

WEATHERING THE STORM: UTILIZING CONGRESSIONAL INVESTIGATIONS TO IMPROVE NATIONAL HURRICANE PREPAREDNESS

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I. INTRODUCTION

During the 2017 hurricane season, three major storms impacted different regions of the United States. These storms—Hurricanes Harvey, Irma, and Maria—devastated communities in Texas, Florida, and Puerto Rico within the span of a month. These storms were so destructive that the World Meteorological Organization has retired all three storm names, meaning no future hurricane will ever bear the names Harvey, Irma, or Maria again.¹ In response, according to the Government Accountability Office (“GAO”), “19 federal agencies had entered into contracts and obligated over \$5.6 billion on those contracts to support efforts related to Hurricanes Harvey, Irma, and Maria” as of December 31, 2017.²

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¹ WORLD METEOROLOGICAL ASSOC., *WMO Hurricane Committee reviews devastating 2017 season, retires names* (Apr. 12, 2018), <https://public.wmo.int/en/media/news/wmo-hurricane-committee-reviews-devastating-2017-season-retires-names>, archived at <https://perma.cc/E9RD-WHBZ>.

² GOV'T ACCOUNTABILITY OFFICE, *2017 Disaster Contracting: Observations on Federal Contracting for Response and Recovery Efforts* (Feb. 2018), <https://www.gao.gov/assets/700/690425.pdf>, archived at <https://perma.cc/7MRQ-SB75>.

The Constitution states that Congress shall have the authority to “make all laws which shall be necessary and proper.”³ From this mandate, Congress derives its implied powers of investigation, “to consider proposed legislation and also to oversee the administration of existing governmental programs.”⁴ This authority has been affirmed by the Supreme Court in *McGrain v. Daugherty*, in which the Court noted that Congress not only possesses “such powers as are expressly granted [] by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective . . . [and] that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.”⁵ In furtherance of this constitutional mandate and its legislative objectives, Congress investigates fraud, waste, abuse, and mismanagement.⁶ As Scott Amey, General Counsel of the Project on Government Oversight noted: “[i]t’s not too early to start investigating fraud, waste and abuse when . . . billion[s] in taxpayer dollars has gone out the door.”⁷

Pursuant to such authority, on October 27, 2017, Ranking Member of the Senate’s Committee on Homeland Security & Governmental Affairs, Claire McCaskill (D-MO), invited the committee’s chairman to conduct “a bipartisan investigation and consider scheduling a series of . . . hearings to lay out the reality of the federal government’s response” to these storms.⁸ In her letter, Senator McCaskill specifically noted the “humanitarian crisis in Puerto Rico,” where one week after Hurricane Maria made landfall on September 20, “97% of the 3.4 million U.S. citizens living [on the island]. . . were without power, and half had no running water.”⁹ The Senator also noted that “90% of cellular communications sites were out of service, and eight of the 37 hospitals that ha[d] been assessed. . . were not operational.”¹⁰ Although these statistics cannot fully convey the full cost of these storms, both in terms of human life and financial impact, McCaskill’s letter serves as a call to action. She characterized Congress’ role as follows: “[W]e have the dual obligation of ensuring that relief funds are reaching

³ U.S. CONST., art. I, § 8.

⁴ *Congressional Investigations*, 4 WEST’S FED. ADMIN. PRAC. § 4283 (West, 2018).

⁵ *McGrain v. Daugherty*, 273 U.S. 135, 173-74 (1927).

⁶ U.S. GOV’T ACCOUNTABILITY OFFICE, FRAUD, WASTE, ABUSE, AND MISMANAGEMENT: KNOW HOW TO RECOGNIZE AND REPORT THEM (2018), <https://www.gao.gov/assets/680/676651.pdf>, archived at <https://perma.cc/7MRQ-SB75>.

⁷ Eric Katz, *Congress, FBI Already Investigating Potential Abuse of Federal Funds in Puerto Rico’s Disaster Response*, GOV’T EXECUTIVE (Oct. 18, 2017), <https://www.govexec.com/management/2017/10/congress-fbi-already-investigating-federal-spending-fraud-puerto-ricos-disaster-response/141876/>, archived at <https://perma.cc/7YN6-25TA>.

⁸ Letter from Claire McCaskill, Senator, to Ron Johnson, Senator (Oct. 16, 2017), <https://www.hsgac.senate.gov/imo/media/doc/2017-10-16%20CMC%20ltr%20to%20RHJ%20re%20HSGAC%20hurricane%20response%20hearings.pdf>, archived at <https://perma.cc/65LM-B34P>.

⁹ *Id.*

¹⁰ *Id.*

disaster victims in an effective and efficient manner and monitoring government spending in an effort to protect the interests of taxpayers.”¹¹

Congressional investigations provide an essential mechanism by which to achieve this twofold obligation, allowing our nation’s elected public officials to evaluate past actions and shape future policies. In explaining the importance of initiating an investigation, Senator McCaskill drew comparisons to Hurricane Katrina to underscore the significance of oversight in response to the 2017 storms. For instance, in noting that damage from the three storms is estimated to “exceed \$300 billion, more than double the total economic damage wrought” by Katrina in 2005, Senator McCaskill highlighted the extent of the devastation and the incredible volume of resources needed in the recovery process.¹² By comparing the destruction caused by the storms, the Senator also hoped to contrast Congress’ divergent responses to these storms. McCaskill described the committee’s response to Katrina in 2005, and remarked that during “the 109th Congress, under Republican leadership, the full Committee held 21 hearings on Hurricane Katrina.”¹³ In drawing this link, Senator McCaskill underscored the importance of a bipartisan investigation into the 2017 hurricane season.

Congressional leaders are at a crossroads and must determine what to do next. The response of individual leaders will invariably differ based on the interests each seeks to protect in conducting Congress’ investigatory functions. Senator McCaskill’s call for a joint investigation makes an overture to find common ground in the investigation into Hurricane Maria recovery efforts. Elected officials, particularly Democrats and moderate Republicans, have a shared interest in a transparent investigation that highlights institutional failures and the shortcomings of the administration’s response to the storm.

A range of political interests have the potential to impede collaborative efforts, because some representatives have staked a position that is highly protective of the administration and been wary to seem critical of the President. When asked about critics’ reproach of the President’s post-Maria management efforts, Senator John Kennedy (R-LA) responded: “I think that’s all a bunch of nonsense. It’s irrelevant. It’s people trying to score political points. That’s all it is. It’s the people who hate Trump trying to make him look bad.” Such skepticism of the current administration’s actions may pose investigatory challenges. Moreover, actors who wish to shift blame to the island, its internal problems, and its local leadership may focus their inquiries accordingly to spotlight these underlying challenges.

Perhaps prompted by this skepticism of partisan interests, Representative Nydia Velázquez (D-NY), the first Puerto Rican woman to be elected to Congress, called “for the establishment of an independent commission similar to what we had after 9/11, to examine the death toll, the federal response

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

and how FEMA and other agencies may have responded sluggishly based on artificially low numbers.”¹⁴ Members like her, who have personal ties to the island or constituents concerned with Puerto Rico, offer yet another perspective of the role of these investigations—one that focuses on the ongoing humanitarian crisis and the challenges of the people.

This paper goes on to describe a number of the investigative actions that have been taken by various members and committees in Congress, both in the House and Senate. These various congressional inquiries demonstrate that the nation’s infrastructure faces significant challenges with respect to fraud, waste, and abuse in responding to national disasters. Worse still, these institutional gaps and shortcomings disproportionately impact vulnerable communities, particularly as evidenced in the federal response to Hurricane Maria. Differences in the federal response between Hurricane Maria and other storms, including Hurricanes Harvey and Irma, are also discussed. These findings also underscore the importance of ongoing congressional oversight, particularly when such mismanagement can worsen the severity of an existing catastrophe; dereliction costs lives, not merely monetary resources. Investigations are not only critical to preserve government transparency and public accountability; they also inform future policy making.

Mark Twain is credited with saying: “History doesn’t repeat itself, but it often rhymes.” The response to Hurricane Maria should mark a turning point in our nation’s emergency preparedness planning. It is time for our country’s leaders to correct the systemic flaws that allowed for the large-scale, widespread maladministration of resources in the wake of Hurricane Maria. Such action would prevent our national refrain from repeating—a chorus of government missteps that result in a disproportionate impact on susceptible, under-resourced, or marginalized communities.

II. INVESTIGATIONS OF WASTE, FRAUD, AND ABUSE AFTER HURRICANE MARIA

This section provides a robust, although not comprehensive, survey of the critical investigative tasks undertaken in the wake of the 2017 hurricane season. These investigations track the institutional failings of our nation’s emergency response systems, beginning with a failure to coordinate and implement a comprehensive disaster readiness plan, and concluding with a calamitous series of government contracts during the recovery efforts post-Hurricane Maria.

¹⁴ Daniella Diaz & Elizabeth Landers, *Democratic Lawmaker Calls for 9/11-Style Commission to Investigate Hurricane Deaths in Puerto Rico*, CNN (June 6, 2018), <https://www.cnn.com/2018/06/06/politics/puerto-rico-deaths-commission-hurricane-maria-congress/index.html>, archived at <https://perma.cc/3ZHK-SVU2>.

A. *Death Toll*

It may never be precisely certain exactly how many people died as a result of Hurricane Maria. When the death toll was updated on December 29, 2017, there were 64 reported fatalities.¹⁵ However, even then, several reports indicated that the official death toll was *extremely* incorrect. Although reports have varied, many estimated that 500 to 1,000 individuals lost their lives; several estimated more than 1,000 fatalities. One estimate by a demographer at Pennsylvania State University, the death toll is closer to 1,230.¹⁶ An analysis by The New York Times of the same data, obtained from Puerto Rico's Vital Statistics System, estimates the death toll at 1,052.¹⁷ A study from Harvard's School of Public Health and Medical Center published in the New England Journal of Medicine "estimates that 4,645 deaths can be linked to the hurricane and its immediate aftermath." Such a projected estimate would mean that over 70 times more individuals perished than the government's official death toll acknowledged and would mean that Hurricane Maria was twice as lethal as Hurricane Katrina, which killed 1,833 individuals.¹⁸ In August 2018, the official death toll in Puerto Rico was increased to 2,975, "nearly 50 times the previous estimate of 64."¹⁹

It is not unusual for death toll numbers to vary slightly by reporting agency, particularly in the immediate aftermath of a storm. Often, these differences are based on variations in defining what constitutes a hurricane-related death. For emergencies, the Centers for Disease Control & Prevention ("CDC") distinguishes between direct fatalities, those "directly attributable to the forces of the disaster or by the direct consequences of these forces, such as structural collapse, flying debris, or radiation exposure," and indirect deaths, which result from "unsafe or unhealthy conditions present

¹⁵ Arelis R. Hernández, *GWU Experts Tapped to Review Hurricane Maria Death Toll in Puerto Rico*, WASH. POST (Feb. 22, 2018), https://www.washingtonpost.com/national/gwu-experts-tapped-to-review-hurricane-maria-death-toll-in-puerto-rico/2018/02/22/7f0a1c94-17e7-11e8-8b08-027a6ccb38eb_story.html?utm_term=.0b6205a5edeb, archived at <https://perma.cc/R5LL-QS39>; see also Ramon Espinosa, *Why Puerto Rico's Death Toll from Hurricane Maria is so Much Higher than Officials Thought*, CONVERSATION (Jan. 3, 2018), <https://theconversation.com/why-puerto-ricos-death-toll-from-hurricane-maria-is-so-much-higher-than-officials-thought-89349>, archived at <https://perma.cc/4J6Y-SSBJ>.

¹⁶ Milton Carrero Galarza, *Puerto Rico Deaths Related to Hurricane Maria Continued for Months after the Storm, Data Suggest*, L.A. TIMES (Feb. 28, 2018), <http://www.latimes.com/nation/la-na-puerto-rico-death-toll-20180228-story.html>, archived at <https://perma.cc/U65H-7R66>.

