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THE LEGAL LANDSCAPE FOR EMERGENCY MANAGEMENT IN THE UNITED STATES

WILLIAM C. BANKS, FEBRUARY 2011

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Executive Summary

With enactment of the Stafford Act in 1974 and the creation of the Federal Emergency Management Agency in 1979, the federal government developed an apparatus to plan for and respond to natural disasters. Over time, the expansive language of the Stafford Act (“any natural catastrophe ... or, regardless of cause, any fire, flood, or explosion”) enabled presidents to rely on Stafford Act authority to respond to acts of terrorism in addition to disasters. While recent attempts have been made to consolidate and streamline the federal entities responsible for emergency management, the overarching characteristic of the U.S. system at present is inadequate integration and coordination of the wide range of civilian and military, governmental, private sector, and nongovernmental organization participants in preparedness and response. While the Department of Homeland Security has been fashioned to manage these responsibilities with a mission to break down “stovepipes” and create “a greater emphasis on and need for joint actions and efforts across previously discrete elements of government and society,” obstacles continue to stand in the way of reforms. Among them:

- Our federal system distributes authority and assigns responsibilities for domestic preparedness and response only ambiguously.
- Research in natural disasters teaches that actual emergency response is more nearly chaotic than hierarchical. Actors improvise to provide the needed goods and services.
- Our communities are becoming increasingly interconnected in urban areas that rely on vulnerable modes of transportation, communication, and provision of public utilities. The lack of resilience of our infrastructure leads to similar grave consequences from natural disasters and terrorist attacks.
- The federal government has provided confusing mandates and poor planning direction for state and local governments. Federal funding priorities exacerbate distortions in local planning, where disproportionate attention is paid to less likely terrorist incidents instead of more likely natural disasters.
- Legal authorities stop short of providing clear prescriptive responsibility over many of the implementation issues. Federal, state, and local law enforcement and intelligence entities have at times threatened civil liberties in implementing unclear or open-ended policy or legal objectives.
- Coordination plans for emergency response are mostly untested, and there are few coordination requirements and virtually no assigned leadership to manage the coordination.

This paper examines the federal organization of emergency management, the federal-state-local interface and its mechanisms, the law enforcement and intelligence overlap, and finally the military roles in emergency management. ■

1. Introduction

Although government has always responded to domestic emergencies by caring for those affected, the federal government began systematic provision of emergency management through the Cold War-era civil defense program, designed to convince Soviet leaders and the American people that the United States could survive a nuclear war. With enactment of the Stafford Act¹ in 1974 and the creation of the Federal Emergency Management Agency in 1979,² the federal government developed an apparatus to plan for and respond to natural disasters. Over time, the expansive language of the Stafford Act (“any natural catastrophe . . . or, regardless of cause, any fire, flood, or explosion”)³ enabled presidents to rely on Stafford Act authority to respond to acts of terrorism.

The overarching characteristic of emergency management in the United States in 2010 is inadequate integration and coordination of the wide range of civilian and military, governmental, private sector, and nongovernmental organization participants in preparedness and response. The attacks of September 11, 2001, hardened a developing tendency to create a top-down, all hazards, command and control model of emergency management. Experience shows that emergency management in the United States works from the bottom up, with support from the federal government.

There are signs that the federal apparatus may be maturing. The first ever Quadrennial Homeland Security Review (QHSR) Report, *A Strategic Framework for a Secure Homeland*,⁴ released in February 2010, states that “homeland security describes the intersection of evolving threats and hazards with the traditional governmental and civic responsibilities of civil defense, emergency response, law enforcement, customs, border control, and immigration.”⁵ In fashioning one government entity to manage these responsibilities, the Department of Homeland Security “breaks down longstanding stovepipes” and “creates a greater emphasis on and need for joint actions and efforts across previously discrete elements of government and society.”⁶ The QHSR envisions homeland security as involving collective efforts and shared responsibilities of all governmental, nongovernmental, and private sector partners in an “enterprise” to maintain critical homeland security capabilities. The QHSR adopts “ensuring resilience to disasters” as one of its core missions, and it recognizes that doing so “will require a significant change in U.S. emergency management from a primary focus on response and recovery to one that takes a wider view, balancing response and recovery with mitigation and preparedness.”⁷ Accordingly, there will be “a shift from a reliance on top-down emergency management to a process that engages all stakeholders”⁸ and promotes regional

response capacity, unity of effort in response, and increased military-civilian and public-private partnerships for preparedness and response.⁹

Despite the forward-looking aspirations contained in the QHSR, persistent efforts in the last decade to improve integration and coordination of emergency management roles and missions have produced only modest improvements. Significant obstacles continue to stand in the way of reforms:

- First, our federal system diffuses authority and assigns responsibilities for domestic preparedness and response only ambiguously.
- Second, research in natural disasters teaches that actual emergency response is more nearly chaotic than hierarchical. Actors improvise to provide the needed goods and services.
- Third, our communities are becoming increasingly interconnected in urban areas that rely on vulnerable modes of transportation, communication, and provision of public utilities. The lack of resilience of our infrastructure leads to similar grave consequences from natural disasters and terrorist attacks.
- Fourth, the federal government has provided confusing mandates and poor planning direction for state and local governments. Federal funding priorities exacerbate distortions in local planning, where disproportionate attention is paid to less likely terrorist incidents instead of more likely natural disasters.
- Fifth, legal authorities stop short of providing clear prescriptive responsibilities over many of the implementation issues. Federal, state, and local law enforcement and intelligence entities have at times threatened civil liberties in implementing unclear or open-ended policy or legal objectives.
- Finally, coordination plans for emergency response are mostly untested notional, and there are few coordination requirements and virtually no assigned leadership to manage the coordination.

Although research has shown that organizational culture and leadership, along with informal networks, are important determinants of success in emergency response, little attention has been paid to developing these resources.

Despite the forward-looking aspirations contained in the QHSR, persistent efforts in the last decade to improve integration and coordination of emergency management roles and missions have produced only modest improvements.

Apart from the federal emergency response bureaucracy, similar coordination problems and implementation shortcomings hinder effective emergency response capabilities in the intelligence and law enforcement communities. Federal interagency coordination in intelligence collection and law enforcement improved after creation of the National Counterterrorism Center (NCTC) in 2004.

Its successes are the result of informal cooperation and persuasion, not legal prescription. Coordination among federal, state, and local law enforcement and intelligence agencies has also been improved through the development of “fusion centers,” yet implementation problems and the reluctance of federal agencies to share some information with state and local counterparts has limited their effectiveness. The vast critical infrastructure assets that are privately controlled are largely not required to participate in emergency response activities sponsored by government, and their integration into emergency response is spotty, at best.

Department of Defense and military roles in response to emergencies have been planned, but military responders have not had the best implementation track record, nor adequate training or resources. The relationship of military responders to civilian authorities remains murky, in part due to the ambiguous federal response plan documents. In addition, exactly what military responders may do remains unclear because of uncertain legal limits on federally deployed troops. Because of the very different orientation and training of war-fighting and emergency response troops, there are continuing concerns that military responders may not serve effectively in emergency response roles.

Across these sectors and institutions looms the prospect that poorly coordinated or overly aggressive emergency response could threaten the civil liberties of the American people. Emergencies have precipitated grievous deprivations of civil liberties in the past – military detention of American citizens and internment of Japanese Americans, to cite two prominent examples. In the event of an evolving crisis of unknown origins – such as an attack with biological weapons – in which new crisis epicenters erupt one after the other, it is not unrealistic to imagine armed members of the military enforcing the laws, including curfews, quarantines, or forced relocation of groups of citizens. Legal authorities exist that may permit such measures, and plans for emergency response are sufficiently open to interpretation that they do not foreclose the most extreme government responses to emergencies.

The presumption that the normal constitutional order will operate during crises is attributable in part to the suspicion that “emergency powers ... tend to kindle emergencies.”

2. The Legal Structure for Emergency Response: A Constitutional Overview

For the most part, the United States Constitution does not contemplate emergencies. The presumption that the normal constitutional order will operate during crises is attributable in part to the suspicion that “emergency powers ... tend to kindle emergencies.”¹⁰ The Constitution does provide ample authority for government to anticipate and then respond to emergencies, whatever the cause. Article IV, Section 4 of the Constitution obligates the federal government to guarantee a “Republican Form of Government” to each state (the Guarantee Clause), to protect the states against

invasion (the Invasion Clause), and to protect them against “domestic Violence,” but only after a request from the governor or legislature (the Protection Clause).¹¹

The ordinary constitutional scheme is a federal system, where sovereignty is divided between the federal and state governments. The institutions, processes, and politics of federalism provide some of the most crucial and difficult components of emergency response. Although the national government may govern only through the powers enumerated in the Constitution, the powers of the states are simply reserved for them by the Constitution.¹² As a result, states have the “police powers” to protect the health, safety, and welfare of their citizens. The breadth of the police powers provides states with the foremost and dominant authorities to respond to emergencies, so long as they do not violate the constitutional rights of their citizens and have not been lawfully preempted by actions of Congress or the Executive.

In general, congressional authority to prescribe rules for emergency response derives from its authority “[t]o regulate Commerce with foreign Nations, and among the several States.”¹³ Although the Supreme Court has since the 1990s imposed limits on congressional authority to regulate local, noneconomic activity,¹⁴ so long as the regulated activity substantially affects interstate commerce,¹⁵ the federal laws are valid and their terms have control over inconsistent state and local laws. By and large, federal statutes that affect emergency response may be supported by Commerce Clause authority.

Even where Commerce Clause authority may not permit regulating a state or local activity, Congress may rely on the Spending Clause¹⁶ to spend in response to emergencies, or to condition the receipt of federal funds on a state’s agreement to comply with particular standards, so long as the condition is sufficiently related to the federal purpose of the spending.¹⁷ In addition, Congress may rely on Section 5 of the Fourteenth Amendment to enforce “by appropriate legislation” the guarantees of the Fourteenth Amendment, including equal protection and due process of law. In the context of emergency response, Congress has relied on this authority to prohibit state and local discrimination on the basis of race and sex in providing emergency response services, including those that are not federally funded.¹⁸

Federalism imposes an important limit on the exercise of these congressional powers. The Supreme Court has held that even where Congress is acting squarely within its Commerce Clause powers, principles of federalism bar the federal government from “commandeering” state officials for the purpose of enacting or implementing federal law.¹⁹ Although further litigation has not clarified the implications of the “no commandeering” principle, the basic idea is that federal emergency response legislation must be implemented by federal personnel with federal funds, by state personnel who have agreed to implement the federal program or who have accepted federal funds in return for implementing the program, or where states have a choice to implement the federal program or devise one of their own.

The president is vested with the “executive power,” the authority as “Commander in Chief of the Army and Navy of the United States, and of the militia of the several States,” and the duty to “take Care that the Laws be faithfully executed.”²⁰ In addition to these textual sources of potential executive power in emergencies, there continues a vigorous debate concerning whether the president has some inherent power to respond in times of emergency, with or without congressional authorization, or perhaps even in the face of congressional opposition.²¹ Although the debate has been most prominent in connection with war powers and the use of military force, the inherent power advocates have asserted that such authorities might permit the president to declare martial law in the wake of a catastrophic emergency, that he might order the military to enforce the laws, or that he could unilaterally suspend habeas corpus.²²

An overview of the structure for the exercise of emergency response authorities in the United States would be incomplete without mention of the statutory mechanism that enables the president to take actions based on a range of standby emergency authorities. Since 1976, the National Emergencies Act (NEA)²³ has enabled the president to declare a national emergency and then rely on at least 40 standby emergency statutes that permit the president to act in ways that would be impermissible in the absence of a crisis. For example, on September 14, 2001, President George W. Bush issued a proclamation of national emergency and then invoked standby authorities to activate the Ready Reserve and retired officers and enlisted members of the Coast Guard, to suspend separation of officers from the armed services, and to suspend certain numerical limitations on numbers of officers at certain ranks.²⁴ In order to activate the additional authorities following the NEA, the president simply declares a national emergency, indicates which statutory authorities he or she wishes to exercise, and notifies Congress.²⁵ No statute defines “national emergency” for purposes of invoking the NEA procedures and resulting standby authorities. The test is subjective, and the determination is apparently entirely up to the president.²⁶

Similarly, the International Emergency Economic Powers Act (IEEPA)²⁷ was enacted in 1977 and gives the president a range of economic powers that may be invoked following declaration of a national emergency. The IEEPA has been utilized by presidents to limit trade with certain nations, and to restrict activities that threaten proliferation of weapons of mass destruction, among other things.²⁸

Strictly speaking, a terrorist attack or natural disaster could be a “major disaster” only if it produced a fire, flood, or explosion. However, the Stafford Act also permits the president to declare a state of emergency when he determines that federal support of state and local authorities is required “to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.”

3. The Federal Organization for Emergency Response: Roles, Missions, and Authorities

The Homeland Security Act of 2002²⁹ directed the secretary of the Department of Homeland Security (DHS) to “build a comprehensive national incident management system with Federal, State, and local government personnel, agencies, and authorities, to respond to such [terrorist] attacks and disasters.”³⁰ The act required the secretary to “consolidate existing Federal Government emergency response plans into a single, coordinated national response plan.”³¹ The act consolidated component agencies, including the Federal Emergency Management Agency (FEMA), in the department, and the secretary was given authority and control over all of its officers and agencies. The act designates DHS as the lead agency for coordinating disaster and emergency response and recovery assistance with state and local authorities. However, the responsibility for investigating and prosecuting terrorism remains vested in the law enforcement and intelligence agencies with jurisdiction over terrorist acts, except to the extent those entities or functions have been transferred to DHS.

The Stafford Act³² is the contemporary title for the authority originating in 1803 that permits the president to support state and local governments following a “major disaster.” At a governor’s request, the president may employ the military to provide support “essential for the preservation of life and property”³³ for up to 10 days in the immediate aftermath of an incident involving “any fire, flood, or explosion” that causes “damages of sufficient severity and magnitude to warrant major disaster assistance.”³⁴ Strictly speaking, a terrorist attack or natural disaster could be a “major disaster” only if it produced a fire, flood, or explosion. However, the Stafford Act also permits the president to declare a state of emergency when he determines that federal support of state and local authorities is required “to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.”³⁵ A terrorist incident or natural disaster could surely constitute an emergency or a “major disaster” under the act. President Bill Clinton invoked the Stafford Act in response to the 1995 Oklahoma City bombing,³⁶ as did President George W. Bush in declaring a major disaster following the September 11, 2001, attacks on the World Trade Center and the Pentagon.³⁷

Case Study: Pandemic Influenza³⁸

The response in New York City and elsewhere in the United States to the initial appearance of influenza A pandemic (H1N1) during spring 2009 was largely successful. The potential crisis illustrated the challenges and creative emergency response strategies that will be required when a more potent virus strikes.

Preparedness planning in New York City accelerated after the 9/11 and anthrax attacks of 2001 and in anticipation of an influenza epidemic. Syndromic surveillance systems were put in place and a range of hospital services information is collected electronically from most hospitals and emergency departments in the city. During the spring 2009 outbreak, these systems allowed for real-time monitoring of the pandemic in New York City, although the first indication of the outbreak came from a school nurse telephoning a report of increased flu-like illnesses at a single school. Eventually somewhere close to 1 million people in New York had a flu-like illness in spring 2009.

The city's Office of Emergency Preparedness implemented its existing Ready New York program, and reached ethnic populations with an extensive public communications program. The mayor and health commissioner held frequent press conferences in English and Spanish, a government hotline was advertised, and a health alert network provided messages to health care providers. Community mitigation measures focused on selective closure of schools. No quarantine orders were issued, nor were businesses closed or public events canceled, unless they involved closed schools. About 50 schools closed in any given week during the spring.

Because the illnesses produced by the virus were generally not severe, there was no need to activate a city emergency stockpile of antiviral drugs; emergency departments were crowded with the worried well, yet city hospitals did not reach capacity even then. Moreover, the efficacy of the school closure policy was not seriously tested, nor were staffing needs (to meet the surge during a pandemic) challenged in this instance.

In the future, a pandemic could severely test response coordination in major cities because of the multiple government agencies involved and their overlapping authorities and responsibilities. Coordination with the private sector remains relatively unplanned and ad hoc. Nonprofit and community groups have established some local plans, but those remain isolated. Surveillance and monitoring of illness trends will be complicated in high-density centers, and where needed to accommodate travelers and the homeless. Alert clinicians will be needed to identify an outbreak. Disease containment could be a severe problem in high-density areas, and in making decisions about closing schools, places of business, or public gathering places. Rapid delivery of drugs and vaccines could also be problematic, especially for home-bound persons, travelers, or undocumented persons.

The scope of "major disaster" and, by implication, the federal response that a disaster declaration triggers, remains unclear. Does the definition cover a disease outbreak, such as pandemic influenza? FEMA has taken the position that biological attacks or disasters do not qualify as Stafford Act major disasters.³⁹ More recently, however, the White House Homeland Security Council asserted in its implementation plan for the National Strategy for Pandemic Influenza that the president could declare either an emergency or a major disaster in the event of a flu pandemic.⁴⁰ It is similarly unclear whether a "major disaster" would include a cyber attack that was not attributable to fire, flood, or explosion.⁴¹

Although the authority conferred by the Stafford Act is sweeping, its essence is disaster relief. The act does permit the president to declare an emergency, but not a major disaster, on his own initiative and provide emergency assistance where the emergency "involves a subject area for which, under the Constitution and laws of the United States, the United States exercises exclusive or preeminent responsibility and authority,"⁴² and the Department of Defense may provide "emergency work" essential for the preservation of life and property for a maximum of 10 days before the declaration of an emergency or disaster.⁴³ Military personnel could be engaged in "efforts to save lives, protect property and public health and safety, and lessen or avert the threat of a catastrophe,"⁴⁴ including law enforcement activities. In these circumstances, the president may proceed without the governor's consent. Although the presumptive basis for this authority would be an attack on military installations or other federal properties, the text allows the president the same discretion when some emergency incapacitates state and local government.⁴⁵

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In response to the flawed federal response to Hurricane Katrina, Congress amended the Stafford Act in the 2006 Post-Katrina Emergency Management Reform Act (PKEMRA)⁴⁶ to allow accelerated federal assistance, without a state request, when necessary to save lives, prevent suffering, and mitigate severe damage.⁴⁷ This authority to “push” federal response resources, rather than wait for the “pull” from the states, is limited to situations where the president declares a “major disaster.” In other words, there was no equivalent change to the Stafford Act “emergency” authorities. Among other changes to the Stafford Act reflected in the PKEMRA are new authorities to support and coordinate precautionary evacuations,⁴⁸ to assist in rescuing, sheltering, and caring for individuals with pets and service animals,⁴⁹ and the creation of a National Emergency Child Locator Center and a National Emergency Family Registry and Locator System.⁵⁰ The former serves as a clearinghouse for information about displaced children, assists law enforcement in locating children and reuniting them with their families, and manages a database and Web site to share information about such children and their families.

In 2003, President Bush issued Homeland Security Presidential Directive 5 (HSPD-5), intended as a blueprint for the “management of domestic incidents.”⁵¹ The directive designates the secretary of Homeland Security as the principal federal official (PFO) for domestic incident management, and it anticipates cooperation between levels of government by “using a national approach to incident management.”⁵² HSPD-5 instructs the secretary to coordinate federal operations to “prepare for, respond to, and recover from terrorist attacks, major disasters, and other emergencies”⁵³ — all hazards. The secretary is further ordered to coordinate a federal response to one of these emergencies:

if and when any of the following four conditions applies: (1) a Federal department or agency acting under its own authority has requested the assistance of the Secretary; (2) the resources of State and local authorities are overwhelmed and Federal assistance has been requested by the appropriate State and local authorities; (3) more than one Federal department or agency has become substantially involved in responding to the incident; or (4) the Secretary has been directed to assume responsibility for managing the domestic incident by the President.⁵⁴

The directive recognizes the primary role of states in responding to emergencies, and it specifically says that the secretary will “assist State and local authorities when their resources are overwhelmed, or when Federal interests are involved.”⁵⁵

HSPD-5 implemented the Homeland Security Act by directing the secretary to establish a National Incident Management System (NIMS) and a National Response Plan (NRP) (now the National Response Framework). The directive urges states to adopt the NIMS by conditioning federal assistance on the states’ adoption of it.⁵⁶

The first iteration of the NRP, adopted in December 2004, had several weaknesses, most of them painfully exposed in the aftermath of Hurricane Katrina in 2005. The triggering mechanism, an “Incident of National Significance,” was not further defined, and the process for invoking the NRP/NIMS was not clearly spelled out. More basically, the NRP did not specify what actions should be taken once the plan was invoked.⁵⁷

After considering the White House and congressional reports on the flawed federal response to Hurricane Katrina, Congress enacted the PKEMRA. FEMA inherited the Preparedness Directorate, and the director of FEMA, re-titled an administrator, became an undersecretary of DHS. Congress required Senate confirmation for the administrator, who must have emergency management credentials, as well as confirmation for four deputy administrators. The act also permits the president to designate the FEMA administrator as a member of the Cabinet in the event of a crisis. The act created a regional FEMA system, with 10 regions and 10 regional directors, and a National Integration Center (NIC), charged with overseeing the NIMS. In addition to maintaining the NIMS and NRP (now NRF), the NIC will revise the NRF and release revisions and updates.⁵⁸

The PKEMRA also defined a National Preparedness System (NPS), which provides the most recent statutory foundation for intergovernmental and interagency homeland security and emergency management coordination.⁵⁹ The NPS shows how to organize preparedness activities following National Preparedness Guidelines (NPG), which in turn include planning scenarios and task and target capabilities lists designed to help government and private sector participants in homeland security preparedness.⁶⁰ By March 2009, DHS and FEMA had released a Comprehensive Preparedness Guide 101 (CPG-101).⁶¹ Central to the CPG-101 is regional collaboration, and the process set out relies on an all-hazards approach to emergency preparedness and response.

The reinvented NRP became the National Response Framework, first released in January 2008. The process of creating a draft NRF was criticized by state and local emergency response interests as insufficiently transparent and largely ignorant of state and local perspectives. Eventually a broader array of stakeholders at all levels of government produced an NRF that was designed to be scalable, flexible, and adaptable. The document claims to articulate clear roles and responsibilities among federal, state, and local officials. The role of FEMA to coordinate federal operations was restored, although overall management responsibilities during a crisis remain at DHS headquarters. The requirement that the DHS secretary designate an “Incident of National Significance” before initiating a federal response to an emergency has been dropped. The FEMA administrator makes the decision to initiate the federal response.

Although the elimination of the “Incidents of National Significance” designation in the NRF means that the framework and its NIMS are always in effect, the NRF remains unclear about many specific operational issues.

Like the NRP, the NRF establishes a series of sweeping principles – “scalable, flexible, and adaptable,” “tiered response,” “readiness to act,” “clear, focused communications,” “engaged partnership,” “unity of effort through unified command” — mostly anodyne and vague. To its credit, the NRF spells out in more detail than the NRP the specific roles and responsibilities of the various governmental and nongovernmental participants in emergency response. The framework also encourages the development of more detailed all-hazards response plans at all levels of government.⁶² The NRF designates a National Operations Center (NOC) as the “primary national hub for situational awareness and [incident management] operations coordination across the Federal Government.”⁶³ The NOC collects and synthesizes relevant incident data, and communicates the information to senior federal officials through two component centers. The National Response Coordination Center (NRCC) is the FEMA center of operations, and the National Infrastructure Coordinating Center (NICC) monitors critical infrastructure and key resources.⁶⁴

Although the elimination of the “Incidents of National Significance” designation in the NRF means that the framework and its NIMS are always in effect, the NRF remains unclear about many specific operational issues. Among the most important is prescribing when DHS should assume the responsibility for coordinating the federal response. The NRF repeats the four HSPD-5 criteria (*see p. 12*) that tell DHS when to assume overall federal incident management responsibilities. What does it mean in practical terms for state and local resources to be “overwhelmed,” and which officials in a state or city must make a request to trigger the federal role? The continuing struggle between federally-dominant “push” response and state or city-initiated “pull” response was not resolved or addressed directly in the NRF.

However, the NRF favors a “bias toward action” and a “forward-leaning posture.” The NRF anticipates “advanced readiness contracting” to procure emergency resources, locating “pre-positioned resources” in vulnerable areas, and developing “pre-scripted mission assignments.”⁶⁵ While we might prefer greater specificity in describing just how DHS would lean forward in advance of an emergency, the more significant question is the policy this “bias” represents.

To be sure, the NRF repeats the mantra from the NRP and NIMS that “incidents are generally handled at the lowest jurisdictional level possible.”⁶⁶ How should this lingering premise be understood in relation to the “forward leaning” orientation just described? Legally, principles of federalism do not permit bypassing state and local governments in emergency response, with the constitutional exceptions noted earlier. Equally important, the NRF and NIMS do not calibrate the local response premise with any assessment of capacity. Should the operating premise be that the response should spring from the most local level of government that may be able to respond effectively?

Plumbing more deeply into the NRF, we find a new section describing three levels of federal plans that should exist for each of 15 National Planning Scenarios (*see Fig. 1*). There are a Strategic

Guidance Statement and Strategic Plan; a National-Level Interagency Concept Plan; and Federal Department and Agency Operation Plans.⁶⁷

Figure 1: National Planning Scenarios
Scenario 1: Nuclear Detonation – 10-Kiloton Improvised Nuclear
Scenario 2: Biological Attack – Aerosol Anthrax
Scenario 3: Biological Disease Outbreak – Pandemic Influenza
Scenario 4: Biological Attack – Plague
Scenario 5: Chemical Attack – Blister Agent
Scenario 6: Chemical Attack – Toxic Industrial Chemicals
Scenario 7: Chemical Attack – Nerve Agent
Scenario 8: Chemical Attack – Chlorine Tank Explosion
Scenario 9: Natural Disaster – Major Earthquake
Scenario 10: Natural Disaster – Major Hurricane
Scenario 11: Radiological Attack – Radiological Dispersal Devices
Scenario 12: Explosives Attack – Bombing Using Improvised Explosive Device
Scenario 13: Biological Attack – Food Contamination
Scenario 14: Biological Attack – Foreign Animal Disease (Foot and Mouth Disease)
Scenario 15: Cyber Attack

Source: FEMA, http://training.fema.gov/EMIWeb/IS/IS800B/SMs/06_IS800NRF_SM.pdf

Putting aside the pull versus push nature of the federal emergency response role, the on-the-ground response is expected to follow an Incident Command System (ICS). Before being incorporated into the NIMS, the ICS developed over many years of implementation in emergency response situations around the United States. The prototype ICS – Command, Planning, Operations, Logistics, and Finance/Administration – grew out of the challenges in fighting wildfires in western states over several decades.⁶⁸ As embodied in the NRF, the ICS consists of an Incident Commander, who has authority for managing all incident operations at the incident site, and the Command Staff, including a Public Information Officer, Safety Officer, Liaison Officer, and others.⁶⁹ In a complex incident there may be “multiple command authorities” and “a unified command comprised of officials who have jurisdictional authority or functional responsibility for the incident under an appropriate law, ordinance, or agreement.”⁷⁰

The concept of “unified command” is central to the NRF and NIMS and, in contrast to a military-type unity of command in one person, this application of the ICS takes into account that there may be multiple agencies and jurisdictions responding to an emergency.

