The Normalization of Homeland Security After September 11: The Role of the Military in Counterterrorism Preparedness and Response

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Repository Citation
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Imagine that accomplices of the hijackers that commandeered the airliners that struck the World Trade Center and the Pentagon and crashed in rural Pennsylvania on September 11, 2001, had the variola virus that causes smallpox and aerosol devices designed to disperse smallpox. Once the crashes occurred, the accomplices would have waited for the cover of nighttime and then covertly dispersed the smallpox virus in densely populated areas in New York City and Washington, D.C. As horrific as September 11 was, it could have been much worse. If the terrorists had carried out an attack with a biological agent as an aftermath to the hijackings, designed to kill silently while attention is focused on the immediate trauma, our nation's public health and emergency management infrastructure could have been brought to its knees.

Smallpox is an acute, infectious, disfiguring, highly contagious disease that can cause slow and painful death in humans. Symptoms, usually flu-like, may not appear for ten or more days. Exposure is hard to avoid for anyone near the virus, particularly because the variola virus is so easily airborne. There is no effective medical treatment for smallpox, and the fatality rate is approximately thirty percent. Because the disease was eradicated worldwide by 1977, the United States ended its mandatory vaccination program. Due to aging populations and the waning effectiveness of old vaccinations, virtually everyone is susceptible to the disease.

Although about 200,000 people would be infected in each of the two primary exposure areas, the first five percent of affected individuals would not show symptoms for seven days, and the average case would not appear for nearly two weeks. Because most
physicians have never seen a smallpox case, early analysis would likely have been unable to determine the cause of illness. Although the smallpox vaccine can prevent the onset of the disease if given within three days of exposure, most potential victims would lose the window of opportunity before the outbreak would be confirmed. Two weeks after the attacks, public health officials in New York City and Washington, D.C. would report thousands of dead and dying people and tens of thousands of hospitalizations due to an outbreak of unknown origins.

Hundreds of thousands more may have been exposed to the agent as those exposed originally went about their daily lives. The area of contamination and exposure would be unclear, especially since travelers would have been moving to and from those cities into untargeted areas. As contamination spreads, hospitals in other areas would recognize sharp increases in patient load, including some emergency personnel exposed in the initial responses. The sheer numbers of sick people would quickly overload the resources in many local areas. Growing awareness would also bring media attention to the incident, which could create panic and make containment increasingly difficult.

As federal agencies become involved with the local, state, and non-governmental agencies, interagency relationships would become strained due to the number of organizations involved, as well as the ambiguity over command, control, and communications. The unprecedented strain would complicate the interagency relationships and could affect the flow of critical information to and from first-responders.

Panic from the growing health crisis, limited response personnel, and problems in coordinating emergency responses could result in failures of the local infrastructure. Public transportation, telephone and radio communications could break down, and road and air transportation would quickly become overloaded. Fear that water and food supplies could be contaminated may also cause strains on supplies. Public health agencies in the affected areas would be overwhelmed by the surge in the illness, and resources would not be adequate to isolate all of those who are sick. Civilian personnel—including law enforcement personnel—would begin to abandon their tasks, as they fear contamination and are looking to escape the area with their families. Despite their insufficient resources, the Governor of New York and the Mayors of New York City and Washington, D.C. would be pressured to consider state, city, and district-wide orders of quarantine, and to forbid all unauthorized traffic in or out of the areas.

6. Id.
Law enforcement agencies would be overwhelmed by the demands of maintaining order, making it easier for others allied with the hijackers to slip undetected into mass transit, government buildings, and other commercial public places, where they could spread additional contagion with aerosolized smallpox spray. Because it is relatively easy to make quantities of variola once the virus is obtained, terrorists intent on disabling our government could strike again and again, in new urban areas on successive days.\(^7\) New cycles of outbreak and ensuing panic could continue indefinitely.

This scenario and others like it are no longer considered the products of overfed imaginations. The specter of mass casualty terrorist attacks on the homeland is now all too real, as is the prospect that uniformed military may be deployed in our cities. In 1999, one study of the threat of terrorism posed by weapons of mass destruction (WMD)\(^8\) concluded that a “priority mission” of the Department of Defense (DoD) would be “to develop, deploy, and operate a wide range of defensive measures for the protection of the United States homeland.”\(^9\) The National Commission on Terrorism suggested in June 2000 that a “catastrophe . . . beyond the capabilities of local, state, and other federal agencies” may prompt the President “to designate DoD as a lead federal agency”\(^10\) to respond to a terrorist attack in the homeland. Former Secretary of the Navy, Richard Danzig, noted that a “single biological attack can kill a great many people, while the technologies to develop and deliver these weapons

\(^7\) See Richard Danzig, Catastrophic Bioterrorism—What is to be Done? 12 (Ctr. for Tech. and Nat’l Security Pol’y 2003).

\(^8\) Federal law defines “weapons of mass destruction” in a variety of ways. The simplest definition applies to “any weapon or device that [can] cause death or serious bodily injury to a significant number of people.” 50 U.S.C. § 2302(1) (Supp. IV 1998). More complex definitions include:

1. The term ‘weapon of mass destruction’ means any weapon or device that is intended, or has the capability, to cause death or serious bodily injury to a significant number of people through the release, dissemination, or impact of – (A) toxic or poisonous chemicals or their precursors; (B) a disease organism; or (C) radiation or radioactivity.” 50 U.S.C. § 2302(1) (1994 & Supp. V 1999).

According to Title 18 of the United States Code: “(2) the term ‘weapon of mass destruction’ means – (A) any destructive device as defined in section 921 of this title; (B) any weapon that is designed or intended to cause death or serious bodily injury through the release, dissemination, or impact of toxic or poisonous chemicals, or their precursors; (C) any weapon involving a disease organism; or (D) any weapon that is designed to release radiation or radioactivity at a level dangerous to human life.


are relatively inexpensive, accessible, and difficult to detect, much less interdict." When these risks are augmented by what Danzig calls "reload," the capacity of terrorists to repeat the biological attack over and over again ("we cannot shut down the atmosphere"), "our national power to manage the consequences of repeated biological attacks could be exhausted while the terrorist ability to reload remains intact."2

After September 11, the military presence in the homeland increased literally overnight. The President approved orders for the Air Force to shoot down civilian airliners in the event of a hijacking, National Guard troops were deployed at the nation's airports, and more United States forces were deployed for security at the Salt Lake City Olympic Games in February 2002 than were then deployed fighting the Taliban in Afghanistan.3 In addition, President Bush proposed and Congress established the Department of Homeland Security4 and conferred through that legislation, the USA PATRIOT Act,5 and related intelligence authorization measures6 with broad new authorities to combat terrorism in the homeland.

Fundamental changes have also been made in the organization of the military in relation to domestic security. The September 30, 2001, Quadrennial Defense Review Report restores the defense of the United States as the DoD's primary mission,7 and the National Strategy for Homeland Security in July 2002 called for "a concerted national effort to prevent terrorist attacks within the United States, reduce America's vulnerability to terrorism, and minimize the damage and recover from attacks that do occur."8 On October 1, 2002, a new combatant command, the United States Northern Command (NORTHCOM) became the first military entity since the Civil War with responsibility for military activities inside the United

11. Danzig, supra note 7, at 1.
12. Id. at 1–2.
It remains unclear what forces will be assigned to NORTHCOM, and what roles NORTHCOM will play in homeland security. Still, a recent Judge Advocate's Corps Operations Law Handbook states that the "role of the military in domestic operations has changed drastically since September 11. But just what will soldiers do in anticipation of or in response to a terrorist attack on the homeland? On what legal bases are military activities planned?