¹⁷ Frances Robles, Kenan Davis, Sheri Fink & Sarah Almukhtar, *Official Toll in Puerto Rico: 64. Actual Deaths May Be 1,052.*, N.Y. TIMES (Dec. 9, 2017), <https://www.nytimes.com/interactive/2017/12/08/us/puerto-rico-hurricane-maria-death-toll.html>, archived at <https://perma.cc/4NYW-958M>.

¹⁸ Arelis R. Hernández & Laurie McGinley, *Harvard Study Estimates Thousands Died in Puerto Rico Because of Hurricane Maria*, WASH. POST (May 29, 2018), https://www.washingtonpost.com/national/harvard-study-estimates-thousands-died-in-puerto-rico-due-to-hurricane-maria/2018/05/29/1a82503a-6070-11e8-a4a4-c070ef53f315_story.html?noredirect=on&utm_term=.dc24bbcf92fe, archived at <https://perma.cc/7PMH-4MKB>.

¹⁹ *Puerto Rico Increases Hurricane Maria Death Toll to 2,975*, BBC (Aug. 29, 2018), <https://www.bbc.com/news/world-us-canada-45338080>.

during any phase of the disaster. . . [that] contribute to a death.”²⁰ The CDC provides a flow chart to assist officials in determining whether a death is disaster-related, including a two-step process for assessing indirect fatalities. Officials are instructed to consider if “the death [was] caused by direct physical forces of the hazard or event,” including traumatic injury, drowning, electrocution, and suffocation.²¹ Next, examiners should assess if the death resulted from “unsafe or unhealthy conditions created by the hazard or event, or by preparations for or cleanup after the natural hazard or event, or by performing work to minimize consequences of the disaster,” which encompasses repair or cleanup activities as well as disruptions to health care, utilities, and transportation.²² However, because there are no required federal standards “to guide medical examiners in their designations,” states and localities have “broad discretion in deciding what constitutes a storm-related death, and determinations can vary from county to county.”²³

In comparing methods for death toll calculations from the hurricanes that occurred earlier in the season in Florida and Texas, the differences are notable. Texas’s Harris County Institute of Forensic Sciences only considers a death to be storm-related “if it occurs as a direct consequence of environmental factors related to the storm or flood.”²⁴ Similarly, Florida’s District Nine Medical Examiner’s Office death toll includes “those caused by flooding or falling debris during a hurricane, [which] are easy to stamp as storm-related.”²⁵ However, the Florida office also includes other types of deaths as storm-related, with discretion. Medical examiners are more likely to include a victim in the death count “[i]f the victim’s shelter was overcrowded, without electricity and lacking in food and clothing.”²⁶ These determinations are most complicated when there are multiple contributing factors. As the Chief Medical Examiner from the Florida office framed the query: if an individual “already [had] poor baseline health, and they’re already kind of frail, does the stress of the hurricane push them over, or would they have died anyway?”²⁷ These are discretionary determinations, where variation can arise. Therefore, in cases where an individual’s underlying health was bad enough, the death would not be counted as hurricane-related.²⁸

²⁰ U.S. DEP’T OF HEALTH & HUMAN SERVS., CTRS FOR DISEASE CONTROL & PREVENTION, NAT’L CTR. FOR HEALTH STATISTICS, NAT’L VITAL STATISTICS SYS., *A Reference Guide for Certification of Deaths in the Event of a Natural, Human-induced, or Chemical/Radiological Disaster* (Oct. 2017), <https://www.cdc.gov/nchs/data/nvss/vsrg/vsrg01.pdf>, archived at <https://perma.cc/9XSL-VNCP>.

²¹ *Id.*

²² *Id.*

²³ Quint Forgey, *Storm-Related Deaths Can Be Difficult to Determine*, WALL STREET J. (Sept. 14, 2017), <https://www.wsj.com/articles/what-counts-as-a-storm-related-death-it-can-depend-1505416887?mg=prod/accounts-wsj>, archived at <https://perma.cc/2HLR-HFX5>.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

Varying definitions of “hurricane-related” deaths or confusion as to what is encompassed in this categorization has been problematic. A “lack of transparency and communication with those handling burials and cremations across the island means the count is less likely to be accurate,” especially for Hurricane Maria.²⁹ However, these variations are insufficient to explain the discrepancy between the official and projected death toll calculation. The severity and duration of many of the hurricane’s lingering effects, including “long-term loss of power, lack of health care, [and] inaccessibility in some remote areas,” prompted general skepticism regarding the tally’s accuracy.³⁰ There were several identifiable issues with Puerto Rico’s death count.

First, if it is unclear whether an individual’s death was hurricane-related or not, medical examiners are supposed to investigate, according to Héctor Pesquera, head of Puerto Rico’s Department of Public Safety.³¹ Yet—especially in the immediate aftermath of the storm—“many doctors do not have the time to investigate each death.”³² Even when investigations are conducted, some of them may be inadequate or medical practitioners may cut corners. One relative reported that he spoke to a forensic investigator for only thirty minutes, when such interviews are typically closer to an hour and a half; the individual also stated that he was not asked any questions directly about the hurricane.³³ Additionally, “medical examiners do not check to see if crucial information has been left out” or may not be aware of what information they are missing in making their cause of death determination. Instead, examiners “will simply not include it in the storm-related death count.”³⁴ According to the Puerto Rican government, indirect deaths should be counted as part of the official death toll. In its official count, the government has included “three suicides and a few heart attacks,” as well as a fatality that “occurred after a person fell off the roof while apparently trying to repair a storm-damaged home.”³⁵

However, the correct categorization of close-call or ambiguous mortalities is far from the most serious concern. Several investigations have revealed mass cremations were undertaken in the wake of the storm, which were not originally included in the death toll calculation. In October 2017,

²⁹ Nidhi Prakash, *Puerto Rico Is Burning Its Dead, And We May Never Know How Many People The Hurricane Really Killed*, BUZZFEED NEWS (Oct. 27, 2017), https://www.buzzfeed.com/nidhiprakash/puerto-rico-cremations?utm_term=.eyz1AqAXa#.wy1x070jZ, archived at <https://perma.cc/X2SV-GJUT>.

³⁰ Hernández, *supra* note 15.

³¹ Eliza Barclay & Alexia Fernández Campbell, *Data Shows Hurricane Deaths in Puerto Rico Could be over 1,000*, VOX (Dec. 8, 2017), <https://www.vox.com/policy-and-politics/2017/11/29/16623926/puerto-rico-death-toll-hurricane-maria-count>, archived at <https://perma.cc/NY6L-82DQ>.

³² *Id.*

³³ John D. Sutter, Leyla Santiago & Khushbu Shah, *We Surveyed 112 Puerto Rican Funeral Homes to Check the Accuracy of the Hurricane Death Toll. This is What We Found.*, CNN (Nov. 20, 2017), <https://www.cnn.com/2017/11/20/health/hurricane-maria-uncounted-deaths-invs/index.html>, archived at <https://perma.cc/FRA5-LG75>.

³⁴ Barclay & Fernández Campbell, *supra* note 31.

³⁵ *Id.*

BuzzFeed News reported that within a month of the storm making landfall, the Puerto Rican government allowed 911 bodies to be cremated, “but that not one of them [was] physically examined by a government medical examiner to determine if it should be included in the official death toll.”³⁶ Nevertheless, the government reported all 911 deaths were due to “natural causes” and did not include any of these fatalities in its official count.³⁷ In November, CNN reporters spoke with 112 funeral homes, about half of the total number of mortuaries in Puerto Rico.³⁸ In discussions with the funeral homes, these representatives “identified 499 deaths in the month after the storm—September 20 to October 19—which they say were related to Hurricane Maria and its aftermath.”³⁹ Although the 499 figure predates death toll updates provided by the Puerto Rican government, the deaths reported by only half of the funeral homes within the first month alone is almost eight times higher than the official death toll reported in December. This same cohort of funeral homes reported referring 601 deaths to the government’s forensics lab for analysis.⁴⁰ The Puerto Rican government received almost 850 cases for analysis within the first month post-Maria; “of those, 377 were visually examined but not autopsied . . . because the deaths resulted from natural causes.”⁴¹ Worse still, a representative from New York University’s Institute for Public Knowledge explained that “a significant number of bodies [] don’t get processed through funeral homes,” meaning that even these figures require further updating and that as reporting continues, “that number is probably going to spike again.”⁴²

The official death toll is not only important in determining large-scale recovery efforts, but also impacts individual benefits. For instance, one program offered by the Federal Emergency Management Agency (“FEMA”) provides funding up to \$6,000 to help pay for funeral expenses, “but the deaths must be certified as hurricane-related in order to qualify.”⁴³ As of November, FEMA “received 2,339 applications for burial and funeral assistance,” with another 168 pending applications.⁴⁴ It is unclear if the agency has considered the potential impact of these broader challenges in calculating an accurate death toll in its review of these applications. In addition to some applications that FEMA has determined are not hurricane-related, it is

³⁶ Nidhi Prakash, *Puerto Rico’s Government Just Admitted 911 People Died After The Hurricane — Of “Natural Causes”*, BUZZFEED NEWS (Oct. 27, 2017), https://www.buzzfeed.com/nidhiprakash/puerto-rico-natural-causes?utm_term=.qbK82N2Wl#.tqJyLJLOE, archived at <https://perma.cc/W3F3-KGU5>.

³⁷ Brennan Weiss, *Puerto Rico is Allowing Funeral Homes to Burn the Bodies of People Killed by Hurricane Maria Without Counting Them in the Official Death Toll*, BUSINESS INSIDER (Oct. 31, 2017), <http://www.businessinsider.com/puerto-rico-hurricane-maria-death-toll-2017-10>, archived at <https://perma.cc/EW2U-5PGW>.

³⁸ Sutter et al., *supra* note 33.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Barclay & Fernández Campbell, *supra* note 31.

uncertain how many of the “applications are seeking help to bury people who died from the storm” as opposed to funding requests “to repair grave sites disturbed by the hurricane,” as both forms of assistance are provided by the same FEMA program.⁴⁵

Puerto Rican officials recognized these issues and announced that a research team from George Washington University would conduct “an independent investigation into Hurricane Maria’s death toll in Puerto Rico and will examine the methods local government officials used to count hurricane-related fatalities.”⁴⁶ The completed report prompted Puerto Rican officials to update the death toll.⁴⁷ Contributing to the public scrutiny that has compelled officials to review and correct the death toll, the Center for Investigative Journalism filed suit against Puerto Rico’s “Demographic Registry for not providing statistical updates about deaths that occurred the months after Hurricane Maria.”⁴⁸

On Capitol Hill, the efforts to investigate the death toll have been spearheaded by Democrats and Puerto Rico-friendly members. A coalition of thirteen Democratic senators authored a letter to Elaine Duke, the Acting Secretary of the Department of Homeland Security (“DHS”), expressing concerns about the accuracy of the death toll. In the correspondence, the senators requested DHS “ensure that there is sufficient cooperation with local authorities to obtain accurate information” in addition to “verify[ing] that the methodology for calculating fatalities in Puerto Rico accords with best practices and does not undercount.”⁴⁹ Additionally, Congressman Bennie Thompson (D-MS), the Ranking Democrat on the House Committee on Homeland Security, and Congresswoman Nydia Velázquez (D-NY) have requested that the DHS investigate potential underreporting in the official death toll.⁵⁰ In December, these two representatives also co-authored a letter to the GAO’s Comptroller General, requesting that the agency review the official death toll in Puerto Rico, including an evaluation of the sufficiency

⁴⁵ *Id.*

⁴⁶ Hernández, *supra* note 15.