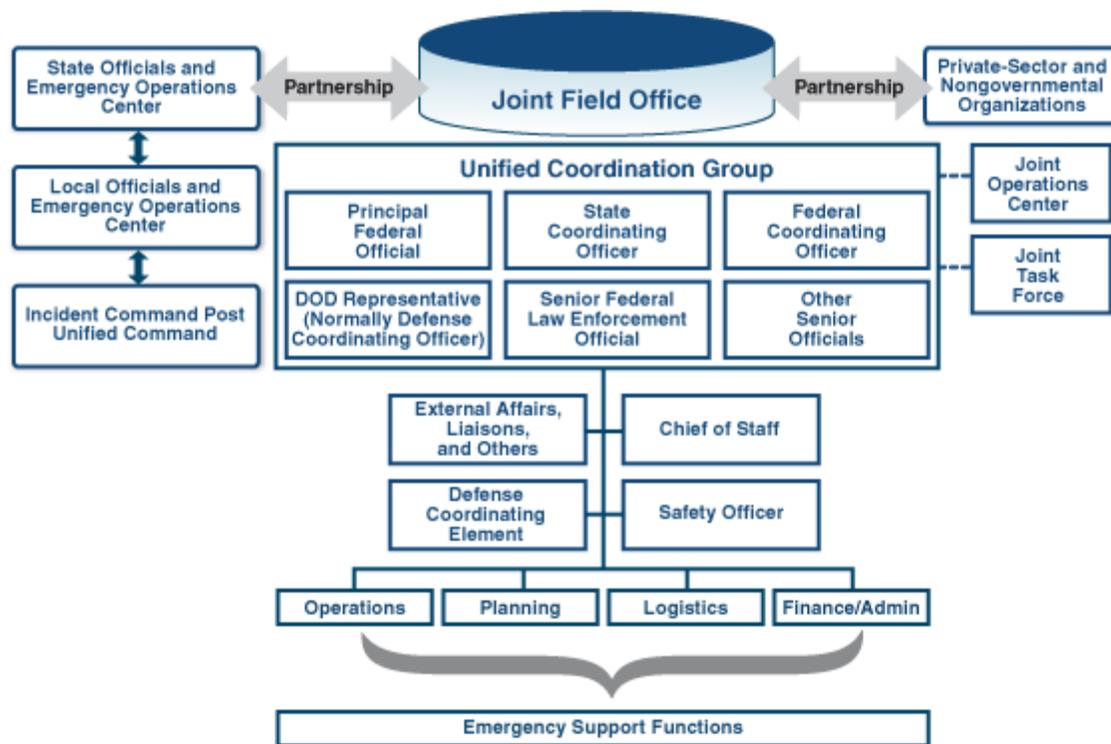


Figure 2: Field-Level Structures and Partnerships
 Source: FEMA, <http://emilms.fema.gov/IS800B/NRFsummary.htm>

The concept of “unified command” is central to the NRF and NIMS and, in contrast to a military-type unity of command in one person, this application of the ICS takes into account that there may be multiple agencies and jurisdictions responding to an emergency. Designated members of those entities work together to establish a common set of objectives, and they agree upon a single operations plan for responding to the event. As illustrated by the conflict between President Bush and Louisiana Governor Kathleen Blanco over the control of National Guard troops in response to Hurricane Katrina, the expectation in the NRF that “unity of effort” will lead to “seamless coordination across jurisdictions in support of common objectives” may be wishful thinking.⁷¹ In operational terms, unified command will be facilitated through a Joint Field Office (JFO), where federal, state, and local officials share a common physical space to meet as a “Unified Coordination Group.”⁷² This group supports on-scene response efforts, which are managed by the local incident command.

Although recent planning documents have added some clarification, unified command may also be compromised by ongoing uncertainty concerning the relationship between the FEMA Federal Coordinating Officer (FCO), appointed pursuant to Stafford Act authorities, and the principal federal official (PFO), appointed by the DHS secretary, who becomes the delegate of the secretary for emergency management. The FCO comes about because the Stafford Act tasks the president to

appoint a federal coordinating officer upon declaring a major disaster or emergency. The FCO appraises urgent needs, sets up field offices, and coordinates relief efforts, among other tasks.⁷³ The original NRP created the PFO as the “lead federal official.” Yet the PFO had no direct authority over the FCO or other officials and does not replace the incident command structure. After the PKEMRA restored the central role of FEMA in emergency response, the act also prohibited the PFO from

Figure 3: ESF Functional Areas	
<i>The Emergency Support Functions serve as the primary operational-level mechanism to provide assistance in the following functional areas:</i>	
ESF #1: Transportation	ESF Coordinator: Department of Transportation
ESF #2: Communications	ESF Coordinator: DHS (National Communications System)
ESF #3: Public Works and Engineering	ESF Coordinator: Department of Defense (U.S. Army Corps of Engineers)
ESF #4: Firefighting	ESF Coordinator: Department of Agriculture (U.S. Forest Service)
ESF #5: Emergency Management	ESF Coordinator: DHS (FEMA)
ESF #6: Mass Care, Emergency Assistance, Housing, and Human Services	ESF Coordinator: DHS (FEMA)
ESF #7: Logistics Management and Resource Support	ESF Coordinator: General Services Administration and DHS (FEMA)
ESF #8: Public Health and Medical Services	ESF Coordinator: Department of Health and Human Services
ESF #9: Search and Rescue	ESF Coordinator: DHS (FEMA)
ESF #10: Oil and Hazardous Materials Response	ESF Coordinator: Environmental Protection Agency
ESF #11: Agriculture and Natural Resources	ESF Coordinator: Department of Agriculture
ESF #12: Energy	ESF Coordinator: Department of Energy
ESF #13: Public Safety and Security	ESF Coordinator: Department of Justice
ESF #14: Long-Term Community Recovery	ESF Coordinator: DHS (FEMA)
ESF #15: External Affairs	ESF Coordinator: DHS
<i>Source: FEMA, http://emilms.fema.gov/IS800B/NRFsummary.htm#lesson4.</i>	

exercising “direct authority” over the FCO.⁷⁴ As a result, the NRF attempts to clarify the roles of the FCO and PFO, in part by stating that the secretary will appoint a PFO only in the event of catastrophic or unusually complex incidents that require extraordinary coordination. The NRF also confirms that the same person will serve as the PFO and FCO at the same time for the same incident.⁷⁵

The PKEMRA also directed FEMA to establish Incident Management Assistance Teams (IMATs), rapidly deployable strike teams with specific skill sets, designed to support local incident command and its unified command.⁷⁶ The teams are made up of full-time emergency management personnel and are tasked with providing leadership in delivering federal support, coordinating among responding jurisdictions, and providing decision-makers with situational awareness. The IMATs consolidate existing federal first response, and will over time absorb the existing Emergency Response Teams (ERT) and Federal Incident Response Support Teams (FIRST).⁷⁷

FEMA also coordinates federal support through any of the 15 Emergency Support Functions (ESFs) described in the NRF. The ESFs are functionally organized, and are staffed by specialists from federal agencies and the private sector. Their purpose is to integrate capabilities from various agencies and private sector entities and use them to support state and local response agencies. Each ESF is, in turn, headed by a lead federal agency.⁷⁸ For example, ESF #8, Public Health and Medical Services, provides the general “mechanism for coordinated Federal assistance ... in response to a public health and medical disaster.”⁷⁹ The Department of Health and Human Services (HHS) leads the federal effort to support state and local public health and medical response through its instructions to 15 federal agencies and the American Red Cross.⁸⁰

In addition to the ESFs, the NRF contains “incident annexes,” which sketch response aspects for different types of emergencies, ranging from natural disasters to various terrorism incidents. The Catastrophic Incident Annex (NRF-CIA) is an important example, in part because it featured prominently in the federal response to Katrina. The PKEMRA defines “catastrophic incident” as “any natural disaster, act of terrorism, or other man-made disaster that results in extraordinary levels of casualties or damage or disruption severely affecting the economy, national morale, or government functions in an area.”⁸¹ This revised definition improves immediate federal response authority, and helps assure that FEMA arrives on the scene as soon as possible. Unfortunately, the revised “catastrophic incident” definition was not added to the Stafford Act, so the federal response authorities remain uncoordinated to that extent.

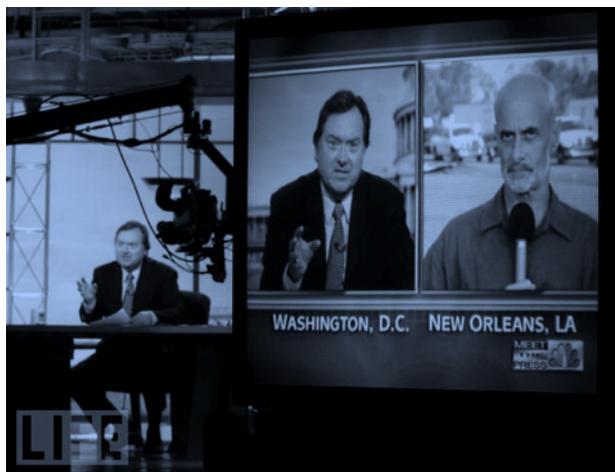


Figure 4: Sept. 4, 2005: U.S. Secretary of Homeland Security Michael Chertoff (R) is seen on a TV monitor as he is interviewed by moderator Tim Russert (L) during NBC’s “Meet the Press” at the NBC studios. (Photo by Alex Wong/Getty Images for “Meet the Press”)

At the time of Katrina, the then-NRP-CIA could be triggered only through a designation by the DHS secretary. When Secretary Michael Chertoff declared an Incident of National Significance too late to enable the federal response to meet many of the challenges presented by the disaster, he did not invoke the NRP-CIA even then, having been advised (incorrectly) that the annex was applicable only to no-notice or short-notice events.⁸²

The NRP-CIA provides the infrastructure for an

aggressive federal response, but the annex does not say when it should be invoked. During Katrina's aftermath, federal response officials in the field made individual decisions to bypass established procedures and provide assistance on the ground without waiting for state requests or clear direction from Washington. These decisions were made in an uncoordinated fashion, over several days, leading to a cumulative switch from a "pull" to a "push" system. Although these actions improved the response to Katrina, they came too late to forestall much loss of life, injuries, and property damage.⁸³

Although the NRP-CIA was not accompanied by changes in the Stafford Act or free-standing legislation that would provide new emergency response authority to federal officials, the annex did establish the policy that called for urgent and proactive response in catastrophic situations.⁸⁴ The NRF calls specifically for proactive response to catastrophic incidents: "Prior to and during catastrophic incidents, especially those that occur with little or no notice, the State and Federal governments may take proactive measures to mobilize and deploy assets in anticipation of a formal request from the State for Federal assistance."⁸⁵ The proactive steps may be taken for "catastrophic events involving chemical, biological, radiological, nuclear, or high-yield explosive weapons of mass destruction, large-magnitude earthquakes, or other catastrophic incidents affecting heavily populated areas," and should be coordinated with state, tribal, and local governments "when possible."⁸⁶

One of the continuing ambiguities in the entire NRF structure that is especially noticeable in the Catastrophic Incident Annex is who or what conditions trigger the federal role, whatever its nature.

Despite the forward-leaning tone of the NRF-CIA and the admonition of the NRF to prepare to act proactively in catastrophic situations, the prospect of uncoordinated federal actions remains. The NRF-CIA states that "all deploying Federal resources remain under the control of their respective federal department or agency," and the annex does not provide additional operational details. A supplement to the annex – the NRF-Catastrophic Incident Supplement – is designed to fill in those operational details. At this writing, the NRF-CIS is under revision.

One of the continuing ambiguities in the entire NRF structure that is especially noticeable in the NRF-CIA is who or what conditions trigger the federal role, whatever its nature. The NRF and NIMS may be triggered when state and local officials are "overwhelmed," and "overwhelmed" states or cities may not be in a position to request federal help. The "push" model would trigger the federal response when a particular set of conditions develop and after a declaration by the secretary of Health and Human Services or the president. The NRF-CIA is designed to be part of the "push." Its assets may be proactively sent directly to the incident site, where further decisions on what to do

and under whose leadership can be determined after deployment. But the recurring problem remains: How will officials know when to operate a “push” system as opposed to a “pull” system?

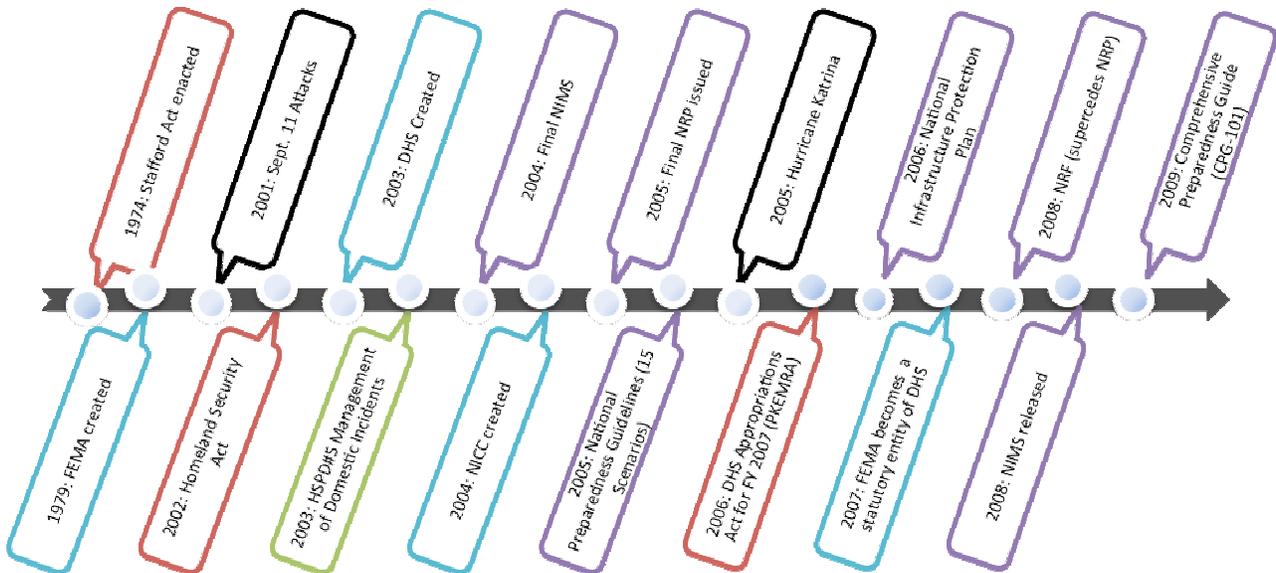


Figure 5: Selected Federal Emergency Management Timeline 1979-2009

KEY : Black: Milestone Incidents or Events; Red: Statutes; Green: Executive Directives; Teal: Organizational Changes; Purple: National Strategies, Plans and Exercises. SOURCE: http://www.disaster-timeline.com/DTL09_Sept26_2009-secure.pdf and author additions.

Should these judgments be made by the FCO (federal coordinating officer), the PFO (principal federal officer), or by on-site officials, such as state and local leaders and their first responders? The lack of clear legal authorities for a push system and the absence of clear coordinated direction from central command suggest that ad hoc arrangements and informal networks may, in fact, determine response activities.

3.1 The Legal Status of the NRF and NIMS

Federal agency prescriptions that are designed for comprehensive application to government activities are normally cast in the form of rules and are promulgated following the procedures of the Administrative Procedure Act (APA).⁸⁷ While plans are not rules, strictly speaking, the character of the NRF and NIMS – comprehensiveness, universal application to all emergency preparedness and response activities, and future effect – is very much rule-like. The label may or may not matter in measuring the legal force and effect of NRF or NIMS provisions. (Would a federal agency that resists cooperating in a particular response activity suffer legal sanctions?) As mentioned, states and cities are conditionally obligated to meet NRF and NIMS standards through the carrot of federal funds, while the private and nonprofit sectors are not obligated by the plans to do anything.⁸⁸

However, the APA anticipates a transparent and widely participatory process of inputs *in advance of promulgation* of an agency rule. The Homeland Security Act expressly granted rulemaking authority to DHS.⁸⁹ The NRP and now the NRF and NIMS were not initiated by a Notice of Proposed Rulemaking in the Federal Register, as the APA requires. Nor was there a public comment period, involving the general public. Finally, where the APA requires promulgation of a proposed rule, with further opportunity for public comment and review, DHS promulgated the NRP/NRF/NIMS in final form after internal executive branch review. A more fully transparent and participatory process may enable better planning products and greater public support for the plans that emerge.

3.2 The Public Health Service Act and Public Health Emergency Authorities

In the event of a terrorist attack involving a contagious biological agent or radiation, or a pandemic, officials may determine either to restrict or force movement of persons in order to limit the spread of the contagion and to preserve order. Public health management would be a critically important function of government in such a situation. But which level of government is responsible for making and enforcing the decisions? The decision to quarantine or otherwise restrict the movement of persons for public health reasons is undeniably a creature of state law in our federal system. Some states have revised state public health and emergency management authorities in response to the threats of a biological weapons attack (*see p. 27*). However, states generally are not well prepared for such a contingency, and the federal support authorities are also not adequate.⁹⁰

Following the terms of the Public Health Service Act,⁹¹ the secretary of Health and Human Services may declare a public health emergency and then respond by deploying the Public Health Service Commissioned Corps, elements of the Centers for Disease Control and Prevention, the Food and Drug Administration, and the National Institutes of Health.⁹² In addition, the surgeon general is authorized to issue and has promulgated regulations “necessary to prevent the introduction, transmission, or spread of communicable diseases” from foreign nations into states, or from one state to another.⁹³ In turn, the president specifies by executive order the diseases that could trigger this limited quarantine authority.⁹⁴ Assuming a terrorist attack with biological weapons,⁹⁵ federal authorities may be invoked if the agent transmits one of the communicable diseases covered by existing regulations.⁹⁶ For example, smallpox is covered. Any person “reasonably believed to be infected with a communicable disease in a communicable stage” may be stopped and examined if he is moving, or is about to move, from state to state, or if he is “a probable source” of infection to others who will be so moving.⁹⁷

However, no existing federal regulations permit the detention or other restriction of persons once identified as communicable to prevent the spread of a disease.⁹⁸ Nor are there federal regulations authorizing the imposition of quarantine following an attack by chemical, radiological, or nuclear weapons.⁹⁹ Thus, unless domestic quarantine regulations are promulgated, no federal quarantine may be lawfully imposed except at our international borders.¹⁰⁰ Moreover, principles of federalism and constitutional limits on the exercise of federal regulatory authority may not permit a federal quarantine within a single state.¹⁰¹ A 2009 attorney general memorandum to the secretaries of HHS

and DHS, and other federal officials, concluded that the authority to implement a federal quarantine intrastate is unclear.¹⁰²

Even if quarantine regulations are promulgated, neither the surgeon general and Department of Health and Human Services nor the Centers for Disease Control (CDC) have police forces that could enforce quarantine. One analysis of a federal exercise involving a fictional biological weapons attack in Denver offered a sobering assessment of the quarantine enforcement problem:

[L]ocal officials ... believed that the public would probably not cooperate with compulsory orders to commandeer property, restrict movement of people, or forcibly remove them to designated locations. ... [C]itizens get angry at forced evacuations for such visible calamities as hurricanes, floods, and wildfires, not to mention a stay-at-home order for a microscopic killer that they may doubt is in their midst. Police also questioned whether their colleagues would recognize the authority of the public health officer to declare a quarantine or would even stick around to enforce the order. ... [S]ome wondered whether there were enough local and state police to quarantine a large metropolitan area in the first place. ... [One police captain stated that] if police officers knew that a biological agent had been released, 99 percent of the cops would not be here. They would grab their families and leave.¹⁰³

The Public Health Service Act also directs the secretary of HHS to collaborate with the CDC and DHS in maintaining a Strategic National Stockpile (SNS) of “drugs, vaccines and other biological products, medical devices and other supplies” needed to protect the nation during a bioterrorist attack or other public health emergency.¹⁰⁴ The efficacy of the SNS and its implementation during an emergency has been questioned, and its performance during preparedness exercises has met with criticism.¹⁰⁵

Federal law also authorizes the waiver of various regulatory requirements in the event of a public health emergency. For example, the Food and Drug Administration (FDA) may permit the use of an unapproved new drug or device in an emergency involving a biological, chemical, radiological, or nuclear agent.¹⁰⁶ In the event that the secretary of HHS declares a public health emergency, unapproved use of a drug may also be permitted. After a federal judge enjoined the military’s mandatory anthrax vaccination program in 2004, based on the FDA’s failure to solicit sufficient public comments before certifying the drug,¹⁰⁷ the HHS responded by issuing an authorization for emergency use.¹⁰⁸ Although the 2005 waiver anticipated a potential terrorist attack, in 2009 the FDA relied on its emergency authority to authorize the use of a new swine flu diagnostic test and widespread distribution of the drugs Relenza and Tamiflu without complying with labeling requirements.¹⁰⁹

When health care professionals volunteer their services during public health emergencies, federal law may shield them from liability.¹¹⁰ Although the individual workers are immunized when volunteering for nonprofit or governmental organizations, the institutions are not immunized. The federal government may also immunize health care workers by hiring them.¹¹¹

3.3 Congressional Oversight of Emergency Management

Congress conducts oversight to hold executive officials accountable for the implementation of authorities delegated by statute. As the above discussion of federal emergency management authorities indicates, Congress has given a broad swath of emergency management discretion to executive departments and agencies. The oversight task might be considered all the more important considering the expansive executive influence in emergency response through entities as massive as DHS. In fact, the continuing splintered oversight responsibilities inside Congress among countless committees and subcommittees, and a general reluctance among many members to question executive decisions in countering terrorism threats, contribute to a generally weak system of congressional oversight in the area of emergency management. Exceptions to the rule include the statutory inspectors general, the Privacy and Civil Liberties Oversight Board (both addressed later in this paper), and occasionally productive oversight hearings and committee reports.

3.4 Civil Liberties Implications of the Federal Plans

Federal exercises, such as the fictional biological weapons attack in Denver noted above, suggest that the dominant civil liberties concern in reaction to federal emergency response plans is the potential for overreaching. Citizens may simply and reasonably prefer that their government in a crisis consist of local and perhaps state officials, closer to home. While federalism provides some protections against federal usurpation of a state and local government prerogative, the combination of financial incentives and federal government resources tends to dominate emergency response preparedness activities. Second, citizens may worry that specific federal government measures may curtail their freedoms. Restrictions on movement, forced isolation, mandatory vaccinations, and potential detention schemes following a catastrophic incident are legally plausible.

While federalism provides some protections against federal usurpation of a state and local government prerogative, the combination of financial incentives and federal government resources tends to dominate emergency response preparedness activities.

3.5 Summary

The Homeland Security Act of 2002 directed the DHS secretary to create a comprehensive management system that would consolidate component agencies, including FEMA. The act designates DHS as the lead agency for coordinating disaster and emergency response and recovery assistance with state and local authorities. In 2003, President Bush issued Homeland Security Presidential Directive 5 (HSPD-5), designating the secretary of Homeland Security as the principal federal official for domestic incident management, and anticipating cooperation between levels of

government by “using a national approach to incident management.” Under the directive, FEMA inherited the Preparedness Directorate, and the director of FEMA, re-titled an administrator, became an undersecretary of DHS. The act also created a regional FEMA system, with 10 regions and 10 regional directors, a National Integration Center, and a National Preparedness System, the latter of which provides the most recent statutory foundation for intergovernmental and interagency homeland security and emergency management coordination. However, due to some confusion about when and under what conditions the federal government would initiate a disaster response, which became apparent during the response to Hurricane Katrina, Congress passed the Post-Katrina Emergency Management Reform Act (PKEMRA) to allow accelerated federal assistance, without a state request, when necessary to save lives, prevent suffering, and mitigate severe damage. This authority to “push” federal response resources, rather than wait for the “pull” from the states, is limited to situations where the president declares a “major disaster.” One of the continuing ambiguities in the entire National Response Framework is who or what conditions trigger a federal role, whatever its nature.

Following the terms of the Public Health Service Act, the secretary of Health and Human Services may declare a public health emergency and then respond by deploying the Public Health Service Commissioned Corps, elements of the Centers for Disease Control and Prevention, the Food and Drug Administration, and the National Institutes of Health. This act allows officials, in the event of a terrorist attack involving a contagious biological agent or radiation, or a pandemic, to either restrict or force movement of persons to limit the spread of contagion and to preserve order. However, no existing federal regulations permit the detention or other restriction of persons once identified as communicable to prevent the spread of disease. Federal exercises suggest that the dominant civil liberties concern in reaction to federal emergency response plans is the potential for overreaching. Citizens may simply and reasonably prefer that their government in a crisis consist of local and perhaps state officials, closer to home.

4. The Federal/State/Local Interface and Its Mechanisms

Federalism complicates but does not prevent effective coordination among governments and private sector interests for emergency response. Federalism connotes a structure for government, but it says little about how that structure governs. Our nation’s governing structures and processes surely are more layered and complex than the governing systems in many other nations, but their inefficiencies can be overcome by mechanisms for coordinated actions in a crisis. Indeed, inter-jurisdictional problems, like coordinating for homeland security, may be managed effectively only by a model of federalism that permits and even facilitates coordination and adaptation.¹¹²

National emergency preparedness requires intergovernmental coordination because, no matter how large the affected area, the incident will demand state and local responses at the outset. At the same time, even localized emergencies may outstrip a city’s response resources. Emergency response will also require adaptation and contingent planning that incorporates improvisation, because the events

often arrive without notice and have dynamic qualities; standard hierarchical government response mechanisms will likely break down. Some emergencies will require a disproportionately federal response – a surprise attack on nuclear power facilities by gun-wielding terrorists – while most will be decidedly local but, depending on scale, may require a state and federal military response – another Katrina. Some incidents may be catastrophic and quickly overrun all civilian agency resources, leaving little alternative but to call forth support for the civilian agencies from some military force – active duty or National Guard – the largest, most organized, and best equipped government personnel force we have.

Typically, state constitutions and other laws give governors broad powers during emergency circumstances, and some states extend similar authority to public health agency heads within their spheres of authority. For example, some states permit public health officials to issue orders isolating those who have an infectious disease to prevent its spread. Following some declaration of emergency, governors may invoke emergency powers, thereby waiving or exempting state laws that would otherwise apply. These declarations, which take the form of executive orders or decrees, are often accompanied by statewide plans and procedures for responding to emergency incidents.