Among the nations of the world, the United States has been proudly unique in entrusting law enforcement to civilian forces, managed and controlled by civilians. Our federal system has helped cement control over and, thus, accountability for law enforcement activities and decisions at the lowest levels of government, closest to the operations being conducted. At the same time, our revolutionary and constitutional heritage, fed by experiences in England and with English military in the colonies, led to the creation of a sharp separation of civilian and military spheres in government, and to the unequivocal subordination of the military to civilian authority.

For more than 200 years, our laws and traditions have made military presence in the homeland exceptional. Still, the domestic use of troops has been a feature of government in this country since President Washington called out the militia to put down the Whiskey Rebellion in 1794. Since then, federal troops have been activated a number of times to help keep the peace, to aid local governments in natural disasters, and to enforce federal and state laws. State militia has been deployed even more often, especially in the first three decades of the twentieth century. Yet current concerns about the ongoing threat of terrorist attacks in the homeland, worsened by the specter of WMD threats, have caused civilian authorities to consider what once would have been unthinkable—uniformed military providing back-up to public health services by enforcing the laws and undertaking military operations on our streets and in our neighborhoods. To be sure, no other governmental entity has the training, equipment, and resources to bring force to bear when an attack occurs. Likewise, if the National Guard is counted, no other part of government is so widely dispersed to be available throughout the nation if its services are needed. But are military personnel capable of refining their role to be engaged in support of public health and law enforcement at home, among the people they are charged to protect?

Express constitutional authority for such use is found in Article I, section 8, which provides, "[t]he Congress shall have the power . . . to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions . . . ." Additional authority may be drawn from Article IV, section 4, which imposes on the federal government the obligation to protect each of the states "against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." The President may also have authority to deploy troops in defense of the homeland from his Article II powers to faithfully execute the laws and to act as Commander in Chief of the armed forces. However, the Framers intended that part-time state-based militias would principally perform the homeland defense tasks. Experience with the militias has been uneven, but these small, professional, and state-governed forces largely sufficed, except for wartime buildups, until the Cold War led to the development of a sizable peacetime military establishment.

The most concrete manifestation of the American tradition of keeping the military out of domestic civilian affairs lies in the Posse Comitatus Act of 1878, which in its current form states that "[W]hoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both."

Although the Posse Comitatus Act (PCA) supplies a general statutory prohibition against domestic use of troops to enforce the laws, the constitutional authorities of the President and a number of statutory exceptions undercut or at least counter-balance the rule. Some of the exceptions specifically apply to various forms of WMD attacks by terrorists, and, following appropriate interagency coordination, permit DoD personnel and equipment to engage in containing, disabling, or disposing of the weapons involved in an attack. In certain emergency circumstances, military personnel are permitted to perform law enforcement functions, where civilian authorities are not capable of taking appropriate action. Other statutes anticipate civil disorder or other emergencies and permit deployment of military units in various circumstances, certainly

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23. U.S. Const. art. II, § 3.
including in response to a terrorist attack.\textsuperscript{28} In addition, the President arguably may deploy military personnel to perform civilian law enforcement pursuant to his constitutional authorities.

The PCA remains as much a symbol of our nation’s subordination of military to civilian control, and to the distaste of military involvement in domestic law enforcement, as it is a set of legal strictures. As conditions and threats have changed, however, so has the principle of \textit{posse comitatus}. The tradition of civilian law enforcement in the United States is undeniably longstanding and deeply engrained. Yet, construed literally the PCA could compromise a military role in support of civilian authorities during a public health emergency or hinder a response to widespread disorder in society.\textsuperscript{29} Interpreted too generously, the exceptions can give rise to regrettable excesses, such as those documented at Kent State University in 1970.\textsuperscript{30}

This paper will focus on one aspect of the question posed by this symposium—what should the normalization of national security post-September 11 look like, and how do we get there—by examining the role of the military in anticipating and responding to a biological weapons terrorist attack on the homeland.\textsuperscript{31} The next section will

\begin{footnotesize}
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\item[28.] 42 U.S.C. §§ 5192, 5170b (c) (Stafford Act); 10 U.S.C. §§ 331-335 (Insurrection Act); 10 U.S.C. § 371 (military support of law enforcement); 10 U.S.C. § 375 (bars direct military involvement in law enforcement unless otherwise authorized by law); 18 U.S.C. 831(e) (military assistance in emergency situations involving nuclear materials).
\item[29.] An alternative way out of the legal woods may be to characterize a range of tasks that may be performed by soldiers in a public health emergency as something other than “executing the laws,” as is proscribed by the PCA. Simply put, the restrictions of the PCA may not apply if the military is doing public health work instead of police work. Support for such an approach may be found in some public health jurisprudence, where public health officials may issue administrative warrants and impose civil sanctions, including quarantine and detention, because criminal law sanctions are not invoked. \textit{See} Edward P. Richards, \textit{The Jurisprudence of Prevention: The Right of Societal Self-Defense Against Dangerous Individuals}, 16 Hastings Con. L. Q. 329 (1989). Further examination of this dichotomy is beyond the scope of this article.
\item[30.] Following President Nixon’s announcement on April 30, 1970, that United States combat forces had been deployed in Cambodia, student antiwar protests erupted on a number of college campuses. The Governor of Ohio called out Ohio National Guard troops equipped with loaded weapons to keep order at Kent State University. When a large group of students gathered for a rally there on May 4, 1970 (would suggest inserting year here), the Guard troops tried to disperse them, at one point firing into the crowd, killing four students and wounding nine others. \textit{See} Gilligan v. Morgan, 413 U.S. 1, 93 S. Ct. 2440 (1973) (dismissing a suit on political question grounds that sought to restrain a state governor and National Guard leaders from future violations of students’ rights of free speech, assembly, and due process).
\item[31.] The article will not address the origins of \textit{posse comitatus} and its evolution
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review briefly the authorities pertinent to determining the lawful role of the military in a domestic terrorist attack on September 10, 2001. Drawing on the smallpox scenario, I will then assess changes in the military role after September 11. Particular attention will be paid to the problems created by a public health emergency and attendant law enforcement and civil disturbance concerns. In a concluding section, obstacles to constructing an appropriate and measured role for the military in counterterrorism preparedness will be addressed briefly.

I. THE LEGAL ENVIRONMENT FOR MILITARY INVOLVEMENT IN DOMESTIC TERRORISM ON SEPTEMBER 10, 2001

A. From Technical and Informational Assistance to Direct Law Enforcement

As the text of the PCA suggests and interpreting case law confirms, a wide range of military activities are not restricted by the Act because the activities do not constitute "execut[ing] the laws." Reviewing courts have employed criteria for measuring whether domestic military activities constitute "executing the laws" that ask, for example, whether the use of the military was "direct" and "active;" whether the military "pervaded the activities" of law enforcement; and whether the military personnel was applied to citizens in ways that were "regulatory, proscriptive, or compulsory." In general, the provision by the military of equipment, communications, reconnaissance and intelligence, and transport has been determined not to violate the PCA.