⁴⁷ See BBC, *supra* note 19; see also *Project Report: Ascertainment of the Estimated Excess Mortality from Hurricane Maria in Puerto Rico*, Milken Institute, School of Public Health, George Washington University (Aug. 29, 2018), <https://publichealth.gwu.edu/sites/default/files/downloads/projects/PRstudy/Acertainment%20of%20the%20Estimated%20Excess%20Mortality%20from%20Hurricane%20Maria%20in%20Puerto%20Rico.pdf>, archived at <https://perma.cc/86C4-5FR8>.

⁴⁸ Julio Ricardo Varela, *Puerto Rican Journalists Sue Demographic Registry Over Hurricane María Death Statistics*, LATINO USA (Feb. 8, 2018), <http://latinousa.org/2018/02/08/puerto-rican-journalists-sue-demographic-registry-hurricane-maria-death-statistics/>, archived at <https://perma.cc/2BYX-Z95S>.

⁴⁹ Letter from Elizabeth Warren, Senator, et al. to Elaine Duke, Acting Sec’y U.S. Dep’t of Homeland Sec. (Oct. 19, 2017), https://www.warren.senate.gov/files/documents/2017_10_19_DHS_Puerto_Rico.pdf, archived at <https://perma.cc/RH6V-TMHK>.

⁵⁰ Letter from Nydia M. Velázquez, Congresswoman, and Bennie Thompson, Congressman, to Elaine Duke, Acting Sec’y U.S. Dep’t of Homeland Sec. (Oct. 12, 2017), https://velazquez.house.gov/sites/velazquez.house.gov/files/2089_001.pdf, archived at <https://perma.cc/6ZNR-5LNT>.

and accuracy of the methodology used to calculate the death toll and points of difference in Puerto Rico's procedures with respect to this count.⁵¹

As reports of the death toll surged, so did public scrutiny. Presumptions of incompetence for this egregious miscalculation—coupled with frustrations over the lack of transparency, outrage over the loss of life, and dismay at the inadequacy of the government's response—increased pressure on representatives to acknowledge the seriousness of Puerto Rico's plight. Public sentiment has provided powerful ammunition for legislators wishing to advocate on behalf of the Puerto Rican people, who rely on an updated and accurate death toll to garner support for greater, sustained resource investment to assist with the island's long-term recovery. The inaccuracy of the death toll could also provide elected officials with an objective, nonpartisan basis to legitimize further investigations into shortcomings of the post-Maria recovery efforts.

B. Energy Infrastructure

Although issues with post-hurricane contracting for power restoration are addressed separately, including problems with the contract solicitation process and difficulties with vendor performance, Puerto Rico's power grid and utility service provider faced severe challenges long before Maria became a hurricane. These underlying issues experienced by the Puerto Rico Electric Power Authority ("PREPA") (in Spanish, *Autoridad de Energía Eléctrica*, or "AEE") were exacerbated by the storm, resulting in detrimental consequences for the island's residents. As of March 9, 2018, the U.S. Army Corps of Engineers ("USACE") reported that power had been restored "to 90.19 percent of customers, or more than 1,328,490 million clients," but this means approximately "145,000 clients remain[ed] without service since Hurricane Maria devastated the island and its power grid" nearly six months after the storm.⁵²

Service issues also persisted. On April 18, 2018, "[e]very single power customer on the U.S. territory" lost power and "more than [three] million people are affected."⁵³ Although this was the first total blackout on the island since the hurricane, a February "explosion at a power substation plunged San Juan back into darkness" and an earlier incident in April "cut

⁵¹ Letter from Nydia M. Velázquez, Congresswoman, and Bennie Thompson, Congressman, to Gene Dodaro, Comptroller Gen., U.S. Gov't Accountability Office (Dec. 13, 2017), https://velazquez.house.gov/sites/velazquez.house.gov/files/12_13_2017_Letter%20to%20GAO%20on%20death%20toll.pdf, archived at <https://perma.cc/F357-Z5EL>.

⁵² Preston Chasteen, *Army Corps of Engineers Announces 90 Percent Power Restoration for Puerto Rico Citizens*, U.S. ARMY (Mar. 9, 2018), https://www.army.mil/article/201863/army_corps_of_engineers_announces_90_percent_power_restoration_for_puerto_rico_citizens, archived at <https://perma.cc/97C4-C3JS>.

⁵³ Camila Domonoske, *Puerto Rico Loses Power — Again*, NPR (Apr. 18, 2018), <https://www.npr.org/sections/thetwo-way/2018/04/18/603569966/puerto-rico-loses-power-again>, archived at <https://perma.cc/F7C7-92UK>.

power to more than half the island's population."⁵⁴ April's total blackout coincided with the Puerto Rico legislature's debate regarding "a bill that would privatize the island's power company, which is \$14 billion in debt and relies on infrastructure nearly three times older than the industry average."⁵⁵ Understanding PREPA's shortcomings, with respect to both the agency's financial strife, dilapidated physical infrastructure, and poor management, is essential to understanding the extent of the devastation and the challenges this presents to recovery efforts.

First, PREPA is severely in debt. PREPA "is responsible for \$9 billion of Puerto Rico's \$73 billion debt load."⁵⁶ In July 2017, months before Hurricane Maria, "creditors of the now-bankrupt power utility [filed a lawsuit] asking a U.S. federal judge to appoint a receiver to manage PREPA's assets."⁵⁷ Negotiated efforts to restructure the debt failed. PREPA refused creditors' proposal to cut bond repayments by fifteen percent "in exchange for higher-rated bonds secured by a dedicated charge on customer bills."⁵⁸ Despite these repayment concerns, creditors "offered the utility a new \$1 billion loan and a discount on a portion of the existing debt to help recovery efforts after Hurricane Maria devastated the island."⁵⁹ This will allow "PREPA to fulfill a cost-sharing requirement for FEMA aid, enabling the utility to qualify for FEMA funds of at least \$3 billion, and at most \$9 billion."⁶⁰ This substantial debt has limited PREPA's ability to fully finance its operations in other ways. Experts anticipate this predicament will worsen because "there is no capacity for any debt payments in the coming decade, and the entire debt stock will need to be massively written-down to make the island's recovery feasible."⁶¹

Ongoing power issues are also connected to the dilapidated condition of Puerto Rico's electrical infrastructure. These problems include "high-priced

⁵⁴ *Id.*

⁵⁵ Danica Coto, *An Island-Wide Power Outage Just Hit Puerto Rico — the First Since Hurricane Maria*, BUSINESS INSIDER (Apr. 18, 2018), <http://www.businessinsider.com/puerto-rico-power-outage-hurricane-maria-2018-4>, archived at <https://perma.cc/Z9SX-BSY4>.

⁵⁶ Josh Siegel, *House Panel Investigating Puerto Rico's Power Authority for Corruption*, WASH. EXAMINER (Mar. 12, 2018), <https://www.washingtonexaminer.com/policy/energy/house-panel-investigating-puerto-ricos-power-authority-for-corruption>, archived at <https://perma.cc/N6BS-74QS>.

⁵⁷ Nick Brown, *Bondholders Seek Receiver for Puerto Rico Utility PREPA*, REUTERS (July, 18, 2017), <https://www.reuters.com/article/us-puertorico-debt-prepa/bondholders-seek-receiver-for-puerto-rico-utility-prepa-idUSKBN1A324H>, archived at <https://perma.cc/W2P3-MV7F>.

⁵⁸ *Id.*

⁵⁹ Stephanie Kelly, *PREPA Bondholder Group Offers \$1 Billion New Cash to Struggling Puerto Rico Utility*, REUTERS (Sept. 27, 2017), <https://www.reuters.com/article/legal-us-usa-puertorico-prepa/prepa-bondholder-group-offers-1-billion-new-cash-to-struggling-puerto-rico-utility-idUSKCN1C21K3>, archived at <https://perma.cc/4VM5-KYFG>.

⁶⁰ *Id.*

⁶¹ Martin Guzman, Joseph E. Stiglitz & Antonio Weiss, *Don't Expect Debt Payments from Puerto Rico Any Time Soon*, WASH. POST (Dec. 11, 2017), https://www.washingtonpost.com/opinions/dont-expect-debt-payments-from-puerto-rico-any-time-soon/2017/12/11/ae11cd44-de98-11e7-89e8-edec16379010_story.html?utm_term=.519c46510022, archived at <https://perma.cc/U4KH-622L>.

electricity resulting from old and expensive oil-fired power plants; declining electricity demand; [and] a fragile grid that is overly dependent on long transmission corridors through the mountains.”⁶² Heavy reliance on Venezuelan oil, coupled with a lack of infrastructure maintenance, has only worsened these issues.⁶³ Yet, with the territory’s multi-billion in debts and a poverty rate of forty-five percent, these repairs are nowhere on the horizon.⁶⁴ This is also because PREPA has “lost two-thirds of its workforce in the past three years, as residents migrate to the mainland U.S. to escape the island’s financial woes and stagnant economy.”⁶⁵ The island’s highly trained electric employees are successfully recruited to mainland utility companies, which often offer a higher salary.⁶⁶ This employee shortage has slowed recovery efforts, put pressure on remaining staff, and created a long-term staffing problem. As PREPA continues to train new employees, this trend will not only continue as long as Puerto Rico’s economic plight persists and is likely to make the crisis worse. In the aftermath of Hurricane Maria, more than 200,000 islanders have left to the mainland “and forecasts project a 10 to 15 percent decline in the island’s 3.4 million population”; experts predict that “[a]bsent an effective recovery plan, the decrease in tax revenue capacity will become permanent.”⁶⁷

These problems are compounded by PREPA’s management issues. In November 2017, PREPA’s Executive Director Ricardo Ramos resigned, having only assumed the role less than nine months before.⁶⁸ Although Ramos’ resignation was welcomed by many in the face of investigations into the utility provider’s post-hurricane contracting, the change in leadership adds another wrinkle to the recovery process.⁶⁹ His departure comes just one week after Puerto Rico’s Emergency Management Director resigned after a local newspaper “reported that he took a two-week vacation shortly after Maria made landfall on September 20.”⁷⁰ Puerto Rico’s Governor, Ricardo Rosselló, described Ramos as a “distraction” from the island’s rebuilding ef-

⁶² Cathy Kunkel, *Another Blackout in Puerto Rico Underscores Urgent Need for Better Leadership*, HILL (Apr. 19, 2018), <http://thehill.com/opinion/energy-environment/383875-an-other-blackout-in-puerto-rico-underscores-urgent-need-for-better>, archived at <https://perma.cc/6MCC-YUS2>.

⁶³ Siegel, *supra* note 56.

⁶⁴ Brown, *supra* note 57.

⁶⁵ Siegel, *supra* note 56.

⁶⁶ Rebecca Kern, *Puerto Rico Utility’s Shrinking Workforce Hinders Power Recovery*, BNA (May 7, 2018), <https://www.bna.com/puerto-rico-utility-s-n57982092567/>, archived at <https://perma.cc/KBJ6-D8J3>.

⁶⁷ Guzman et al., *supra* note 61.

⁶⁸ Alexia Fernández Campbell, *The Head of Puerto Rico’s Power Utility Resigns After the Whitefish Debacle*, Vox (Nov. 17, 2017), <https://www.vox.com/policy-and-politics/2017/11/17/16671196/puerto-rico-power-prepa>, archived at <https://perma.cc/F4AV-DB4H>.

⁶⁹ *Id.*

⁷⁰ Ray Sanchez, *Puerto Rico Emergency Director Resigns; US Military Effort Winds Down*, CNN (Nov. 11, 2017), <https://www.cnn.com/2017/11/10/us/puerto-rico-emergency-management-director-resigns/index.html>, archived at <https://perma.cc/6DC4-VD3Y>.

forts.⁷¹ Nevertheless, these changes at the top levels of emergency management response coordination may delay recovery efforts.