Inevitably, invoking emergency powers requires careful attention to striking a proper balance between individual and communal interests. Although the laws that enable the emergency declarations themselves include processes to ensure that decision-makers take into account how addressing community-based needs affects individual rights, the affected individuals may still object to emergency measures. For example, some people may complain that a forced evacuation should not occur without establishing a demonstrable need to leave. Or people who suffer from disabilities may claim with justification that the general evacuation order cannot be applied to all groups in the affected communities. Still others might demand that the government provide vaccines or medicines when resource allocation decisions have been made on the basis of finite supplies.

In a terrorist attack involving a contagious biological agent or radiation, state officials may decide either to restrict or to force the movement of persons in order to limit the spread of the contagion and to preserve order. An attack with a nuclear device would create such physical devastation, such a high number of casualties, and such widespread contamination that some areas would become uninhabitable on a long-term basis. Public health management would be a critically important function of government in such situations.

The one-two punch of the September 11 attacks and the anthrax letters prompted the Centers for Law and the Public's Health, a collaborative program of Georgetown University and Johns Hopkins University, to draft the Model State Emergency Health Powers Act (MSEHPA) in late 2001.¹¹³ The idea in developing the MSEHPA was to provide state and local governments with a template for legislative reform of existing public health and emergency response laws in light of the

preparedness challenges posed by terrorism. Over the course of five years, 38 states enacted some portion of the MSEHPA as law, varying in content across the states.¹¹⁴

The model defines a public health emergency as an occurrence or imminent threat of an illness or health condition that, first, is believed to be caused by any of the following: (1) bioterrorism, (2) the appearance of a novel or previously controlled or eradicated infectious agent or biological toxin, (3) a natural disaster, (4) a chemical attack or accidental release, or (5) a nuclear attack or accident; and, second, poses a high probability of any of the following harms: (1) a large number of deaths in the affected population, (2) a large number of serious or long-term disabilities in the affected population, or (3) widespread exposure to an infectious or toxic agent that poses a significant risk for substantial future harm to a large number of people in the affected population.¹¹⁵

If these criteria trigger declaration of a public health emergency, MSEHPA grants public health agencies a series of powers not possessed in ordinary times. In fact, existing legal requirements are suspended for the specific purposes identified in the emergency declaration. Among other things, officials could waive professional licensing and related certification requirements for volunteers joining emergency response efforts, and give the volunteers liability protections. They could also expedite acquisition of essential supplies and personnel, and suspend other regulatory requirements for the conduct of state or local business.

If these criteria trigger declaration of a public health emergency, MSEHPA grants public health agencies a series of powers not possessed in ordinary times. In fact, existing legal requirements are suspended for the specific purposes identified in the emergency declaration.

Public health or emergency management officials also could designate any government property needed for emergency use related to the public health emergency, as well as private facilities, such as a hotel or private meeting place, if needed to provide emergency public health services, such as vaccination or shelter. Similarly, private property (such as medicines or medical equipment) could be taken by the government during the emergency, subject to the requirement that the owners be compensated fairly for the loss after the emergency has subsided.¹¹⁶ State representatives and various public health experts collaborated in 2003 to produce an alternative model, the Turning Point Model State Public Health Act (MSPHA). The MSPHA borrows some provisions from the MSEHPA, and provides a more comprehensive approach to public health regulation.¹¹⁷

Among the biggest challenges facing public health officials and other state or local decision-makers when a public health crisis is imminent is handling the medical surge — that is, the demand for services and protection that far outstrips day-to-day capacities. Triage conditions may exist, and criteria may be developed, even ad hoc, to strictly ration care. Thus the capacity to waive licensing

and certification requirements to permit widespread use of volunteers may be essential, as would be the need to provide waivers for liability for those volunteers. Neither MSEHPA nor most existing state and local laws provide expressly for the possibility of networked responses to public health crises, in which existing response structures and institutions are enhanced by others inside government and from the private sector and nongovernmental organizations.

The State of New York, arguably one of the best prepared and certainly most experienced of the states in dealing with crises, recently published *The New York State Public Health Legal Manual: A Guide for Judges, Attorneys, and Public Health Professionals*.¹¹⁸ In the understated prose typical of judicial reports, the Guide confirms that government in New York State has broad authority to declare a state of emergency, and that even local governments may establish curfews, quarantine wide areas, close businesses, restrict public assemblies, and even suspend local laws. The Guide catalogs potential doomsday-type scenarios, and then notes that the procedures that state laws normally provides for hearings and public participation may be curtailed during a crisis, when state officials can compel mass evacuations, control traffic, communications, and utilities.

Even inside each state, it is not always clear where local government authority ends and state authority begins. Some states have rules that presume that local governments have only those authorities expressly assigned by the state constitution or another state law. Other states follow a “home rule” approach, in which local governments may do anything within their geographic limits absent contrary instructions in state law. Regardless of legal authorities, limited expertise and finite resources often stand in the way of effective local government preparedness for an emergency response, leaving most cities dependent on the beneficence and leadership of their state government.

4.1 Regional Responses

In between the conventional “pull” system, in which states request federal assistance when needed, and the “push” model, in which a federal role is inserted proactively in a crisis, cooperation among affected states in a crisis may afford a sort of middle ground between push and pull. Some emergencies affect more than one state, but they do not necessarily require the full panoply of federal resources in support. For example, during a hypothetical terrorist attack on an industrial facility in New Jersey, chemical vapors are released and affect New Yorkers. Even where federal support is surely required, regional mechanisms can supplement the federal assets.

Mutual aid agreements for emergency management have been a feature of U.S. law and practice since the early Civil Defense Act days of the 1950s. After Hurricane Andrew devastated southern Florida in 1992, southern governors formed a compact, which in 1995 grew to include any state that wished to join, before Congress codified the Emergency Management Assistance Compact (EMAC) in 1996.¹¹⁹ All 50 states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands have enacted legislation to become members of EMAC. The National Emergency Management Association has also drafted model legislation, based on EMAC, designed to facilitate similar agreements among political subdivisions of a state.¹²⁰ Although the EMAC legislation contemplates

regional plans and the sharing of resources and information in an all-hazards range of crises, its mechanisms urge decentralization of the emergency response tasks. EMAC plans and procedures are recognized as legitimate response mechanisms in HSPD-5, the NRF, and NIMS. EMAC arrangements also worked relatively well in the response to Hurricane Katrina – one of the few government institutions that received high marks in the follow-on studies.

4.2 Coordination with Private and Nongovernmental Responders

Although the DHS plan for protecting the nation’s critical infrastructure recognizes the importance of the private companies that own and operate the vast majority of it, and contemplates CI/KR (Critical Infrastructure/Key Resources) Coordinating Councils that would engage private owners with their public sector counterparts in emergency planning and response,¹²¹ the Stafford Act and other federal legislation do not explicitly authorize private sector participation in emergency response. The NRF and NIMS take note of the “essential role” of the private sector and nongovernmental organizations (NGOs) in emergency response,¹²² but no legal authorizations flow from those plans. The confused attempts to facilitate private sector responses to Hurricane Katrina underscored the inadequacy of plans for private sector participation.¹²³

A 2006 amendment to the SAFE Port Act¹²⁴ adds to the Stafford Act language that prohibits federal agencies from actively denying or impeding private utility companies’ access to a disaster area. Yet the law does not authorize federal agencies to assist companies in gaining access to the disaster site, nor to secure the environment for their workers. Nor does the law do anything to facilitate the emergency response role that may be played by private companies that are not essential service providers (e.g., Wal-Mart).

The American Red Cross (ARC) is the oldest and arguably most important nongovernmental organization involved in emergency response. Currently, the NRF ESF #6, concerning mass care, housing and human services, designates the ARC as a support agency to DHS/FEMA. In fact, government relies heavily on the ARC to carry out a range of emergency services.¹²⁵ Yet implementation of federal law and policy may conflict with ARC policies, for example, if the federal policy accommodating pets at shelters is met by Red Cross officials who, for whatever reason, are reluctant to accept pets in their shelters.

The law does not authorize federal agencies to assist companies in gaining access to the disaster site, nor to secure the environment for their workers. Nor does the law do anything to facilitate the emergency response role that may be played by private companies that are not essential service providers.

Finally, consider the role of citizens in emergency response. The Citizen Corps, established in the wake of 9/11, is coordinated by FEMA to encourage education, training, and volunteer service in

support of first responders, disaster relief groups, and community safety organizations.¹²⁶ Similarly, Community Emergency Response Teams (CERT) have been implemented by more than 1,100 communities, sponsored by state, county, or local emergency management agencies. Citizens receive training in disaster preparedness, fire suppression, medical operations, light search and rescue, disaster psychology, and team building.¹²⁷

4.3 Civil Liberties and Vulnerable Populations

In an emergency, vulnerable groups include persons with disabilities, pregnant women, children, elderly persons, people with language barriers, and the poor. The U.S. Constitution and federal and state statutes establish some obligations to protect vulnerable groups. The Equal Protection Clause and the Eighth Amendment provide constitutional protections for the vulnerable, although several litigation obstacles have stood in the way of most of those who have sought to utilize these provisions.¹²⁸ The Americans with Disabilities Act (ADA)¹²⁹ provides that individuals with disabilities may not be denied the benefits of programs, activities, and services, such as public transportation, provided by public entities,¹³⁰ and, in many cases, by private entities providing public accommodations.¹³¹ As with the constitutional protections, proving violations of the ADA by emergency responders is challenging. A plaintiff has to show that the wrongdoing was specifically due to the disability rather than the emergency circumstances, and that the responder could have accommodated the needs without undue hardship.¹³² Good faith decisions by medical service providers also are likely insulated from ADA recovery.¹³³ Other federal and state statutory protections, and common law tort actions, face similar obstacles. In the face of these obstacles, the federal government and some states have specifically addressed the needs of vulnerable populations during emergencies.

The Pandemic and All-Hazards Preparedness Act of 2006 added a provision to the Public Health Service Act that considers the “public health and medical needs of at-risk individuals” a national goal.¹³⁴ Yet the act does not direct means toward the achievement of the goal. The Stafford Act does contain a broad nondiscrimination mandate,¹³⁵ and the PKEMRA created the position of disability coordinator in FEMA to assist with disaster planning for persons with disabilities.¹³⁶ Although the new provision provides considerable detail on the duties of the coordinator, it does not protect any groups other than the disabled. No special efforts are contemplated for children, the elderly, or others.¹³⁷ A June 2009 report by Save the Children concludes that states remain poorly prepared to meet the disaster-related needs of children.¹³⁸

4.4 Summary

National emergency preparedness requires intergovernmental coordination because, no matter how large the affected area, the incident will demand state and local responses at the outset. Because localized emergencies may outstrip a city’s response resources, state constitutions and other laws give governors broad powers during emergency circumstances, and some states extend similar authority to public health agency heads within their spheres of authority. Even inside each state, it is

not always clear where local government authority ends and state authority begins. Some states have rules that presume that local governments have only those authorities expressly assigned by the state constitution or another state law. Other states follow a “home rule” approach, in which local governments may do anything within their geographic limits absent contrary instructions in state law. Moreover, although the DHS plan for protecting critical infrastructure recognizes the importance of private companies in emergency response, the Stafford Act and other federal legislation do not explicitly authorize private sector participation. The American Red Cross is the oldest and arguably most important nongovernmental organization involved in emergency response. Currently, it is designated as a support agency to DHS/FEMA; in fact, government relies heavily on the Red Cross to carry out a range of emergency services.

While the U.S. Constitution, and federal and state statutes, establish some obligations to protect vulnerable groups during emergency response efforts, and private groups can help with these efforts, persons with disabilities, pregnant women, children, elderly persons, people with language barriers, and the poor remain at risk. A June 2009 report by Save the Children concludes that states remain poorly prepared to meet the disaster-related needs of children.

5. The Role of Federal and Local Police and Intelligence Investigators, and the Intelligence/Law Enforcement Overlap

5.1 Overview

Terrorism presents a unique set of challenges in the United States. Our criminal laws and traditional law enforcement processes cannot provide absolute protection against terrorist acts. The possibility of catastrophic harm from terrorist attacks forces us to consider other means of prevention. At the same time, the traditional citizens’ protection against overzealous law enforcement – Fourth Amendment requirements¹³⁹ – may thwart many investigations of terrorism, which depend on stealth to prevent terrorist acts before plans are carried out.

Terrorism represents an unusual confluence of phenomena for the investigative community. The primary purpose of the investigation may be simultaneously and in equal measure law enforcement and national or homeland security. Our tradition of personal liberty in the United States casts a shadow over surveillance for homeland security, and is an overriding issue in addressing terrorism concerns. The core openness of our society permits all of us, including the potential terrorist, considerable freedom to move about, to associate with others, and to act in furtherance of political aims. We are often reminded that hasty actions to prevent terrorism may threaten the freedoms that permit an open society.

As a result, we have historically separated law enforcement and intelligence collection functions in the United States. Yet because stealth is an essential element of gathering intelligence, and because the default Fourth Amendment requirements of obtaining a warrant from a magistrate after

demonstrating probable cause of a criminal act are not well suited to surveillance for national security, we have created laws and practices that sometimes permit national security intelligence collection inside the United States following a more relaxed set of justifications. At the same time, because intelligence collected to prevent terrorist acts may also provide evidence of criminal wrongdoing, we have isolated the law enforcement and intelligence teams from each other, to preserve the “clean” evidence for eventual prosecution.

The failures to share information between intelligence and law enforcement investigators in the months and weeks before 9/11 led the executive and Congress to relax the rules and effectively lower the “wall” that had existed between law enforcement and intelligence gathering inside the United States. Now the Department of Justice National Security Division (NSD) works to integrate the criminal and intelligence elements of DOJ, and revised laws permit considerable freedom to utilize the Foreign Intelligence Surveillance Act (FISA) and relaxed FBI guidelines in keeping tabs on potential terrorist activity. Lawsuits that continue to raise Fourth Amendment objections to the blended investigations have, for the most part, failed.

In light of 2008 amendments to FISA, the National Security Agency now has statutory authority to collect information on U.S. persons inside the United States as an incidental byproduct of collections targeting persons reasonably believed to be outside the United States.

Our society has declined to create an internal security agency equivalent to Britain’s MI-5. Accordingly, the FBI has always been known, first and foremost, as a law enforcement agency. When the Central Intelligence Agency (CIA) was created by statute in 1947, its charter expressly prohibited it from having any “internal security function.” When the CIA collects intelligence inside the United States, it must be seeking “foreign intelligence information,” based on the connection of the target (whether or not a U.S. citizen) to international terrorism or clandestine foreign intelligence activities. Similarly, the National Security Agency (NSA) engages in signals intelligence collection, not human intelligence gathering, and it was forbidden from collecting inside the United States, subject to the same basic provision affecting the CIA. In light of 2008 amendments to FISA, NSA now has statutory authority to collect information on U.S. persons inside the United States as an incidental byproduct of collections targeting persons reasonably believed to be outside the United States, so long as the agency is pursuing “foreign intelligence” and has obtained an authorization from the special Foreign Intelligence Surveillance Court (FISC) for such collection.

Like the FBI, state and local police are subject to the limits imposed by the U.S. Constitution. However, below the constitutional baseline, they investigate crimes and security threats subject to a much less formal set of restrictions on their activities. Cooperation between police and intelligence investigators at different levels of government will be addressed below.

5.2 Federalism and the Tradition of Local Policing

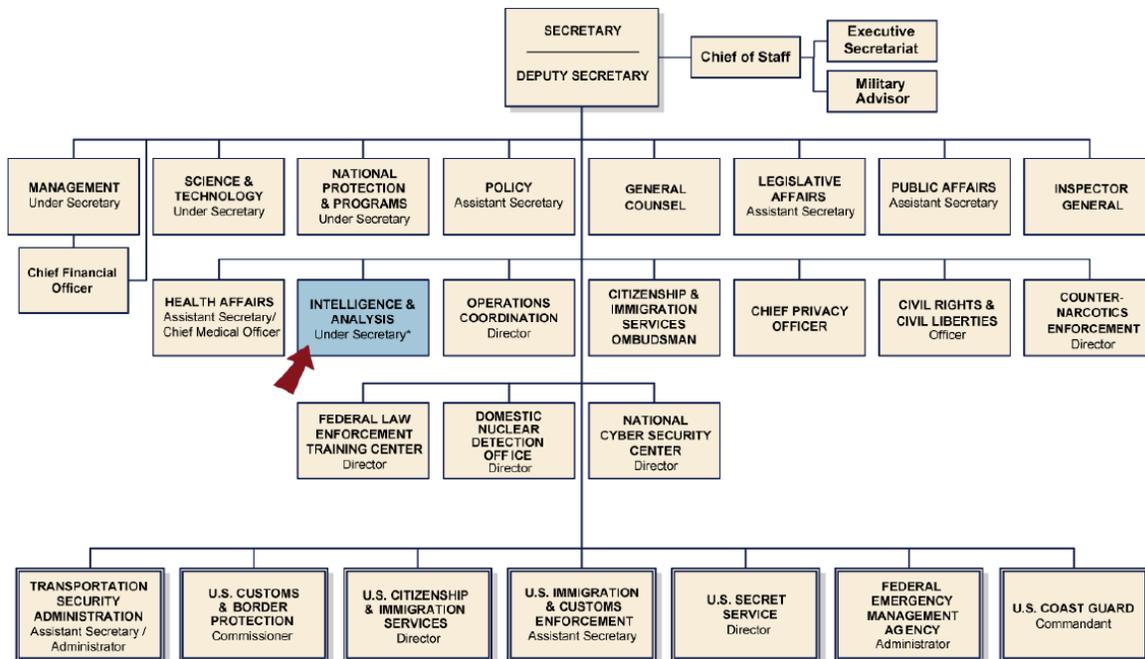
For more than 150 years, before the September 11 attacks, police intelligence had little to do with national or military intelligence. A simple division of labor prevailed, based on the nature and scope of threats, and sometimes their location. Since 9/11, government officials envision that a serious attack could occur against the nation, in one city, using weapons of mass destruction or even small arms, as in Mumbai. The perpetrators might live in a U.S. community or come from across the globe. Whether based domestically or abroad, the potential perpetrators often commit ordinary crimes to finance their planned attacks. In these scenarios, local police and intelligence and their national or military counterparts may seek to cooperate, or at least to coordinate their efforts.

By tradition and government structure, policing in the United States is civilian, overwhelmingly local, and fragmented. Police typically are accountable to local elected officials. Of almost 18,000 separate law enforcement agencies in the United States, roughly 16,000 are local. Most of the remaining 2,000 represent special jurisdictions, such as park police or university security, or are state agencies and, finally, federal non-military agencies. Of 837,000 full-time police personnel with arrest authority, 74 percent are local, 13 percent federal, and 13 percent state or special jurisdiction.¹⁴⁰

There is not a chain of command among and between police agencies. Officers in the field tend to work with immediate supervision and, unless their decisions result in an arrest, their activities are not reported and no official information is gathered for analysis or sharing. Arrests are recorded, credited to the officer, and often are rewarded. Otherwise, the local practice is not to collect intelligence and not to share information that may be gathered.

5.3 Contemporary Organization of Homeland Security Intelligence Collection and the Law Enforcement/Intelligence Overlap

The Department of Homeland Security has had an intelligence component since its creation in 2003. The original Directorate of Information Analysis and Infrastructure Protection was given responsibility to receive, analyze, and integrate law enforcement and intelligence information in order to “(A) identify and assess the nature and scope of terrorist threats to the homeland; (B) detect and identify threats of terrorism against the United States; and (C) understand such threats in light of actual and potential vulnerabilities of the homeland.”¹⁴¹ Although information sharing was also prioritized in the original DHS charter, after the 9/11 Commission identified failure in information sharing as a major factor in failing to prevent the 9/11 attacks, Congress required the president to “create an information sharing environment for the sharing of terrorism information in a manner consistent with national security and applicable legal standards relating to privacy and civil liberties.”¹⁴²



Source: DHS, July 18, 2008.

Figure 6: Current Department of Homeland Security Organization

Source: Congressional Research Service, May 27, 2009, R40602.

After completing a Second Stage Review (2SR) inside DHS, Secretary Chertoff initiated a reorganization of the department in July 2005, established a strengthened Office of Intelligence and Analysis (I&A), and elevated the head of I&A to undersecretary for intelligence and analysis and chief intelligence officer for DHS (see Fig. 6). In the Implementing Recommendations of the 9/11 Commission Act of 2007, Congress required that DHS:

- integrate information and standardize the format of intelligence products within DHS;
- establish procedures for review, analysis, integration, and dissemination of information provided to DHS by other entities;
- evaluate how DHS agencies are utilizing homeland security information and participating in the Information Sharing Environment (ISE);
- establish a comprehensive IT network architecture;
- establish an initiative to partner with state, local, and regional “fusion centers”; and
- create an Interagency Threat Assessment and Coordination Group (ITACG) that will bring component agency analysts to the National Counterterrorism Center (NCTC).¹⁴³

Currently, the intelligence enterprise at DHS consists of I&A, the Homeland Infrastructure Threat and Risk Analysis Center, and the intelligence division of the Office of Operations Coordination and Planning, along with the intelligence elements of six operational components: Customs and Border Protection (CBP); Immigration and Customs Enforcement (ICE); Citizenship and Immigration Services (USCIS); Transportation Security Administration (TSA); Coast Guard (USCG); and the

Secret Service (USSS).¹⁴⁴ The intelligence products of I&A are made available to state and local officials through classified and unclassified intelligence networks, including the Homeland Security Information Network (HSIN), a secure Web-based platform that circulates sensitive but unclassified (SBU) information to other governmental, private sector, and international partners. The HSIN interacts with the National Operations Center (NOC) to provide real-time, interactive connectivity between DHS, the states, and major urban areas.¹⁴⁵

As described more fully below, the utility of DHS intelligence to state and local governments and fusion centers has been limited. Since the ITACG was established by statute in 2007 and only operational since early 2008, it is too early to make definitive judgments about its effectiveness.¹⁴⁶

5.4 Law Enforcement/Intelligence Tensions in Emergency Response

Emergent concerns about homegrown terrorism have brought local police into view as important players in homeland security preparedness and response. Recent episodes involving the “Lackawanna Six” (see the Sleeper Cells case study, below), the “Fort Dix Six,” Najibullah Zazi, David Headley, and U.S. Army Maj. Nidal Malik Hasan included intelligence and law enforcement efforts led by various combinations of local police, FBI, and military police. Apart from the complications arising from the roles of local police, the FBI, and other federal agencies in intelligence collection and law enforcement to counter terrorism in the United States, local police interact with the same agencies as part of the first layer of response to natural disasters or other emergencies.



Figure 7: Najibullah Zazi arrives at the Byron G. Rogers Federal Building in Denver, Colorado, on September 17, 2009. (Photo: Getty Images)

Local police and local intelligence have obvious situational advantages in emergency response, including their knowledge of the communities they serve. Yet local police lack the resources and expertise to respond to or manage significant events, and their determination to respond to emergencies may sometimes obstruct rather than facilitate effective emergency response.

From one perspective, local police provide a buffer against potential overreaching by federal counterterrorism policies and practices. After September 11, for example, the Portland, Oregon, police chief withdrew local police officers from a federal Joint Terrorism Task Force (JTTF); the Dearborn, Michigan, police chief complained as local police were tasked to participate in federal intelligence investigations; and New York Mayor Michael Bloomberg asserted that local police would not assist in the enforcement of federal immigration laws.¹⁴⁷ These local officials took strength from the constitutional principle announced by the Supreme Court in the 1990s, that the

federal government could not commandeer state and local governments to implement or enforce federal policy.¹⁴⁸ Similarly, in theory local police are closer to the communities they serve, and are thus more likely accountable to their publics.¹⁴⁹

On the other side of the ledger, to the extent that local police agencies become involved in intelligence collection to counter terrorism, the informality of their mechanisms for reporting and accounting for their activities may compromise effectiveness, or worse. Internal guidelines tend to be relaxed, local legislative checks on policing are sparse, and the courts typically do not review challenges to local intelligence activities.¹⁵⁰ Indeed, New York City expressed its frustration with federal-local information sharing by stationing personnel in several cities overseas, including London, Paris, Abu Dhabi, and Amman. Officials reasoned that New York remains a target of international terrorism, that the CIA, FBI, and other federal agencies may not share pertinent information with them, and that they wanted to collect critical intelligence of importance to the city. They assume that local police in foreign cities are more likely to share information with them than with federal agencies.¹⁵¹

To the extent that local police agencies become involved in intelligence collection to counter terrorism, the informality of their mechanisms for reporting and accounting for their activities may compromise effectiveness, or worse.

In any case, in the face of structural, traditional, and still nettlesome challenges, there have been improvements in information sharing and other forms of cooperation and coordination between local and federal police and intelligence officials. Local police now are encouraged to collect and forward Suspicious Activity Reports (SARs) to the FBI.¹⁵² Fusion centers have in some cases been granted access to classified federal information systems,¹⁵³ and local and state agencies have increased contacts with a range of federal agencies, including the FBI, CIA, CDC, Federal Aviation Administration, and National Guard.¹⁵⁴ The president and then Congress created the National Counterterrorism Center, and established an Information Sharing Environment.¹⁵⁵

5.5. Suspicionless Surveillance

5.5.1 Foreign Intelligence Surveillance Act (FISA)

Beginning in 1978, the Foreign Intelligence Surveillance Act (FISA)¹⁵⁶ authorized the means for electronic collection of foreign intelligence outside the law enforcement system. The basic idea was simple. Government may conduct intrusive electronic surveillance of Americans or others lawfully in the United States, without traditional probable cause to believe that they had committed a crime, if it could demonstrate to a special Article III court that it had a different kind of probable cause: reason to believe that targets of surveillance are acting on behalf of foreign powers.¹⁵⁷ Over time,

FISA was amended several times, to extend its procedures to physical searches,¹⁵⁸ to suspected “lone wolf” terrorists,¹⁵⁹ and to accommodate evolving threats.¹⁶⁰

Over the last decade, critics have argued, the patchwork-like architecture of FISA became too rigid, too complicated, and too unforgiving to enable effective intelligence responses to crises.¹⁶¹ The computerization of communications that has so enriched our capabilities has also facilitated stealth and evasion by those seeking to avoid detection. Would-be targets of surveillance are communicating in ways that stress or evade the FISA system.¹⁶² Because of the pervasiveness of U.S. telecom switching technology, collection inside the United States is now often the best or only way to acquire even foreign-to-foreign communications that were originally left unregulated by FISA.¹⁶³ Meanwhile, powerful computers and data mining techniques now permit intelligence officials to select potential surveillance targets from electronic databases of previously unimaginable size.¹⁶⁴ The wholesale quality of this expansive computer collection and data mining is incompatible with the retail scope of the original FISA process. Instead of building toward an individual FISA application by developing leads on individuals with some connection to an international terrorist organization, for example, officials now develop algorithms that search thousands or even millions of collected e-mail messages and telephone calls for indications of suspicious activities.¹⁶⁵

At the same time, more Americans than ever are engaged in international communications, and there is far greater intelligence interest in communications to and from Americans.¹⁶⁶ Both circumstances increase the likelihood that the government will be intercepting communications of innocent Americans, raising as many questions about the adequacy of the FISA safeguards as they do about the adaptability of FISA architecture. This tension forms the context for a series of post-September 11 developments, culminating in the FISA Amendments Act of 2008 (FAA).¹⁶⁷

The 2008 amendments codified a procedure to permit broad, programmatic surveillance focused on patterns of suspicious activities, and not on a specific individual or the contents of their communications, through changes in FISA that overcame the case-specific orientation of the original statute. As a result, the FAA also codifies until December 31, 2012, potentially intrusive electronic surveillance, unaccompanied by safeguards to protect personal privacy and free expression. The amended FISA also institutionalizes operations that are prone to inaccuracy and chronic over-collection.¹⁶⁸ A 2008 decision by the FISA Court of Review,¹⁶⁹ upholding the government’s implementation of the programmatic procedures of earlier but similar temporary legislation¹⁷⁰ by relying on procedures drawn from sources outside FISA, underscores the slapdash development and still incomplete legal architecture that attends the broad-based programmatic orders.