In addition, a range of information-sharing authorities exist, including an express permission for armed forces personnel to share intelligence acquired during military operations for law enforcement in the United States before enactment of the PCA. Nor will it assess the constitutionality of the PCA or any such restriction on the President's constitutional powers. These issues, along with analyses of the meaning of the PCA and its statutory exceptions, have been addressed elsewhere. See, e.g., William C. Banks, Troops Defending the Homeland: The Posse Comitatus Act and the Legal Environment for a Military Role in Domestic Counter Terrorism, 14 Terrorism & Pol. Violence 1 (2002); Matthew Carlton Hammond, The Posse Comitatus Act: A Principle in Need of Renewal, 75 Wash. U. L.Q. 953 (1997); David Engdahl, Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders, 57 Iowa L. Rev. 1 (1971).

purposes. The permission is extended, however, only where the intelligence is acquired in conducting an operation for military purposes. Similar authorities permit the armed forces to train police on how to use equipment, and to provide “expert advice” relevant to the training. Military equipment may also be provided for civilian use. These authorities may not be exercised to undermine military readiness, the civilians must pay for what they receive, and the DoD must promulgate regulations to clarify that armed forces personnel may not directly make arrests or conduct searches and seizures “when supporting civilian law enforcement.” Curiously, the regulations, promulgated for years in the Code of Federal Regulations, now appear only in a Defense Department Directive. The Directive forbids certain forms of direct military assistance to civilian law enforcement, specifically including interdiction of a means of transport, search or seizure, arrest or detention, and surveillance, although the authorizing legislation states that these limits apply unless “otherwise authorized by law.” By regulation, the DoD evaluates requests to support civilian law enforcement including “acts or threats of terrorism” by considering the legality of the request for support, the potential for lethal use of force, the risks to DoD forces, the costs of the assistance and impact on the DoD budget, the appropriateness of the operation to the DoD mission, and the impact of the request on DoD’s ability to perform its principal missions.

At least since 1995, federal government planning documents have directed the DoD to develop capabilities to respond to threats or acts of WMD terrorism, including terrorism involving nuclear, biological, or chemical weapons. Some of the contemplated support described in the planning documents is clearly technical and informational, while other activities may involve law enforcement

35. Id. §§ 371, 373.
36. Id. §§ 372–373.
37. Id. § 376.
38. Id. § 377.
39. Id. § 375.
and even war fighting. Under federal planning guidance promulgated in 2000, the DoD is tasked to provide assistance... [to the lead federal agency] during all aspects of a terrorist incident.45 Among the tasks assigned are the following: “[t]hreat assessment; [emergency support team] participation and transportation; technical advice; operational support; tactical support; support for civil disturbances; custody, transportation and disposal of a WMD device; and other capabilities including mitigation of the consequences of a release.46

Threat assessment and the provision of technical advice do not directly involve law enforcement and are thus outside the reach of the PCA, whether or not specifically exempted by statute. However, the other items in the list may involve doing what civilian law enforcement otherwise does, and some tasks could clearly go beyond law enforcement to war fighting depending on the nature of the incident, the gravity of the situation, and the continuing nature of the crisis. In addition, the Federal Bureau of Investigation (FBI), lead federal agency (LFA) for response to domestic terrorism incidents during the crisis phase in 2001, anticipated situations where military assistance to civilian law enforcement could be sought, including terrorism incidents, to provide technical support, to interdict an event and apprehend those responsible, to restore law and order following an incident, and to abate the consequences of a terrorist act.47 The planning directives are not statutes or their legal equivalent; they simply describe activities that are otherwise authorized. These latter assignments fell squarely within the prohibition of the PCA unless they were exempted by statute or the Constitution. The Fiscal Year 2000 DoD Authorization Act permitted the Secretary to “provide assistance to civil authorities in responding to an act of terrorism or threat of an act of terrorism”48 although the authority to “provide assistance” may not extend to direct law enforcement. However, several more specific laws described in the next section may provide the authority contemplated in the plans.

46. Id. at 4.
B. The Stafford Act

The Stafford Act\(^49\) 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,"\(^50\) for up to ten 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."\(^51\) Strictly speaking, a WMD event could only be a "major disaster" 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."\(^52\)

A major WMD terrorist incident could surely constitute an emergency or a "major disaster" under the Stafford Act. President Clinton invoked the Stafford Act in response to the 1995 Oklahoma City bombing,\(^53\) and President Bush relied on the Act in declaring a major disaster following the September 11, 2001, attack on the World Trade Center.\(^54\)

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 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,"\(^55\) and the DoD may provide "emergency work" essential for the preservation of life and property for a maximum of ten days before the declaration of an emergency or disaster.\(^56\) Military personnel would be engaged in "efforts to save lives, protect property and public health and safety, and lessen or avert the threat of a

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50. Id. § 5170(b).
56. Id. § 5170b(c).
catastrophe,” including law enforcement activities that may otherwise be proscribed by the PCA.

C. The Insurrection Act

Upon enactment of the PCA in 1878, the Insurrection Act constituted one longstanding express exception to the PCA. As currently codified, the Insurrection Act confers authority for the President to use the military to undertake a range of actions domestically, including law enforcement. There is little doubt that the Insurrection Act could support a military role in homeland defense in the event of a catastrophic terrorist incident. One section dates from 1792 and the Whiskey Rebellion and permits the President to use the military to suppress “an insurrection” at the request of a state government. Another section permits the President to determine when “unlawful obstructions, combinations, or assemblages, or rebellion . . . make it impracticable to enforce the laws.” If he so determines, the President may federalize the National Guard and/or use “such of the armed forces, as he considers necessary to enforce [the] laws or to suppress the rebellion.” The third section permits the President to use the armed forces or Guard to suppress any “insurrection, domestic violence, unlawful combination, or conspiracy” if law enforcement is hindered within a state, and local law enforcement is unable to protect individuals, or if the unlawful action “obstructs the execution of the laws of the United States or impedes the course of justice under those laws.”

Over the long history of the Insurrection Act, Presidents have relied on their authorities to break the Pullman Strike in 1894, to enforce school desegregation decrees, and to quiet civil disturbances in several cities, such as after the Rodney King verdict in Los Angeles. The language of the Act is broad enough to permit the President to order military forces, Guard or regular, on his own or at the request of a state to respond to a terrorist incident in the United States. The terrorist incident or its aftermath would constitute

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57. Id. § 5192(a)(1).
59. Id.
60. Id. § 331.
61. Id. § 332.
62. Id.
63. Id. § 333.
64. Id.
the "conspiracy" or "unlawful combination" that would cause "domestic violence" of such a magnitude to hinder enforcement of the laws. The disturbance could develop from the panic and unrest that may attend an outbreak of unknown origins or magnitude, or from efforts by state and local law enforcement personnel to enforce restrictions on movement or quarantine, for example.

In exercising the Insurrection Act authorities, the President must first issue a Proclamation to Disperse, commanding all persons engaged in domestic violence in the area affected to cease and desist and to leave the area. Then the President would issue an executive order authorizing the Secretary of Defense to use military force to suppress the activities described in the proclamation. The executive order would prescribe rules of engagement and rules for the use of force, and would require that the DoD coordinate its law enforcement activities with the Attorney General. Although the Insurrection Act confers broad authorities, the Act has never been invoked, nor its procedures employed, in a situation of mass casualties.

D. Weapons of Mass Destruction (WMD) Authorities

In 1996, Congress enacted the Defense Against Weapons of Mass Destruction Act. Pursuant to authority in this Act, the DoD has developed and maintains thirty-five rapid response teams trained to aid federal, state, and local officials in responding to an attack with weapons of mass destruction. The response teams form the Joint Task Force-Civil Support (JTF-CS), designed to respond to state-generated requests for assistance in the consequence management stage of a terrorist incident. Since 1999, the JTF-CS has prepared to deploy to a WMD incident site and assume command and control of all responding military forces in support of a civilian lead federal agency. In addition to providing agent assessment and communications capabilities, JTF-CS is designed to provide planning and logistics capabilities, and broad-based support in response operations in contaminated environments.

For terrorism involving the use of nuclear material, Congress has authorized the Attorney General to seek Defense Department law enforcement assistance, including search and arrest authority, when the Attorney General and the Secretary agree that an "emergency situation" is present, and the assistance will not limit military

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readiness. An "emergency situation" exists where there is a serious threat to the United States, where law enforcement would be seriously impaired if DoD assistance were not provided, and civilian personnel cannot enforce the law.