More importantly, Ramos' resignation calls attention to a history of mismanagement within PREPA. Concerns regarding PREPA's hurricane contracting processes are more thoroughly discussed in the subsequent section, but the utility company faced a serious, yet unrelated accusation of corruption in 2016. A representative from PREPA was called to testify during hearings held by the Senate of Puerto Rico to investigate "the energy authority's purchasing office, which bought and burned dirty oil sludge for 25 years while charging customers the higher prices associated with refined distillates."⁷² In a class action lawsuit, complainants estimate that customers were overcharged more than \$1 billion as a result.⁷³

General mismanagement of PREPA has also taken a toll on recovery efforts. In the face of widespread materials shortages, USACE "discovered a stock of transformers, splices and other materials in a warehouse at PREPA's Palo Seco plant," supplies that are critical in restoring power.⁷⁴ This warehouse was discovered in January 2018, months after the storm, because it was not listed in PREPA's computer records.⁷⁵ "[S]uch mismanagement by PREPA made the island's energy infrastructure prone to the devastation wrought by Hurricane Maria," said José Román Morales, President of the Puerto Rico Energy Commission.⁷⁶

This episode is specifically mentioned in a letter by Congressmen Rob Bishop (R-UT), Bruce Westerman (R-AR), and Doug LaLalfa (R-CA) addressed to the electric company's Interim Executive Director Justo Gonzalez. In this correspondence, the representatives asked for "document[s] sufficient to show PREPA's policies and procedures for inventorying, warehousing, tracking, and distributing equipment needed for power restoration and the electrical grid."⁷⁷ A hearing was held by the Subcommittee on Oversight and Investigations in April 2018 to receive an "update on the restoration of

⁷¹ Fernández Campbell, *supra* note 68.

⁷² Nsikan Akpan, *Puerto Rico Energy Authority Investigates Dozens of Post-Maria Bribery Cases*, PBS (Jan. 14, 2018), <https://www.pbs.org/newshour/nation/puerto-rico-energy-authority-investigates-dozens-of-post-maria-bribery-cases>, archived at <https://perma.cc/KYY5-WDL6>.

⁷³ *Rolon v. PREPA*, Civ. No. 15, U.S. District Court, District of Puerto Rico (Feb. 24, 2015), https://www.hbsslaw.com/uploads/case_downloads/prepa/prepa_complaint_2.24.15.pdf, archived at <https://perma.cc/S2BU-NDVS>.

⁷⁴ Nick Brown, *Puerto Rico Governor Orders Probe of Discovery of Hurricane Recovery Materials*, REUTERS (Jan. 11, 2018), <https://www.reuters.com/article/us-puertorico-storm-energy/puerto-rico-governor-orders-probe-of-discovery-of-hurricane-recovery-materials-idUSKBN1F02VU>, archived at <https://perma.cc/C2FG-HFKG>.

⁷⁵ Letter from Rob Bishop, Congressman, et al. to Justo Gonzalez, Interim Exec. Dir., P.R. Elec. Power Auth. (Mar. 13, 2018), https://naturalresources.house.gov/uploadedfiles/3.12.18_letter_to_prepa_re_corruption_and_mismanagement.pdf, archived at <https://perma.cc/D8EX-YF9Y>.

⁷⁶ Brown, *supra* note 74.

⁷⁷ *Id.*

Puerto Rico's electric infrastructure."⁷⁸ The subcommittee, chaired by Congressman Gregg Harper (R-MS), heard testimony from USACE, FEMA, and the Department of Energy, among others, regarding power restoration.⁷⁹ These actions, initiated by Republicans, focus on the underlying issues that limited the efficacy of PREPA's post-disaster responsiveness. Underscoring these problems helps ensure that a larger share of the blame is apportioned to PREPA, displacing culpability that might have otherwise fallen upon the administration's direction of recovery efforts.

C. Corruption

There have been several reported instances of corruption during the recovery efforts post-Maria. The House Natural Resources Committee is investigating PREPA for several violations, as outlined in a letter by Chairman Rob Bishop (R-UT) and colleagues to the electric company's Interim Executive Director Justo Gonzalez.⁸⁰ PREPA officials are accused of restoring power to their own homes "before restoring power to critical locations such as San Juan's Rio Piedras Medical Center and the Luis Muñoz Marín International Airport."⁸¹ In addition to delaying power restoration to key facilities, the letter also notes a reported case of bribery between officials and an exotic dance club. PREPA officials allegedly accepted \$5,000, plus entry tickets to the establishment valued at \$1,000 each, to restore power to the facilities ahead of schedule.⁸²

Although three employees have been suspended without pay for bribery complaints received in November 2017, and at least twenty-five investigations are ongoing, there has been an increase in the number of bribery complaints received.⁸³ For instance, another corruption accusation was described in *El Vocero*, a Puerto-Rican based newspaper, by Ángel Figueroa Jaramillo, the President of the *Unión de Trabajadores de la Industria Eléctrica y Riego* ("UTIER") (Electrical Industry and Irrigation Workers Union). Jaramillo described a letter from residents of Villa Andalucía, who complained that a PREPA supervisor charged \$3,000 to reconnect power to their community.⁸⁴

⁷⁸ SUBCOMM. ON OVERSIGHT & INVESTIGATIONS, HOUSE COMM. ON ENERGY & COMMERCE *Hearing On "Update On the Restoration of Puerto Rico's Electric Infrastructure," Subcommittee On Oversight And Investigations*, (Apr. 11, 2018), <https://energycommerce.house.gov/committee-activity/hearings/hearing-on-update-on-the-restoration-of-puerto-rico-s-electric>, archived at <https://perma.cc/9YJS-WC5L>.

⁷⁹ *Id.*

⁸⁰ Letter from Rob Bishop, Congressman, et al. to Justo Gonzalez, Interim Exec. Dir., P.R. Elec. Power Auth. (Mar. 12, 2018), https://naturalresources.house.gov/uploadedfiles/3.12.18_letter_to_prepa_re_corruption_and_mismanagement.pdf, archived at <https://perma.cc/4EEB-LE93>.

⁸¹ *Id.*

⁸² *Id.*

⁸³ Akpan, *supra* note 72.

⁸⁴ Melissa Correa Velázquez, *Intensa pesquisa en la AEE*, EL VOCERO (Jan. 12, 2018), https://www.elvocero.com/gobierno/intensa-pesquisa-en-la-ae/article_26dc7ac2-f73e-11e7-8dbf-0335eaffcd8a.html, archived at <https://perma.cc/757Y-22KW>.

In its letter, the House Committee on Natural Resources sternly rebuked these actions, condemning the violation of the public's trust, while also noting that "improper, out-of-sequence power restoration has been associated with at least two fires and complicates scheduled power restoration operations."⁸⁵ Additional concerns were raised in a separate letter by Representatives Rob Bishop (R-UT), Bruce Westerman (R-AR), Doug LaLalfa (R-CA), and Jenniffer González Colón (R-Puerto Rico), including misappropriation of FEMA supplies. The Federal Bureau of Investigation ("FBI") in San Juan and the Office of the U.S. Attorney for the District of Puerto Rico are investigating several complaints. One allegation regards impermissible political favoritism by mayors of local municipalities, who are allegedly giving their "supporters special treatment [and] goods they [are] not giving to others."⁸⁶ Another grievance purports that "a party official dr[ove] off in his personal vehicle full of FEMA supplies obtained from a government building."⁸⁷ These allegations of misconduct and misappropriation harm recovery efforts as much as they shake public confidence in the integrity and fairness of recovery aid efforts.

These Republican-led efforts focus attention on bad actors within Puerto Rico that have impeded the recovery efforts. Rather than assessing the administration's response, these inquiries direct blame away from systemic practices or government policies, isolating a source of trouble far removed from the administration. In addition, legislators can tout their steadfast commitment to accountability and transparency, having initiated investigative action for illegal and universally-repugnant conduct.

D. Contracts

FEMA often relies on prepositioned contracts, agreements made in advance of a disaster, to provide for communities recovering from a crisis. This approach is consistent with current law, which authorizes FEMA to implement "a contracting strategy that maximizes the use of advance contracts to the extent practical and cost-effective" in "securing disaster response requirements, including specific goods and services, for which the Agency is capable of contracting for in advance."⁸⁸ With these contracts in place, during a disaster it is easier to activate "a network of large supply centers that can quickly respond," expediting the delivery of supplies to those in need, including "basic commodities such as water, food, blankets, plastic tarps for emergency shelter and repairs, electrical generators, and other supplies and

⁸⁵ Bishop, *supra* note 80.

⁸⁶ Letter from Rob Bishop, Congressman, et al. to William Long, Adm'r, Fed. Emergency Mgmt. Agency (Oct. 17, 2017), https://naturalresources.house.gov/uploadedfiles/10.17.17_letter_to_fema_on_puerto_rico_aid_funds_updated.pdf, archived at <https://perma.cc/UJ4V-FYXP>.

⁸⁷ *Id.*

⁸⁸ Pub. L. No. 109-295, Sec. 691 (2006).

equipment.”⁸⁹ Additionally, these agreements allow FEMA “to maximize competition, conduct market research, and thoroughly evaluate prospective contractors’ qualifications and proposals” during a time when there is not an urgent need for supplies, a model that “provide[s] benefits to both disaster survivors and taxpayers.”⁹⁰

There have been several concerns expressed about the contracting processes employed by the federal government post-Hurricane Maria. For instance, “[n]early half of the 540 federal contracts signed” during the first two months after the storm, “totaling \$252 million, were awarded outside the open bidding process.”⁹¹ In addition to receiving less scrutiny and oversight, for “most of these no-bid deals, federal contracting officers contacted only one business before giving them the contract.”⁹² No-bid contracts awarded for less than \$750,000 in disaster zones are not required to “meet certain labor and safety standards,” “report potential kickback schemes,” or permit “the government to audit costs and review records to evaluate the company’s performance.”⁹³

Claire McCaskill (D-MO), the Ranking Member of the U.S. Senate Committee on Homeland Security and Governmental Affairs in 2018, directed the committee’s staff for the minority to examine FEMA’s contracts for emergency tarps and sheeting. The findings of the committee are damning. First, the McCaskill report details how FEMA failed to adequately use prepositioned contracts in supplying emergency tarps and sheeting. FEMA awarded fourteen contracts totaling \$206.9 million for emergency tarps and sheeting during the 2017 hurricane season.⁹⁴ Of these awards, only three were prepositioned contracts for emergency tarps; there were no prepositioned contracts for plastic sheeting in place at the time the hurricane season started.⁹⁵ The three prepositioned contracts’ total value was \$7.3 million, representing “only 3.5% of the total value of FEMA’s contracts for emergency tarps and sheeting.”⁹⁶ This means that over 96% of the contracts—nearly \$200 million—awarded by FEMA for these supplies during the hurricane

⁸⁹ Peter Tyler, *Senate Report Details Major Disaster Response Contracting Failures*, PROJECT GOV’T OVERSIGHT (Apr. 23, 2018), <http://www.pogo.org/blog/2018/04/senate-report-details-major-disaster-response-contracting-failures.html>, archived at <https://perma.cc/KD2U-CJLA>.

⁹⁰ SENATE COMM. ON HOMELAND SECURITY & GOVERNMENTAL AFFAIRS, *Government Oversight: Failures in FEMA Contracting for Emergency Tarps & Sheeting During the 2017 Hurricane Season* (Apr. 10, 2018), <https://www.hsgac.senate.gov/imo/media/doc/Government%20Oversight%20-%20Failures%20in%20FEMA%20Contracting%20for%20Emergency%20Tarps%20and%20Sheeting%20During%20the%202017%20Hurricane%20Season.pdf>, archived at <https://perma.cc/3EEG-5XKL>.

⁹¹ Alexia Fernández Campbell, *Companies Barely Had to Compete for Half of the Federal Contracts Awarded in Puerto Rico so far*, VOX (Nov. 17, 2017), <https://www.vox.com/policy-and-politics/2017/11/17/16618476/puerto-rico-federal-contracts>, archived at <https://perma.cc/5YSB-7MGD>.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ SENATE COMM. ON HOMELAND SECURITY & GOVERNMENTAL AFFAIRS, *supra* note 90.