From FISA’s beginnings, the overarching question has been how to evaluate and weigh the basic values of security and individual liberties when intrusive electronic surveillance is used to collect foreign intelligence. Modern communications and surveillance technologies have so complicated policy discussions, however, that the values debate has drowned in a sea of misapprehension about the means to implement the policies. Meanwhile, FISA has become so complex that the law further impedes informed policy choices.

The Constitution continues to provide a baseline. The Fourth Amendment Warrant Clause applies to electronic surveillance conducted for foreign intelligence purposes within the United States if the surveillance involves U.S. persons who do not have a connection to a foreign power.¹⁷¹ FISA now permits such electronic surveillance as the inevitable byproduct of surveillance of unprotected targets, but the act does little to insulate U.S. persons from the effects of the surveillance. (It is not clear whether the Warrant Clause applies to such surveillance when a U.S. person is connected to a foreign power, or when the surveillance of U.S. persons occurs wholly outside the United States. The reasonableness component of the Fourth Amendment does apply in these instances.¹⁷²) Historically, our laws have rejected granting discretion for government to undertake intrusive surveillance of individuals without some showing of suspicious activities.¹⁷³ If the combination of terrorism threats and computerization demands a more nimble capacity to conduct suspicionless electronic surveillance to combat terrorism, the discretion that is necessarily part of that system should be more carefully controlled, either at the point of collection or when the information is maintained or used by the government. Absent such controls, FISA as amended now threatens long-standing Fourth Amendment principles. Apart from its potential constitutional shortcomings, the programmatic surveillance that FISA permits should be repaired to improve its efficacy. Making the program more efficacious will help make it lawful.

Even before programmatic surveillance was stitched onto FISA, the act labored under continuing controversies over lowering the wall that separated intelligence from law enforcement investigations,¹⁷⁴ and the inconsistency of requiring probable cause of foreign agency for targets while permitting surveillance of lone wolves.¹⁷⁵

5.5.2 The original architecture

Until the 2008 amendments, FISA governed the electronic surveillance and physical searches only of persons in the United States and only for the purpose of collecting foreign intelligence.¹⁷⁶ (FISA did not apply to surveillance or searches conducted outside the United States, or to foreign-to-foreign telephone communications intercepted within the United States.¹⁷⁷) FISA “probable cause” required that a target of the surveillance be a “foreign power,” an “agent of a foreign power,”¹⁷⁸ or, since 2004, a “lone wolf” terrorism suspect.¹⁷⁹ Applications for approval of a search or surveillance had to specify “facilities” where the surveillance would be directed¹⁸⁰ and procedures to “minimize” the acquisition, retention, and dissemination of information not relevant to an investigation.¹⁸¹ A special court that meets in secret called the Foreign Intelligence Surveillance Court (FISC) was created to hear requests for orders to conduct the surveillance.¹⁸²

For a long time the process worked well as a mechanism to regulate surveillance of known intelligence targets.¹⁸³ The FISA process and its eventual orders have always been limited, however. FISA was concerned with “acquisition,” not with the uses government might have for what is collected. FISA also assumed that officials know where the target is and what “facilities” the target will use for his communications. Knowing this much enabled the government to demonstrate the

required “probable cause” to believe that the target was an agent of a foreign power or a lone wolf. FISA did not authorize intelligence collection for the purpose of identifying the targets of surveillance, or of collecting aggregate communications traffic and then identifying the surveillance target. In other words, FISA envisioned case-specific surveillance, not a generic surveillance operation, and its approval architecture was accordingly geared to specific, narrowly targeted applications. FISA was also based on the recognition that persons lawfully in the United States have constitutional privacy and free expression rights that stand in the way of unfettered government surveillance.¹⁸⁴

Although the volume of FISA applications increased gradually through the 1990s,¹⁸⁵ after September 11 the pace of electronic intelligence collection quickened, and Bush administration officials argued that traditional FISA procedures interfered with necessary “speed and agility.”¹⁸⁶ As the pre-9/11 FISA annual applications number doubled to more than 2,000 a few years later, the director of national intelligence (DNI) complained that more than “200 man hours” were required to prepare an application “for one [phone] number.”¹⁸⁷ The system was, it seemed, grinding along, but it was carrying a lot of weight.

5.5.3 Technological stresses on FISA

Meanwhile, with the revolution in digital communications, the idea of a geographic border has become an increasingly less viable marker for legal authorities and their limits. Using the Internet, packets of data that constitute messages travel in disparate ways through networks, many of which come through or end up in the United States. Those packets, and countless Skype calls and instant messages, originate from the United States in growing numbers, and the sender may be in the United States or abroad. Likewise, it may or may not be possible to identify the sender or recipient by the e-mail addresses or phone numbers used to communicate.

We do not think of our international communications as being in any way less private than our domestic calls. Congress apparently exempted from FISA international surveillance conducted abroad because, when FISA was enacted, electronic communications by Americans did not typically cross offshore or international wires. Now, of course, we do communicate internationally and our message packets may travel a long distance, even if we are corresponding by e-mail with a friend in the United States who is in the same city. The location or identity of the communicators is simply not a useful marker in Internet communications. As then-CIA Director Michael Hayden said in 2006: “There are no area codes on the Internet.”¹⁸⁸

Because FISA was written to apply to broadly defined forms of “electronic surveillance”¹⁸⁹ acquired inside the United States, digital technologies brought interception of previously unregulated communications inside the FISA scheme.¹⁹⁰ In particular, digitization brought e-mail communications within the FISA scheme. Because of the definition of “electronic surveillance,” even a foreign-to-foreign e-mail message could not be acquired from electronic storage on a server inside

the United States except through FISA procedures.¹⁹¹ While foreign-to-foreign telephone surveillance was expressly left unregulated by Congress, coverage of e-mail by FISA created an anomalous situation for investigators.

Even an exemption carved out of FISA for foreign-to-foreign e-mail would be problematic, because it is often not possible to verify the location of the parties to a communication.¹⁹² A broader authorization for e-mail surveillance would inevitably include U.S. person senders or recipients and even wholly domestic e-mail. A foreign-to-foreign e-mail exemption would effectively leave in place the requirement of individual FISA applications for overseas targets using e-mail messages that rely on an Internet service provider (ISP) in the United States, because government could neither ferret out U.S. incoming or outgoing messages in real time, nor ignore those messages.¹⁹³

Changing technologies have also turned the traditional sequence of FISA processes on its head. We discovered after September 11 that investigators could enter transactional data about potential terrorists and come up with a list that included four of the 9/11 hijackers¹⁹⁴ – a sort of reverse of the typical FISA-supported investigation. Now our intelligence agencies see the potential benefits of data mining¹⁹⁵ – the application of algorithms or other database techniques to reveal hidden characteristics of the data and infer predictive patterns or relationships¹⁹⁶ – as a means of developing the potential suspects that could be targets in the traditional FISA framework. In order to collect the foreign intelligence data, officials claim that they need to access the telecom switches inside the United States so that they can conduct surveillance of e-mails residing on servers in the United States. The mined data would necessarily include U.S. person data.

5.5.4. Programmatic Electronic Surveillance

5.5.4.1. The Terrorist Surveillance Program

After September 11, President George W. Bush ordered an expanded program of electronic surveillance by the National Security Agency (NSA) that simply ignored FISA requirements.¹⁹⁷ In December 2005, the New York Times reported that Bush secretly authorized the NSA to eavesdrop on Americans and others inside the United States to search for evidence of terrorist activity without obtaining orders from the FISA court.¹⁹⁸ Although the details of what came to be called the Terrorist Surveillance Program (TSP) have not been made public, NSA apparently monitored the telephone and e-mail communications of thousands of persons inside the United States where one end of the communication was outside the United States and where there were reasonable grounds to believe that a party to the international communication was affiliated with al-Qaeda or a related organization.¹⁹⁹

From subsequent accounts and statements by Bush administration officials it appears that the TSP operated in stages.²⁰⁰ With the cooperation of the telecommunications companies, the NSA first engaged in wholesale collection of all the traffic entering the United States at switching stations – so-

called vacuum cleaner surveillance. Second, those transactional data – addressing information, subject lines, and perhaps some message content – were computer-mined for indications of terrorist activity. Third, as patterns or indications of terrorist activity were uncovered, intelligence officials at NSA reviewed the collected data to ferret out potential threats, at the direction of NSA supervisors. Finally, the targets selected as potential threats were referred to the FBI for further investigation, pursuant to FISA, and the human surveillance ended for the others.

At first the administration vigorously defended the legality of the TSP, but it was an uphill struggle.²⁰¹ In the face of mounting criticism and litigation challenging the TSP, the administration persuaded the FISA court to take over supervision of the program, presumably within the statutory parameters of FISA. When the FISC took over administration of the TSP in January 2007, Attorney General Alberto Gonzales advised that a FISC judge “issued orders authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization.”²⁰² According to the attorney general, all surveillance that had been occurring under the TSP would now be conducted with the approval of the FISC.

Although the legal basis for fitting the TSP inside FISA during this period has not been disclosed, the government must have persuaded at least one FISC judge to treat the international telecom switches as FISA “facilities.” Because it could reasonably be argued that al-Qaeda was using the switches for communications coming into and leaving the United States, a few FISC orders gave the government access to nearly all the international telecom traffic coming in and leaving the United States.²⁰³ The fact that the rest of us were using those switches at the same time was, presumably, dealt with through some version of FISA minimization procedures, where executive branch personnel would cull what looked like al-Qaeda communications from the mass of data.²⁰⁴

5.5.4.2. The Protect America Act of 2007

A different FISC judge decided in April 2007 not to continue approval of what had been the TSP under FISC supervision, and apparently determined that at least some of the foreign communications acquired in the United States pursuant to the program were subject to individualized FISA processes.²⁰⁵ After a backlog of FISA applications developed, the Bush administration successfully persuaded Congress to pass statutory authorization for programmatic surveillance outside the case-specific FISA processes.

The administration emphasized the need to amend FISA to account for changes in technology and thus enable it to conduct surveillance of foreign digital communications from within the United States. Yet providing statutory access to U.S. digital telecommunications switches would enable NSA to access e-mail traffic traveling to or from U.S. servers, thus opening up a vast swath of U.S. person communications for government scrutiny.

As enacted in August 2007, the Protect America Act²⁰⁶ (PAA) determined that the definition of “electronic surveillance” in FISA would not apply to surveillance of a person reasonably believed to be outside the United States.²⁰⁷ The PAA also permitted the director of national intelligence (DNI) and the attorney general to authorize collection of foreign intelligence from within the United States “directed at” persons reasonably believed to be outside the United States, without obtaining an order from the FISC, even if one party to the communication was a U.S. citizen inside the United States.²⁰⁸ Because a FISA “person” may include groups or foreign powers, surveillance “directed at” al-Qaeda permitted warrantless surveillance of the telephones and e-mail accounts of any U.S. person if the government was persuaded that the surveillance was directed at al-Qaeda.²⁰⁹

The PAA thus made less onerous the determination that the target is known to be abroad. Comparing the PAA to the TSP (as characterized by Attorney General Gonzales), the main differences were that the TSP allowed surveillance of targets inside the United States, and the predicate for collection authority under the PAA was the location of the target, not his status in relation to a foreign power or terrorist organization (as it was under the TSP).

5.5.4.3. The FISA Amendments Act of 2008

The PAA expired by its own terms in February 2008 after Congress and the administration failed to agree on a set of provisions that would grant broad, retroactive immunity to telecommunications firms that participated in the TSP.²¹⁰ The FISA Amendments Act of 2008²¹¹ (FAA), enacted in July 2008, conferred the immunity sought by the administration and the telecommunications industry,²¹² and it authorized until December 31, 2012, sweeping and suspicionless programmatic surveillance from inside the United States.

In essence, the FAA codified the PAA, with some additional wrinkles. The core of the new subtitle of FISA retains the broad-based authorization for the attorney general and the DNI to authorize jointly, for a period of up to one year, the “targeting” of non-U.S. persons “reasonably believed to be located outside the United States to acquire foreign intelligence information.”²¹³ The FISC does not review individualized surveillance applications pursuant to the FAA, and it does not supervise implementation of the program. The act does prohibit the government from “intentionally target[ing] any person known at the time of the acquisition to be located in the United States.” However, the government cannot reliably know a target’s location, nor often the target’s identity. These uncertainties, combined with the fact that the targeted person may communicate with an innocent U.S. person, mean that the authorized collection may include the international or even domestic communications of U.S. citizens and lawful residents.

Under the FAA, the attorney general submits procedures to the FISC by which the government will determine that acquisitions conducted under the program meet the program targeting objectives and satisfy traditional FISA minimization procedures.²¹⁴ Although the procedures are classified, we know that they are designed to limit the acquisition, retention, and dissemination of private

information acquired during an investigation.²¹⁵ The application to the FISC must also contain a certification and supporting affidavit,²¹⁶ as well as “targeting procedures” designed to ensure that collection is limited to non-U.S. persons reasonably believed to be outside the United States, and to prevent the intentional acquisition of communications where the sender and all known recipients are known at the time to be located in the United States.²¹⁷ The certification and supporting affidavit must state that the attorney general has adopted “guidelines” to ensure compliance with the statutory procedures, that the targeting and minimization procedures and guidelines are consistent with the Fourth Amendment, and that a significant purpose of the collection is to obtain foreign intelligence information.²¹⁸

As with the PAA and the TSP, the FAA does not limit the government to surveillance of particular, known persons reasonably believed to be outside the United States, but instead authorizes so-called “basket warrants” for surveillance and eventual data mining. In addition, non-U.S. person targets do not have to be suspected of being an agent of a foreign power nor, for that matter, do they have to be suspected of terrorism or any national security or other criminal offense, so long as the collection of foreign intelligence is a significant purpose of the surveillance.²¹⁹ Potential targets could include, for example, a nongovernmental organization, a media group, or a geographic region. That the targets may be communicating with innocent persons inside the United States is not a barrier to surveillance.

For the first time, surveillance intentionally targeting a U.S. citizen reasonably believed to be abroad is subject to FISA procedures.²²⁰ As a practical matter, this increased protection for Americans may be illusory. The government may not target a particular U.S. person’s international communications pursuant to its programmatic authorizations, whether the person is in the United States or abroad. Yet officials could authorize broad surveillance, for example, of all international communications of the residents of Detroit on the rationale that the surveillance was targeting foreign terrorists who may be communicating with persons in a city with a large Muslim population.

Unlike traditional FISA applications, the government is not required to identify the facilities, telephone lines, e-mail addresses, places, or property where the programmatic surveillance will be directed.²²¹ Under the FAA, targeting might be directed at a terrorist organization, a set of telephone numbers or e-mail addresses, or perhaps an entire ISP or area code. After a FISC judge approves the program features,²²² executive branch officials authorize the surveillance and issue directives compelling communications carriers to assist.²²³ Although details of the implementation of the program authorized by the FAA are not known, a best guess is that the government uses a broad vacuum cleaner-like first stage of collection, focusing on transactional data, where wholesale interception occurs following the development and implementation of filtering criteria. Then NSA engages in a more particularized collection of content after analyzing mined data.²²⁴

Incidental acquisition of the communications of U.S. persons inside the United States inevitably occurs, especially in light of the difficulty of ascertaining a target’s location, and because targets

abroad may communicate with innocent U.S. persons. The FAA does nothing to assure U.S. persons whose communications are incidentally acquired that the collected information will not be retained by the government.

The generic FISA minimization requirements were not modified in the FAA to accommodate the surveillance of individual targets through programmatic surveillance.²²⁵ The FAA requires that the attorney general and director of national intelligence certify that minimization procedures have been or will be submitted for approval to the FISC, prior to or within seven days following implementation.²²⁶ However, the FISC does not review the implementation of minimization procedures or practices for the programmatic surveillance it approves, and the act permits the government to retain and disseminate information relating to U.S. persons so long as the government determines that it is “foreign intelligence information.”²²⁷ By implication, the government may compile databases containing foreign intelligence information from or about U.S. persons, retain the information indefinitely, and then search the databases for information about specific U.S. persons.

Viewing minimization as it evolved from law enforcement rules to traditional FISA and to the FAA, attaining the original objective – preventing the collection, retention, or dissemination of private information – has been seriously compromised, or so it seems from the public record. The combination of allowing the government to use the foreign intelligence trump card to hold or disseminate information and the lack of judicial oversight of how private communications are filtered out leaves the minimization mechanism short of meeting its goals for programmatic FISA surveillance. Because FISA minimization is already focused on retention and dissemination and not so much on acquisition, it should be relatively easy to reform FAA minimization to insert controls on executive discretion and assign a monitoring function to the FISC.

The FISC has described its role in authorizing and reviewing surveillance conducted under the FAA as “narrowly circumscribed.”²²⁸ The FISC must approve an order for programmatic surveillance if it finds that the government’s certification “contains all the required elements,”²²⁹ that the targeting procedures are “reasonably designed” to target non-U.S. persons,²³⁰ and that the targeting and minimization procedures are consistent with the act and the Fourth Amendment.²³¹ The FISC does not supervise the implementation of the targeting and thus does not review the efficacy of specific surveillance targets.

5.5.5. Suspicionless Surveillance and the FBI Guidelines

The constitutional and statutory framework established by Congress and the courts in FISA tells only part of the story of suspicionless counterterrorism investigations. For investigative techniques other than electronic surveillance and physical searches, the discretion in the executive branch to initiate and then conduct investigations is largely governed by executive branch rules, not by statute, and the courts have had little to say to provide guidance for the investigations.

The attorney general is expressly vested with “primary investigative authority for all Federal crimes of terrorism.”²³² Lacking a legislative charter, the FBI operates on the basis of the attorney general’s authority to appoint officials “to detect and prosecute crimes against the United States.”²³³ All FBI investigations are conducted according to guidelines promulgated by the attorney general and an executive order that directs the activities of all the agencies that make up the intelligence community.²³⁴ On September 29, 2008, Attorney General Michael Mukasey announced the issuance of The Attorney General’s Guidelines for Domestic FBI Operations.²³⁵ The newly consolidated guidelines combine nearly uniform standards for all FBI domestic investigations and replace five sets of previously discrete guidance on criminal investigations, national security investigations, and foreign intelligence investigations.

Separate guidance is provided by Guidance Regarding the Use of Race by Federal Law Enforcement Agencies.²³⁶ This set of rules states that “federal law enforcement officers who are protecting national security . . . may consider race, ethnicity, and other relevant factors to the extent permitted by our laws and the Constitution.” Before a formal investigation is opened, FBI assessments may be undertaken without any predicate suspicion or threat. In addition, the FBI may engage in physical surveillance in an assessment.

Before the guidelines were rewritten in 2008, the FBI could not conduct a pretext interview (where an FBI agent interviews someone without identifying himself as an FBI agent, or without correctly stating the purpose of the interview) unless there was an open investigation to which the interview applied. In advance of the 2004 Republican and Democratic national conventions in New York and Boston, the FBI interviewed dozens of members of anti-war groups. Although the attorney general asserted that the interviews were based on specific threat information, a subsequently disclosed FBI field office memorandum characterized the effort as “pretext interviews to gain general information concerning possible criminal activity at the upcoming . . . conventions.”²³⁷ Following the 2008 revisions, pretext interviews are permitted without any predicate suspicion or threat.

A January 2011 report by the Brennan Center for Justice²³⁸ criticizes the Obama administration for continuing to rely on the 2008 guidelines, because they expand the FBI’s discretion to investigate individuals and groups while limiting oversight requirements. The weakened oversight risks the use of profiling and chilling protected expressive activities. In addition, because the FBI is perceived as relatively untethered by the revised guidelines, the Brennan Center report worries that communities whose cooperation is most essential in countering terrorism will be alienated by the government powers. The report recommends increased oversight of the use of the guidelines, by the Justice Department and Congress. Finally, the report urges the Attorney General to pull back on the open-ended discretion to launch non-predicated investigations so that inquiries are begun only when there are facts indicating a need for further investigation.

5.6 Dragnet Intelligence Collection on Innocent Persons

After a young Somali-American man from Minneapolis committed a suicide bombing in Africa in October 2008, FBI agents investigated whether he was recruited on U.S. soil. However, instead of collecting information from tips or informants who could link targets to the suicide bomber, agents scrutinized Somali communities across the country, not based on reports connecting those persons to the bomber or to any terrorist activity.

According to the bureau's Domestic Investigations and Operations Guide, agents may open an "assessment" to "proactively" seek information about whether people or organizations are involved in national security threats. Assessments may begin without a particular factual connection to the intended targets, and the assessment stage may include infiltrating an organization with confidential informants and observing or photographing targets in public places. Collected information may remain in FBI databases, even if nothing incriminating is found. Agents may consider the target's political speech or religion in determining whom to assess, and they may take into account "specific and relevant ethnic behavior" in order to "identify locations of concentrated ethnic communities." If agents find something that suggests wrongdoing, they may begin a more intrusive "preliminary" or "full" FBI investigation.²³⁹

One NGO, Muslim Advocates, accused the FBI of harassing Muslim Americans through these new policies. DHS investigators also produced a "terrorism watch list" report concerning a Muslim conference in Atlanta, Georgia where several Americans were scheduled to speak, even though there was no evidence that the conference or the invited speakers promoted extremist views or terrorist activity. On another occasion, DHS intelligence officials wrote a "threat assessment" for local police in Wisconsin about a local demonstration involving proponents and opponents of abortion rights, despite the absence of any threat to homeland security posed by the event.²⁴⁰ A recent article concludes that the U.S. government has increasingly relied on religious speech as a sort of proxy for terrorism risk in its intelligence and law enforcement practices.²⁴¹ Aziz Hug acknowledges that constitutional doctrine in modern U.S. cases may not provide robust protections for religious speech, but he examines institutional considerations and emerging social science literature that suggests that religious speech is ill-suited to its role of proxy for terrorism. Instead, the empirical evidence suggests that the close associations of a terrorism suspect are more sanguine predictors of terrorism.

Case Study: Najibullah Zazi and Information Sharing

Najibullah Zazi, born in Afghanistan and a permanent resident of the United States, was arrested in 2009, along with his father and another permanent resident hailing from Afghanistan, and accused of being part of a conspiracy to bomb targets in the United States. Zazi apparently attempted to build bombs with large quantities of hydrogen peroxide purchased at beauty shops in the Denver area. According to news reports, Zazi and others planned to hide the bombs in backpacks and detonate them in New York City. Zazi allegedly was trained by al-Qaeda affiliates in Pakistan.²⁴²

After Zazi's arrest, the media reported disputes between the FBI and DHS, and between the FBI and New York City Police Department officials. DHS claimed that the FBI failed to share pertinent intelligence about Zazi and his alleged co-conspirators with the department and, through its intelligence bulletins, with local officials. According to reports of a later meeting of top officials arranged by the White House, the FBI concerned itself with the success of the investigation, and it declined to take actions that it viewed as potentially compromising the investigation.²⁴³ On February 22, Zazi pleaded guilty to conspiring to use weapons of mass destruction against New York City, conspiring to commit murder in a foreign country, and providing material support to terrorism.²⁴⁴

Case Study: Material Support, Sleeper Cells, and the Lackawanna Six

Before September 11, 2001, only a few prosecutions were based on a federal statute enacted in 1995 that criminalizes providing "material support" to terrorism, and the cases that were brought were not controversial — support for designated groups was charged, and convictions were obtained. Since September 11, material support crimes have become the central vehicle for prosecutors who are tasked with working to prevent additional terrorist attacks. As such, the material support provisions are employed by the Department of Justice not simply to prosecute terrorists in the way most people think of prosecution — investigating to find those who have violated the law and bringing them to trial — but also to prosecute inchoate crimes; that is, the activities of persons who belong to "sleeper cells." This change in orientation by the Justice Department has resulted in the widespread use of the material support laws, along with convictions in which the accused argued unsuccessfully that their activities were constitutionally protected and did not constitute terrorism at all.

One such case revolved around the "Lackawanna Six" — six Yemeni-Americans from the Buffalo area who traveled to Afghanistan in the spring of 2001 to attend an al-Qaeda "training camp." The six men were then charged with providing material support to terrorism, and eventually pleaded guilty in return for slightly lower than maximum sentences. The sentencing judge provided a summary of the defendants' activities:

Both Alwan and Al-Bakri have admitted to traveling to a "training camp" some distance from Kandahar, Afghanistan. ... Al-Bakri further stated that "while in the Kandahar guest house he was given a uniform" which he "wore at the al-Farooq camp." ... Al-Bakri also "indicated that while he was at the al-Farooq training camp, he considered himself to be a member of al-Qaida." Both defendants Alwan and Al-Bakri also stated that while all six defendants were at the al-Farooq training camp, Usama bin Laden spoke to the attendees at the camp.

Alwan states that Usama bin Laden ... spoke about an "alliance of the Islamic Jihad and al-Qaida" and that he "mentioned how important it is to train and fight for the cause of Islam." Alwan stated that bin Laden also "espoused anti-American and anti-Israeli statements." ... bin Laden spoke "about the need to prepare and train" because "there was going to be a fight against Americans."

While at the al-Farooq training camp, all of the defendants were given code names and were given training in the use of explosives. The al-Farooq training camp was "dedicated to producing and training terrorist fighters for the al-Qaida cause."