Parallel authority exists in the event of an "emergency situation" involving biological or chemical weapons of mass destruction. These authorities extend to "any weapon or device that [can] cause death or serious bodily injury to a significant number of people" through the release of chemicals, germs, or radiation. In addition to meeting the conditions required before assistance is provided in the event of an incident involving nuclear materials, DoD assistance in terrorist incidents involving biological or chemical weapons requires that the assistance be "considered necessary for the immediate protection of human life." The triggering definition of "emergency situation" also mirrors the definition for a nuclear incident with only slight variations in language.

II. NORMALIZATION AFTER SEPTEMBER 11

The emergence of counter terrorism laws and policies that anticipate domestic military operations has undoubtedly pushed the posse comitatus principle to a less prominent position in prescribing the military role in domestic law enforcement. With the recent attention given to homeland defense, it may be reasonable to ask whether the exceptions to posse comitatus have swallowed the rule. However, the PCA continues to reflect a long-standing policy that military personnel do not conduct law enforcement activities in the United States. To what extent has the policy changed after September 11? In light of recent reforms that anticipate a greater DoD role in homeland defense, and continuing assertions of broad constitutional authority for the President to respond to acts of terrorism, the next section of this article revisits the smallpox scenario introduced in the introduction and assesses a future attack with germs. If a smallpox attack occurs, or one like it, what will military personnel do?

70. Id.
72. 50 U.S.C. § 2302(1) (Supp. IV 1998). 18 U.S.C. § 229E provides similar authorities in the event of a chemical weapons emergency even when the chemical weapon is not a weapon of mass destruction. The broad definition of WMD—capable of injuring "a significant number of people"—may render this authority relatively meaningless.
A. Future Planning for a Military Role in Law Enforcement in Homeland Defense: The Smallpox Scenario Revisited

Assume that it is September 25, 2001. The smallpox outbreak has worsened. Thousands of cases with symptoms are flooding local hospitals, and the crisis has spread on at least two fronts. Preliminary reports indicate that reload may have occurred—emerging incidence of smallpox symptoms suggest that attacks have been carried out in other major cities in the United States. Meanwhile, the delayed onset of the first identified smallpox cases has spread the contagion around the United States and to other nations, as exposed travelers moved through and out of the infected areas in the first days after the original attacks. Although transmission rates for this highly communicable disease vary considerably based on the dynamics of the outbreak, rough estimates are that by the time the outbreak is recognized, second-generation exposure will produce about ten new cases for every initial case.\(^4\)

Public health and emergency response resources in the New York City and Washington, D.C. areas have been exhausted and demoralized by the magnitude of their tasks. Isolation of cases has proven impossible; no hospitals or similar facilities could be made available for that purpose on such short notice. Nor was contact tracing accomplished following the initial outbreaks; time was too short. When the smallpox outbreak was confirmed a few days earlier, efforts to begin vaccinations faltered. Only a small percentage of the first responders in the infected areas had been vaccinated against smallpox, and, partly because of concerns over the privacy of medical information, no mass screening had been done in the affected areas to determine which persons are ineligible for the vaccine due to immune system weaknesses, skin conditions, or other issues.

A range of vaccination strategies would also have been debated and begun. The attempts to isolate cases and contacts and then ring vaccinate and contain the disease around New York and Washington, D.C. would fail to confine the outbreak because infected carriers had already traveled outside of the originally targeted area before the outbreak was confirmed. Follow-on efforts at voluntary mass vaccination would also come up short as distribution of the vaccine would encounter logistical problems working from centralized sites; thousands of persons within the originally affected areas would decline the vaccination, and those who were ineligible for the vaccine would become infected and would begin spreading the disease.

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4. Tara O'Toole, Michael Mair, and Thomas V. Inglesby, *Shining Light on "Dark Winter,*" 34 Clinical Infectious Diseases 972, 975 (2002).
Various containment strategies would have been considered by federal, state, and local officials, including quarantine and closure of public facilities and gatherings. Local leaders would resolve to stem the crisis by imposing quarantines and curfews, along with closure orders on mass transit and other public places, to halt the further spread of the disease and to quell rising civil disorder. However, the mayors and governors have also been conferring regularly with the President. Believing that only federal authority can quell this crisis, the President would be advised by senior federal agency officials that the only way to contain the spread of the epidemic is to shut down all places of assembly, theaters, shopping malls, sports stadiums, businesses—in effect, everything. The President favors a national vaccination program managed by federal officials. To insure an orderly containment, and to provide personnel to help manage the vaccination program, the President is considering federalizing the National Guard throughout the United States.

Twenty days after the initial exposure, there are 100,000 reported smallpox cases from twenty states and four other nations, 20,000 are dead, and thousands more are dying. Travel restrictions are causing additional problems, and Canada and Mexico have closed their United States' borders. Food shortages are cropping up as travel problems and store closings worsen the growing sense of panic. Public affairs officers have sought to reassure the public that the outbreak will be confined and will pass with fewer consequences if the populace does not panic and cooperates with orders to stay home and to refrain from attempting to travel or flee an infected area. However, as media reports of casualties and new smallpox cases in a widening array of places mounts, widespread panic and disorder is occurring.

If events spin this far out of control, the Mayor, Governor, or President could call for armed military intervention—to manage a vaccination program, to enforce quarantine or relocation orders, to maintain curfew, to command local resources or facilities, to take or destroy property, and to enforce roadblocks and the closure of air, rail, and other transit centers. Deployed military units could also seek to apprehend, detain, or shoot to kill those who perpetrated the outbreak, but military personnel may also be tasked with search,

75. Dept of Defense Directive 5210.56, Use of Deadly Force and the Carrying of Weapons by DOD Personnel Engaged in Law Enforcement and Security Duties (Nov. 11, 2001) [hereinafter DoD Directive 5210.56], permits the use of deadly force under “conditions of extreme necessity” when lesser means will not suffice, there is no significant increase in the risk of harm to innocent persons, and the purpose is defensive, to protect sensitive assets, to protect persons from serious harm, to protect public health or safety, or to effect an arrest or apprehension or prevent escape. Id. Encl. 2, E.2.1.2.
arrest, and detention of any persons who violate a curfew or quarantine restriction, who attempt to breach a roadblock to escape the outbreak area, or who attempt to loot or otherwise take advantage of the breakdown in civil authority. Other armed tactical units would be deployed to root out those who have threatened additional attacks.

Regardless of the legal structures for responding to a domestic terrorist attack, the reality is that the incidents are local, not state or federal, at least at the outset. In the scenario sketched here, local and state decision makers would undoubtedly have called upon federal assistance once the existence of the smallpox attacks was verified. The Governor of New York and Mayor of Washington, D.C. would have deployed the CST and National Guard units to assist in emergency response activities. As will be reviewed in the next two subsections, the operations plan, once a biological attack has been suspected and then verified, would become more complex and legally and practically problematic.

B. Impact of New Structures, Policies, and Laws

September 11 and the aftermath war on terrorism generated an array of new plans, policies, and laws that affect the potential military role in responding to a domestic terrorism incident. Within days of the World Trade Center and Pentagon attacks, Congress passed a joint resolution authorizing the President to “use all necessary and appropriate force” against those responsible for September 11 “in order to prevent any future acts of international terrorism against the United States by such . . . persons.”

No geographic or time limit was placed on the authority granted, and the authorization to “prevent any future acts” raises the possibility that domestic military activities could take place for the foreseeable future.