⁹⁵ *Id.*

⁹⁶ *Id.*

season were not subject to the heightened scrutiny of the prepositioned contract process.

Although FEMA reported that the capacity of prepositioned contractors had been exhausted as a justification for the new contracts, the committee report casts doubt on this assertion for two reasons. First, FEMA awarded at least four new contracts before the agency's last tarp order through its prepositioned contracts.⁹⁷ Second, one of the new contracts was awarded to OSC Solutions, Inc. ("OSC"), which was one of the three vendors with which FEMA had a prepositioned contract for tarps. However, according to the report, "FEMA did not order any tarps from OSC through their prepositioned contract."⁹⁸

Additionally, the report takes note of several deficiencies in the contract vetting process, highlighting agreements with two contractors that totaled over \$73 million that were awarded to Bronze Star, LLC ("Bronze Star") and Global Computers and Networks, LLC ("Global Computers").⁹⁹ Bronze Star was awarded two contracts, totaling \$39.5 million, for emergency tarps and sheeting.¹⁰⁰ The company had no qualifying experience to undertake their commitment of providing 600,000 emergency self-help tarps and 60,000 rolls of plastic sheeting, as Bronze Star "was formed less than two months before bidding on FEMA's . . . contracts."¹⁰¹ In a letter to Homeland Security's Acting Inspector General, Senators Elizabeth Warren (D-MA), Richard Blumenthal (D-CT), Catherine Cortez Masto (D-NV), Bernie Sanders (D-VT), Robert Menendez (D-NJ), Tammy Baldwin (D-WI), and Dick Durbin (D-IL) requested the Department conduct an investigation into how Bronze Star obtained its contract, including "whether all relevant procurement laws, regulations, and procedures were followed in FEMA's decision."¹⁰² Although not referenced in the senators' letter, the issues regarding the Global Computers contract closely parallel the concerns expressed about Bronze Star. Global Computers first registered as a contractor in September 2017, a mere month before being awarded a contract "worth a total of \$33.9 million to provide 500,000 emergency tarps."¹⁰³ Ultimately, FEMA cancelled the agreements with both vendors in November 2017, because each company had failed to deliver on its respective contract.¹⁰⁴

Although a search of three databases did not identify prior performance problems with the prospective vendors prior to the issuance of the contracts, the report concludes that "FEMA's vetting process did not appear to comply

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Letter from Elizabeth Warren, Senator, et al. to John Kelly, Acting Inspector Gen., Dep't of Homeland Sec. (Dec. 5, 2017), https://www.warren.senate.gov/files/documents/2017_12_05_Letter_to_DHS_IG_on_Bronze_Star_LLC.pdf, archived at <https://perma.cc/HLQ2-PA5R>.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

with the Federal Acquisition Regulation [“FAR”] requirements for evaluating prospective contractors.”¹⁰⁵ Per FAR’s standards, “a contracting officer must affirmatively determine that the contractor is capable of fulfilling the contract requirements . . . [by] evaluating the prospective contractor’s capabilities, including financial resources, business ethics, and organization experience.”¹⁰⁶ Yet, in its response to the committee’s inquiry, “FEMA did not provide any explanation of how it was able to make an affirmative determination of responsibility” for the two contractors in question.¹⁰⁷

The McCaskill report goes on to explain how FEMA’s short bidding timeframes failed to ensure adequate competition for the contracts.¹⁰⁸ The solicitations were only open for an average of three days.¹⁰⁹ Even more critically, “[f]ive solicitations were open for less than a day, and one gave vendors less than two hours to respond.”¹¹⁰ The contract with the greatest number of bids generated eleven responses, but on average there were fewer than six bidders per solicitation.¹¹¹

Besides the two aforementioned contracts terminated by FEMA for non-delivery, at least six other vendors failed to deliver contracted-for materials on time, with the average delay totaling fourteen days.¹¹² These vendors experienced delays ranging from four to forty-two days; in total, 4,000 tarps and over 200,000 sheeting rolls were late in arriving between September and November, the critical months after Hurricane Maria.¹¹³ One contractor had yet to complete its delivery of 100,000 sheeting roles, originally scheduled for March 1, 2018. Delivery was then projected for June—four months late.

In addition to the tarp and sheeting contracting problems uncovered in the McCaskill report, there were equally grave issues in FEMA’s emergency meal contracting. The agency issued a \$156 million contract for meals to Tiffany Brown—the sole employee and owner of the company Tribute Contracting, LLC (“Tribute”).¹¹⁴ The results were as predictable as they were devastating. Two woefully underequipped subcontractors were only able to deliver 50,000 of the 30 million emergency meals that had been promised.¹¹⁵ Not only were less than 1% of the promised meals actually prepared, but *all*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* Additionally, per the Tarp and Sheeting Contract Solicitations & Proposal Deadlines chart included on page 8 of the report, there were 58 total bids for 10 solicitations. Thus, 58 divided by 10 equals 5.8 bids per solicitation.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Patricia Mazzei & Agustin Armendariz, *FEMA Contract Called for 30 Million Meals for Puerto Ricans, 50,000 Were Delivered*, N.Y. TIMES (Feb. 6, 2018), <https://www.nytimes.com/2018/02/06/us/fema-contract-puerto-rico.html?smid=NYtcore-iphone-share&smprod=NYtcore-iphone>, archived at <https://perma.cc/ZXA2-9CY2>.

¹¹⁵ Letter from Elijah Cummings, Congressman, and Stacey Plaskett, Congresswoman, to Trey Gowdy, Congressman (Feb. 6, 2018), <https://democrats-oversight.house.gov/sites/demo>

of the delivered meals failed to meet one of the basic, critical requirements in FEMA's original solicitation: the meals must be self-heating.¹¹⁶ Additionally, it seems FEMA did not verify the information included in the bid. In fact, "the overwhelming majority of Tribute's [nine]-page proposal appears to be plagiarized from several sources readily available on the internet."¹¹⁷ This seems to be part of a larger pattern in Tribute's proposal, which "used language similar to other companies' websites and . . . misrepresented its resources and ability to fulfill the order."¹¹⁸ For example, at least one of Tribute's proposed subcontractors was not contacted by Brown's firm until three days after Tribute was awarded the FEMA contract; ultimately, the logistics company did not work with Tribute.¹¹⁹

Although successfully awarded other government contracts in the past, given Brown had "no experience in large-scale disaster relief and [had] at least five canceled government contracts in her past," it is unclear why FEMA selected Tribute for emergency meal delivery services.¹²⁰ However, not all of Brown's contracts were successful. Four of Tribute's contracts with the Federal Prison System were cancelled because the company "failed to deliver meat, bakery, cereal and other food products to various correctional institutions."¹²¹ A fifth agreement with the Government Publishing Office was terminated when Tribute failed to deliver bags according to contract specifications.¹²² The GPO's inspector general subsequently uncovered that Tribute had "altered and submitted a false shipping document and subcontracted the predominant production function on two contracts without proper authorization."¹²³ Even though Tribute was banned from receiving GPO contracts over \$35,000 until January 2019, "that exclusion applied only to [the GPO, but]. . . not to any other federal agency."¹²⁴

In February, Representative Elijah Cummings (D- MD) and Delegate Stacey Plaskett (D-U.S. Virgin Islands) co-authored a letter to Congressman Trey Gowdy (R-SC), who serves as the Chairman of the House Oversight Committee. In the letter, Cummings and Plaskett asked Chairman Gowdy to subpoena documents that had previously been requested by the Oversight Committee via a bipartisan letter in October 2017.¹²⁵ This request for a subpoena enumerates the "complete file of the contracting officer on the award

crats.oversight.house.gov/files/2018-02-06.EEC%20%26%20Plaskett%20to%20Gowdy%20re.FEMA-Tribute%20Contracting.pdf, archived at <https://perma.cc/5CQA-LNTJ>.

¹¹⁶ *Id.*

¹¹⁷ Cummings, *supra* note 115.

¹¹⁸ Stephanie Ebbs, *Senators Say Company Plagiarized Bid Proposal to Get \$156 million FEMA Contract*, ABC NEWS (Feb. 23, 2018), <https://abcnews.go.com/Politics/senators-company-plagiarized-bid-proposal-156-million-fema/story?id=53256295>, archived at <https://perma.cc/UKB3-NYPC>.

¹¹⁹ *Id.*

¹²⁰ Cummings, *supra* note 115.

¹²¹ Mazzei & Armendariz, *supra* note 114.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Cummings, *supra* note 115.

and administration of the contract with Tribute Contracting.¹²⁶ Around the same time, a letter was sent by Senators Claire McCaskill (D-MO), Heidi Heitkamp (D-ND), and Gary Peters (D-MI), similarly requesting information regarding FEMA's responsibility determination and the vetting of Tribute's proposal.¹²⁷ Although it is "unclear whether FEMA was unaware of these previous problems or simply disregarded [them] in awarding the contract to Tribute," it is certain that Brown's failure to timely deliver the requisite number of emergency meals worsened the food shortage in Puerto Rico in the immediate aftermath of the storm.¹²⁸

Perhaps the most scrutinized and notorious contracting calamity of the 2017 hurricane season was FEMA's \$300 million agreement with Whitefish Energy Holdings ("Whitefish"), a Montana-based energy firm contracted to repair Puerto Rico's electricity grid without a formal bidding process. Whitefish was originally awarded \$3.7 million on September 26 to begin mobilization efforts, but a formal contract for the full \$300 million was signed by PREPA and Whitefish less than a month later on October 17, 2017.¹²⁹

There were warning flags from the beginning. Despite being the largest relief contract awarded, Whitefish "only [had] two full-time employees on the day Hurricane Maria hit the island."¹³⁰ Also, two of Whitefish's subcontractors, the Jacksonville Electric Authority and Kissimmee Utility Authority, are electric companies that could have entered into mutual aid agreements with PREPA; instead, the subcontracting through Whitefish accomplished "the same thing a mutual aid agreement might have arranged at a lower cost."¹³¹ Because PREPA has been bankrupt since July 2017, the utility supplier would not have been able to provide assurances of payment that are often required in mutual aid agreements, whereas Whitefish "asked for no such guarantee."¹³² The other company being considered for the con-

¹²⁶ *Id.* In the letter, the subpoena requested for DHS documents, of which FEMA is a subsidiary agency.

¹²⁷ Letter from Claire McCaskill, Senator, et al. to Brock Long, Adm'r, Fed. Emergency Mgmt. Agency (Feb. 22, 2018), <https://www.hsgac.senate.gov/imo/media/doc/2018-02-22%20CMC%20Heitkamp%20Peters%20to%20FEMA%20re%20meals%20contract.pdf>, archived at <https://perma.cc/5WXT-NRWJ>.

¹²⁸ *Id.*

¹²⁹ Lobbying Disclosure Form for Whitefish Energy Holdings, LLC to Clerk of the House of Representatives and Secretary of the Senate (Jan. 19, 2018) (hereinafter "Whitefish Lobbying Form"), <https://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=AC02A1B8-D5C7-4A85-842D-C5CF439BD9A0&filingTypeID=78>, archived at <https://perma.cc/Y3J4-3J8D>.

¹³⁰ Aaron Davis, *FEMA Cites 'Significant Concerns' over Whitefish Energy Deal in Puerto Rico*, WASH. POST (Oct. 27, 2017), https://www.washingtonpost.com/investigations/congressional-committee-asks-for-records-of-whitefish-energy-deal/2017/10/26/327ba64e-ba9b-11e7-be94-fabb0f1e9ffb_story.html?utm_term=.82ccd0c891e6, archived at <https://perma.cc/489T-ZWNV>.