The FBI began surveillance of the group after receiving an anonymous letter that described the Lackawanna recruiting apparently being conducted by one of the men and identified those who traveled to Afghanistan. Eventually, FBI Director Robert S. Mueller received twice-daily reports about the men, and President Bush was briefed frequently by Mueller about the surveillance. During the summer of 2002, FBI and CIA analysts debated the seriousness of the threat, if any, posed by the Lackawanna Six. Many inside the FBI wanted to continue surveillance, and the CIA determined that the six men were a terrorist cell and that they were dangerous. When senior administration officials asked whether the FBI could assure them that the six would not cause harm while they were subject to surveillance, the FBI responded that it was 99 percent confident that it could prevent the men from causing harm. Administration officials decided that such an assurance was not good enough, and a debate ensued on how to interdict what was assumed to be a sleeper cell.

Some senior leaders recommended that the six be detained by the Defense Department and classified as enemy combatants. Others, including Attorney General John Ashcroft, argued that the criminal justice system could accommodate prosecution of the six. Yet there was no criminal conspiracy that could be charged, no basis for holding any of them as material witnesses, and, because the men were citizens, no basis for immigration detention on the basis of collateral crimes. In a then-creative interpretation of the material support law, the government charged the six with receiving training and providing themselves as personnel in provision of "material support or resources" to al-Qaeda. In other words, the six men became the material support by their participation in the training camp.

5.7 Preventive Charging and Detection

In traditional law enforcement, the government could do little in a sleeper cell situation other than to intensify surveillance of potential targets and suspicious groups or individuals, if known. Under the prevention strategy practiced by the Department of Justice since September 11, 2001, however, additional options can be pursued. Foreign-based threats may be deterred by more stringent enforcement of existing immigration laws, denying entry to those who lack a proper visa or whose names appear on a watch list of terrorism suspects, and removing those who have overstayed a visa. Document fraud and financial transfer fraud enforcement also might deter would-be terrorists. Most significantly, prosecutors can now use the material support laws to prosecute those who provide support to terrorists, even when the donor has no intention of supporting any particular terrorist act, or even terrorism in general. Although prosecuting supporters of terrorism may not thwart a planned attack, in theory at least a diminished level of support will prevent harm from terrorist attacks.

The U.S. Supreme Court endorsed an especially government-friendly reading of the material support laws in its 2010 decision in *Humanitarian Law Project v. Holder*.²⁴⁵ The Court held that speech-related activities that were coordinated with a proscribed terrorist organization could be criminalized. Even though the Court insisted that the Constitution protects membership in such organizations, at the same time that it ruled that any speech that supported the organization could be criminalized.

The prevention approach would be more effective, of course, if those persons identified as potentially dangerous but who have not committed any terrorism-related crime could be detained or otherwise neutralized as a threat. One technique utilized by the Justice Department, “preventive charging,” appears to accomplish the desired end. Attorney General Ashcroft issued this statement in October 2001: “We have waged a deliberate campaign of arrest and detention to remove suspected terrorists who violate the law from our streets. If you violate a local law, you will be put in jail and kept in custody as long as possible. We will use every available statute. We will seek every prosecutorial advantage.”

Justice Department officials defended this preventive charging strategy as distinct from the program of preventive detention practiced in some European countries. Instead, the U.S. strategy engages in prosecution, not detention, based on actual law violations, albeit violations far removed, typically, from the terrorism threats that officials are seeking to interdict. This is sometimes referred to as the “Al Capone approach” (for the Chicago gangster who was responsible for murders, extortion, and other violent crimes in the 1920s and 1930s, but who was eventually charged and convicted of income tax evasion when evidence problems compromised his prosecution for the violent crimes), or the “spitting on the sidewalk approach” (prosecute for violating an innocuous municipal ordinance). Preventive prosecution is harmless at first glance: If crimes are committed and prosecuting the violators takes dangerous persons off the street, all the better. However, implementation of the preventive prosecution strategy spurred controversy in the wake of 9/11 when it was used primarily against noncitizens who were detained for minor immigration violations. Critics of the strategy wondered whether the government was, in effect, profiling Middle Eastern men and rounding them up for preventive detention, using immigration status questions or minor violations as a pretext.

Whatever its promises and pitfalls, preventive prosecution requires a violation of the law. What



Figure 8: *The Lackawanna Six*: The men grew up and lived in the city of Lackawanna, outside Buffalo. Their families were among thousands of Yemeni immigrants who moved there to work for Bethlehem Steel. (Courtroom drawing by Ralph Sirianni)

can government do to meet its prevention strategy when the suspicious person or group has not violated the law, even in a minor way? One solution pursued periodically since September 11 is the use of a statute that permits the detention of a “material witness” to assure his or her availability to testify in a pending criminal prosecution. If the government asserts that someone suspected of involvement in terrorist activities may have testimony that could be material to a criminal prosecution of terrorists, the material witness may be detained, indefinitely, so long as a supervising judge agrees that biweekly reports made by the government justify the continued detention of the potential witness.

The PENTTBOMB investigation, explored in more detail below, illustrated the potential for abusive use of the material witness authorities. What remedies are there for government overreaching in instances like these? A recent civil suit against former attorney general John Ashcroft and others suggests that there may be judicial remedies for the most egregious abuses. In *Al-Kidd v. Ashcroft*²⁴⁶, the courts have refused to dismiss a lawsuit claiming that improper use of the material witness statute violated the Fourth Amendment rights of the detainees. In addition to potential civil remedies, the writ of habeas corpus remains available to those detained in the United States. In general, the writ requires the government to justify the continued detention of the claimant. Over a five-year period, from 2003 through 2008, the Supreme Court determined that the federal habeas corpus statute could be utilized by detainees at Guantanamo Bay; that the Due Process Clause required a reasonable opportunity for a detainee to tell his side of the story; and that Congress could not suspend the availability of habeas corpus to those detained by the United States.²⁴⁷

Case Study: Immigration-Based Detention — The PENTTBOMB Investigation

Investigation of the September 11 terrorist attacks (dubbed the PENTTBOMB investigation) began even before the last plane crashed, but not simply to identify, apprehend, and convict the perpetrators, in the time-honored fashion of criminal investigations. Assistant Attorney General Michael Chertoff explained:

In past terrorist investigations, you usually had a defined event and you’re investigating it after the fact. That’s not what we had here. ... From the start, there was every reason to believe that there is more to come. ... So we thought that we were getting information to prevent more attacks, which was even more important than trying any case that came out of the attacks.

The FBI immediately checked passenger manifests, airport terminal and parking garage videotapes, car rental agreements, credit card receipts, telephone records, and numerous other data sources to help identify the hijackers. It then extended its investigation to persons who lived or worked with the hijackers or otherwise crossed paths with them.

Most of those interviewed were foreign nationals. The FBI itself detained some or had state and local authorities detain them on suspicion of committing a variety of minor crimes. In addition, it detained a few persons as “material witnesses.” The bureau asked the Immigration and Naturalization Service (INS) to detain many others who were in technical violation of their immigration status (“out-of-status” immigrants).

“We’re clearly not standing on ceremony, and if there is a basis to hold them we’re going to hold them,” Chertoff said in reference to the detentions. Attorney General Ashcroft was even more blunt: “We have waged a deliberate campaign of arrest and detention to remove suspected terrorists who violate the law from our streets.”

Within weeks, the media reported that more than 1,100 persons had been or were being detained by law enforcement authorities. Although the government declined to release a breakdown of this number, a newspaper investigation of 235 detainees whom it could identify indicated that the largest number were from Egypt, Saudi Arabia, and Pakistan. By the end of November, federal criminal charges had been brought against 104 individuals (most relating to possession of false identification or other fraud), of whom 55 were then in custody, while the INS had detained 548 persons for immigration violations.

In January 2002, the government initiated the “Absconder Apprehension Initiative” to locate and deport 6,000 Arabs and Muslims with outstanding deportation orders (among more than 300,000 foreign nationals subject to similar orders). As of May 2003, another 2,747 non-citizens were detained as part of a Special Registration program directed at Arabs and Muslims.

5.8 Contemporary Institutional Design of the Intelligence/Law Enforcement Overlap

The FBI, DHS, and the Office of the Director of National Intelligence (ODNI) have sought to work with state and local officials through a variety of top-down arrangements. Joint Terrorism Task Forces have been created by the FBI, a large and growing set of fusion centers has been created and paid for by DHS, and the ODNI’s National Counterterrorism Center (NCTC) serves as a analysis center for state and local intelligence agencies. U.S. Circuit Judge Richard Posner is one prominent critic of the top-down nature of these arrangements, and he complains that true integration of local policing into the national enterprise has largely failed.²⁴⁸ The charge against JTTFs is cooptation – state and local officials become subordinated to FBI managers and the national agenda.²⁴⁹ Fusion centers are initiated by state and local agencies, but the practice has been for the state and local participants to become consumers of federal information, rather than active participants, and information is rarely “fused” from the layers of government.²⁵⁰ The NCTC enterprise of shared analysis has greater potential, and its authority was expanded in the 9/11 Commission Act of 2007 through creation of the Interagency Threat Assessment and Coordination Group (ITACG). State and local agencies gain access to classified information, and are entitled to receive “federally-coordinated threat information in a timely, consistent and usable manner.”²⁵¹

Since 9/11, it has become more common to refer to local police as “first preventers,” aligning them with the more familiar first responders. The National Strategy for Information Sharing embraces this expanded role for local police and emphasizes the synergy between traditional crime reduction tactics and countering terrorism. The strategy document provides hypothetical examples, including local police investigating a gas station robbery and uncovering a homegrown jihadist cell planning a series of attacks, and an investigation into cigarette smuggling by a county sheriff’s department that uncovers Hezbollah cells operating in several states.²⁵²

At times, despite the increased cooperation between local and federal agencies, federal agencies feud among themselves in ways that prevent effective intelligence sharing, such as when the FBI and Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) each claim the lead federal role in explosives investigations, and the result is mixed signals sent to state and local agencies.²⁵³ A survey of state and local police concluded that progress toward information sharing has been made since 9/11, but that conflicts persist, and improvements should be made. A “need to know” mentality continues to dominate in many contexts.

5.9 National Counterterrorism Center (NCTC)

The NCTC was established in 2004, through an executive order of President Bush, as the culmination of post-9/11 determination to break down the wall between law enforcement and intelligence — or, to use the other popular euphemism, to correct a failure to “connect the dots.” The NCTC includes federal law enforcement agencies, federal intelligence agencies, and military intelligence components. The NCTC was then given statutory authorities in the December 2004 intelligence reform legislation, and it was placed subordinate to the newly created DNI in the ODNI. The director of the NCTC is a Senate-confirmed presidential appointee and, although he reports to the DNI for analyzing and integrating terrorism information, he reports directly to the president (through the National Security Council and White House staffs) for planning and progress of joint counterterrorism operations.

The NCTC mission is to serve “as the primary organization in the United States Government for integrating and analyzing all intelligence pertaining to terrorism possessed or acquired by the United States Government (except for purely domestic terrorism).” The center also serves as a “shared knowledge bank on terrorism information” and provides “all-source intelligence support to government-wide counterterrorism activities.”²⁵⁴ State and local law enforcement interests assist the NCTC through the ITACG, which shares information with federal agencies on a temporary basis, until the Information Sharing Environment (ISE) is able to meet those needs on an ongoing basis. The NCTC has about 500 staff members, more than half of whom are on detail from other agencies.

The NCTC provides intelligence for the President’s Daily Brief and the National Terrorism Bulletin, both classified. It also claims to provide 24/7 situational awareness to agencies of the intelligence community, in part through its three times daily meetings of agency representatives. The NCTC has functional working groups – Radicalization and Extremist Messaging Group, a Chemical, Biological, Radiological, Nuclear Counterterrorism Group, and a DNI Homeland Threat Task Force, among others.²⁵⁵

An Army War College student studied the NCTC in 2007 and concluded that the agency was more focused on loyalty to the parent intelligence agencies and on avoiding bureaucratic conflict than it was on boldly implementing its coordination and integration roles.²⁵⁶ Although these criticisms

appeared isolated when voiced, the Fort Hood attack by Maj. Nidal Hasan in November 2009, and the Abdulmutallab “underwear bomber” incident of December 25, 2009, prompted substantial criticisms of the inadequate intelligence analysis conducted by federal agencies, including the NCTC. The White House issued a blistering critique of the Christmas Day incident,²⁵⁷ and promised reforms.²⁵⁸ These incidents are reminders that the NCTC lacks formal legal authority over other departments and agencies in its efforts to integrate intelligence, and it must rely on persuasion and its influence through National Security Council staff to affect recalcitrant participants in its processes. At least in part, these incidents also illustrate that cultural and bureaucratic barriers to sharing information remain, independent of legal reforms to tear down walls and connect dots.

These incidents are reminders that the NCTC lacks formal legal authority over other departments and agencies in its efforts to integrate intelligence, and it must rely on persuasion and its influence through NSC staff to affect recalcitrant participants in its processes.

A new study by the Project on National Security Reform (PNSR) concludes that the NCTC suffers from a lack of coordination and communication among the participating agencies, including the CIA and State Department.²⁵⁹ The report confirms that the NCTC lacks the legal authority to force the needed cooperation, including the task of coordinating the White House’s counterterrorism priorities. The PNSR concludes that overlapping statutory authorities and long-standing cultural clashes and tensions between agencies have caused the NCTC to struggle to fulfill its mission.

5.10 Fusion Centers

Fusion centers were formalized through state-level DHS offices in response to recommendations of the 9/11 Commission. They were yet another prescription to address the failure to connect the dots before September 11, and by 2009 there were 72 fusion centers across the United States, funded by DHS at a cost of \$380 million. The centers are designed to share data among government agencies, and to facilitate cooperation among agencies and the private sector. Most fusion centers are physically located within state and local police agencies. They employ DHS intelligence analysts, along with civilian analysts and police officers. The centers receive homeland security threat information provided by other public employees, and some also operate tip hotlines where members of the public can report suspicious activities.²⁶⁰

The fusion centers have been constructed informally, in varying forms and with different structures in various locations. However, federal intelligence information collected in the fusion centers is not coordinated into a single system within the federal agencies. As such, the massive amount of uncoordinated information makes much of the information of little or no value to state and local consumers.²⁶¹ At the same time, some argue that fusion centers would not be necessary if federal agencies did more to share information and make use of common databases. A continuing belief

that state and local officials do not “need to know” intelligence information sums up the shortcomings of many fusion centers, and explains the reason for their existence.²⁶² The fusion centers attempt to work around mismatched security clearances and ambiguous understandings about which officials should receive available information.²⁶³

Fusion centers follow the DHS all-hazards approach to homeland security, and most thus incorporate an all-crimes operation, in addition to traditional conceptions of terrorism. In what may be viewed as mission creep or creative state and local governing, “hazmat” suits purchased for bomb squads may be employed for cleaning up highway spills, or a truck purchased to tow a patrol boat for port security may haul a horse trailer unrelated to security needs.²⁶⁴ In addition, despite information sharing problems, federal officials have access to more state and local information than ever before, and state and local officials and private security contractors have unprecedented access to federal information.²⁶⁵ While homeland security intelligence analysts traditionally came from an emergency management background, the fusion center phenomenon has shifted the orientation so that most analysts now come from state and local police agencies, the private sector, and public health.²⁶⁶

Fusion centers have also been criticized for infringing on civil liberties. A fusion center deployed to limit protests near the Republican National Convention’s 2004 proceedings in New York City was initially defended as a preventive measure against terrorism, although the Democrats’ convention in Boston that year was not similarly equipped.²⁶⁷ Justice Department guidelines that limit federal intelligence collection²⁶⁸ are not necessarily followed by state and local police. Thus, local police may collect “suspicious activity reports” and share them with fusion centers, without regard to the federal reasonable suspicion standard.²⁶⁹ In addition, to the extent that private companies populate the fusion centers, their relatively lax obligations to protect privacy permit them to use technology to collect and store information in databases maintained by the fusion centers, potentially including personal information about innocent Americans.²⁷⁰

After the 2007 legislation required DHS to find ways to improve its response to fusion centers’ requests for information, a State and Local Fusion Center (SLFC) Pilot Project deployed teams to six fusion centers and worked to strengthen the relationships between the centers and DHS. Although the pilot project has reported progress at the six centers, it is unclear whether DHS can institutionalize the improvements across the 72 centers.²⁷¹

5.11. Institutional Arrangements to Protect Civil Liberties

Since September 11, one of the most persistent criticisms of the counterterrorism apparatus inside the United States has been the failure to share information needed to uncover and avert terrorist attacks. As described above, a number of information-sharing structures have been implemented in the last decade. One byproduct of increased sharing of information is an enhanced risk that civil liberties will be compromised, particularly by interfering with protected expressive activities or

violating individual privacy. Over time, Congress and the executive branch have created institutional arrangements designed to protect civil liberties without compromising the information-sharing objectives.

The DHS Privacy Office is the first statutorily required privacy office in any federal agency.²⁷² The Privacy Office evaluates department proposals that involve the collection, use, and disclosure of personally identifiable information; reports, investigates, and mitigates incidents of privacy intrusions; and conducts training to build a culture of privacy across DHS. Of course, the Privacy Office has no responsibilities to oversee the activities of the Justice Department, the CIA, the Department of Defense (including NSA), or the Treasury Department, all of which collect information on persons inside the United States. The Information Sharing Environment (ISE), located in the Office of the Director of National Intelligence (ODNI), is a nascent means for sharing intelligence and law enforcement across federal agencies and among state, local, and tribal police forces. The types of information set for sharing are broadly defined. Yet the privacy guidance developed for ISE has been faulted for its weak protections and ambiguity.²⁷³

A Privacy and Civil Liberties Oversight Board, recommended by the 9/11 Commission, was established as an agency within the Executive Office of the President in 2004.²⁷⁴ The PCLOB was charged with advising the president or the head of any executive branch department or agency concerning the privacy and civil liberties implications of steps taken to protect the nation from terrorism; reviewing executive branch regulations, policies, and procedures through that same lens; and ensuring that respect for civil liberties and privacy are considered in prospective executive branch policies to counter terrorism. The PCLOB was not given subpoena power or other means to obtain information necessary to perform its functions, and it did little to implement its missions in 2005 and 2006. In the 9/11 Commission Act of 2007, the PCLOB was reconstituted as an independent agency within the executive branch.²⁷⁵ The new board consists of five members appointed by the president and confirmed by the Senate to staggered six-year terms. The board will be able to issue and enforce subpoenas through the Department of Justice.

Finally, civil liberties and privacy issues may be investigated by inspectors general, charged since the Inspector General Act of 1978 with detecting violations of law in the operations of the federal government.²⁷⁶ The IGs have played a significant role in uncovering civil liberties violations, including the joint report prepared by the IGs of DOD, DOJ, CIA, NSA, and ODNI on the Bush administration's NSA surveillance program.

5.12 Summary

When the Central Intelligence Agency was created by statute in 1947, its charter expressly prohibited it from having any "internal security function." Therefore, when the CIA collects intelligence inside the United States, it must be seeking "foreign intelligence information," based on the connection of the target (whether or not a U.S. citizen) to international terrorism or clandestine foreign intelligence

activities. The FBI, by contrast, was created first and foremost as a domestic law enforcement agency. Terrorism represents an unusual confluence of phenomena for the investigative community; the primary purpose of the investigation may involve both law enforcement and national or homeland security. While we have historically separated law enforcement and intelligence collection functions in the United States, we have created new laws and practices that sometimes permit national security intelligence collection inside the United States following a more relaxed set of guidelines. The failure to share information between intelligence and law enforcement investigators in the months and weeks before 9/11 in particular led the executive branch and Congress to relax the rules and effectively lower “the wall” that had existed between law enforcement and intelligence gathering inside the United States. Now the Justice Department National Security Division works to integrate the criminal and intelligence elements of DOJ, and revised laws permit considerable freedom to utilize the Foreign Intelligence Surveillance Act (FISA) and relaxed FBI guidelines in keeping tabs on potential terrorist activity. The National Counterterrorism Center was established in 2004, through an executive order of President Bush, as the culmination of post-9/11 determination to break down the wall between law enforcement and intelligence -- or to use the other popular euphemism, to correct a failure to “connect the dots.” However, a recent independent study concludes that the NCTC suffers from a lack of coordination and communication among the participating agencies, including the CIA and State Department. Additionally, the “fusion centers,” formalized through state-level DHS offices in response to recommendations of the 9/11 Commission, have been of limited utility. The centers, which are physically located within state and local police agencies, attempt to work around mismatched security clearances and ambiguous understandings about which officials should receive available information. The centers have also been criticized for infringing on civil liberties.

6. Military Roles in Emergency Management

Over time, the presence of the military in civil society in the United States has been limited by two interrelated traditions embedded in policy and law. Because the military grew out of our nation’s revolutionary and constitutional heritage, its subordination to civilian control has been a central feature of our government from its beginning. The Constitution anticipates that military force may be required for domestic missions in extraordinary circumstances, including invasion, insurrection, and other forms of domestic violence. However, the mechanisms for the support by the military in civilian settings anticipated by the Constitution are, for the most part, tightly controlled and are subject to civilian decision-making. Second, our federal system was designed to ensure that, in situations where a federal military force is required to respond to a domestic crisis, decisions about the need for a federal force would, where possible, be made by state and local officials closest to where the troops are needed. If military personnel are required, state decision-makers would deploy such personnel from within their own communities and thereby avoid the need for a federal force.

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6.1. The Constitutional and Statutory Framework

The Calling Forth Clause in Article I, Section 8 of the Constitution authorizes Congress “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel invasions.”²⁷⁷ No express mention is made in the Calling Forth Clause or anywhere in the Constitution of an authority of the national government to respond to “domestic violence.” In addition, the “militia” referred to in Article I is not the same as the regular army or the modern National Guard,²⁷⁸ and the Supreme Court has held that the Calling Forth Clause does not limit the domestic use of the armed forces, including the federalized National Guard.²⁷⁹ Nonetheless, the clause confirms that it is Congress, not the president, which authorizes the deployment of the military in responding to a domestic crisis.²⁸⁰

The Framers understood that the assurance of security in the states could require military force, but they intended that only extreme threats would justify a federal military role in the absence of a state’s request. If an invasion or insurrection against the national government occurs – in modern settings, conceivably a major terrorist attack threatening the nation as well as one or more states – the Constitution requires that the federal government use military force to protect the state. In the event of an “insurrection” within a state that presents a direct threat to its republican form of government (an attack on the state qua state), the federal government is likewise obligated to use the military to defend the state. However, in the event of “domestic violence” – less dire sets of circumstances more likely to be the byproduct of a natural disaster, a lesser terrorist attack, or a public health emergency created by one or the other of these events – the Constitution presumes that the states can meet the challenge with their own law enforcement resources, supplemented by local militia, or in modern times the state-deployed National Guard. The state legislature or governor must request federal military support before it is provided.

Ironically, one of the ingredients Americans demanded of their new Constitution – subordination of military to civilian leadership – has added to the difficulties in coordinating military and civilian roles and missions in emergency response. Every military commander has a clear and defined chain of authority from the president, to the secretary of defense, to the on-scene commander. While federal military units can participate in federal emergency response, long-standing doctrine based on the subordination of military to civilian control does not permit the military to operate under the National Response Framework-based command system. This feature of our system complicates

emergency response, and it adds another layer of decision-making to the civilian institutions in the federal and state governments.

Ironically, one of the ingredients Americans demanded of their new Constitution – subordination of military to civilian leadership – has added to the difficulties in coordinating military and civilian roles and missions in emergency response.

The Insurrection Act has, since its first enactment in 1792,²⁸¹ included provision for a unilateral presidential decision to deploy federal military forces in a state under the circumstances that were sanctioned in the Constitution – general insurrection or invasion – and to execute federal laws, subject to a number of pre-deployment conditions. In addition, under the early versions of the act, the president was obligated to follow procedures that encouraged deliberation with state officials and required the issuance of a cease and desist order to the insurgents before the military force could be sent.

In 1878, the Posse Comitatus Act (PCA) established a statutory presumption against military participation in civilian law enforcement activities. In other words, such activities could be authorized by express statutory or constitutional provisions. Despite frequent confusion and uncertainty about the meaning of the act, the Posse Comitatus Act has influenced significantly the dynamics of domestic deployments of the federal military to engage in law enforcement and related activities. The act was amended to include the Air Force in 1956.²⁸² Although courts have held that the act does not apply directly to the Navy or the Marine Corps,²⁸³ the PCA has been effectively applied to those services by Defense Department regulations and by the terms of other statutes.²⁸⁴ In the face of the general statutory presumption, the constitutional authorities of the president and a number of statutory exceptions undercut or counter-balance the rule.

Case Study: Uprising at Wounded Knee

On the night of February 27, 1973, members of the American Indian Movement (AIM) and the Oglala Sioux Civil Rights Organization forcefully took possession of the village of Wounded Knee on the Pine Ridge Reservation in South Dakota, to protest the corrupt tribal government, mismanagement by the Bureau of Indian Affairs (BIA), violations of the Treaty of 1868, and reservation economic conditions. More than 100 people in about 30 cars drove into the village, shot out the street lights, broke into and looted the trading post, and then occupied the local church. Later they dug trenches, built bunkers, and constructed roadblocks, while transforming private homes and the church into sleeping quarters, communal kitchens, and a medical clinic. Almost immediately, the FBI, the U.S. Marshals Service, and BIA police sealed off the village by setting their own roadblocks at all major entry and exit roads. For more than two months, federal agents laid siege to the community. During the siege, the Army and the National Guard of several states provided equipment and advice to the federal law enforcement agencies. Before the siege ended with the surrender of the Indian occupiers on May 8, two Indians died and one U.S. marshal was paralyzed.

The National Guard director of military support stated that “the name of the game is not to kill or injure the Indians. ... Federal forces should not be the aggressor. ... The object of the exercise is not to create martyrs.” The U.S. Army officers present wore civilian clothes and sought to blend in with civil law enforcement personnel, part of their effort to avoid the commitment of armed troops. When the siege ended, federal law enforcement officials arrested several of the AIM activists and charged them with a variety of offenses, including assault on federal officers, possession of unregistered firearms, and interfering with law enforcement officers performing their duties during a civil disorder. Defense lawyers argued that the government could not show that its law enforcement officers were lawfully engaged because they had used the Army in violation of the Posse Comitatus Act.

Meanwhile, several civil actions were filed, and the protesters relied on the alleged violations of the Posse Comitatus Act to support their claims of abuses of their Fourth, Fifth, and Eighth Amendment freedoms. After years of litigation and conflicting opinions from federal judges in different districts, the court of appeals produced at least three approaches to measuring compliance with the Posse Comitatus Act and, thus, to the appropriate role for federal military forces in civil law enforcement.

In *United States v. Jaramillo*,²⁸⁵ the government’s criminal case against two protesters depended in part on determining whether federal law enforcement officers were “engaged in the lawful performance of their official duties.” The court interpreted the Posse Comitatus Act to stand in the way of using the Army to “execute the laws” if that use “pervaded the activities” of the civilian law enforcement officers. Applying its own test, the court found that the use of military equipment – as distinguished from personnel – was wholly unaffected by the act, so that the Army’s provision of flares, ammunition rounds, protective vests, rifles, and armored personnel carriers did not violate the act. As for Army personnel, an Army colonel arrived at Wounded Knee a few days after the uprising. He recommended strategy to other federal agencies on site and advised on tactical adjustments to the civil disturbance disorder plan. The judge found reasonable doubt concerning whether the law enforcement officers were engaged in “the lawful performance of their duties” and acquitted the defendants.

