

Statement of
The Honorable John Breaux

Before the

Subcommittee on State, Local, and Private Sector
Preparedness and Integration
of the
Committee on Homeland Security and Governmental Affairs
United States Senate

June 21, 2007

Mr. Chairman, members of the Committee, thank you for the opportunity to provide testimony today. I am John Breaux, Senior Counsel at Patton Boggs LLP. Last summer, I accepted the invitation of Duane Ackerman to serve alongside The Honorable Newt Gingrich as Co-Chair of the BENS Business Response Task Force. I would like to ask that my full testimony be submitted for the record, as well as the Task Force's report, "Getting Down To Business: An Action Plan for Public-Private Disaster Response Coordination."

Our report, issued in January of this year, focused on institutionalizing an effective and sustainable role for business in disaster preparation and response in partnership with all levels of government. To that end, as you have heard, it offered recommendations in three substantive areas:

1. Public-private collaboration, to plan, train, exercise, implement and evaluate joint actions required to facilitate effective communication, decision-making and execution;
2. Surge capacity for private-sector goods and services, and the capabilities resident in private-sector supply chains, to manage the delivery of goods and services (including pro bono and contracted) to and within disaster areas; and
3. The legal and regulatory environment, which can help or dramatically hinder efficient delivery of private-sector support during a disaster. It's also an important issue after the disaster in terms of economic continuity and recovery in the affected locales.

I would like to focus on this last area—the legal & regulatory environment—because it is in this category that I believe your subcommittee can be most effective in spurring improvement in our nation's disaster-response capabilities. I will conclude with some observations on how we might re-define existing resources to meet the recommendations in our report.

At Duane Ackerman's suggestion, in addition to the chair and co-chairs, the Task Force was comprised of 10 senior business leaders and over 20 expert advisors, divided into three scoping groups; each group was charged with developing recommendations in one of the three focus areas. I served as the senior advisor to the legal and regulatory group, and we set out to deliberate these questions:

- How should government improve Good Samaritan laws to better facilitate the participation of the businesses and business employees that volunteer to help?
- How should legislation, regulation and policy be better aligned at the federal, state and local levels to encourage private-sector preparedness and better mobilize the private sector in a catastrophic event?
- Is revision of the Stafford Act desirable?

After assimilating the results of the Task Force surveys, each scoping group developed recommendations for the *near term* designed to optimize business participation in disaster response. We also developed recommendations for the systematic *longer-term* integration of the private sector into the National Response Plan and its execution in a disaster.

Briefly, here are the findings of the group that I advised:

Business requires a predictable legal regime to operate efficiently in an emergency situation, whether that business is engaged in charitable or profit-motivated activities. The current legal and regulatory environment is neither predictable nor efficient.

Action by the Congress and the Executive Branch is essential for putting into place a legal and regulatory environment in which the private sector can become a full partner in the national response to disaster. We can and must ensure that federal, state and local emergency planners include the private sector in the preparations, testing, training, and execution of their responsibilities. We also must rethink the not-inconsequential issue of the legal allocation of risk through the civil justice system, notably in disaster-related areas of tort law, as well as through regulation.

Based on these findings, the Task Force makes the following recommendations to you, the Congress. Consider:

- Enacting a nationwide body of "disaster law";
- Modifying the Stafford Act to include the private sector; and

- Holding further hearings to determine which Task Force recommendations can be implemented under existing law and which will require new legislation or regulatory action.

Let me amplify the first two points in the belief that doing so will encourage you to hold additional hearings on the full set of recommendations.

NATIONAL DISASTER LAW. Major disasters are a national issue, and uniformity of law across states is essential to the efficient leveraging of the nation's business assets in dealing with them. During the Katrina response, many out-of-state businesses that tried to help had little or no familiarity with the laws of Louisiana or Mississippi, which hurt their efforts and hurt the people of both states. While we must respect the purposes and value of federalism, we should explore nevertheless whether we need a body of federal disaster law to preempt the heterogeneous patchwork of state law in this particular and narrow context.

Two basic principles should guide us in thinking about such a body of law:

- Things should get easier, not harder, and better, not worse, during a major disaster or incident of national significance.
- Individuals and businesses acting in good faith should be able to confidently provide assistance based on a predictable set of rules and responsibilities governing their conduct.

Following the hurricanes of 2005, a great number of laws and regulations necessarily were waived, suspended or modified— two cases in point are certain HIPAA (Health Insurance Portability and Accountability Act) privacy provisions and transportation regulations that inhibited the flow of goods or services to disaster sites. This body of waiver authority should be kept “on the shelf” for consideration in future disasters. In fact, the Task Force went so far in recommending that this issue should be considered in a preventative sense by having federal agencies at the ready to modify other likely provisions in line with the DHS National Planning Scenarios List. Either way, to be effective when invoked, government must communicate with the private sector in advance of and during the crisis so that the predictability standard is met.

REVISE THE STAFFORD ACT. As you know, the Robert T. Stafford Disaster Relief and Emergency Assistance Act is a federal law designed to bring an orderly and systematic means of federal natural-disaster assistance to state and local governments in carrying out their responsibilities to aid citizens. The Stafford Act is a 1988 amended version of the Disaster Relief Act of 1974. The amended act created the system in place today by which a Presidential Disaster Declaration of an Emergency triggers financial and physical assistance through FEMA. The Act gives FEMA the responsibility for coordinating government-wide relief efforts and includes the contributions of 28 federal agencies and non-governmental organizations, such as the

American Red Cross. In October 2000, Congress amended the law with passage of the Disaster Mitigation Act of 2000 (Public Law 106-390), which permitted contributions of federal resources to private nonprofit entities under certain conditions.