¹³¹ Laurel Wamsley, *Here's What's in That \$300 Million Whitefish Contract*, NPR (Oct. 27, 2017), <https://www.npr.org/sections/thetwo-way/2017/10/27/560422492/heres-what-s-in-that-300-million-whitefish-contract>, archived at <https://perma.cc/F9V8-E9F8>.

¹³² *Id.*

tract was seeking a \$25 million down payment because of PREPA's dire financial status.¹³³

Perhaps the more problematic aspect about Whitefish's reliance on sub-contractors is the inflated labor rates reflected in the contract: \$462 per hour for a supervisor, \$319 per hour for a lineman, \$80 per diem for meals, \$332 per day for lodging, and one-way flights for \$1,000.¹³⁴ However, Article 59 of the contract between PREPA and Whitefish states that "[i]n no event shall PREPA, the Commonwealth of Puerto Rico, the FEMA Administrator, the Comptroller General of the United States, or any of their authorized representatives have the right to audit or review the cost and profit elements of the labor rates specified herein."¹³⁵ In conjunction with Article 42, which limits audits and inspections to "the performance of Contractor's activities" and "verify the quality of purchased products or services," these provisions aim to limit the grounds upon which the contract can be scrutinized.¹³⁶ Surprisingly, in Article 4, PREPA also "waives any claim against Contractor related to delayed completion of the work."¹³⁷

Additionally, it is unclear whether FEMA approved the Whitefish contract. Article 68 of the contract places the responsibility on PREPA, which "represents and warrants that FEMA has reviewed and approved of this Contract, and confirmed that this Contract is in an acceptable form to qualify for funding from FEMA or other U.S. Governmental agencies."¹³⁸ In a public statement in October 2017, FEMA asserted that "[a]ny language in any contract between PREPA and Whitefish that states FEMA approved that contract is inaccurate."¹³⁹ The White House confirmed it was "not aware of any federal involvement in the selection."¹⁴⁰ FEMA's statement also expressed "significant concerns with how PREPA procured this contract and has not confirmed whether the contract prices are reasonable."¹⁴¹ It is unclear what role Article 29 of the contract may play in resolving this dispute, as "[a]ny failure to secure approvals or funding from FEMA or some other

¹³³ Matthew Daly, *Lawmakers Seek Probe of Power Contract to Zinke Neighbor*, AP NEWS (Oct. 24, 2017), <https://www.apnews.com/82a076d092724b27bb80cb59c42d328e>, archived at <https://perma.cc/G5NQ-JGZ8>.

¹³⁴ Wamsley, *supra* note 131.

¹³⁵ Contract between Government of Puerto Rico, Puerto Rico Electric Power Authority and Whitefish Energy Holdings, LLC (Oct. 17, 2017) (hereinafter "Whitefish Contract"), <https://assets.documentcloud.org/documents/4151304/Whitefish-Contract-Signed-10-17-Copy.pdf>, archived at <https://perma.cc/66GW-4ZNV>.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ FED. EMERGENCY MGMT. AGENCY, *Updated: FEMA Statement on Puerto Rico Electric Power Authority's Contract with Whitefish* (Oct. 27, 2017), <https://www.fema.gov/news-release/2017/10/27/updated-fema-statement-puerto-rico-electric-power-authoritys-contract>, archived at <https://perma.cc/V7QZ-ERMK>.

¹⁴⁰ Timothy Cama, *White House: No Involvement in Puerto Rico's Whitefish Contract*, HILL (Oct. 27, 2018), <http://thehill.com/policy/energy-environment/357520-white-house-no-involvement-in-puerto-ricos-whitefish-contract>, archived at <https://perma.cc/JVW7-ZMCB>.

¹⁴¹ FED. EMERGENCY MGMT. AGENCY, *supra* note 139.

source (except due to the Contractor's sole fault) shall not relieve PREPA from its obligations for payment under this Contract."¹⁴²

The most concerning findings relate to the circumstances under which Whitefish was awarded the contract. First, the company was largely an unknown player even to industry leaders and experts in the field.¹⁴³ Secondly, the company is headquartered in Whitefish, Montana—the 7,200-person hometown of Secretary of the Interior Ryan Zinke.¹⁴⁴ The connection between Zinke and Whitefish Chief Executive Officer (“CEO”) Andy Techmanski is closer than mere geography: “one of Zinke’s sons worked for a summer on a construction site” for Techmanski.¹⁴⁵ In an interview given a few days after Whitefish was awarded the contract, “Techmanski told a local news station that he had been in touch with Mr. Zinke for ‘more resources.’”¹⁴⁶ Zinke has denied allegations of impropriety,¹⁴⁷ criticizing attempts by “the dishonest media or political operatives” to undermine his credibility, because “only in elitist Washington, D.C., would being from a small town be considered a crime.”¹⁴⁸

In addition to the company’s connection to the Trump administration’s Interior Secretary, Whitefish is primarily financed by a private equity firm named HBC Investments, founded and managed by Joe Colonna—a major donor to President Trump.¹⁴⁹ According to Federal Elections Commission records, Colonna “contributed \$20,000 to the Trump Victory PAC during the general election, \$2,700 to Trump’s primary election campaign [maximum permitted], \$2,700 to Trump’s general election campaign [maximum

¹⁴² Whitefish Contract, *supra* note 135.

¹⁴³ Umair Irfan, *The FBI is Investigating Whitefish Energy’s Contract to Rebuild Puerto Rico’s Grid*, VOX (Oct. 30, 2017), <https://www.vox.com/energy-and-environment/2017/10/30/16570684/fbi-investigating-whitefish-energy-puerto-rico-prepa>, archived at <https://perma.cc/VR6N-8MR2>.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Frances Robles & Deborah Acosta, *Puerto Rico Cancels Whitefish Energy Contract to Rebuild Power Lines*, N.Y. TIMES (Oct. 29, 2017), <https://www.nytimes.com/2017/10/29/us/whitefish-cancel-puerto-rico.html>, archived at <https://perma.cc/767X-JR66>. The original local news story reported: “Techmanski said planes are backed up at the airports so getting the personnel and equipment down there has hit a snag. He’s been in touch with Interior Secretary Ryan Zinke to try to free up more resources.” McKayla Haack, Whitefish Energy working on Puerto Rico power grid, NBC MONT. (operating as KECI in Missoula, KCFW in Kalispell, and KTVM in Butte) (Oct. 1, 2017), <http://nbcmontana.com/news/local/whitefish-energy-working-on-puerto-rico-power-grid>, archived at <https://perma.cc/4MU7-MTEM>.

¹⁴⁷ Separately, Zinke is also under investigation for a suspect real estate deal. See Ben Lefebvre & Nick Juliano, *Zinke’s Halliburton Mess Deepens*, POLITICO (June 21, 2018), <https://www.politico.com/story/2018/06/21/ryan-zinke-halliburton-developer-conflict-644651/>, archived at <https://perma.cc/Z2AC-PU9L>.

¹⁴⁸ Natasha Geiling, *Secretary Zinke Attacks ‘Dishonest Media’ for Asking Questions About Shady Whitefish Energy Contract*, THINKPROGRESS (Oct. 28, 2017), <https://thinkprogress.org/secretary-zinke-blames-media-for-whitefish-energy-scandal-517a7036a864/>, archived at <https://perma.cc/6D9B-WRCV>.

¹⁴⁹ Ken Klippenstein, *\$300M Puerto Rico Recovery Contract Awarded to Tiny Utility Company Linked to Major Trump Donor*, DAILY BEAST (Oct. 24, 2017), <https://www.the-dailybeast.com/dollar300m-puerto-rico-recovery-contract-awarded-to-tiny-utility-company-linked-to-major-trump-donor>, archived at <https://perma.cc/YKJ7-KDLH>.

permitted], and a total of \$30,700 to the Republican National Committee.”¹⁵⁰ Kimberly Colonna, his wife, also “gave \$33,400 to the Republican National Committee [maximum permitted]” in the same year.¹⁵¹ There is other evidence of the Colonnas’ political influence and proximity to the administration: thousands of dollars in contributions to the Republican Party and individual candidates, dating back at least a decade;¹⁵² Joe Colonna’s prominence in Texas politics, including several appointments by the state’s Republican Governor and Lieutenant Governor;¹⁵³ social media posts with at least two of Trump’s cabinet members, Secretary of Housing & Urban Development Ben Carson and Secretary of State Rex Tillerson.¹⁵⁴

Fourth, statements made by Whitefish’s own spokesperson indicate “the contract . . . stemmed from [CEO] Techanski introducing himself to PREPA officials [last] summer while vacationing in Puerto Rico . . . and they discussed disaster recovery issues.”¹⁵⁵ Fifth, as noted in the company’s disclosure form, Whitefish spent \$150,000 between October and December 2017 lobbying Congress, at the same time that several investigations were being initiated on the Hill into the company’s Hurricane Maria contract.¹⁵⁶ Because the specific lobbying issue listed on Whitefish’s disclosure form was “Puerto Rico Electric Power Authority to rebuild transmission lines damaged from recent hurricane damage,” it is self-evident that the company hoped to address post-Maria recovery in its lobbying efforts.¹⁵⁷ Lastly, PREPA’s Executive Director, Richard Ramos, resigned in November, shortly after various Congressional entities began investigating the Whitefish contract.¹⁵⁸

Although the contract with Whitefish was cancelled at the end of October 2017, there is no shortage of issues to investigate related to this agreement. A host of government entities have responded to the public’s demands to scrutinize the PREPA-Whitefish deal. The Office of Inspector General for DHS is reviewing the agreement.¹⁵⁹ Puerto Rico’s Governor has also pledged to audit the Whitefish contract.¹⁶⁰ The FBI is also looking into potential wrongdoing surrounding the contract.¹⁶¹

In addition, several members of Congress have taken action. Congressmen Rob Bishop (R-UT) and Bruce Westerman (R-AR), respectively the

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Blake Sobczak & Hannah Northey, *Lawmakers Call for Probe of Puerto Rico Grid Contract*, E&E NEWS (Oct. 25, 2017), <https://www.eenews.net/stories/1060064547/print>, archived at <https://perma.cc/TT8Z-4C2U>.

¹⁵⁶ Whitefish Lobbying Form, *supra* note 129.

¹⁵⁷ *Id.*

¹⁵⁸ Akpan, *supra* note 72.

¹⁵⁹ Davis, *supra* note 130.

¹⁶⁰ David Smith, *Firm Restoring Puerto Rico’s Power Threatened to Quit, Mayor Says*, GUARDIAN (Oct. 25, 2017), <https://www.theguardian.com/world/2017/oct/25/puerto-rico-power-whitefish-energy-carmen-yulin-cruz>, archived at <https://perma.cc/FJ2V-AVG3>.

¹⁶¹ Irfan, *supra* note 143.

Chairmen of the House Committee on Natural Resources and Subcommittee on Oversight and Investigation, co-authored a letter to PREPA's Executive Director.¹⁶² In the letter, the representatives request "documents sufficient to show under what circumstances PREPA has authority to deviate from normal contracting and procurement processes and what officers, employees, or agents" were responsible.¹⁶³ Senators Maria Cantwell (D-WA) and Ron Wyden (D-OR) formally requested the GAO conduct an investigation into reports of "potentially inflated costs of time and material," "the opaque and limited nature of PREPA's bidding process," and the "communications between Whitefish and senior members of the federal Executive branch."¹⁶⁴ Senator Cantwell, who serves as the Ranking Member of the Senate Energy and Natural Resources Committee, issued a statement reiterating her commitment to ensure taxpayers were not "gouged by Whitefish Energy or anyone else."¹⁶⁵ A bipartisan coalition of the House Committee on Energy and Commerce wrote Whitefish CEO Techmanski to request documents and briefing directly from the company.¹⁶⁶ Additionally, Minority Leader for the House Nancy Pelosi (D-CA),¹⁶⁷ Senator Elizabeth Warren (D-MA),¹⁶⁸ and Congressman Raúl Grijalva (D-AZ)¹⁶⁹ each called for an inquiry into PREPA's contract with Whitefish. Perhaps it is here that the partisan divide is most evident. While both parties are calling for investigations into Whitefish, the scope of the Republican inquiry is limited, focusing on liable individuals—"officers, employees, or agents"—and anomalies in the contracting process. By contrast, the Democratic inquiries have centered on broader administrative shortcomings, including resource costs, contracting procedures, and corruption.