In *United States v. Red Feather*,²⁸⁶ the court found that evidence of military involvement in law enforcement is relevant in interpreting whether the civilians were lawfully performing their duties, to the extent that the federal military troops took “an active direct role” in law enforcement. The court cited examples of active involvement in direct law enforcement:

arrest; seizure of evidence; search of a person; search of a building; investigation of crime; interviewing witnesses; pursuit of an escaped civilian prisoner; search of an area for a suspect...

According to the court, activities constituting a passive (and lawful) role include:

... report[ing] on the necessity for military intervention; preparation of contingency plans to be used if military intervention is ordered; advice or recommendations given to civilian law enforcement officers by military personnel on tactics or logistics; presence of military personnel to deliver military material, equipment or supplies, to train local enforcement officials on the proper use and care of such material or equipment, and to maintain such material or equipment; aerial photographic reconnaissance flights and other like activities...

A third standard for interpreting the Posse Comitatus Act was adopted in *United States v. McArthur*.²⁸⁷ Considering an indictment of 10 protesters charged with interfering with civilian law enforcement at Wounded Knee, the court ruled that the act prohibits the use of the Army or Air Force “which is regulatory, proscriptive, or compulsory in nature...” The court found no violation of the act and convicted six of the 10 defendants.

In a related civil suit, *Bissonette v. Haig*,²⁸⁸ the court applied the same formula to decide whether plaintiff protesters' constitutional rights were violated by military involvement in the law enforcement activities at Wounded Knee. Evaluating the claim that plaintiffs were searched and their property seized in violation of the "reasonableness" standard of the Fourth Amendment, the court took note that the interests opposing seizure "are more societal and governmental than strictly individual in character" because "[t]hey concern the special threats to constitutional government inherent in military enforcement of civilian law." The court also acknowledged that the government has an interest in "maintain[ing] order in times of domestic violence or rebellion" and in "improv[ing] the efficiency of civilian law enforcement by giving it the benefit of military technologies, equipment, information, and training personnel." Conceding that the president may have inherent powers to use the military to respond to domestic emergencies, the court noted that Congress had acted to authorize and prescribe the means for presidential deployment of the military. In this case, the Posse Comitatus Act provided "a reliable guidepost" for evaluating the Fourth Amendment claim, especially since the act is "not just any act of Congress" but rather "the embodiment of a long tradition of suspicion and hostility towards the use of military force for domestic purposes."

6.2. Summing Up Application of the Posse Comitatus Act

Taking the judicial guidance into account, the contemporary Posse Comitatus Act prohibits direct active-duty military involvement in civilian law enforcement where the exercise of military power is regulatory, proscriptive, or compulsory in nature, unless authorized by the Constitution or statute. Direct involvement is a subjective qualifier, to be sure, but it certainly includes arrest authority and related law enforcement investigative techniques, such as conducting electronic surveillance, inspections, and searches. Detaining and adjudicating civilians alleged to have committed crimes is also forbidden direct involvement in law enforcement.

By regulation, the Department of Defense has interpreted the PCA to forbid "interdiction of a vehicle, vessel, aircraft or other similar activity"; a "search or seizure"; "an arrest, apprehension, stop and frisk, or similar activity"; and "use of military personnel for surveillance or pursuit of individuals, or as undercover agents, informants, investigators, or interrogators."²⁸⁹ The federal courts have followed the Wounded Knee cases, and continue to prohibit "direct" and permit "indirect" military assistance.²⁹⁰

Because the statutory emergency response authorities have proliferated in recent decades, the new laws serve as a reminder that the Posse Comitatus Act is but one manifestation of the principle of limiting military involvement in civilian affairs. To the extent that the act's feeble presumption enables military overreaching in civilian affairs or permits threats to the civil liberties of the people, it is important to remember that our Constitution and laws limit the military role in other ways.

For example, does the PCA stand in the way of federal troops enforcing an evacuation order, or a quarantine or isolation order? Could troops administer vaccinations as part of a mandatory program during a pandemic? So long as the federal forces followed state public health laws and were directed by the secretary of HHS, the PCA may or may not permit these roles. There are no

clear precedents. It is likely that, if a state governor faced a shortfall in the state public health infrastructure and personnel following a catastrophic incident, the governor would avoid the possible legal pitfalls of requesting regular federal troops or federalized National Guard forces and would instead rely on state National Guard personnel. Even active-duty military doctors and nurses might be barred from assisting in a catastrophic incident because of the PCA.²⁹¹

Support actions such as distributing food and other essential supplies and providing logistical support to civilian relief efforts would likely be characterized as “indirect” support and would be permitted. Indeed, the types of assistance authorized by the Stafford Act – search and rescue, food distribution, debris removal – could be ordered by the president or requested by a governor consistent with the PCA. In the Hurricane Katrina setting, federal officials apparently were reluctant to send federal troops to New Orleans for fear that they would have to protect themselves from angry mobs and would thus engage in law enforcement operations.²⁹² Yet reportedly after federal troops arrived in New Orleans, television crews filmed soldiers riding in the back of a pickup truck with their M-16s trained on civilians in the street. These soldiers may have “epitomized a posse comitatus and appeared to be playing out a scene from a developing country run by aberrant gangs.”²⁹³ Whatever the role of the PCA, the traditional orientation and training of military troops is not well suited to the nuances of civilian law enforcement, including dealing with crowds and demonstrating respect for the civil liberties of citizens.²⁹⁴ At the same time, critics of an expanding military role in homeland security argue that the training, exercising, and deployments for the emergency response role would only undermine military readiness.²⁹⁵

6.3. Constitutional and Statutory Exceptions to the Posse Comitatus Act

The Constitution does not address military involvement in civilian law enforcement. Given that considerable attention was paid at the Philadelphia Convention to providing security for the states and guarding against insurrections and other forms of domestic violence, we may reasonably conclude that our Framers never anticipated military participation in the more routine police functions. Nonetheless, over time Congress has created a variety of statutory authorities that enable military involvement in domestic affairs. Some of the authorities permit quelling civil disturbances, while others call for direct military involvement in law enforcement. Still others anticipate military personnel enforcing the law on or off military installations when there is a military purpose to the enforcement action, or when an immediate response by military personnel to a serious law violation can lead to the detention and arrest of the lawbreaker.

The 1871 Ku Klux Act, later codified as a portion of the Insurrection Act, was used to justify the uninvited deployment of federal troops to intervene during the Pullman Strike in 1894 and during the race riots in the second half of the 20th century. Ironically, it was the failure of Congress to distinguish between true “insurrection” or treasonous federal law violations and lesser forms of domestic violence that enabled the overreaching federal intervention in violation of the Constitution’s protections for the decision-making prerogatives of state governors and legislatures.

Case Study: The Pullman Strike

When the Chicago Pullman Strike broke out in the company town of Pullman, Illinois, in 1894, Attorney General Richard Olney (who, at the time, earned more as an employee of a major railroad than he did as attorney general) ordered the local U.S. Marshal to deputize friends of the railroad companies, which had his desired effect of exacerbating tensions. Over the objection of the governor, Olney then persuaded President Grover Cleveland to send federal troops to Illinois to enforce a broad injunction to prevent obstruction of the mails, protect the movement of interstate commerce, and ensure the continued operation of the federal courts. For the most part, the troops served in small detachments and assisted local police and marshals in enforcing the law in Chicago. The troops shot and killed 12 persons and destroyed considerable property. Although the president acted on familiar authority in enforcing a judicial injunction, he did not engage in what could have been fruitful consultations with state and local officials. The president's constitutional authority to respond with military force was endorsed by the Supreme Court in a claim brought by the president to enjoin the Pullman Strike on the ground that it threatened transportation of the mails. In *In re Debs*,²⁹⁶ the court opined that:

*[t]he entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the National Government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia, are at the service of the Nation to compel obedience to its laws.*²⁹⁷

The *Debs* analysis exacerbates the tendency for federal dominance in emergency response. There had been no determination by state and local officials that emergency conditions existed, nor that their resources were insufficient to quell the disorder. More important, the court's rhetoric obscures the question of which part of the national government may have been empowered to act under such circumstances (it was Congress) and it fails altogether to consider the distinct implications of the military's involvement in our civilian affairs.

Case Study: The Los Angeles Riots

Race-related riots in Los Angeles illustrated the shortcomings of the modern Insurrection Act. The 1965 Watts riot was sparked by the arrest of three members of a black family following a routine traffic stop. Rioting continued for seven days but was contained and eventually quelled by California National Guard forces, together with state and local police. Federal, state, and local officials did discuss calling in federal troops, but state and local officials chose not to make a request for federal military presence because of the sensitive nature of the riots and because they believed that they could control the situation. A commission created to review the Watts incidents found that the California National Guard performed well but was slow to respond.

In 1992, following the videotaped beating of motorist Rodney King and the eventual acquittal of the police officers involved in the beating, riots erupted. Hundreds of fires were started and assaults and widespread looting by gangs occurred within hours of the verdict. The Los Angeles Police Department chose to retreat from the scene rather than making a show of force, and the mayor soon realized that he would need military support to quell the growing violence. This time, in part based on the advice of those involved in the 1965 fracas that the National Guard would not react quickly enough, the mayor persuaded California Gov. Pete Wilson to request federal troops from President George H.W. Bush. The president's executive order resolved "to use whatever force was necessary to restore order," federalized the California National Guard, and noted that he was acting "under circumstances expressly authorized by the Constitution or Act of Congress." In less than a day, more than 13,000 regular Army troops joined 9,000 federalized California National Guard forces and state and local police in riot control and law enforcement actions. By then, more than 5,000 fires had been set, 43 people had been killed, and 1,257 injured.

Despite the relative clarity of the president's executive order and its broad authorization to enforce the laws and quell domestic violence, federalization of the incident had a perverse effect. Some Guard personnel believed that calling in the federal forces and subordinating the Guard command to the regular Army reflected on their own response to the crisis. Worse yet was the disinclination of the federal commanders to support law enforcement activities. Perhaps due to a lack of training and the war-fighting orientation of the regular Army forces, the federal officer leadership actively avoided law enforcement missions during the rioting. Because the federal leadership now commanded state National Guard forces as well, support for state and local police was reduced dramatically when the president's order was implemented. Although California National Guard officers complained about orders to stand down, there was little they could do. Federal officers either misunderstood the executive order and believed that they were bound by the Posse Comitatus Act to avoid law enforcement activities, or they understood but chose to rely on the PCA as a justification for avoiding the law enforcement duties they did not want to perform.

Even though the rioting waned after the federalization of the military response, regular and National Guard forces were attacked by snipers, drive-by shooters, and motorists who attempted to run them down. One motorist was killed – the first civilian killed by military forces in a domestic operation since Kent State – when federalized Guard troops shot him on his third attempt to strike soldiers manning a barricade. Other incidents of violence directed at soldiers ended in arrests or escape.

After five days of rioting, 54 persons were dead, 2,328 were treated for injuries, and 862 buildings were burned. Despite the strong showing of federal military force, there was no indication that the state and local forces were unable or unwilling to enforce the laws. Beyond the dramatic slowdown in the military response to law enforcement needs, a failure to train active-duty military forces in law enforcement had nearly disastrous consequences during the riots. Marines accompanying local police in response to a domestic dispute, where a shot had been fired from a house, responded to a police officer's request to "cover me" by spraying the house with 200 M-16 rounds. Instead of being prepared to respond if the officer was threatened, the Marines preemptively fired on the house.

Although the statutory request mechanism was followed in the case of the 1992 riots, the predicate conditions did not justify the federal military response. The unfortunate lack of law enforcement support training underscores the complexities of mixing federal and local, and military and civilian, commands and mission orientations in responding to domestic incidents.

Case Study: Raid on the Branch Davidians

After local law enforcement reported to the Bureau of Alcohol, Tobacco, and Firearms (ATF) in May 1992 that the Branch Davidians, an obscure religious group, were receiving large quantities of firearms and black powder, officials worried that the sect's leader, known to his followers as David Koresh, was creating a military-type compound. An ATF investigation gathered evidence of illegal weapons activity, sufficient to obtain search warrants for the compound. Although ATF had a highly trained response team, agency officials determined that executing the warrants would require military support.

Because ATF did not want to foot the bill for military support, agency staff essentially imagined a drug connection to the Branch Davidians so that military expertise could be supplied without cost to the agency. Air surveillance of the compound revealed no drug activity, but ATF reported the possible presence of a methamphetamine laboratory on the grounds. Although ATF supplied no proof of the drug activity, DOD drug enforcement officers supplied requested training facilities and equipment, including seven Bradley fighting vehicles. As plans for the raid grew, ATF requested that Special Forces soldiers from the local Joint Task Force (JTF) assist with a range of operations, including "room clearing discriminate fire operations," equivalent to "close-quarter combat" by the military.

When the JTF reported its new assignment to Army Special Forces Command and the Judge Advocate General (JAG) office at Fort Bragg, North Carolina, the command officers and their lawyers soon grew suspicious. After a review of the plans for requested military support – construction of a practice site, review of the ATF assault plan, provision of on-site medical services during the raid – the lawyers concluded that the military would be providing forbidden "active" participation in law enforcement. Army personnel could find themselves treating injured civilians and searching arrested persons. If there was a drug lab at the site, soldiers could be involved in collecting evidence for prosecution.

When the JTF officers in Texas learned of the command officers' doubts about the operation, they argued that headquarters was an "unwarranted obstacle to mission success." Only after the command lawyers delivered a memorandum for the record to the Office of the Secretary of Defense did the JTF conduct a more thorough legal and fact review. Soon thereafter, the military scaled back its offer of assistance to ATF to include safety, communications, and medical evaluation training. No soldiers would accompany ATF personnel to the compound.

When the raid was executed, on February 28, 1993, the resulting firefight killed four agents and wounded more than 20; there were six deaths and four injuries among cult members. After a 51-day siege, a fire swept through the compound, killing 74 Davidians. As tragic as they were, the raid, siege, and eventual fire could have been much worse in the public eye if Army Special Forces had been seen guiding ATF agents in an attack on a religious compound. In the end, the Posse Comitatus Act presumption gave strength to the legal misgivings of headquarters JAG lawyers, and their resistance saved the Army from embarrassment and a backlash from an angry citizenry.

6.4. Non-Statutory Exceptions to the PCA

The Department of Defense has relied on the constitutional authorities of the president as commander in chief and chief executive to assert two constitutional exceptions to the Posse

Comitatus Act that do not rely on any federal statute. In the first setting, DOD claims that it can protect federal installations and functions when state and local authorities do not.²⁹⁸ Second, DOD claims an “immediate response authority” when state and local resources are overwhelmed and a military response is needed to save lives, prevent human suffering, mitigate serious property damage, and restore government functions and public order.²⁹⁹

The department has promulgated regulations prescribing the forms of its emergency response support. In its Military Support to Civil Authorities (MSCA) directive, “imminently serious conditions resulting from any civil emergency or attack ... [permit, when] time does not permit prior approval from higher headquarters, local military commanders ... to take necessary action to respond to requests of civil authorities.”³⁰⁰ The specific support provided by the military may also be ordered when FEMA determines that local civilian authorities are overwhelmed; the support described in the DOD directive includes a range of rescue and recovery activities roughly parallel to what may be authorized under the Stafford Act.³⁰¹ Any commander who performs any of these functions is obligated to restore civil responsibility at “the earliest possible time.”³⁰² Although most of the support listed in the directive would not violate the PCA in any case, some of the anticipated activities may constitute “direct” involvement in law enforcement – “safeguarding food,” “controlling contaminated areas,” and “roadway movement control and planning.”³⁰³

The directive on Military Assistance for Civil Disturbances (MACDIS) does more clearly involve troops in civilian law enforcement.³⁰⁴ In the civil disturbance setting, DOD relies on congressional delegation of authority to the president in the Insurrection Act, although it includes justifications for the use of federal armed forces to respond to “domestic violence” in the directive,³⁰⁵ in excess of constitutional limits. The directive states that military support will maintain “the primacy of civilian authority” and that a DOD response will follow a request from the attorney general “in response to a request by State or Federal civil law enforcement or Executive authorities.”³⁰⁶ Military forces may respond when “sudden and unexpected civil disturbances ... occur, if duly constituted local authorities are unable to control the situation and circumstances preclude obtaining prior authorization from the President.”³⁰⁷

6.5. Role of the National Guard and Reserves

DOD issued its “Strategy for Homeland Defense and Civil Support” in June 2005 and its “Joint Doctrine on Homeland Security” in August 2005.³⁰⁸ In a departure from previous planning documents, DOD anticipated substantial reliance on National Guard and Reserve forces for domestic missions.³⁰⁹ Although the new policy signals a more expansive domestic role for the military, DOD has carefully distinguished its emerging role in homeland defense (“HD”) from its role in homeland security (“HS”), the latter being one in which “DOD will serve in a supporting role for domestic incident management.”³¹⁰

During disaster response operations, National Guard forces by default operate under the control of state governors.³¹¹ The National Guard Bureau (NGB), a federal entity, has responsibility for developing and implementing coordination policies affecting Army and Air National Guard personnel and serves as the conduit for communications between active-duty and Guard and Reserve Army and Air Force units.³¹² The NGB chief does not command the National Guard personnel, although he is responsible for National Guard Military Support to Civil Authorities programs generally.³¹³ The commanding officer of Northern Command (NORTHCOM) is responsible for command of the federal military response to a disaster — active-duty forces and federalized Guard.³¹⁴

Thus, military support during emergencies, including natural disasters, may be provided by state or federal military troops. The traditional, default support comes from state National Guard units, deployed at the behest of the governors. Differences among state and local plans may be significant, although the basic structures for emergency response are similar throughout the states.³¹⁵

By participating in the Emergency Management Assistance Compact (EMAC),³¹⁶ governors may also activate state National Guard personnel and send them to another state that requires assistance during a disaster.³¹⁷ The EMAC, administered by the National Emergency Management Association (the states' professional emergency managers), provides the legal basis for state-to-state sharing of military resources.³¹⁸ The governor of an affected state (through the state's adjutant general) commands both in-state and EMAC-deployed National Guard units from other states.³¹⁹

In addition, the Militia Clause of the Constitution authorizes the use of the National Guard under continuing control of the governors but serving the federal government to "execute the Laws of the Union, suppress insurrections and repel invasions."³²⁰ For example, when the president requested deployment of National Guard personnel to the nation's airports after the September 11 attacks, the Guard forces were controlled by the governors at federal expense and ordered to perform federally prescribed operations — in this instance, to ensure air security and compliance with federal commerce and aviation laws.³²¹ This was a case in which, under a federal law, National Guard personnel served in what is commonly referred to as "Title 32 status."³²² Governors may request that National Guard personnel continue to be directed by state commanders while they receive federal pay and benefits for performance of the federally assigned role.³²³ Alternatively, governors may request Title 32 status from the secretary of defense, allowing them to equalize the terms and conditions of service when a multi-state deployment or response occurs.³²⁴

Federal military response to disasters may instead, or in addition, consist of active-duty units or Reserve or National Guard personnel called into federal service by the president.³²⁵ So deployed, these forces remain under the control of the president, the secretary of defense, and military commanders.³²⁶ The use of the federal military for disaster relief is specifically contemplated by the Stafford Act.³²⁷ The act permits the president to use any agency, including DOD, to assist state and local governments in disaster relief operations and specifically to deploy the active-duty military to

perform work essential for the preservation of life and property.³²⁸ Under the Stafford Act, the military normally responds to requests for support from a governor but may provide, under its “immediate response authority,” assistance to local civil authorities without waiting for the request or prior approval of the president if the action is necessary to save lives, prevent suffering, or mitigate great property loss under imminent and serious conditions.³²⁹

When a federal military role in disaster response is contemplated, DOD appoints a defense coordinating officer (DCO) at the request of DHS, and the DCO becomes the operational contact for NORTHCOM and the designated Joint Task Force commander.³³⁰ NORTHCOM constitutes a Joint Task Force for disaster response from forces assigned from the service branches.³³¹ When a request for military support comes to DOD from DHS, the assistant secretary of defense for homeland defense evaluates it and, upon approval, forwards the request to the joint director of military support, who provides orders to NORTHCOM.³³²

This synopsis shows that planning documents, a few laws, and our constitutional structure present an imprecise blueprint for the roles played by military personnel in disaster response. The plans and laws do not provide all the answers as to who is in charge of the forces once deployed.

This synopsis shows that planning documents, a few laws, and our constitutional structure present an imprecise blueprint for the roles played by military personnel in disaster response. The plans and laws do not provide all the answers as to who is in charge of the forces once deployed. State-deployed National Guard units are the default first military responders, and they may be supplemented by units from other states under EMAC arrangements.³³³ However, the National Guard may be federalized by the president, and active-duty military personnel may also be deployed in response to a domestic disaster or terrorism incident.³³⁴ An unresolved tension persists between a potential need for active-duty military when state and local officials cannot manage a crisis and the continuing presumption that a governor must decide whether to ask for federal support and when to do so. Even the most forward-leaning and tailored plan — the NRF-CIA — assumes that state and local response authorities will know how to integrate federal assets that arrive without having been requested. With these loose ends, it is hardly surprising that the military portion of the response to Hurricane Katrina was not a model of efficiency.

Case Study: Katrina — What Happened?

As part of regular preparations for the hurricane season, Secretary of Defense Donald Rumsfeld issued a standing order on August 19, 2005, that allowed NORTHCOM to deploy installations and a defense coordinating officer in support of FEMA wherever needed.³³⁵ Units from U.S. Joint Forces Command followed with instructions on which units would deploy in support of NORTHCOM and FEMA.³³⁶ Although NORTHCOM began tracking what would become Hurricane Katrina on August 23, and initial relief actions were put in motion by NORTHCOM on August 26, most pre-landfall activities consisted of evacuating active military units from the projected path of the storm.³³⁷ At landfall, DOD sought a damage assessment for DOD facilities and NORTHCOM issued alerts in anticipation of requests for assistance.³³⁸

The pre-landfall preparation for Katrina also involved FEMA and its disaster-related relief agencies, along with state and local officials. Between the August 24 forecast of Katrina's strength and path and its landfall on August 29, FEMA deployed more resources to the landfall states than it had positioned before any event in the agency's history.

In Louisiana, Gov. Kathleen Blanco requested, and President Bush declared, a Stafford Act emergency for the state on August 27 and a major disaster on August 28.³³⁹ State emergency management agencies and parish and Red Cross groups also prepared in advance of the storm.³⁴⁰ The Louisiana National Guard deployed troops and began stocking shelters (including the Superdome in New Orleans) with supplies on August 26, and Adjutant General Bennett Landreneau made requests for additional Guard troops through the EMAC beginning on August 28.³⁴¹ The National Guard Bureau (NGB) also worked in anticipation of Katrina to pre-position staff to potentially affected states and to coordinate requests for assistance from adjutants general in the Gulf States.³⁴² In several pre-landfall instances, the NGB arranged for assistance for states through the EMAC and did not deploy federal assets.³⁴³

Despite the pre-positioning of FEMA assets in the Gulf States, the storm quickly overtook the federal preparedness efforts, and state and local resources were swamped — some literally and others figuratively.³⁴⁴ Even after President Bush declared a federal emergency on Saturday, August 27, two days before landfall, DHS did not follow suit. It did not declare the predicted Category Four or Five hurricane an Incident of National Significance (INS) until August 30.³⁴⁵ DHS Secretary Michael Chertoff then appointed FEMA Director Michael Brown as the Principal Federal Officer (PFO) for the federal response to Katrina. Even then, Chertoff declined to trigger the National Response Framework-Catastrophic Incident Annex (NRP-CIA), which would have redirected the federal response posture to a proactive mode of operations. In Louisiana, the local government in New Orleans was obliterated by Katrina, and state government was severely limited. Thus, the expected “pull” system of disaster response could not function, and FEMA effectively was tasked with commanding the response. FEMA Director Brown was not prepared to build an incident command structure before landfall, and he struggled to complete such a scheme even weeks after landfall.³⁴⁶

Because the INS designation was made a full day after landfall, only then did the NRP call for DOD to enable NORTHCOM to establish Joint Task Force Katrina to coordinate the federal military response to the storm.³⁴⁷ Even if the NRP-CIA had been implemented at the same time that the INS was declared, the federal military response would have been delayed. The request for military assistance had to originate with Gov. Blanco and be transmitted to the lead federal agency, FEMA.³⁴⁸ The request then went to the Office of the Secretary of Defense, was reviewed by the assistant secretary for homeland defense, and was forwarded, after approval, to the joint director of military support within the Joint Staff, who in turn provided orders to NORTHCOM.³⁴⁹ Because it took nearly three days for Blanco's request for active-duty military support to be communicated to JTF-Katrina, it took until September 1 for JTF-Katrina to deploy 3,000 active-duty military personnel inside the affected area.³⁵⁰

By August 31, the need for a unified military command was more than apparent. Federal officials discussed federalizing the National Guard with Blanco.³⁵¹ Although the president may have been able to federalize the Guard on his own authority, the White House determined, for political reasons and to avoid drawing attention to the civil unrest in New Orleans, that it was preferable to have the request come from Blanco. She refused.³⁵² Eventually, President Bush offered Blanco a "Memorandum of Agreement Concerning Authorization, Consent and Use of Dual Status Commander for JTF-Katrina," which would have made Lt. Gen. Russel Honoré, commander of Joint Task Force Katrina, a member of the Louisiana National Guard.³⁵³ The Guard force then would have remained under Blanco's control and Honoré's command.³⁵⁴ Honoré would have worn two hats — first, as commander of U.S. forces in the task force under the president; and second, as commander of the Louisiana Guard under Gov. Blanco.³⁵⁵ Blanco declined this arrangement as well.³⁵⁶

DOD support was spearheaded by Honoré, who arrived on August 31. Navy and Air Force personnel began to arrive on September 1, followed by Army units on September 2. Federal personnel joined in search and rescue operations — sometimes with state National Guard, Coast Guard, and local law enforcement personnel. DOD also took over basic logistics distribution functions when FEMA was unable to keep up with the demands.³⁵⁷

By September 5, more than 14,000 military personnel were in the area.³⁵⁸ Yet the initial military support in response to the storm was too little, too late, and too disorganized. There was no effective coordination between active-duty and Guard forces, and the separate commands could not communicate effectively because of equipment compatibility problems.³⁵⁹ Early in the JTF-Katrina response, NORTHCOM did not know which Guard forces were deployed or where they were.³⁶⁰ The Louisiana Guard did not know where JTF-Katrina forces were or what they were doing.³⁶¹ Some forces bumped heads at redundant assignments while other central tasks were not performed.³⁶² FEMA's requests for active-duty military support were made without knowledge of what state Guard units were doing.³⁶³

Most of the Guard response to Katrina came from outside the affected states, and the NGB served as the clearinghouse for information relayed from adjutants general of deploying states to Louisiana and Mississippi.³⁶⁴ The need for out-of-state forces was great because those two most affected states already had thousands of Guard personnel deployed for other missions in Iraq and Afghanistan when Katrina struck.³⁶⁵ Although the number of out-of-state Guard troops eventually grew to over 40,000, mobilization plans were developed on the fly during the crisis.³⁶⁶ When Superdome bus evacuations began on September 1, only 1,600 out-of-state troops augmented a like number of state Guard personnel.³⁶⁷ Similarly, considerable confusion surrounded the tardy arrival of federal military forces.³⁶⁸ After the president visited the area September 2 and met with Blanco, 7,000 active-duty troops were ordered to the region the next day.³⁶⁹ Even then, although communications and protocols were set and functioned reasonably well for the state Guard units, NORTHCOM lacked a compatible system for communication between DOD entities on the ground and state-deployed Guard units.³⁷⁰

Management and direction of the various state Guard units became complex even though the EMAC made the basic deployments and initial communications straightforward.³⁷¹ Because each state's units were on state active duty and subject to the rules of their states, administrative quagmires were inevitable.³⁷² Within a few days, the governors of the three principally affected states wrote to the secretary of defense asking that the Guard forces deployed from all states be placed under Title 32 status, which would allow continued control by the governors but would substitute a uniform federal pay and benefits system.³⁷³ DOD approved the request on September 7, retroactive to August 29.³⁷⁴

In and around New Orleans, deployed Guard units helped restore law and order in support of the exhausted New Orleans Police Department. However, the military did not plan for the integration of deployed forces from different commands during a disaster response operation.³⁷⁵ Existing Louisiana plans contemplated absorbing up to 300 troops per day into state Guard command, but more than 20,000 Guard forces from other states arrived in Louisiana.³⁷⁶ While the commands of these forces were coordinated, they were not integrated — there was no unified command.³⁷⁷ In some instances, soldiers patrolled New Orleans with weapons raised, while members of another unit, trained in levee repair and not police work, locked themselves in the Convention Center rather than deal with an angry crowd of hurricane victims.³⁷⁸

All in all, the state Guard forces performed admirably, as did the federal troops, upon arrival. However, according to the assistant defense secretary for homeland defense, Paul McHale, coordination and communication between Guard and federal active-duty forces was done, if at all, “‘on the fly’ — albeit by superb leaders.”³⁷⁹ McHale acknowledged that Guard plans were not integrated with DOD plans, even though the NGB provided JTF-Katrina with timely and accurate reports.³⁸⁰ Likewise, Guard commanders did not coordinate with the federal forces at NORTHCOM for the most part.³⁸¹ Mississippi was an exception, apparently because of the strong personal relationship between Mississippi's adjutant general, Harold Cross, and Honoré, the JTF-Katrina commander; the two spoke daily during the crisis.³⁸² As for DHS coordination with DOD, there was no DHS document or plan that would have advised DOD of the requirements for military assistance to civilian authorities during a crisis.³⁸³

Later in September, after the resignation of the FEMA administrator and several days of finger-pointing by city, state, and federal officials, President Bush suggested that he and Congress should consider whether to change federal law so that emergency response in significant natural disasters could be led and coordinated by the military.³⁸⁴ In discussing proposals that would necessarily reduce the authority of DHS and FEMA in disaster response, NORTHCOM's commander, Adm. Timothy Keating, recommended that DOD be given “complete control” for response to disasters like Katrina: “We have to think the unthinkable may be possible, even probable.”³⁸⁵ In other words, if those now in charge cannot get it right, let us give the job to the institution that can — DOD.