The SAFE Port Act of 2006 (P.L. 109-347, Sect. 607) extends the Stafford Act to include the private sector, but only to the extent that it precludes the head of a Federal agency from denying or impeding essential service providers¹ access to the disaster site or impeding them from performing restoration or repair services.

As we saw in Katrina, though, this is not enough. For example, without utilities, banks in the disaster zone—even though they had cash to dispense—could not reopen because they did not have adequate security and local and federal officers would not provide the security requested because the banks were commercial, not public, entities. In light of these and other lapses, several recent congressional actions have proposed changing the Stafford Act yet again, but none of these efforts have been successful. The Task Force believes that Congress should extend coverage of the Act beyond state and local government to include the private sector, with particular attention to enabling the federal government to provide security or protection for private sector personnel and assets operating in a disaster zone. Authorities should be automatic upon presidential declaration of a national disaster, but protections offered should be specific and limited to situations where it is impractical or impossible for the private sector to provide for on its own security.

While remedies to the private sector's full participation in the nation's disaster-response capabilities are urgent, such remedies should not be taken hastily. Adequate consideration and deliberation before deciding to legislate is in order: once in place, law is hard to undo. The Task Force, therefore, urges Congress to review carefully the body of existing law pertaining to disaster response and the agencies of government responsible for carrying out that law. The initial focus of its investigation should be to determine which of the recommendations of this Task Force can be implemented under existing statute, and which require new legislation.

I want to emphasize that the Task Force saw a vital distinction between a need to ensure a predictable legal and regulatory regime, and any alterations to the allocation of risk; it focused exclusively on the former. We recognized that allocation of risk implicates significant, and often contentious, policy issues, and there is no need to address such issues in this context. In contrast, simply ensuring that existing legal standards are clear, stable and

¹ Essential Service Providers include entities that provide telecommunications, electrical power, natural gas, water and sewer services or any other essential services as determined by the President. They include municipal, nonprofit and private, for profit, entities in the act of responding to an emergency or major disaster.

predictable will dramatically increase the ability of the private sector to effectively engage in time of disaster.

Let me conclude with a commentary on financial resources. What I've discussed can be accomplished by you, the Congress, and by the executive branch with little or no additional cost. Our principle Task Force recommendation remains that the American private sector must be systematically integrated into the nation's response to disasters, natural and man-made alike. Building public-private collaborative partnerships, starting at the state level, is one of the most important steps that can be taken now to prepare the nation for future contingencies. The primary recommended vehicle is the already existing network of state Emergency Operations Centers (EOCs).

Most states and major cities already have EOCs. In a few, the broader private sector (that is, not just public utilities) is becoming more integrated through a complementary model that the Task Force calls the Business Operations Center (BOC).² As the model scales up to the regional or federal level, sources of funding need to be identified to create and sustain the integration of Emergency Operations Centers with Business Operations Centers. The major investment is talent and time, and the Task Force believes that the private sector itself is willing to commit those resources if it is given its seat at the table.

The Task Force believes that to ensure that the BOC concept takes root nationwide, Congress should direct DHS to develop guidelines and funding for states and urban areas to build BOCs. Currently, grant programs are geared largely to funding one-off exercises and Public-Private communications systems and data interchanges. To address the BOC and cooperation issues, however, such sustained funding through the FEMA grant program should be tied to the requirement that states and urban areas are developing, training and exercising this business-government collaboration. By doing so, the federal government will be taking a tangible step to share this public-private collaborative ethos. It will also be acknowledging the simple fact that businesses will and do get called upon in crisis, and thus, when our government authorities are planning ahead for such, businesses should be an integral part of that preparation.

To be certain, this work is not entirely on your shoulders. For our part, the Task Force has embarked on a number of follow-up initiatives through BENS and its members:

² Participation in the BOC should represent critical infrastructure and other industries/companies vital to community viability and continuity in crisis situations. Connected structurally to its corresponding EOC, a BOC will greatly enhance government's disaster-response capability by providing a vehicle to collaborate with the private sector in planning, preparation, training, exercises and, ultimately, execution. More information can be found starting on pg 16 of the Business Response Task Force Report.

- The development of a Business Emergency Management Assistance Compact (“BEMAC”) concept as a companion to the Emergency Management Assistance Compact structure;
- Assistance to DHS in the revision of the National Incident Management System (NIMS) and the National Response Plan (NRP);
- Work with individual state governments to strengthen Good Samaritan laws to encourage and allow for public-private partnerships in crisis situations; and
- The development of an efficient mechanism by which the federal government might manage the disaster-prompted suspensions of applicable regulations.

To close, the Task Force understands that a comprehensive Congressional review of the legal and regulatory environment surrounding emergency response will require time and effort. For that reason, we urge this body to schedule hearings that will start the process of solving some these longer-term issues. At the same time, we recommend that government seize the opportunity to address the report’s short-term objectives, in particular the provision or application of federal financial resources that will enable business and government to train and exercise together. Doing so will be a significant and proactive step towards ensuring that an adequate private-sector response is available for the next disaster—and not one that may befall us many years from now.

Thank you.