For the first time since the Civil War, our government authorized a wartime battlefield that could include our cities. Although the lawfulness of the war fighting dimensions of the resolution are beyond the scope of this article, by implication the resolution also contemplates that there may be new law enforcement roles for the military, incident to the use of force against terrorists or in mitigating a terrorist attack on the homeland. A few weeks later, Congress enacted the USA PATRIOT Act. Among other

enhancements to authorities to combat terrorism in the homeland, the PATRIOT Act assured that the military may respond to requests for assistance involving weapons of mass destruction besides nuclear, biological, and chemical weapons.\footnote{78}

In 2002, the Department of Homeland Security was created\footnote{79} in a massive restructuring of government functions and agencies. The National Security Strategy of the United States and National Strategy for Homeland Security\footnote{80} were announced by President Bush, both of which emphasized the increasingly important role of the military in protecting the homeland from terrorism. The National Strategy for Homeland Security called for "a concerted national effort to prevent terrorist attacks within the United States . . . and minimize the damage and recover from attacks that do occur."\footnote{81} However, the strategy documents do not further specify military roles and missions, nor do they sort between possible war fighting and support to civil authorities. Meanwhile, since 2002 and ongoing today, the Administration has reshaped and refined federal planning for homeland security preparedness, including planning for managing a major terrorist attack on the homeland.

In February 2003, President Bush promulgated Homeland Security Presidential Directive 5 (HSPD-5)\footnote{82} to "enhance the ability of the United States to manage domestic incidents by establishing a single, comprehensive national incident management system."\footnote{83} Where prior plans treated crisis management and consequence management as discrete functions, with different lead agencies and decision structures, HSPD-5 characterizes domestic terrorism incidents as a single phenomenon, subject to the overall direction of the Secretary for Homeland Security, although the FBI retains lead authority for criminal investigations of domestic terrorist attacks.\footnote{84} The Secretary's responsibilities are triggered when a federal agency acting under its own authority has requested Department of Homeland Security assistance; when state and local resources are overwhelmed and Federal assistance has been requested by state and

\footnote{78}{Id. § 104, 115 Stat. at 272.}
\footnote{81}{Homeland Security, supra note 18.}
\footnote{83}{Id.}
\footnote{84}{Id.}
local authorities; when more than one federal agency has become involved in responding to the incident; or when the President directs the Secretary to assume management responsibility of the incident. The centerpiece of the post-September 11 homeland security plan is the establishment of a single National Response Plan (NRP), designed as an “all-discipline, all-hazards” approach to all federal prevention, preparedness, response, and recovery. The NRP includes twelve Emergency Support Functions (ESFs), described in annexes to the Federal Response Plan that supply details on the mission, policies, concept of operations, and responsibilities of the federal agencies involved in providing support to state and local agencies. To implement the NRP, the Secretary of Homeland Security will administer a National Incident Management System (NIMS) designed to permit federal, state, and local entities to work effectively together. The NIMS will include systems, command control, and communications devices that provide for interoperability and compatibility among the different agencies working to anticipate or respond to a domestic terrorism incident.

As part of the implementation of the Homeland Security Act, the Secretary of Defense created a new Assistant Secretary for Homeland Defense (ASD/HD) whose principal duty is the overall supervision of the homeland defense activities of the DoD. In effect, the New ASD/HD becomes the Pentagon’s Domestic Crisis Manager, and the advent of the new Assistant Secretary position transfers from military to civilian control the Department’s policy oversight of military support for homeland defense. Along with the ASD/HD, the Defense Coordinating Officer (DCO) coordinates DoD civil support activities as the on-scene representative with the Federal Coordinating Officer (FCO), the lead Department of Homeland Security representative on-scene. Emergency Preparedness Liaison Officers (EPLOs) are charged by the Services and other DoD agencies to plan, coordinate, and implement support to civil authorities, subject to chain of command orders.

During a crisis and subject to the still-evolving NRP and NIMS, the Department of Homeland Security (DHS) would coordinate the

85. Id.
86. Id. Still a work in progress at this writing, the status of a variety of existing response plans will be determined when the NRP is completed.
88. Id.; see also id. at 3-15-16.
federal response. If DHS officials determine that military personnel could provide technical support to law enforcement or crisis response personnel, or that the military could interdict the terrorist event and apprehend the terrorists, the on-site DHS commander, or FCO, may request military support from the DCO—the senior defense official at the Site, after the Attorney General has requested DoD assistance in enforcing the laws, through the EPLO. Once deployed, the EPLO relinquishes command and military units remain under the military chain of command. If state-deployed National Guard units are already active in the crisis, possibly including Civil Support Teams, existing authorities do not prescribe the federal-state relationship or the command and control structures that may be necessary to coordinate the military activities.

Acting pursuant to the special statutory authority for responding to WMD terrorism, the DoD may supply technical assistance in the form of equipment, facilities, or personnel. Depending on the crisis setting and on the particular technical assistance provided, the federal statute that permits the assistance may constitute an exception to or may be read as not falling within the prohibition of the PCA. The Secretary of Defense, following DoD Guidelines, must approve the support requested.

The same statutes permit the DoD to provide direct, operational law enforcement assistance. Once approved by the Secretary, military units plan and implement their support, subject to military command. When providing technical support, military personnel will not normally be armed and are authorized to use force only in self-defense. Once deployed in such a situation, military assistance to law enforcement personnel may include providing advice on the technical aspects of locating, identifying, disabling, and transporting a suspected WMD; containing or otherwise rendering safe a suspected WMD that is not weaponized, or, upon approval of the National Command Authority, doing the same with a suspected WMD; questioning suspects with law enforcement personnel when necessary to learn more about the WMD device; and supplying and operating equipment or vehicles. In addition, military personnel may conduct searches during such an emergency when there is

91. DoD Directive 3025.15, supra note 43, § 4.7.1., Immediate Response (1997). This “immediate response” authority may include rescue, evacuation, emergency medical treatment, restoration of essential public services, control of roadways and food and supplies distribution, and facilitating reestablishment of civil government functions. Id. §§ 4.5.4.1–10.
94. DoD Directive 5210.56, supra note 75, § 4.1. See CONPLAN,
95. See CONPLAN, Supra note 45, at 4.
suspicion that an area may contain WMD and trained law enforcement personnel are unavailable.\textsuperscript{96}

In the aftermath of a WMD terrorist incident, coordination among agencies and levels of government may become highly complex. Although federal statutes supply authority for federal personnel, civilian and military, to take various actions in such an instance, including some law enforcement tasks, the laws do not authorize federal control over state and local personnel. Some authorities authorize the President to "coordinate" assistance, including coordination with state and local governments.\textsuperscript{97} However, the President's efforts to "coordinate" would not include prescriptive authority. In addition, the Constitution has been construed by the Supreme Court not to permit the national government to compel state and local officials to implement federal law.\textsuperscript{98} It is at least conceivable that a governor could disagree or have different objectives concerning the provision of military support in a domestic terrorism crisis. If he persists, the President would be obligated legally to order federal military forces into local law enforcement roles based on constitutional powers or pursuant to the Insurrection Act.

If a tactical military force were deployed to respond to a domestic terrorism crisis, the deployment decision would be based on a determination that public safety could not be assured by civilian law enforcement capabilities, or that a hostile attack threatens the continuity of government. If a tactical force is engaged during a hostile attack, the necessary military response is well within the President's Article II authority to repel attacks. However, the Insurrection Act may permit the President to circumvent the PCA restrictions and deploy a tactical force for law enforcement purposes when widespread, unlawful activities "make it impracticable to enforce the laws of the United States," or when violence "hinders the execution of the laws of that State, and of the United States within that State."\textsuperscript{99} The order for military deployment could follow the cease and desist proclamation and executive order steps outlined above, even where not sought or resisted by a governor or state legislature. After invoking the Insurrection Act authorities, the President could decide to make available to the Department of Homeland Security on-site leadership through its National Homeland Security Operations Center (HSOC), military units as part of an Interagency Incident Management Group (I IMG), or an interagency

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\textsuperscript{96} DoD Directive 5525.5, super note 41, Encl. 4, § E4.3.2.
\textsuperscript{97} 42 U.S.C. § 5192(a); 42 U.S.C. § 5170a(2).
\end{flushleft}
team tasked to advise and support the Department of Homeland Security in crisis management.