Instead of a new law placing federal military personnel at the forefront of emergency response, the president in 2006 advocated an apparently modest revision of the Insurrection Act to clarify its language and update its antiquated terminology.³⁸⁶ As enacted by Congress in October 2006,³⁸⁷ the Insurrection Act expressly permitted the president to use the armed forces, including the National Guard in federal service, to “restore public order and enforce the laws of the United States” when he determines that “as a result of a natural disaster, epidemic or other serious public health emergency, terrorist attack or incident, or other condition, domestic violence occurred to such an extent that the constituted authorities of the State ... were incapable of maintaining public order.”³⁸⁸

In essence, the amendment inserted a new set of conditions into the Insurrection Act that permitted the president to deploy federal military to a state without waiting for a request from the affected governor. The traditional presumption against the federal military presence in the states was replaced by a presumption in favor of the military role if certain conditions occurred. The act spelled out the conditions that might give rise to the president's decision, but at least some of these conditions fell short of the kinds of extreme circumstances that the Constitution contemplates could warrant an unsolicited federal military presence in domestic affairs. In addition, and ironically, the authority for a unilateral federal decision to intervene under the amended act could come only *after* the crisis was fully upon the states,³⁸⁹ so the revised mechanism would not respond adequately to fast-moving crises such as Hurricane Katrina or an anthrax attack in New York City.

Although the 2006 amendment included requirements for a presidential finding setting out the justification for a decision to trigger these authorities,³⁹⁰ notice and reports to Congress,³⁹¹ and the cease and desist proclamation that has long been part of the legislation,³⁹² the act as amended unconstitutionally permitted the president to bypass state decision-makers and extended federal authority beyond what the Article IV Protection Clause and Article I Calling Forth Clauses permit. Because the "domestic violence" trigger in the amended act fell short of "insurrection" or "invasion" as those terms were used by the Framers and the early Congresses, the act failed to meet the constitutional requirements of Article IV. Similarly, permitting the president to act unilaterally to enforce federal laws because of domestic violence exceeded the authority Congress could confer under the Calling Forth Clause.

All 50 governors publicly opposed the changes in the act,³⁹³ and after the 2006 elections, new Democratic committee chairs in Congress promised to revisit the issue in 2007. They did,³⁹⁴ and the provision was eventually repealed in the 2008 Defense Authorization Act,³⁹⁵ signed by the president on January 28, 2008.

In a general way, the 2008 repeal does reinforce a congressional determination that the president should assert federal military control over the states and cities in a domestic emergency only in the gravest of circumstances, and that the deliberations that have typically preceded invocation of the Insurrection Act in such circumstances³⁹⁶ should continue unaffected by the modernizing language of the 2006 amendment.³⁹⁷ The restored Insurrection Act is flawed, but the 2006 amendment made the act worse.

6.6. Phasing the Incident Management Tasks: Special WMD Plans and National Guard and Reserve Training

Local responders will only call in state capabilities, potentially including the National Guard, on the governor's orders, to the extent that the local medical, fire, police, and emergency personnel and nongovernmental agencies cannot control and manage the consequences of the incident. In turn, if a state is unable to manage the crisis and its consequences, the governor may turn to other states if there is an applicable mutual assistance compact, or the state may seek federal support, through the Department of Homeland Security. Only if other capabilities fail to stem the crisis may military forces be requested by a governor or by the president. The force structure could consist of the Weapons of Mass Destruction Civil Support Teams (WMD-CSTs), Joint Task Force – Civil Support (JTF-CS) teams under NORTHCOM command, or larger commitments, again presumably under

evolving NORTHCOM configurations. Specific arrangements for military enforcement of operations such as quarantine are not yet addressed in the NRF or supporting documents.

The Defense Against Weapons of Mass Destruction Act³⁹⁸ designates the assistant secretary of defense for homeland defense as the executive agent to coordinate DOD assistance with federal, state, and local entities in response to a WMD attack. The Department of Energy appoints a separate executive agent for its nuclear, chemical, and biological response. The FBI, DHS, the Department of Commerce, the EPA, and other federal agencies have roles and responsibilities in domestic emergencies involving WMD as well.

NORTHCOM is in the process of activating and training an estimated 20,000 military service members for specialized domestic operations. One unit became operational in 2008, and two more units are scheduled for assignment by 2011. Approximately 80 National Guard and Reserve units, with 6,000 troops, are assigned in support of state and local officials and trained to respond to a domestic WMD attack.

6.7. Civil Liberties Implications of the Military Role in Emergency Response

When troops enforce the laws, a few civil liberties protections apply to limit the military role.³⁹⁹ The Third Amendment,⁴⁰⁰ which limits the quartering of soldiers, and the Suspension Clause, which assures access to the courts for individuals held under federal authority “except when in Cases of Rebellion or Invasion the public Safety may require it,”⁴⁰¹ surely impose limits on the military role in the states. In addition and more generally, it has been argued that the Due Process Clause embodies a modern version of the English principle that citizens must have resort to civilian law and processes when the courts are open, and that due process principles apply to limit domestic use of the military.⁴⁰²

The military has all the authority it needs to support civilian efforts to prepare for and respond to emergency situations.

The shortcomings in shaping a role for the military in domestic emergency response are not attributable to a lack of legal authority. The military has all the authority it needs to support civilian efforts to prepare for and respond to emergency situations. Rather than reshaped legal authorities, military units need more fully refined operations plans, including detailed arrangements for cooperation and unified command during emergency incidents.

Apart from what law permits or requires, military personnel will in all but the most unusual circumstances not engage in law enforcement in response to domestic emergencies. Soldiers’ skills will be most valuable in search and rescue operations and in providing shelter, clearing debris, and coordinating other logistical activities.⁴⁰³ No one, inside the Department of Defense or among state and local officials, advocates military involvement in enforcing the laws. Under the dire

circumstances triggering the Insurrection Act, legal restrictions on such involvement are overcome by following the terms of the act. Otherwise the Posse Comitatus Act provides a background legal presumption against military participation in civilian law enforcement.

6.8 Summary

The U.S. military's subordination to civilian control has been a central feature of our government from the beginning. Our federal system was designed to ensure that in situations where a federal military force is required to respond to a domestic crisis, decisions about the need for a federal force would, where possible, be made by state and local officials closest to where the troops are needed. The state legislature or governor must request federal military support before it is provided. However, subordination of military to civilian leadership has added to the difficulties in coordinating military and civilian roles and missions in emergency response. The 1878 Posse Comitatus Act prohibits direct active-duty military involvement in civilian law enforcement where the exercise of military power is regulatory, prescriptive, or compulsory in nature, unless authorized by the Constitution or statute. Nonetheless, over time Congress has created a variety of statutory authorities that enable military involvement in domestic affairs. Some of the authorities permit quelling civil disturbances, while others anticipate military personnel enforcing the law on or off military installations. During disaster response operations, National Guard forces by default operate under the control of state governors. Federal military response to disasters may instead or in addition consist of active-duty units or Reserve or National Guard personnel called into federal service by the president. So deployed, these forces remain under the control of the president, the secretary of defense, and military commanders. The use of the federal military for disaster relief is specifically contemplated by the Stafford Act. The act permits the president to use any agency, including the DOD, to assist state and local governments in disaster relief operations and specifically to deploy the active-duty military to perform work essential for the preservation of life and property.

When troops enforce the laws, a few civil liberties protections apply to limit the military role. The Third Amendment, which limits the quartering of soldiers, and the Suspension Clause, which assures access to the courts for individuals held under federal authority "except when in Cases of Rebellion or Invasion the public Safety may require it," surely impose limits on the military role in the states. In addition and more generally, it has been argued that the Due Process Clause embodies a modern version of the English principle that citizens must have resort to civilian law and processes when the courts are open, and that due process principles apply to limit domestic use of the military.

7. Conclusion

There is ample, mostly centralized legal authority for emergency response. The national government is instructed in Article IV, Section 4 of the Constitution to guarantee a “Republican Form of Government” to each state (the Guarantee Clause), to protect the states against invasion (the Invasion Clause), and to protect them against “domestic Violence” (the Protection Clause). Though there is uncertainty about which of the political branches controls certain emergency response powers, by and large Congress has delegated broad discretion to the executive branch to act in anticipation of and response to emergencies. States and their cities do retain the police powers to protect the health, safety, and welfare of their citizens, and in some contexts these reserved state prerogatives establish limits on the prescriptive authorities of the national government.

In recent years, especially since 9/11 and Hurricane Katrina, considerable efforts have been made to improve emergency management and communications infrastructure within and among federal, state, and local governments. However, the emergency management system still suffers from ambiguously assigned responsibilities for domestic preparedness and response as well as improvised provision of goods and services. Moreover, while the federal government has provided confusing mandates and poor planning direction for state and local governments, disproportionate attention is paid to less likely terrorist incidents instead of more likely natural disasters.

In addition, this paper has shown that poorly coordinated or overly aggressive emergency response could threaten the civil liberties of the American people. Emergencies have precipitated deprivations of civil liberties in the past, as several selected case studies illustrate. In the event of an evolving crisis of unknown origins – such as an attack with biological weapons – where new crisis epicenters erupt one after the other, it is not unrealistic to imagine armed members of the military enforcing the laws, including curfews, quarantines, or forced relocation of groups of citizens. Legal authorities exist that may permit such measures, and plans for emergency response are sufficiently open to interpretation that they do not foreclose the most extreme government responses to emergencies.

¹ Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121-5206 (2007), as amended in the DHS Appropriations Act of 2007 (Title VI) and the Post-Katrina Emergency Management Reform Act (PKEMRA) of 2006, Pub. L. No. 109-295, 120 Stat. 1355 (2006).

² Exec. Order No. 12,148, 44 Fed. Reg. 43, 239 (July 20, 1979).

³ 42 U.S.C. §5122(2).

⁴ February 2010, <http://www.dhs.gov>.

⁵ *Ibid.*, 11.

⁶ *Ibid.*

⁷ *Ibid.*, 31.

⁸ *Ibid.*

⁹ *Ibid.*, 71-73.

¹⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., Concurring).

¹¹ U.S. Constitution Article IV, §4 states: “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”

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- ¹² The Tenth Amendment confirms that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, or reserved to the States respectively, or to the people.” U.S. Constitution, Amendment X.
- ¹³ U.S. Constitution, Article I, §8, cl. 3.
- ¹⁴ *United States v. Lopez*, 514 U.S. 549 (1995) (striking down the Gun Free School Zones Act, prohibiting gun possession in a school zone).
- ¹⁵ *Ibid.* If the regulated activity is economic in nature, the “aggregate effect” of similar conduct may be considered when judging the substantial effect on interstate commerce. If noneconomic, aggregation may not be allowed. *United States v. Morrison*, 529 U.S. 598 (2000) (striking down part of the Violence Against Women Act, granting a civil remedy for victims of private, gender-motivated violence).
- ¹⁶ U.S. Constitution, Article I, §8, cl. 1 (granting Congress “power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States”).
- ¹⁷ Congress has conditioned federal disaster spending on state adoption of emergency preparedness plans, e.g., Pet Evacuation and Transportation Standards Act of 2006, Pub. L. No. 109-308, 120 Stat. 1725, §2 (emergency shelter funds condition on state planning for the relief needs of households with pets); Disaster Mitigation Act of 2000, Pub. L. no. 106-390, 114 Stat. 1552, §322 (conditioning hazard mitigation funds on States developing hazard mitigation plans).
- ¹⁸ Section 308 of the Stafford Act prohibits government bodies from discriminating on the basis of race, color, nationality, or gender when distributing federal disaster aid, 42 U.S.C. §5151.
- ¹⁹ *United States v. Printz*, 521 U.S. 898, 922 (1997) (“The power of the federal government would be augmented immeasurably if it were able to impress into service – and at no cost to itself – the police officers of the 50 States.”)
- ²⁰ U.S. Constitution, Article II, §§1, cl. 1, 2, cl. 1, 3.
- ²¹ David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – A Constitutional History*, 121 *Harvard Law Review* 941 (2008).
- ²² Some of President George W. Bush’s advisors maintained that the president had the authority to arrest U.S. citizen terrorist suspects in upstate New York. Mark Mazetti & David Johnston, “Bush Weighed Using Military in U.S. Arrests,” *New York Times*, July 25, 2009, A1. See also Office of Legal Counsel Opinion Addressing The Domestic Use Of Military Force To Combat Terrorism Activities, U.S. Dep’t of Justice, Oct. 6, 2008, available at <http://www.fas.org/irp/agency/doj/olc/caution.pdf>.
- ²³ 50 U.S.C. §§1601-1651.
- ²⁴ Proclamation No. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks, 66 Fed. Reg. 48,199 (Sept. 14, 2001).
- ²⁵ See Harold C. Relyea, *National Emergency Powers*, Cong. Rsrch. Serv. 98-505 (2005).
- ²⁶ Glenn E. Fuller, Note, The National emergency Dilemma: Balancing the Executive’s Crisis Powers with the Need for Accountability, 52 S. Cal. L. Rev. 1453,1458 (1979).
- ²⁷ 50 U.S.C. §§1701-1707.
- ²⁸ See Kim Lane Scheppele, Small Emergencies, 40 Georgia L. Rev. 835, 845 (2006).
- ²⁹ Pub. L. No. 107-296, 116 Stat. 2135 (2002), 6 U.S.C. §§101-557, as amended by the PKEMRA.
- ³⁰ 6 U.S.C. §312(5).
- ³¹ 6 U.S.C. §312(6).
- ³² Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121-5206 (2007), as amended in the DHS Appropriations Act of 2007 (Title VI) and the Post-Katrina emergency Management Reform Act of 2006, Pub. L. No. 109-295, 120 Stat. 1355 (2006) (PKEMRA).
- ³³ *Ibid.*, 42 U.S.C. § 5170(b).
- ³⁴ *Ibid.*, 42 U.S.C. § 5122(2). 1988 amendments to the Stafford Act clarify that the authorities are not limited to “natural catastrophes,” but apply “regardless of cause.” See H.R. Rep. No. 100-517, at 4 (1988), 1988 U.S.C.C.A.N. 6085, 6088.
- ³⁵ 42 U.S.C. § 5122(1).
- ³⁶ Major Disaster and Related Determinations, 60 Fed. Reg. 21, 819 (May 3, 1995).
- ³⁷ Major Disaster and Related Determinations, 66 Fed. Reg. 48, 682 (Sept. 21, 2001).
- ³⁸ See DM Bell, IB Weisfuse, M Hernandez-Avila, C del Rio, X Bustamante, G Rodier, “Pandemic Influenza as a 21st Century Urban Public Health Crisis,” *Emergency Infectious Diseases*, December 2009, <http://www.cdc.gov/EID/content/15/12/1963.htm>.
- ³⁹ Department of Homeland Security, *A Review of the Top Officials 3 Exercise* (Nov. 2005), http://www.dhs.gov/xoig/assets/mgmttrpts/OIC_06_07_Nov05.pdf.
- ⁴⁰ Homeland Security Council, *Implementation Plan for the National Strategy for Pandemic Influenza 212*, <http://www.lib.umich.edu/govdocs/pdf/fluplan.pdf>. See Edward CI Liu, *Would an Influenza Pandemic Qualify as a Major Disaster under the Stafford Act?* Congressional Research Service, RL34724, Oct. 20, 2008.
- ⁴¹ See *National Planning Scenarios*, Cyber.
- ⁴² 42 U.S.C. § 5191 (b).
- ⁴³ 42 U.S.C. § 5170b (c).
- ⁴⁴ 42 U.S.C. § 5192 (a)(1).

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- ⁴⁵ See Erin Ryan, “Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area,” 66 *Maryland Law Review* 503, 530 (2007) (concluding that the question is unsettled).
- ⁴⁶ Pub. L. No. 109-295, 120 Stat. 1355 (2006).
- ⁴⁷ 42 U.S.C. § 5170 (a)(5).
- ⁴⁸ 42 U.S.C. § 5170 (a)(1)-(2).
- ⁴⁹ 42 U.S.C. § 5196 (b)(g).
- ⁵⁰ 6 U.S.C. §§ 774-775.
- ⁵¹ Homeland Security Presidential Directive/HSPD-5, 39 Weekly Comp. Pres. Doc. 263 (March 7, 2003).
- ⁵² *Ibid.*
- ⁵³ *Ibid.*
- ⁵⁴ *Ibid.*
- ⁵⁵ *Ibid.* The directive also directs the Secretary to coordinate with the private sector, and it recognizes the role of nongovernmental entities.
- ⁵⁶ *Ibid.*
- ⁵⁷ See *The White House, The Federal Response to Hurricane Katrina: Lessons Learned 13-15* (2006).
- ⁵⁸ 6 U.S.C. §§ 315, 313.
- ⁵⁹ National Preparedness Guidelines, Department of Homeland Security, http://www.dhs.gov/files/publications/gc_1189788256647.shtm.
- ⁶⁰ *Ibid.*
- ⁶¹ United States, Federal Emergency Management Agency, *Comprehensive Preparedness Guide* 101 (Washington: FEMA) March 2009, http://www.fema.gov/pdf/about/divisions/npd/cpg_101_layout.pdf.
- ⁶² National Response Framework, FEMA, <http://www.fema.gov/pdf/emergency/nrf/nrf-core.pdf>, 28.
- ⁶³ *Ibid.*, 55.
- ⁶⁴ *Ibid.*, 56.
- ⁶⁵ *Ibid.*, 29-30.
- ⁶⁶ *Ibid.*, 10.
- ⁶⁷ *Ibid.*, 71-75.
- ⁶⁸ *Lessons Learned*, 13.
- ⁶⁹ NRF, 50.
- ⁷⁰ *Ibid.*
- ⁷¹ *Ibid.*, 48-49.
- ⁷² *Ibid.*, 52.
- ⁷³ 42 U.S.C. § 5143.
- ⁷⁴ 6 U.S.C. § 319(C).
- ⁷⁵ NRF, FAQ, 6.
- ⁷⁶ 42 U.S.C. §5144.
- ⁷⁷ FEMA Fact Sheet: IMAT (2009), http://www.fema.gov/pdf/media/factsheets/2009/dod_inc_mgmt_asst_teams.pdf.
- ⁷⁸ NRF, 58-59.
- ⁷⁹ FEMA, Emergency Support Function # 8 – Public Health and Medical Services Annex (2008), <http://www.fema.gov/pdf/emergency/nrf/nrf-esf-08.pdf>.
- ⁸⁰ *Ibid.* See also Brian Kamode, “The National Response Plan: A New Framework for Homeland security, Public Health, and Bioterrorism Response,” 38 *Journal of Health Law* 287, 300-304 (2005).
- ⁸¹ 6 U.S.C. §701(4). The Act requires FEMA to make provision for catastrophic incidents when preparing to deploy emergency response functions. It is not clear why the definition was not integrated into the Stafford Act and its mechanisms. See Mitchell Moss et. al., “The Stafford Act and Priorities for Reform,” 6 *Journal of Homeland Security & Emergency Management* 8-9 (2009).
- ⁸² United States Senate, Committee on Homeland Security and Governmental Affairs, *Hurricane Katrina: A Nation Still Unprepared* 27-29 (2006).
- ⁸³ U.S. House of Representatives, *A Failure of Initiative, Final Report of the Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina* 131-132 (2006).
- ⁸⁴ Senate, *A Nation Still Unprepared*, 17.
- ⁸⁵ NRF, 42.
- ⁸⁶ *Ibid.* The revised NRF-CIA (2008) is available at <http://www.fema.gov/emergency/nrf/incidentannexes.htm>.
- ⁸⁷ 5 U.S.C. §§551-706.

- ⁸⁸ In addition, the NRF and NIMS should be classified as “significant regulatory action” if the two combined would be likely to result in a yearly economic effect of \$100 or more. Exec. Order No. 12,866, 58 Fed. Reg. 51,735, §3(f)(1). Such an impact would require a centralized regulatory review of the NRF/NIMS to determine potential costs and benefits of the plans, and less costly alternatives that might achieve the same results. *Ibid.* §6.
- ⁸⁹ 6 U.S.C. §112(e) (providing that the issuance of regulations by DHS are governed by the APA, except as otherwise provided within the Act).
- ⁹⁰ See *Domestic WMD Incident Management Legal Deskbook*, The Defense Threat Reduction Agency Office of the General Counsel 4-14 – 4-17 (Dec. 2003) (describing The Model State Emergency Health Powers Act (MSEHPA), its partial adoption in 32 states, and uneven state law).
- ⁹¹ 42 U.S.C. §§201-300hh-11.
- ⁹² 42 U.S.C. §247d(a). On April 26, 2009, the Secretary declared a nationwide public health emergency for H1N1 influenza. See Determination that a Public Health Emergency Exists, *available at* http://www.hhs.gov/secretary/phe_swh1n1.html.
- ⁹³ 42 U.S.C. § 264.
- ⁹⁴ *Ibid.* § 264(b). See Exec. Order 13,295 (April 2003); Exec. Order 13,375 (April 2005).
- ⁹⁵ An attack by chemical, radiological, or nuclear weapons would not trigger federal quarantine authorities unless the spread of a communicable disease is considered likely due to the effects on immune systems of the primary attack.
- ⁹⁶ 21 C.F.R. § 1240.54 (listing several diseases, including anthrax and smallpox).
- ⁹⁷ 42 U.S.C. § 264(d).
- ⁹⁸ Regulations do permit such detention of persons entering the United States from abroad. 42 C.F.R. Pt. 71.
- ⁹⁹ Although contamination for these sources may not be a “communicable disease” within the statute, federal authority may exist to prevent the transmission of disease that could occur as secondary effects of the contamination.
- ¹⁰⁰ “Federal Legal Authorities for Use in an Incident Involving Nuclear, Biological, or Chemical Weapons of Mass Destruction,” Memorandum for the Attorney General, Randolph D. Moss, Acting Assistant Attorney General, U.S. Department of Justice, Office of Legal Counsel, Tab 42 (May 12, 2000).
- ¹⁰¹ See National Commission on Terrorism, *Countering the Threat of International Terrorism* 27 (2000). In *United States v. Lopez*, 514 U.S.549 (1995), the Supreme Court struck down an act of Congress as exceeding the Commerce Clause authority for the first time in nearly sixty years. Although the Court stated that Congress may “regulate those activities having a substantial relation to interstate commerce,” 514 U.S. at 555, it has also ruled that Congress may not regulate non-economic activities within a state solely on the basis of the effect of those activities on interstate commerce. *United States v. Morrison*, 529 U.S. 598 (2000).
- ¹⁰² Office of the Attorney General, Memorandum to the President, “Summary of Legal Authorities for Use in Response to an Outbreak of Pandemic Influenza” (April 25, 2009), <http://www.ncsl.org/IssuesResearch/Health/H1N1FluSwimeFluPublicHealthAlert/tabid/17089/Default.aspx>.
- ¹⁰³ Amy E. Smithson and Leslie-Anne Levy, *Ataxia: The Chemical and Biological Terrorism Threat and U.S. Response* 269-270, Henry L. Stimson Center (2000).
- ¹⁰⁴ 42 U.S.C. §247d-6b (a)(1).
- ¹⁰⁵ See “Are We Ready? A Practical Examination Of The Strategic National Stockpile In Response To Public Health Crises,” Syracuse University, Institute for National Security and Counterterrorism, June 2006 (prepared by Barbara Anderson, Adam Piner, Nicholas Rossman, Kerry Weir, Dan Wilder, Jason Yaley, Matthew Zeller), http://insct.syr.edu/research/publications/student_publications/06%20MPA%20Workshop/2006%20MPA%20Workshop%20Project.pdf.
- ¹⁰⁶ 21 U.S.C. §§360bbb-3(a).
- ¹⁰⁷ *Doe v. Rumsfeld*, 341 F. Supp. 2d 1,16 (D.D.C. 2004).
- ¹⁰⁸ See “Determination and Declaration Regarding Emergency Use of Anthrax Vaccine Absorbed for Prevention of Inhalation Anthrax,” 70 Fed. Reg. 5450 (Feb. 2, 2005).
- ¹⁰⁹ See FDA News Release (April 27, 2009), <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm149571.htm>.
- ¹¹⁰ Volunteer Protection Act, 42 U.S.C. §§14501-14505.
- ¹¹¹ 42 U.S.C. §300hh-11(d); 42 U.S.C. §5149(b)(1); 42 U.S.C. §209(f).
- ¹¹² Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 *Iowa Law Review* 243, 248-9 (2005).
- ¹¹³ The Centers for Law and the Public’s Health, *The Model State Emergency Health Powers Act* (2001), <http://www/publichealthlaw.net/ModelLaws/MSEHPA/php>.
- ¹¹⁴ See *MSEHPA State Legislative Surveillance Table*, <http://www.publichealthlaw.net/modellaws/msehpa.php>.
- ¹¹⁵ *Ibid.* §604 (a).
- ¹¹⁶ *Ibid.* §§601-804.
- ¹¹⁷ *Turning Point Model State Public Health Act*, <http://www.hss.state.ak.us/dph/improving/turningpoint/MSPHA.htm>. By August 2007, thirty-three states had enacted legislation incorporating some provisions of the MSPHA.