¹⁶² Letter from Rob Bishop, Congressman, and Bruce Westerman, Congressman, to Ricardo Ramos, Exec. Dir., P.R. Elec. Power Auth. (Oct. 26, 2017), https://naturalresources.house.gov/uploadedfiles/2017-10-26_bishop_westerman_to_ramos_prepa_re_emsa.pdf, *archived at* <https://perma.cc/Q7VU-QGLC>.

¹⁶³ *Id.*

¹⁶⁴ Letter from Maria Cantwell, Senator, and Ron Wyden, Senator, to Eugene Dodaro, Comptroller Gen., Gov't Accountability Office (Oct. 26, 2017), https://www.energy.senate.gov/public/index.cfm?a=files.serve&File_id=5FB1032F-DC0B-430A-8507-4765A45B3B84, *archived at* <https://perma.cc/B7RY-QK3P>.

¹⁶⁵ ASSOCIATED PRESS, *Puerto Rico to Cancel \$300M Power Deal with Whitefish, Montana Company*, GUARDIAN (Oct. 29, 2017), <https://www.theguardian.com/world/2017/oct/29/puerto-rico-governor-whitefish-power-contract-cancelled>, *archived at* <https://perma.cc/2PNJ-XGYC>.

¹⁶⁶ Letter from Greg Walden, Congressman, et al. to Andrew Techmanski, Chief Exec. Officer, Whitefish Energy Holdings, LLC (Oct. 26, 2017), <https://republicans-energycommerce.house.gov/wp-content/uploads/2017/10/20171026WhiteFish.pdf>, *archived at* <https://perma.cc/3MA7-KCF7>. The following parties signed the letter: Committee on Energy and Commerce Chairman Greg Walden (R-OR), Ranking Member Frank Pallone (D-NJ); Subcommittee on Energy Chairman Fred Upton (R-MI), Ranking Member Bobby Rush (D-IL); Subcommittee on Oversight and Investigations Ranking Member Diana DeGette (D-CO). *Id.*

¹⁶⁷ Smith, *supra* note 160.

¹⁶⁸ Warren, *supra* note 102.

¹⁶⁹ Smith, *supra* note 160.

III. CONSEQUENCES, DISPARITIES, AND NEXT STEPS

When asked to grade the administration's response to Hurricane Maria, President Trump relayed, "I give ourselves a 10."¹⁷⁰ Contrary to this assessment, the federal response to Hurricane Maria has been insufficient to meet Puerto Rico's existing needs. A cohort of experts from the United Nations agrees.¹⁷¹ Moreover, records and testimony support a simple conclusion: the federal government did not respond to Hurricane Maria in the same way it reacted to other storms, including those from earlier in the 2017 hurricane season. These disparities, as much as the individual shortcomings and problems identified through investigation, call for further inquiry into the reasons for these differences in the national recovery response.

An independent assessment found several glaring discrepancies between the resources and personnel provided by the government in response to Hurricanes Harvey and Maria. For instance, "[i]t took just 10 days for FEMA to approve permanent disaster work for Texas, compared with 43 days for Puerto Rico."¹⁷² In the first ten days, there were over 30,000 federal government personnel in the vicinity of Houston, but in Puerto Rico there were less than one-third as many personnel (10,000) dispatched in that same time-frame.¹⁷³ In the first week and a half after Hurricane Harvey hit Texas, "FEMA provided 5.1 million meals, 4.5 million liters of water and over 20,000 tarps to Houston; but in the same period, it delivered just 1.6 million meals, 2.8 million liters of water and roughly 5,000 tarps to Puerto Rico."¹⁷⁴ Additional discrepancies are evident with respect to assistance to victims within ten days of the storm (\$141.8 million for Harvey; \$6.2 million for Maria) and approving applications for relief (39% for Harvey; 28% for Maria), which also support this conclusion.¹⁷⁵ The response to Maria also falls short of the response to other storms, as well. For instance, after Hurricane Irma, there were "[m]ore than 40,000 federal personnel, including 2,650 FEMA staff" on-site just four days of the storm.¹⁷⁶

The administration's characterization and response to the storms has also been different. President Trump visited Texas and Florida four days af-

¹⁷⁰ Ali Vitali, *Trump Gives Administration a '10' for Puerto Rico Recovery*, NBC NEWS (Oct. 19, 2017), <https://www.nbcnews.com/politics/white-house/trump-gives-administration-10-puerto-rico-recovery-n812321>, archived at <https://perma.cc/R96V-ML26>.

¹⁷¹ OFFICE OF THE HIGH COMM'R, UNITED NATIONS HUMAN RIGHTS, *Puerto Rico: Human Rights Concerns Mount in Absence of Adequate Emergency Response* (Oct. 30, 2017), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22326&LangID=E>, archived at <https://perma.cc/L56A-X8PG>.

¹⁷² Danny Vinik, *How Trump Favored Texas over Puerto Rico*, POLITICO (Mar. 27, 2018), <https://www.politico.com/story/2018/03/27/donald-trump-fema-hurricane-maria-response-480557>, archived at <https://perma.cc/G6PK-8YYY>.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Eric Levenson, *3 Storms, 3 Responses: Comparing Harvey, Irma and Maria*, CNN (Sept. 27, 2017), <https://www.cnn.com/2017/09/26/us/response-harvey-irma-maria/index.html>, archived at <https://perma.cc/BSZ2-SANS>.

ter Hurricanes Harvey and Irma impacted each state.¹⁷⁷ By contrast, President Trump did not visit Puerto Rico until thirteen days after the storm hit, although he did go on a golf trip beginning the day after Maria made landfall.¹⁷⁸ When Trump finally did visit Puerto Rico, what most people remember about his visit was his signature move in distributing aid:¹⁷⁹ by “flicking paper towels into a crowd with the motion of a jump shot in basketball.”¹⁸⁰ San Juan’s mayor described President Trump’s visit as a public relations stunt, noting a seventeen minute meeting with local officials in which “[t]here was no exchange with anybody, with none of the mayors.”¹⁸¹ Mayor Carmen Yulín Cruz also commented on the “terrible and abominable view of [the president] throwing paper towels and throwing provisions at people, it really—it does not embody the spirit of the American nation.”¹⁸²

The president’s priorities are also reflected through another important medium: his Twitter. Within a week of each storm, “Trump sent three times as many tweets about Harvey as Maria—24 about the plight of Texas and eight about Puerto Rico, including a series of comments about Puerto Rico’s debt level and quality of infrastructure that local officials considered insulting and enraging while lives were still in jeopardy.”¹⁸³ More recently, Trump expressed unfounded skepticism towards the robust academic report developed by George Washington University, which prompted Puerto Rican authorities to raise the death toll. Although “[t]he president again provided no evidence to contradict the now widely accepted death toll,” he tweeted:¹⁸⁴

When Trump visited the island territory last October, OFFICIALS told him in a briefing 16 PEOPLE had died from Maria.” The Washington Post. This was long AFTER the hurricane took place. Over many months it went to 64 PEOPLE. Then, like magic, “3000 PEOPLE KILLED.” They hired GWU Research to tell

¹⁷⁷ *Id.*

¹⁷⁸ Robinson Meyer, *What’s Happening With the Relief Effort in Puerto Rico?*, ATLANTIC (Oct. 4, 2017), <https://www.theatlantic.com/science/archive/2017/10/what-happened-in-puerto-rico-a-timeline-of-hurricane-maria/541956/>, archived at <https://perma.cc/B5E8-FYDP>.

¹⁷⁹ Vann R. Newkirk II, *That Time Trump Threw Paper Towels at Puerto Ricans*, ATLANTIC (Jan. 13, 2019), <https://www.theatlantic.com/politics/archive/2019/01/trumps-legacy-is-tied-to-hurricane-maria/580060/> (describing Trump’s aid distribution as follows: “The image is indelible: Trump, facing a throng of Puerto Ricans with outstretched arms, launching rolls of paper towels. The symbolism is thick enough to cut. A president whose job it is to serve Americans, to do the impossible to keep them safe and come to their aid in moments of crisis, reduced that role to cheerful charity for a crowd of brown faces, doing his ‘best Stephen Curry impersonation,’ as a pool report would later describe it.”)

¹⁸⁰ Louis Nelson, *San Juan Mayor Lambastes Trump’s ‘Insulting’ Visit to Puerto Rico*, POLITICO (Oct. 4, 2017), <https://www.politico.com/story/2017/10/04/trump-puerto-rico-visit-mayor-reacts-243437>, archived at <https://perma.cc/4TBH-ETW9>.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Vinik, *supra* note 172.

¹⁸⁴ Eliza Barclay, *What We Know About the Death Toll in Puerto Rico*, VOX (Sept. 15, 2018), <https://www.vox.com/2018/9/13/17855414/trump-hurricane-maria-puerto-rico-death-toll> (provides a robust defense of the validity of the university study’s design and methodology, archived at <https://perma.cc/HVE3-PNXP>).

ters. Proposed policy solutions are being advanced, by both legislators¹⁸⁹ and advocates.¹⁹⁰ These plans offer a variety of specific policy solutions to more effectively respond to Hurricane Maria and prepare for future natural catastrophes. These proposals, when coupled with the findings of these various congressional investigations, can help inform final policy determinations. This was the case in 2006 when “Congress passed the Post Katrina Emergency Response Act. . . [to] update critical laws and policies. . . [b]ased on the work of congressional special investigative committees that examined” our nation’s institutional failures before, during, and after Hurricane Katrina.¹⁹¹

Awareness and public discussion regarding these proposed policy measures are important for another reason: coalition building. Puerto Rico has been described as a “zombie state” because of its unique status. Puerto Rico “does not hold political power in Congress, and [] the only representative does not vote,” even though Puerto Ricans are U.S. citizens.¹⁹² The island’s vulnerable political position makes it “crucial to convey the reality to all elected officials, so that their votes align with the necessities of those who are still in Puerto Rico.”¹⁹³ Without the support and investment of Congress, as a whole, the federal government’s response will be insufficient to address these growing needs.

Legislators should not only be aware of the technical issues arising in the relief efforts, but also remain cognizant of the bias that may present itself in the data being relied upon to make recovery and aid determinations. For instance, some have speculated Puerto Rican officials have deflated the death toll to reduce the share of blame that will fall upon the government’s response efforts.¹⁹⁴ Carlos Yordán, a Puerto Rican economist and international relations professor at Drew University, explains the dangers of this approach. Yordán explains how a “[l]ack of trust in the island’s political parties or political institutions” will further complicate recovery efforts.¹⁹⁵ A

¹⁸⁹ Press Release, Elizabeth Warren, Senator, Warren, Sanders, Colleagues Unveil Legislation to Rebuild Puerto Rico and Virgin Islands (Nov. 29, 2017), <https://www.warren.senate.gov/newsroom/press-releases/warren-sanders-colleagues-unveil-legislation-to-rebuild-puerto-rico-and-virgin-islands>, archived at <https://perma.cc/5B8D-FZFX>.

¹⁹⁰ Erin Cohan, *Recovering from Hurricane Maria Requires an Extensive Federal Response*, CTR. AM. PROGRESS (Oct. 12, 2017), <https://www.americanprogress.org/issues/general/news/2017/10/12/440732/recovering-hurricane-maria-requires-extensive-federal-response/>, archived at <https://perma.cc/B9PH-LVM7>.