One of the most difficult and contentious issues surrounding any future role for the military in law enforcement during a domestic terrorism crisis concerns the rules of engagement that would govern the actions taken by armed members of the military. On the one hand, the prospect of calling in the military to supplement or to supplant traditional civilian law enforcement in a crisis indicates that law enforcement is not up to the task, because, for example, a terrorist organization armed with lethal weapons of mass destruction may overwhelm civilian capabilities. Civilian law enforcement capabilities are not designed to match a paramilitary assault on the homeland, especially one that employs weapons of mass destruction. On the other hand, deploying military units in such situations brings with it a tradition of shooting to kill. Unless otherwise trained and equipped, soldiers will be used as they have traditionally been trained with military rules of engagement, and not with the traditional law enforcement rules where deadly force may be used only in self-defense or defense of other agents in imminent danger of death or serious bodily harm. The military personnel will be obligated to sort combatants from others, likely on the spur of the moment, to make assessments about the use of deadly force on the same basis, and to treat the provocation as an act of war, with attendant consequences. Even if trained in law enforcement rules and techniques, in the heat of the moment, military personnel may default to their base training orientation and culture.

Following the riots that erupted after the verdict in the Rodney King trial in Los Angeles in 1992, the Joint Task Force of Los Angeles implemented for the first time The DoD Civil Disturbance Plan (GARDEN PLOT). Among its rules of engagement (ROE) are the following: minimum force must be used at all times when responding to civil disturbances; warning shots are not permitted; deadly force may be used only if lesser means have been exhausted or are unavailable, the risk of harm to bystanders is not significantly increased, and the purpose is self defense, prevention of serious crime, destruction of vital public health or safety, or to prevent the

100. See DoD Directive 5210.56, supra note 75.
escape of a person who is a serious threat to persons or property.\textsuperscript{102} Although these rules of engagement were written to apply following an Insurrection Act proclamation and are thus not subject to the PCA, the rules of engagement emphasize that military personnel should provide support to civilian officials, leaving law enforcement tasks to state and local authorities whenever possible.\textsuperscript{103}

Beyond the organizational change to add an Assistant Secretary for Homeland Defense and the potentially broad assignment of homeland defense responsibilities in the National Strategy document, the military civil support role is unchanged by the new structures, laws, and policies. Indeed, in the Homeland Security Act, Congress "reaffirmed the continued importance" of the PCA, and noted that it "has served the Nation well in limiting the use of the Armed Forces to enforce the law."\textsuperscript{104} Progress has clearly been made in fleshing out the rules for a military role in law enforcement during a terrorist incident. Still, the affirmation of the PCA and the availability of the DoD Civil Disturbance Plan rules of engagement only begin to prescribe the new normal. What exactly will troops do in the event of an attack with biological weapons? How will the activities of the civilian and military entities responding to a biological weapons attack be phased, and subject to whose leadership? How will the federal players and roles, however they are phased, be coordinated with state and local responders, and subject to whose leadership? Even more nettlesome issues crop up when a potential biological weapons attack is examined closely.

Combining the new authorities and plans with pre-existing ones, the key variables governing the military role in homeland security are these:

- The National Strategy for Homeland Security assigns to the military the role of protecting the homeland, and a new civilian Assistant Secretary was created to manage the military homeland defense roles;
- The evolving NRP and NIMS do not clearly prescribe military tasks;
- Existing authorities do not establish the relationships or command and control arrangements between state and federal military troops;
- Special statutory authorities for WMD permit troops to provide technical assistance and direct law enforcement;

\textsuperscript{102} DOPLAW Handbook, \textit{supra} note 101, at 70–72.
\textsuperscript{103} \textit{Id}.
Insurrection Act procedures allow the President to order troops to enforce the laws;

Rules of engagement exist to prescribe military roles only when the Insurrection Act has been invoked.

C. Controlling People: The Military Role in Enforcing Quarantine or Travel and Movement Restrictions, Vaccination Programs, and Related Disorder

In the event of a terrorist attack involving a contagious biological agent or radiation, 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. However, states generally are not well prepared for such a contingency, and the federal support authorities are also not adequate.  

The Surgeon General is authorized to 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. In turn, the President specifies by executive order the diseases that could trigger this limited quarantine authority. Assuming a terrorist attack with biological weapons, federal authorities may be invoked if the agent transmits one of the communicable diseases covered by existing regulations. For instance, 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 or is about to move from state to state, or if he is “a probable source” of infection to others who will

105. WMD Incident Management Deskbook, supra note 87, at 4-14-4-17 (describing The Model State Emergency Health Powers Act (MSEHPA), its partial adoption in 32 states, and uneven state law).
107. Id. § 264(b).
108. 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 from the primary attack.
be so moving. However, no existing federal regulations permit the detention or other regulation of persons once identified as communicable to prevent the spread of a disease. Nor are there federal regulations authorizing the imposition of quarantine following an attack by chemical, radiological, or nuclear weapons. Thus, unless domestic quarantine regulations are promulgated, no federal quarantine may be lawfully imposed except at our international borders. Moreover, principles of federalism and constitutional limits on the exercise of federal regulatory authority may not permit a federal quarantine within a single state.

Even if quarantine regulations are promulgated, neither the Surgeon General and the Department of Health and Human Services nor the Centers for Disease Control 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] if police officers knew that a biological agent had been released, ninety-nine

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111. Regulations do permit such detention of persons entering the United States from abroad. 42 C.F.R. § 71.32 (2004).
112. Although contamination from 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.
113. Federal Legal Authorities, supra note 47.
114. See National Commission on Terrorism, supra note 10, at 27. In United States v. Lopez, the Supreme Court struck down an act of Congress as exceeding the Commerce Clause authority for the first time in nearly sixty years. 514 U.S.549, 115 S. Ct. 1624 (1995), Although the Court stated that Congress may "regulate those activities having a substantial relation to interstate commerce," Id. at 555, 115 S. Ct. At 1627, 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, 120 S. Ct. 1740 (2000).
percent of the cops would not be here. They would grab their families and leave.115

Depending on the level of force required to enforce the quarantine, armed military may be necessary for law enforcement purposes. Most state laws make violating quarantine a misdemeanor, creating the quintessential law enforcement action. The PCA and DoD directives forbid direct military involvement in law enforcement. However, federal assistance, including military support, may be provided to enforce state and local quarantines after the invocation of the Insurrection Act, or pursuant to a governor's request or presidential determination under the Stafford Act.116 On the one hand, absent an Insurrection Act event, federal military forces arguably could, consistent with the PCA and DoD directives, provide support to civil authorities in the form of communications, movement of essential personnel in or out of a quarantine area, marking a quarantine perimeter, moving persons out of the quarantine area for health or safety reasons, and providing mass vaccinations in voluntary lines.117 On the other hand, even activities as relatively non-invasive as traffic control when traffic lights are not operating is a law enforcement function that could not be performed by federalized Guard or regular military118 unless the Insurrection Act procedures are followed.

