsuccessful, but other amendments to the Stafford Act eventually were enacted in 2006.³⁰⁸ One welcome amendment to the Stafford Act was the inclusion of the cost of utilities and security deposits in temporary housing financial assistance.³⁰⁹ Katrina evacuees were unsuccessful in obtaining this assistance under the previous language of the Act.³¹⁰

The 2006 bill required the FEMA administrator to develop and disseminate guidance to the public on the types of housing assistance available after a disaster. The bill also required the FEMA administrator to report to Congress by July 2007 describing in detail the creation of the National Disaster Housing Strategy to improve coordination among agencies and better use federal resources in future disasters. On July 31, 2007, the FEMA administrator testified before Congress that FEMA was “making significant progress in . . . developing a national disaster housing strategy and improving operational planning for providing temporary housing in a catastrophic disaster.”³¹¹ The changes reported to Congress included developing the FEMA Housing Portal “to consolidate available rental resources for evacuees from Federal agencies, private organizations, and individuals”; increasing “the daily home inspection capacity of FEMA-contracted firms”; pursuing capabilities to quickly double Internet-

306. 42 U.S.C.A. § 5170b(a)(3)(B) (Supp. 2007).

307. S. 3721, 109th Cong. (2006).

308. H.R. 5441, 109th Cong. (2006) (enacted).

309. 42 U.S.C.A. § 5174(c)(1)(A)(i) (Supp. 2007).

310. *Watson v. FEMA*, No. 06-20651, 2006 WL 3420613 (5th Cir. Sept. 6, 2006).

311. *U.S. H. Comm. on Oversight and Gov't Reform*, 110th Cong. 16 (2007) (statement of R. David Paulison, Administrator, FEMA), available at <http://oversight.house.gov/documents/20070731105123.pdf> [hereinafter Paulison].

based registration intake capacity; and establishing a pilot program to deploy "Mobile Registration Intake Centers" to shelters.³¹²

The 2006 amendments to the Stafford Act and FEMA's recent initiatives are a good start, but much more needs to be done. To alleviate some of the blunders that have occurred and will continue to occur if changes in policies and practices are not made, we suggest implementing the following changes:

(1) Modify the shared-household rule or its application so that the rule does not unfairly discriminate against low-income victims of natural disasters.

(2) Update all outdated computer and communications systems that are used to process disaster assistance applications.

(3) Adequately staff toll-free phone lines to handle incoming calls so that the lines will not be perpetually busy.

(4) Hire additional permanent staff, train them well, and establish timelines to ensure prompt assistance where there are substantial backlogs.

(5) Implement the recommendations of the United States Department of Homeland Security Inspector General issued in his statement before the Senate Committee on Homeland Security and Governmental Affairs on February 13, 2006, to prevent fraud, waste, and abuse of government funds.³¹³

(6) Implement major programs to save, repair, and replace housing after a major disaster.

(7) Develop a comprehensive program with the United States Department of Housing and Urban Development and the United States Department of Agriculture to ensure that an adequate stock of affordable housing exists after a major disaster occurs.³¹⁴

(8) Eliminate unnecessary delays in the administrative process, such as time-consuming SBA loan applications for persons who clearly do not or cannot qualify for SBA loans.

312. *Id.* at 16–18.

313. Skinner, *supra* note 300, at 15–16.

314. The amendments include a pilot program to better use existing rental housing in disaster areas to provide timely and cost-effective temporary housing. H.R. 5441, 109th Cong. (2006) (enacted).

(9) Develop procedures for notice of termination, pre-termination hearings, and a navigable appellate process that comport with due process.³¹⁵

(10) Make available funding responsive to community needs such as providing funds for rebuilding or replacing housing units to state and local agencies and nonprofit housing organizations, as was eventually done successfully in California after the Loma Prieta earthquake.³¹⁶

(11) Fully leverage private and public resources to help communities detrimentally affected by disasters in their recovery efforts.

(12) Foster an environment of openness and honesty with victims of disasters by sharing information in simple, clear, and precise terms in an upfront and forthright manner rather than hiding behind bureaucratic doubletalk, obscure regulations, and loaded platitudes.

VI. CONCLUSION

Despite its assertions to the contrary, FEMA was obviously unprepared to deal with the housing assistance issues stemming from Hurricane Katrina. Even worse, FEMA acknowledged in April 2007 that it did not have an emergency response plan ready before the 2007 hurricane season,³¹⁷ although by July 31 the director stated he believed FEMA was prepared.³¹⁸ FEMA's response to the housing problems caused by Katrina was excruciatingly slow, which strained the patience of disaster victims

315. The court in *Ridgely* described the current process as "woefully inadequate even by these modest standards." *Ridgely v. FEMA*, No. 07-2146, slip op. at 7 (E.D. La. June 13, 2007). As one commentator noted in describing the need for due process in terminating government housing benefits under the strict liability drug policy, if poor citizens who rely on government housing assistance are deprived of that aid, "it should be for the right reasons and done the right way." Myers P. Namie, Note, *Strict Liability Drug Policy Renders "Innocent Tenants" Homeless: Department of Housing and Urban Development v. Rucker*, 30 S.U. L. REV. 277, 288 (2003).

316. Fagan, *supra* note 108.

317. Hope Yen, *Probe Calls FEMA's Pact Waste*, THE ADVOCATE (Baton Rouge), Apr. 23, 2007, at A1.

318. Paulison, *supra* note 311, at 19.

and indeed most Americans. FEMA's erratic behavior and internal bureaucratic debacles were troubling when one considers that the sole reason for the agency's existence is to assist disaster victims in meeting crucial needs.

The human consequences of natural disasters reverberate long after the events occur. Hence, it is imperative that Congress and the executive branch reexamine and reevaluate the role of FEMA to ensure that the agency deals with disaster relief as effectively as possible. While many of FEMA's mandates are directed to states, counties, municipalities, and businesses affected by natural disasters, FEMA must pay more attention to the disaster assistance needs of individuals and families most directly affected by disasters. The legislative and executive branches of our government and the American taxpayers must demand that human beings who are the victims of disasters be cared for equally, equitably, and fairly.