¹⁹¹ Peter Tyler, *The New Normal—America Needs to Up Its Game When Responding to Natural Disasters*, PROJECT GOV’T OVERSIGHT (Oct. 31, 2017), <http://www.pogo.org/our-work/articles/2017/the-new-normal-america-needs-to-up-its-game-when-responding-to-natural-disasters.html>, archived at <https://perma.cc/523A-ZQ9Q>.

¹⁹² Z. Byron Wolf, *Puerto Ricans Are Americans, too! But They Live in a ‘Zombie State’*, CNN (Oct. 4, 2017), <https://www.cnn.com/2017/10/03/politics/puerto-rico-citizens-trump/index.html>, archived at <https://perma.cc/7CNJ-XAFL>.

¹⁹³ *Id.*

¹⁹⁴ Levenson, *supra* note 176.

¹⁹⁵ Carlos Yordán, *Restoring Puerto Rico’s Electric Grid at the Municipal Level: Does the Mayor’s Party Affiliation Matter?*, P.R. DATA LAB (Mar. 15, 2018), <https://prdatalab.wordpress.com/2018/03/15/restoring-puerto-ricos-electric-grid-at-the-municipal-level-does-the-mayors-party-affiliation-matter/>, archived at <https://perma.cc/MG3P-XW6T>.

lack of public trust, in turn, weakens faith in the entire democratic system, making the island's desperately needed political and economic reforms more difficult to achieve.¹⁹⁶

Yet, the biggest ongoing challenge to recovery and future planning efforts appears to be the lack of acknowledgement—let alone prioritization—of the plight experienced by the people of Puerto Rico; as a result, collaboration between federal officials and the island's leadership have been non-existent or openly hostile. In the storm's aftermath, San Juan Mayor Carmen Yulín Cruz came under attack after criticizing Homeland Security Secretary Elaine Duke's comments saying that she was "very satisfied" with the government's response to the storm, characterizing the disastrous aftermath of the hurricane as "a good news story in terms of our ability to reach people and the limited number of deaths that have taken place."¹⁹⁷ In response, Mayor Cruz responded, "This is, damn it, this is not a good news story. This is a 'people are dying' story. This is a 'life or death' story. This is 'there's a truckload of stuff that cannot be taken to people' story. This is a story of a devastation that continues to worsen."¹⁹⁸ The mayor's call to action was rebuked by President Trump, who responded to criticize the mayor's "poor leadership," laud federal emergency responders, and criticize distortions in media reporting.¹⁹⁹ Specifically, the president lambasted "Fake News CNN and NBC [for] going out of their way to disparage our great First Responders as a way to 'get Trump'" and noted the "[r]esults of recovery efforts will speak much louder than complaints by San Juan Mayor."²⁰⁰

The president's response stands in stark contrast to the messaging furthered by Mayor Cruz in the aftermath of Hurricane Maria. Appearing on Anderson Cooper wearing a black T-shirt that said, "Help Us, We Are Dying," Mayor Cruz pled for ongoing support, explaining, "We truly are dying here. And I keep saying it, SOS. If anyone can hear us, if Mr. Trump can hear us, let's just get it over with and get the ball rolling."²⁰¹ Although Mayor Cruz's advocacy on behalf of the island's residents have made her a target of President Trump's ire, her attention has remained steadfastly focused on the island's recovery efforts.²⁰² Mayor Cruz recounts her words to

¹⁹⁶ *Id.*

¹⁹⁷ Richard Fausset, Michael D. Shear, Ron Nixon & Frances Robles, *San Juan Mayor Rebukes Trump Administration for Rosy Comments on Relief Effort*, N.Y. TIMES (Sept. 29, 2017), <https://www.nytimes.com/2017/09/29/us/san-juan-mayor-trump.html?module=inline>, archived at <https://perma.cc/3Q3N-AZ8C>.

¹⁹⁸ *Id.*

¹⁹⁹ Peter Baker, *Trump Lashes Out at Puerto Rico Mayor Who Criticized Storm Response*, N.Y. TIMES (Sept. 30, 2017), <https://www.nytimes.com/2017/09/30/us/politics/trump-puerto-rico-mayor.html>, archived at <https://perma.cc/H62K-QHSL>.

²⁰⁰ Donald J. Trump (@realDonaldTrump), Twitter (Sept. 30, 2017, 4:48 AM), <https://twitter.com/realdonaldtrump/status/914094625488502784?lang=EN>; Donald J. Trump (@realDonaldTrump), Twitter (Sept. 30, 2017, 1:37 PM), <https://twitter.com/realdonaldtrump/status/914227642131509248>, archived at <https://perma.cc/BV8Y-LABG>.

²⁰¹ Baker, *supra* note 199.

²⁰² Ian Schwartz, *San Juan Mayor: "Hater in Chief" Trump Has "Taken All of His Anger Out On Puerto Rico,"* REAL CLEAR POL. (Oct. 13, 2017), https://www.realclearpolitics.com/video/2017/10/13/san_juan_mayor_hater_in_chief_trump_has_taken_all_of_his_anger_out_

Trump: “[W]hat I told the president is that this is about saving lives, this is not about politics. [. . .] My only motive is a human motive.”²⁰³ This message has been echoed by other Puerto Rican leaders, including Gov. Ricardo Rosselló, who has called upon the president to “stop unfair treatment, as if [Puerto Ricans] were second-class citizens.”²⁰⁴ The Governor has stated, “My message to the president is very simple. Let’s stop the insults and the attacks. We are not your political opponents. We are his American citizens.”²⁰⁵

What is most problematic is that this tension shows no signs of abating; rather, the response to Hurricane Maria has become a touchstone in assessing the Trump administration’s response to natural disasters. As a result, tensions periodically surge and boil over into the public sphere. This occurred in advance of Hurricane Florence, when President Trump tweeted, “We got A Pluses for our recent hurricane work in Texas and Florida (and did an unappreciated great job in Puerto Rico, even though an inaccessible island with very poor electricity and a totally incompetent Mayor of San Juan). We are ready for the big one that is coming!”²⁰⁶ Political criticisms also emerged in the wake of a congressional Democratic delegation visit to Puerto Rico in January 2019, when these tensions remerged against the backdrop of the government shutdown. At the same time that Democratic “[l]awmakers flew to Puerto Rico[,] the White House was reportedly considering ways to divert disaster funds earmarked for hurricane relief toward the construction of a wall on the U.S.-Mexico border.”²⁰⁷ In addition, disaster relief legislation has also become politicized and, thus, polarizing. After a disaster relief bill failed to pass in April 2019, Trump blamed Democrats—and Puerto Rico. The president posted “a string of factually inaccurate tweets defending his position that federal government aid to the hurricane-ravaged island of

on_puerto_rico.html, archived at <https://perma.cc/83DY-YB6T>. (quoting Mayor Cruz: “So rather than tweeting, get to work. Rather than saying disparaging things, let’s get constructive. So, you know, if the president wants to take aim at me, I’m here. Bring it on. It doesn’t matter to me because this isn’t about me.”)

²⁰³ Madeline Marr, *San Juan Mayor Has a Message for Donald Trump — And It’s Nasty*, MIAMI HERALD (Oct. 5, 2017), <https://www.miamiherald.com/news/weather/hurricane/article177235191.html#storylink=cpy>, archived at <https://perma.cc/YM2J-6JDQ>.

²⁰⁴ Aurelio Moreno, *Puerto Rico’s Governor Comes out Swinging for ‘Bully’ Donald Trump*, SUN SENTINEL (Mar. 30, 2019), <https://www.sun-sentinel.com/news/politics/fl-ne-ros-sello-punch-bully-trump-20190329-story.html>, archived at <https://perma.cc/9QWC-Z9S7?type=image>.

²⁰⁵ *Id.*

²⁰⁶ Donald J. Trump (@realDonaldTrump), Twitter (Sept. 12, 2018, 3:51 AM), <https://twitter.com/realDonaldTrump/status/1039828966595616768>, archived at <https://perma.cc/CRV6-LWXW>; see also Matthew Choi & Emily Goldberg, *Trump Reignites Hurricane Feud with Puerto Rican Officials*, POLITICO (Sept. 12, 2018), <https://www.politico.com/story/2018/09/12/donald-trump-puerto-rico-a-plus-job-815801>, archived at <https://perma.cc/6LH7-B6LU>.

²⁰⁷ David Weigel, *Democratic Delegation’s Trip to Puerto Rico Becomes a Target for Trump*, WASH. POST (Jan. 14, 2019), https://www.washingtonpost.com/powerpost/democratic-delegations-trip-to-puerto-rico-becomes-a-target-for-trump/2019/01/14/c73e7f82-1818-11e9-88fe-f9f77a3bcb6c_story.html?utm_term=.6fba081e3d3, archived at <https://perma.cc/33TY-C24V>.

Puerto Rico should be limited to food stamp subsidies.”²⁰⁸ In his series of messages, “Trump oddly referred to the US territory as a ‘place,’ accused Puerto Rican politicians of being ‘incompetent or corrupt[,]’ and referred to San Juan Mayor Carmen Yulín Cruz as ‘crazed.’”²⁰⁹ His tweets erroneously alleged that “Puerto Rico got 91 Billion Dollars for the hurricane, more money than has ever been gotten for a hurricane before, & all their local politicians do is complain & ask for more money.”²¹⁰ Rather, \$91 billion is “the estimated cost of Puerto Rico’s recovery over a period spanning decades,” when only about one-tenth of that amount has been spent thus far.²¹¹ Worse still, President Trump “framed the question of how much disaster relief funding to provide to the island and flood-affected farmers in the Midwest as a zero-sum game,” blamed Democrats for “taking dollars away from our Farmers and so many others,” and made clear he prioritizes the needs of US citizens living in flood-ravaged Midwestern states above those of US citizens living in Puerto Rico.”²¹² Yet, seemingly without irony, he asserted “[t]he best thing that ever happened to Puerto Rico is President Donald J. Trump.”²¹³

IV. CONCLUSION

In advocating for greater resources and support for Puerto Rico in the aftermath of Hurricane Maria, Senator Bill Nelson (D-FL) asked, “Can you imagine that happening in any of our states on the mainland? Can you imagine the degree of anger and insistence that there be the full recovery?”²¹⁴ In response, the federal government must do more to help Puerto Rico’s long-term recovery efforts and must also act to prevent history from repeating—or from rhyming, to use Twain’s words—as the tragedy of Hurricane Maria continues to echo in our public discourse.

“We’ve run out of tears,” said Lisandra Llera Vidal, a Puerto Rican resident, in the aftermath of the storm.²¹⁵ Prioritizing investigations into the challenges that created the perfect storm of devastation in the aftermath of Hurricane Maria will allow legislators to thoroughly assess existing policies and the administration’s actions in order to develop future policies that remedy these shortcomings. Ultimately, without understanding the origin and

²⁰⁸ Aaron Rugar, *Trump’s Latest Outburst Against Puerto Rico, Explained*, Vox (Apr. 2, 2019), <https://www.vox.com/2019/4/2/18291975/trump-puerto-rico-disaster-relief-funding-bill-explained>, archived at <https://perma.cc/EZS6-HM2H>.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ Danica Coto, ASSOCIATED PRESS, *Puerto Rico Grid CEO Says PREPA Adopting U.S. Standards in Post-Maria Rebuild*, ELECTRIC LIGHT & POWER (May 8, 2018), <https://www.elp.com/articles/2018/05/puerto-rico-grid-ceo-says-prepa-adopting-u-s-standards-in-post-maria-rebuild.html>, archived at <https://perma.cc/Q6YD-WYJ8>.

²¹⁵ Sutter et al., *supra* note 33.

scope of the difficulties facing Puerto Rico, the response is likely to yield an ineffective, fragmented patchwork of changes that are insufficient to remedy the problems faced in the wake of Hurricane Maria—many of which are likely to repeat and worsen if action is not taken.