States may apply quarantine restrictions incident to their generic police power,119 so long as they do not exceed what is "necessary for [the state's] self-protection."120 The state quarantine could restrict any individual's constitutional right to travel only on the basis of finding that the quarantine is necessary to serve a compelling interest.121

121. See Saenz v. Roe, 526 U.S. 489, 500–502, 119 S. Ct. 1518, 1524–25 (1999) (reviewing the legacy of the constitutional right to travel and the requirement that compelling governmental interests be found before burdening the right); Smith v. Avino, 91 F.3d 105 (11th Cir. 1996) (upholding curfew in South Florida after
However, civilian law enforcement personnel may not be able to enforce the quarantine. A range of military assets could be deployed to enforce a quarantine, and considerable uncertainty exists concerning the appropriate military role and force configuration for quarantine enforcement that could create potential conflicts or disagreements among decision makers.

In the scenario described above, quarantine may not be a realistic or helpful measure. With reload and multiple outbreaks, along with delayed onset of smallpox and a highly mobile population, an even slightly ineffective or "leaky" quarantine may be worse than no quarantine at all. Further, enforcing quarantine in the circumstances described here—widespread disorder and an out-of-control outbreak—could create enforcement problems that no one wants to confront (do soldiers shoot families that breach a roadblock in their SUV?).

More likely officials would resort to a mass vaccination campaign. With an outbreak of this magnitude, only mass vaccination can immunize sufficient numbers of people to keep services functioning and avoid unwieldy and unenforceable quarantine. Like quarantine, vaccination is a public health policy that is reserved to the states and their police powers.\(^2\) Also like quarantine, even mandatory vaccination programs are lawful so long as appropriate flexibility is permitted for those with constitutionally compelled reasons for an exemption. As with other unexplored facets of a massive biological weapons attack, however, the potential military roles in mass vaccination have not been set out or even recommended. Would military personnel be trained to give the shots? Do armed units guard health care providers who are giving shots? Would the military be deployed to manage a detention center for those who decline the vaccination, and those who are ineligible to receive it? If vaccination is mandatory, do armed military force the unwilling to be vaccinated, and, if so, according to what rules for the use of force? Or will military units prevent the unvaccinated from leaving their homes until vaccinated?

What is known about the military role in restricting civilian populations and in support of a mass vaccination program may be summarized as follows:

- Various aspects of quarantine enforcement by military personnel may violate the PCA unless the Insurrection Act procedures are invoked;

\(^{122}\) See Jacobson, 197 U.S. 11, 25 S. Ct. 358.
Troops may support state and local civilians by providing communications, transportation, and various public health services, but may not enforce the laws unless pursuant to the Insurrection Act;

Many potential military roles have not been assigned, nor have force configurations been determined, for enforcing quarantine or like restrictions (Do military personnel deliver food and medicine? Do they operate abandoned public utility services?);

Military roles are similarly unclear in support of a mass vaccination program. May military force be used to seal off an urban area? May troops manage a vaccination program, voluntary or mandatory? What rules for the use of force would apply?

D. The Role of the National Guard and Reserves

In one respect, the National Guard “solves” the problems presented by domestic assignment of the armed forces to respond to a terrorist attack. Particularly to the extent that a terrorist incident is local and within one state, state deployed National Guard can provide military-type law enforcement support to enforce quarantine, other area restrictions, or curfews, and to distribute health or other emergency supplies in support of civilian authorities. As a state entity, not part of the armed forces of the United States, the PCA presumably does not apply, and the tradition of keeping the armed forces out of civilian law enforcement would not include the state National Guard personnel.

The legal picture is not so clear, and the practical distinctions are not so sharp, however. Whether the National Guard is “part” of the Army or Air Force for purposes of the PCA depends on the status of Guard personnel at a particular point in time. The National Guard had its origins in the colonial militias. The Constitution respects the citizen-soldier tradition of having homeland defense provided by the local militia, and assures that the National Guard will serve as a state force under the control of governors—except when federalized by the President.\footnote{123} Congress can “provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions,”\footnote{124} and it “provide[s] for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States,”\footnote{125} leaving

\footnote{123} U.S. Const. art. I, § 8, cl. 15.
\footnote{124} Id.
\footnote{125} Id. § 8, cl. 16.
appointment of the officers to the states. The Supreme Court has affirmed that the National Guard is a state entity unless called into federal service.\textsuperscript{126} Thus, the National Guard may be the citizen-soldier, subject to local control.\textsuperscript{127} Or the National Guard may be a trained supplement to the regular military, prepared to fight and destroy.

In 1933, Congress created the National Guard of the states and the National Guard of the United States.\textsuperscript{128} Members belong both to a state Guard and to the federal Guard, and are civilians when not in their military status.\textsuperscript{129} Later Congress created a separate Air National Guard of the United States and limited the original federal Guard to the Army component.\textsuperscript{130} Even when called into federal service, members of the National Guard are not on "active duty," a status limited to full-time active military service personnel.\textsuperscript{131} State laws typically authorize the Adjutant General, directed by the Governor, to call up National Guard units in an emergency. When not in federal service, federal law (typically known as Title 32) requires that training, equipment, and inspection be supplied according to federal requirements.\textsuperscript{132}

Particularly since the end of the Cold War, the Guard has become an ever more frequent source of combat support. Once federalized, National Guard personnel serve as reserves of the Army.\textsuperscript{133} National Guard personnel have also provided support to civil authorities after natural disasters, including clean up after floods or storms, assisting in fighting fires, and helping with evacuation and managing supplies. The authority to order such support was transferred in 2003 from the Secretary of the Army to a new Assistant Secretary for Homeland Defense.\textsuperscript{134}

It is thus logically assumed that Guard personnel would be well positioned to become involved in the event of a significant terrorist attack in the United States. In 1998, Secretary of Defense William Cohen expressly added response to chemical and biological weapons terrorism as a new mission for the Guard.\textsuperscript{135} The new mission began

\textsuperscript{127} See supra text accompanying note 89.
\textsuperscript{132} See supra text accompanying note 89.
\textsuperscript{133} Defense Reform Initiative Directive No. 25, The Department of Defense
in 1999 with the development of new Rapid Response and Initial Detection (RAID) teams, configured to assist state and local personnel in response to a terrorist attack. The specific missions of the RAID teams were to identify a suspected chemical or biological agent associated with a terrorist event, to track dispersal patterns and evacuate victims, to control access to the site, to assist in bringing other federal and state assets to a site, and to advise civilian leaders. After delays in training the RAID teams, the program was modified and renamed the Weapons of Mass Destruction Civil Support Teams (WMD-CST) in 2000. By late 2003, Congress had authorized fifty-five WMD-CST teams, and the DoD certified thirty-three as ready to assist in a WMD incident. These teams consist of twenty-two full-time National Guard personnel, who assess a WMD event, advise civilian first responders on appropriate responses, and facilitate introducing follow-on military support into the affected area. The primary function of the teams is to identify the weapon/agent, and to supply communications with other federal, state, and local agencies.

Whether as WMD-CSTs or otherwise, there can be little doubt that Guard personnel are controlled by the PCA when in federal service. Once federalized, Guard personnel are simply assimilated into regular military forces, subject to the same chain of command, rules of engagement, and DoD limits on their law enforcement activities as regular forces. It also seems clear, however, that National Guard personnel under the control of a governor are not subject to the PCA. On the one hand, state militia were responsible for much of the mischief that gave rise to the PCA, and the Act broadly regulates the military as “posse comitatus or otherwise.” On

Plan for Integration of the National Guard and Reserve Component into Domestic Weapons of Mass Destruction Terrorism Response (Jan. 26, 1998).


138. Id.

139. See DoD Directive No. 5525.5, supra note 41, Encl.4, § E4.2 (exempting from the PCA proscriptions members of the National Guard when not in federal service).