- ¹¹⁸ <http://www.nycourts.gov/whatsnew/pdf/PublicHealthLegalManual.pdf>
- ¹¹⁹ Pub. L. No. 104-321, 110 Stat. 3877 (1996).
- ¹²⁰ *Model Intrastate Mutual Aid Legislation*, <http://www.emacweb.org/?150>.
- ¹²¹ Department Of Homeland Security, *Interim National Infrastructure Protection Plan 1,4,5,33-34* (2005).
- ¹²² NRF, 6-7; NIMS, 139.
- ¹²³ National Security Telecommunications Advisory Committee, Legislative and Regulatory Task Force, *Federal Support to Telecommunications Infrastructure Providers in National Emergencies: Designation as "Emergency Responders (Private Sector)"* (Jan. 31, 2006).
- ¹²⁴ Pub. L. no. 109-347, §607, 120 Stat. 1941.
- ¹²⁵ See Katrina House Report at 42; National Academy of Public Administration, *Coping With Catastrophe: Building An Emergency Management System To Meet People's Needs In Natural And Manmade Disasters* 10 (1993).
- ¹²⁶ See <http://www.citizen corps.gov/councils>.
- ¹²⁷ See <https://www.citizen corps.gov/cert/about/shtm>.
- ¹²⁸ Sharona Hoffman, *Preparing for Disaster: Protecting the Most Vulnerable in Emergencies*, 42 U.C. Davis L. Rev. 1491, 1516-1521 (2009).
- ¹²⁹ 42 U.S.C. §§12101-213.
- ¹³⁰ *Ibid.* §12132.
- ¹³¹ *Ibid.* §12182.
- ¹³² *Ibid.* §12182(b)(2)(A).
- ¹³³ *Burger v. Bloomberg*, 418 F. 3d 882, 883 (8th Cir. 2005). Hoffman asserts that some claims may nonetheless be successful, 42 U.C. Davis Law Review, 1525-26.
- ¹³⁴ Pub. L. No. 109-417, §300hh-16, 120 Stat. 2831.
- ¹³⁵ 42 U.S.C. §5151(a).
- ¹³⁶ 6 U.S.C. §321b(a).
- ¹³⁷ Hoffman, 42 U. C. Davis Law Review, 1533-35.
- ¹³⁸ See Save The Children, *The Disaster Decade: Lessons Unlearned for the United States*, June 2009, <http://www.savethechildren.org/programs/us-literarcy-and-nutrition/disaster-decade-lessons.html>.
- ¹³⁹ The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Constitution, Amendment IV.
- ¹⁴⁰ Brian A. Reaves, *Census of State and Local Law Enforcement Agencies* (Washington, D.C.: Bureau of Justice Statistics, 2007).
- ¹⁴¹ Homeland Security Act of 2002, §201d(9), 116 Stat. 2147.
- ¹⁴² Intelligence Reform and Terrorism Prevention Act of 2004, *Pub. L. No. 108-458*, §1016b (1, 118 Stat. 3665).
- ¹⁴³ Pub. L. No. 110-53, §§204, 205, 511, 521, 121 Stat. 307-328 (2007).
- ¹⁴⁴ Mark A. Randol, *The Department of Homeland Security Intelligence Enterprise: Operational Overview and Oversight Challenges for Congress*, Congressional Research Service R40602, March 19, 2010.
- ¹⁴⁵ DHS, HSIN, Feb. 10, 2009, http://www.dhs.gov/xinfo share/programs/gc_1156888108137.shtm.
- ¹⁴⁶ Randol, 13.
- ¹⁴⁷ Susan N. Herman, "National Authority and Local Autonomy in the War on Terror," 69 *Brooklyn Law Review* 1201, 1212-13 (2006).
- ¹⁴⁸ *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).
- ¹⁴⁹ Martin Innes, "Policing Uncertainty: Countering Terror through Community Intelligence and Democratic Policing," 65 *ANNALS of the American Academy of Political and Social Science* 235 (2006).
- ¹⁵⁰ Samuel J. Rascoff, "Domesticating Intelligence," 83 *Southern California Law Review* (forthcoming 2010).
- ¹⁵¹ Lydia Khalil, "Is New York a Counterterrorism Model?" *Expert Brief*, NY, Council on Foreign Relations, September 10, 2009.
- ¹⁵² Bureau of Justice Assistance, *Nationwide Suspicious Activity Reporting (SAR) Initiative*, Washington, D.C., 2009.
- ¹⁵³ U.S. Department of Homeland Security, "DHS Announces New Information-Sharing Tool to Help Fusion Centers Combat Terrorism." Press Release, Sept. 14, 2009.
- ¹⁵⁴ Chad Foster and Gary Cordner, *The Impact of Terrorism on State Law Enforcement: Adjusting to New Roles and Changing Conditions*, Lexington, KY: Council of State Governments, 2005.
- ¹⁵⁵ ISE, *Information Sharing Environment* (2008); White House, *National Strategy for Information Sharing: Successes and Challenges in Improving Terrorism-Related Information Sharing*, Washington, D.C., 2007.
- ¹⁵⁶ Foreign Intelligence Surveillance Act (FISA) of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. §§1801-1885 (xxxx)).
- ¹⁵⁷ 50 U.S.C. §1805(a).
- ¹⁵⁸ 50 U.S.C. §§1821-29.

¹⁵⁹ 50 U.S.C. §1801(b)(1)(C)

¹⁶⁰ 50 U.S.C. 1805(c)(2)(B)(roving wiretaps); 1805(c)(1)(B)(requiring an application to identify the facilities where surveillance will be sought “if known”).

¹⁶¹ See, e.g., Richard A. Posner, Op-Ed., *A New Surveillance Act*. WALL ST. J., Feb. 15, 2006, at A16; K.A. Taipale & James Jay Carafano, Op-Ed., *Fixing Surveillance*, WASH. TIMES, Jan. 24, 2006. Judge Richard Posner claimed that FISA “remains usable for regulating the monitoring of communications of known terrorists, but it is useless for finding out who is a terrorist. . . .” Richard A. Posner, *Privacy, Surveillance, and Law*, 75 U. CHI. L. REV. 245, 252 (2008).

¹⁶² See William C. Banks, *The Death of FISA*, 91 Minn. L. Rev. 1209, 1274-78 (2007).

¹⁶³ See David S. Kris, *Modernizing the Foreign Intelligence Surveillance Act*, (Brookings Inst., 2008, at 25-28 available at http://www.brookings.edu/papers/2007/1115_nationalsecurity_kris.aspx).

¹⁶⁴ See, e.g., James Bamford, *The Shadow Factory: The Ultra Secret NSA from 9/11 to the Eavesdropping on America 12-14* (2008).

¹⁶⁵ Shane Harris, *FISA’s Failings*, NAT’L J. 58 (Apr. 8, 2006).

¹⁶⁶ Leslie Cauley, *NSA Has Massive Database of Americans’ Phone Calls*, USA TODAY, May 11, 2006, available at http://www.usatoday.com/news/washington/2006-05-10-nsa_x.htm.

¹⁶⁷ FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2438, codified at 50 U.S.C. §§1881a-1885c.

¹⁶⁸ See *infra* xx.

¹⁶⁹ *In re Directives to Section 105B of the Foreign Intelligence Surveillance Act*, 551 F. 3d 1004 (FISA Ct. Rev. 2008) (hereinafter *Directives*).

¹⁷⁰ Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552, partially expired 2008, codified at 50 U.S.C. §§1805a-c (2007).

¹⁷¹ *United States v. United States District Court (Keith)*, 407 U.S. 297 (1972).

¹⁷² A lower federal court has upheld an exception to the Fourth Amendment warrant clause for searches conducted for foreign intelligence purposes outside the United States that involve U.S. persons acting as foreign agents, although in other respects a search still must be reasonable. *United States v. bin Laden*, 126 F. Supp. 2d 264, 271-72 (S.D.N.Y. 2000). The Supreme Court has not ruled on either set of questions.

¹⁷³ See *Katz v. United States*, 389 U.S. 347, 361 (1967).

¹⁷⁴ Banks, *The Death of FISA*, 1241-54.

¹⁷⁵ *Ibid.*, 1271-74.

¹⁷⁶ 50 U.S.C. §1805(a).

¹⁷⁷ 50 U.S.C. §1801(f).

¹⁷⁸ 50 U.S.C. §1805(a).

¹⁷⁹ 50 U.S.C. §1801(b)(1)(C) (defined as “any person other than a United States person, who engages in international terrorism or activities in preparation therefore.”)

¹⁸⁰ 50 U.S.C. §1805(a).

¹⁸¹ 50 U.S.C. §§1801(h), 1821(4).

¹⁸² 50 U.S.C. §1803.

¹⁸³ See Banks, *The Death of FISA*, 1233-40.

¹⁸⁴ 50 U.S.C. §1805(a)(3)(A).

¹⁸⁵ Banks, *The Death of FISA supra*, note xx at 1233-34.

¹⁸⁶ See CNN, *Administration Defends NSA Eavesdropping to Congress*, Dec. 23, 2005,

<http://www.cnn.com/2005/POLITICS/12/23/justice.nsa/index.html>).

¹⁸⁷ See Chris Roberts, Transcript: Debate on the Foreign Intelligence Surveillance Act, *El Paso Times*, Aug. 22, 2007, available at http://www.elpasotimes.com/news/ci_6685679).

¹⁸⁸ Testimony of General Michael V. Hayden, Director of Central Intelligence, before the Senate Committee on the Judiciary (July 26, 2006) (available at http://judiciary.senate.gov/testimony.dfm?id=698&wit_id=5604).

¹⁸⁹ “(f) “Electronic surveillance” means –

- (1) the acquisition by an electronic . . . device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes;”
- (2) the acquisition by an electronic . . . device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States;
- (3) the acquisition by an electronic . . . device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and both the sender and all intended recipients are located within the United States; or

- (4) the installation or use of an electronic . . . device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.” 50 U.S.C. §1801(f)(1)-(4).

¹⁹⁰ See Kris *supra* note xx at 8.

¹⁹¹ See 50 U.S.C. §1801(f)(4). The provision was written to cover microphone bugs and closed circuit television surveillance, but its terms clearly apply to surveillance of foreign-to-foreign e-mail messages from inside the United States.

¹⁹² See Statement of James Baker before the Senate Judiciary Committee (Sept. 25, 2007) (“you cannot tell in advance (if ever) where one or both of the parties to a communication are located. This is a particular issue with Internet communications, including web-based email, as well as mobile telephone technology.”) (available at http://judiciary.senate.gov/testimony.dfm?w=2942&wit_id=6669).

¹⁹³ Kris, *supra* note xx, at 29-30.

¹⁹⁴ Media reports indicated that four of the hijackers had been identified in the summer of 2000 by a data mining program called Able Danger, run by the Defense Intelligence Agency. Kristen Breitweiser, *Enabling Danger (Part One)*, Aug. 20, 2005, The Huffington Post, Aug. 20, 2005, available at http://www.huffingtonpost.com/kristen-breitweiser/enabling-danger-part-one_b_5951.html.

¹⁹⁵ Commonly defined as the “creation of profiles by collecting and combining personal data and analyzing it for particular patterns of behavior deemed to be suspicious.” Technology and Privacy Advisory Committee Report, Safeguarding Privacy in the Fight Against Terrorism, available at <http://www.cdt.org/security/uusapatriot/20040300tapac.pdf>. Hundreds of data mining programs are in use or are being developed by the government. U.S. General Accounting Office, Data Mining: Federal Efforts Cover a Wide Range of Uses, GAO-04-548, May 5, 2004, available at <http://www.gao.gov/new.items/d04548.pdf>, including at least ten dedicated to analyzing intelligence and detecting terrorists, Jeff Jonas & Jim Harper, Effective Counterterrorism and Limited Role of Predictive Datamining, Policy Analysis no. 584 (Dec. 11, 2006) at 5, available at http://www.cato.org/pub_display.php?pub_id=6784.

¹⁹⁶ Kim Taipale, *Data Mining and Domestic Security: Connecting the Dots to Make Sense of the Data*, 5 Colum. Sci. & Tech. L. Rev. 2 (2003).

¹⁹⁷ Except where otherwise noted, this section relies on Offices of Inspectors General et. al., “Unclassified Report on the President’s Surveillance Program,” 10 July 2009, <http://www.fas.org/iirp/eprint/psp.pdf>.

¹⁹⁸ James Risen and Eric Lichtblau, “Bush Lets U.S. Spy on Callers Without Courts,” *New York Times*, Dec. 16, 2005, A1.

¹⁹⁹ Press Conference, President George W. Bush (Dec. 19, 2005),

<http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html>; see also U.S. Department of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President (2006), <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf>.

²⁰⁰ UNCLASSIFIED REPORT *supra* note xx at 15-16.

²⁰¹ *Ibid.*, 11-14, 20.

²⁰² Letter from the Attorney General, Alberto R. Gonzales, http://www.fas.org/irp/congress/2007_cr/fisa011707.html. He thus implicitly conceded that TSP did fall within the scope of FISA

²⁰³ Kris, *supra* note xx at 31.

²⁰⁴ *Ibid.*, 32.

²⁰⁵ See Statement of Director of National Intelligence J. Michael McConnell, before the Senate Judiciary Committee at 10, Sept. 25, 2007, available at http://judiciary.senate.gov/testimony.cfm?id=2942&wit_id=6668.

²⁰⁶ Pub. L. No. 110-55, 121 Stat. 552.

²⁰⁷ 50 U.S.C. §1805b(a).

²⁰⁸ *Ibid.*

²⁰⁹ Kris, *supra* note xx at 33.

²¹⁰ Eric Lichtblau, *Rhetoric: High; Anxiety: Low*, N.Y. TIMES, March 1, 2008, A1.

²¹¹ Pub. L. No. 110-261, 122 Stat. 2436, 50 U.S.C. §§1881a *et. seq.*

²¹² 50 U.S.C. §1885a.

²¹³ 50 U.S.C. §1881a.

²¹⁴ 50 U.S.C. §§1881a(d),(e). The requirements for minimization in the review of individualized applications for FISA surveillance are codified in 50 U.S.C. §§1801(h), 1821(4). Both sections direct the Attorney General to promulgate detailed minimization procedures. The procedures are classified.

²¹⁵ 50 U.S.C. §1806(A), 1825. The requirements for minimization are subject to the government’s need “to . . . disseminate foreign intelligence information.” 50 U.S.C. §1801(h)(1).

²¹⁶ 50 U.S.C. §1881a(g).

²¹⁷ 50 U.S.C. §1881a(g)(2)(A)(i).

²¹⁸ 50 U.S.C. §1881a(g)(2)(A)(iii)-(vii).

²¹⁹ 50 U.S.C. §1801a(g)(2)(A)(vi).

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- ²²⁰ 50 U.S.C. §1881b.
- ²²¹ 50 U.S.C. §1881a(g)(4). [add cites to subsections b and c.]
- ²²² 50 U.S.C. §1881a(i). FISC approval of a written certification from the Attorney General and Director of National Intelligence must occur prior to implementation of the authorization for surveillance, unless the same officials determine that time does not permit the prior review, in which case the authorization must be sought as soon as practicable, but not more than 7 days after the determination is made. 50 U.S.C. §§1881a(g)(1),(2).
- ²²³ 50 U.S.C. §1881a(h).
- ²²⁴ Posner *supra* note xx, at 252-53.
- ²²⁵ 50 U.S.C. §1881a(e).
- ²²⁶ 50 U.S.C. §1881a(g)(2)(A)(ii).
- ²²⁷ 50 U.S.C. §§1801(h), 1821(4)(A).
- ²²⁸ *In re Proceedings Required by §702(i) of the FISA Amendments Act of 2008*, No. Misc. 08-01, slip. Op. at 3 (FISA Ct. Aug. 27, 2008).
- ²²⁹ 50 U.S.C. §1881a(i)(3)(A).
- ²³⁰ 50 U.S.C. §1881a(i)(2)(B).
- ²³¹ 50 U.S.C. §1881(i)(3)(A).
- ²³² 18 U.S.C. §2332b(f).
- ²³³ 28 U.S.C. §533.
- ²³⁴ Exec. Order 12,333, 73 Fed. Reg. 45,325 (July 30, 2008).
- ²³⁵ Available at: <http://www.usdoj.gov/ag/readingroom/guidelines/pdf>.
- ²³⁶ Available at: http://www.usdoj.gov/crt/split/documents/guidance_on_race.php. (June 2003, updated July 2008).
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- ²⁴⁹ Guy Lawson, "The Fear Factory," *Rolling Stone* (Feb. 2008).
- ²⁵⁰ John Rollins, *Fusion Centers: Options for Congress*, Congressional Research Service, Order Code RL34070 (2008).
- ²⁵¹ Implementing Recommendations of the 9/11 Commission Act, 6 U.S.C. §101.
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- ²⁸⁰ Vladeck, 1092-1094 (explaining that the Calling Forth Clause remains a structural check on the President's authority, but that its "substantive limits do not apply to federal regulars," based on Supreme Court decisions that conclude that the "militia" does not reach the modern military.); see also *Youngstown Sheet & Tube Co. v. Sawyer* (Steel Seizure), 343 U.S. 579, 644 (1952) (Jackson, J., concurring) ("... Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy.").
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- ²⁸² Posse Comitatus Act, 70A Stat. 626 (1956).
- ²⁸³ For example, *United States v. Kahn*, 35 F. 3d 426, 431 (9th Cir. 1994); *United States v. Mendoza-Cecelia*, 963 F. 2d 1467, 1477 (11th Cir. 1992); *United States v. Yunis*, 924 F. 2d 1086, 1093 (D.C. Cir. 1991).
- ²⁸⁴ Department of Defense, Directive No. 5525.5, DOD Cooperation with Civilian Law Enforcement Officials (1989). 10 U.S.C. §375 .
- ²⁸⁵ 380 F. Supp. 1375 (D. Neb. 1974).
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- ²⁹⁵ *Ibid.*, 701-702.

²⁹⁶ 158 U.S. 564 (1895).
²⁹⁷ *Ibid.*, 582.
²⁹⁸ 32 C.F.R. §215.4(c)(1)(ii).
²⁹⁹ *Ibid.* §215(c)(1)(i).
³⁰⁰ DOD Directive 3025.1, “Military Support to Civil Authorities (MSCA) (Jan. 15, 1993),
<http://www.dtic.mil/whs/directives.corres/pdf/302501p.pdf>.
³⁰¹ *Ibid.* §§4.5.1-4.5.4.10.
³⁰² *Ibid.*
³⁰³ *Ibid.*
³⁰⁴ DOD Directive 3025.12,<http://www.dtic.mil/whs/directives/corres/html/30251.2htm>.
³⁰⁵ *Ibid.* §4.1.1.
³⁰⁶ *Ibid.* §4.1.5.
³⁰⁷ *Ibid.* §4.2.2.1. See also DOD Directive 5525.5, “DoD Cooperation with Civilian Law Enforcement Officials,”
<http://www.dtic.mil/whs/directives/corres/html/552505.htm>.
³⁰⁸ Department of Defense, Strategy for Homeland Defense and Civil Support (2005); Department of Defense and Joint Chiefs of Staff, DOD Joint Doctrine on Homeland Security, Joint Publication No. 3-26 (2005).
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³¹⁰ Department of Defense, Strategy for Homeland Defense and Civil Support, viii (2005).
³¹¹ *Failure of Initiative*, 41.
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³¹⁴ *Ibid.*, 40.
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³¹⁶ Emergency Management Assistance Compact, Pub. L. No. 104-321, 110 Stat. 3877 (1996).
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³¹⁹ *Ibid.*, 1-5.
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<http://www.ngaus.org/ngaus/files/ccLibraryFiles/Filename/000000000457/primer%20fin.pdf>. Hereafter “Role of the National Guard”.
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³²⁵ *Ibid.*, 3.
³²⁶ *Ibid.*
³²⁷ 42 U.S.C. §§ 5121–5206 (2002 & Supp. 2006).
³²⁸ 42 U.S.C. § 5192 (Supp. 2006); 42 U.S.C. §§ 5170b (2002 & Supp. 2006).
³²⁹ Department of Defense, Military Support to Civil Authorities, Directive No. 3025.1, 7–8 (1993).
³³⁰ *Failure of Initiative*, 40.
³³¹ *Ibid.*
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- ³⁵⁰ *Lessons Learned*, 43.
- ³⁵¹ Ibid., 206.
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- ³⁵³ *Failure of Initiative*, 206.
- ³⁵⁴ Ibid.
- ³⁵⁵ Ibid., 206-207.
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- ³⁸⁷ John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, §1076, 120 Stat. 2083, 2404 (2006), codified as amended at 10 U.S.C. §3333, repealed, Pub. L. No. 110-181, §1068, 122 Stat. 3 (2008).

³⁸⁸ Ibid. The full text of the 2006 amendment follows: “(a) Use of armed forces in major public emergencies. – (1) The President may employ the armed forces, including the National Guard in Federal service, to – (A) restore public order and enforce the laws of the United States when, as a result of a natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition in any State or possession of the United States, the President determines that – (i) domestic violence has occurred to such an extent that the constituted authorities of the State or possession are incapable of maintaining public order; and (ii) such violence results in a condition described in paragraph (2); or (B) suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy if such insurrection, violation, combination, or conspiracy results in a condition described in paragraph (2). (2) A condition described in this paragraph is a condition that – (A) so hinders the execution of the laws of a State or possession, as applicable, and of the United States within that State or possession, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State or possession are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or (B) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws. (3) In any situation covered by paragraph (1)(B), the State shall be considered to have denied the equal protection of the laws secured by the Constitution. (b) Notice to Congress. – The President shall notify Congress of the determination to exercise the authority in subsection (a)(1)(A) as soon as practicable after the determination and every 14 days thereafter during the duration of the exercise of that authority.”

³⁸⁹ Ibid. (The President may employ the armed forces when the authorities of a state “are incapable of maintaining public order.”)

³⁹⁰ 10 U.S.C. §333(a) (“The President may employ the armed forces, including the National Guard in Federal service, to restore public order and enforce the laws of the United States when, as a result of a natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition in any State or possession of the United States, the President *determines* that (i) domestic violence has occurred to such an extent that the constituted authorities of the State or possession are incapable of maintaining public order; and (ii) such violence results in a condition described in paragraph (2).”).

³⁹¹ 10 U.S.C. §333(b) (“The President shall notify Congress of the determination to exercise the authority in subsection (a)(1)(A) as soon as practicable after the determination and every 14 days thereafter during the duration of the exercise of that authority.”).

³⁹² 10 U.S.C. §334 (“Whenever the President considers it necessary to use the militia or the armed forces under this chapter, he shall, by proclamation, immediately order the insurgents or those obstructing the enforcement of the laws to disperse and retire peaceably to their abodes within a limited time.”).

³⁹³ “Governors Association Opposes Senate Authorization Measure,” *Inside the Army*, Sept. 4, 2006, available at 2006 WLNR 15348717 (Westlaw); see also Press Release, Office of Governor Janet Napolitano, “Napolitano Urges Removal of Provisions in Federal Legislation Usurping Governors’ Control of National Guard,” Sept. 20, 2006, http://www.governor.state.az.us/dms/upload/NR_092006_National%20guard%20provisions.pdf.

³⁹⁴ “Senate Judiciary Holds Hearing on State Control of National Guard,” *Congressional Quarterly*, Apr. 24, 2007, <http://www.ngaus.org/ngaus/files/ccLibraryFiles/Filename/00000002550/statecontrolhearing.doc>.

³⁹⁵ Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, §1068, 122 Stat. 3 (2008).

³⁹⁶ See Statement of Senator Patrick Leahy, Feb. 7, 2007, <http://www.leahy.senate.gov/press/2007020707.html>. See also Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders 1789-1878* (1988); Bennett Milton Rich, *The Presidents and Civil Disorder 51-54* (1941); Clayton D. Laurie & Ronald H. Cole, *The Role of Military Forces in Domestic Disorders 1877-1945* 133-152 (1997)

³⁹⁷ See *Martin v. Luther*, 689 F.2d 109, 117 (3d Cir. 1932) (repealing statutes should be construed in light of the laws they replaced), cannot be read rather than in “some sort of interpretative vacuum...” instead, repeals should be construed in light of the laws they replaced).

³⁹⁸ 50 U.S.C. §§2301-2368.

³⁹⁹ Vladeck, 1102-1103.

⁴⁰⁰ U.S. Constitution, amend. III.

⁴⁰¹ U.S. Constitution, Article I, §9, cl. 2.

⁴⁰² Engdahl, *Troops in Civil Disorders*, 28.

⁴⁰³ Some scholars have found evidence that police and soldiers’ roles are evolving to overlap in some areas, see Donald J. Campbell and Kathleen M. Campbell, “Soldiers as Police Officers/Police Officers as Soldiers: Role Evolution and Revolution in the United States,” 36 *Armed Forces & Society* (2), 327 (2009).



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