140. See United States v. Gilbert, 165 F.3d 470 (6th Cir. 1999); United States v. Hutchings, 127 F.3d 1255 (10th Cir. 1997).

the other hand, as an outgrowth of the early state militias, the Guard has also been a creature of state law since the Articles of Confederation. This history, along with the default placement of the National Guard as subordinate to the state governors, and the principles of federalism reflected in the Tenth Amendment, all point to a reading of the PCA that does not reach the National Guard when not federalized. In addition, numerous judicial decisions have arrived at the same understanding, and various congressional reports have concluded that the Guard is not subject to the PCA when not in federal service.

However, uncertainty concerning the roles of and legal restrictions on the National Guard in homeland defense is increasing. State-deployed National Guard units could be charged with enforcing the quarantine. Although the state-deployed Guard personnel are not subject to the PCA, the regular Guard units are trained for combat, not law enforcement. In addition, it is conceivable that, in a germ or radiation attack that affects more than one state, a governor in State A could ask for federal military intervention, while the governor in State B may wish to rely on state-deployed National Guard units, or no military personnel at all. Or one or both governors could dispute the President's judgment that federalized National Guard personnel should enforce quarantine or curfew or border and travel restrictions.

The President could federalize the Guard for the purposes of enforcing the quarantine, but only upon a state request, given the lack of federal quarantine authority, unless the President relies on the Insurrection Act provision that permits unilateral presidential orders of military deployment in the event of a breakdown of civil authorities in a state. Otherwise the federalized Guard units would also then be subject to the PCA, and the operation would require a different independent legal justification.

Although the absence of

144. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601–9675 (2000), permits the President to "take any . . . measure . . . which the President deems necessary to protect the public health or welfare or the environment" whenever the release of a contaminant "may present an imminent and substantial danger to the public health or welfare." Id. § 9604(a)(1). Although written to support cleanup of environmental hazards, CERCLA could permit federal authorities to restrict access or conduct evacuations in a WMD terrorist incident, either in support of state and local authorities or as an independent federal action. If CERCLA did become the predicate for federal action, the Environmental Protection Agency (EPA) would be the lead federal agency. A military role could occur in support of an EPA determination to rely on CERCLA to quarantine or restrict access to an area following a WMD terrorist incident. A presidential declaration pursuant to the
federal legal restrictions would afford more discretion for state officials to deploy National Guard units, in the event of a significant deployment cost factors may favor federal activation, since the federal government would pay for the operation once the force is federalized.

Even more difficult legal questions could arise where a state adjacent to one suffering from a WMD terrorist attack decides to close its borders to those fleeing a contagion. While the states retain police powers to protect their citizens, a wholesale border closure might unfairly affect those unaffected by the terrorists who seek refuge from the contaminated state. It is unclear whether federal officials, civilian or military, could force the adjacent state to accept contaminated persons.

A former Army National Guard director has warned that freighting the military role for homeland defense onto the Guard could create a "worse-case" scenario, where the Guard "becomes a quasi-federal, domestic constabulary" with a singular focus that diminishes its role as the primary reserve for the Army's fighting force. The Army "then becomes a purely federal force of unprecedented size, threatening the economic, social and political traditions of our country." 145 146 Ironically, assuming that policy preferences are to utilize Guard forces in state active-duty status, a state's funding priorities may drive a decision to federalize any large-scale or expensive military deployment in response to a terrorist incident to force the transfer of the costs of the deployment to the federal government. Although any federalized National Guard force would be subject to the PCA, other authorities would permit the Guard to act—even to engage in direct law enforcement—in response to a domestic terrorism incident.

Others see the Guard as the component of the armed forces best situated to be the "lead military agency for homeland security." 148 Because the Guard is located throughout the nation with its members

Insurrection Act could authorize federal support, military and civilian, to state and local officials in enforcing a quarantine. The problems due to the lack of federal quarantine authority may thus be averted through the environmental emergency mechanism. Otherwise, the CERCLA option presents the same potential for federal-state confusion or even conflict as described above.

146. Id.
147. Bruce M. Lawlor, Military Capabilities and Domestic Terrorism 2 (Perspectives on Preparedness No.2, August 2001).
from every community, Guard units are arguably well positioned to assist first responders or to respond otherwise to attacks on the homeland. In July 2003 command and control of the National Guard was transformed into a joint bureau with a joint staff, from separate Army and Air National Guard headquarters to a Standing Joint Force Headquarters. Headquarters' staff includes federal military personnel, and the Defense Science Board (DSB) has recommended that emergency preparedness and coordination officers join the Joint Forces Headquarters in each state, and that the new state Headquarters report to the new military command for the homeland, Northern Command, described below. The DSB maintained in its November 2003 report that "the best course of action is to use the Guard to the maximum extent possible in title thirty-two status for all federal-purpose domestic operations." 149 According to DSB, among the advantages of maximizing Guard use in such circumstances are utilizing existing state command structures to save time in deploying units, and the ready use of volunteers to avoid mobilizing units. 150

The legal parameters of National Guard and reserve roles in a public health emergency may be summarized in this way:

- The PCA does not deter state deployed National Guard forces, but cost factors provide an incentive for state officials to favor federalized forces if a significant deployment is anticipated;
- No mechanisms exist other than interstate compacts for mediating conflicts between bordering states concerning the assignment of Guard or reserves, such as a border closure designed to deter those fleeing an outbreak in a neighboring state;
- Federalized Guard and reserves could only engage in law enforcement pursuant to the Insurrection Act or special statutory WMD authorities.

E. Northern Command (NORTHCOM) and Civilian Controls

The explicit assignment to the military of a national security mission of protecting the homeland complicates further the military role in providing support to civil authorities. When the new Unified Combatant Command, the United States Northern Command (NORTHCOM) was made operational on October 1, 2002, it became the first ever command authority for homeland Defense. NORTHCOM will provide support to civilian authorities for

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149. DSB Study, supra note 137.
150. Id.
managing the consequences of natural and terrorism-related disasters, but it will also "deter, prevent and defeat external threats against the American homeland."\textsuperscript{151}

The assignment of homeland defense responsibility assures that NORTHCOM can be responsible for enforcing quarantine once the Insurrection Act is invoked. No permanent forces are assigned to NORTHCOM. However, in the event of a terrorist attack on the United States, the JTF-CS teams operate under NORTHCOM to support civil authorities.\textsuperscript{152} Potential implementation problems remain, however.\textsuperscript{153} The JTF-CS has been placed in the critical position of being asked to translate requests for assistance from civilian officials, almost always from state or local officials, into requirements that military personnel can meet. As Former JTF-CS General Bruce Lawlor explained, it is a considerable challenge for military officers to identify units that are trained and equipped for war fighting that can be adapted to meet the requirements needed by the civilian requesters.\textsuperscript{154} Beyond simply translating the civilian request into a form that communicates effectively to a military commander, and training the war fighters to perform very different tasks, the authorization to perform the requested tasks also must pass from the state or local officials through the Federal Emergency Management Agency and the Department of Homeland Security, to the Secretary of Defense, and then to the JTF-CS. The Secretary will assess the request for military support against criteria prescribed by the DoD Military Assistance to Civil Authorities Directive reviewed above.\textsuperscript{155} The likely first military responders are the federally trained and funded Civil Support Teams (CSTs). The teams serve under the command of state governors unless they are federalized by the President, when they would be subject to the command of the JTF-CS.\textsuperscript{156}

A November 2003 study by the Defense Science Board (DSB) argued that the DoD remains deficient in its capabilities to mitigate and re-mediate the effects of a major terrorist attack, to provide surge medical capabilities, and to provide communications operability

\textsuperscript{151} See U.S. Northern Command, at http://www.northcom.mil.


\textsuperscript{154} Lawlor, supra note 147, at 4.

\textsuperscript{155} See id. at 3–6; DoD Directive 3025.15, supra note 43, § 4.2.

\textsuperscript{156} See Operational Law Handbook, supra note 20, at 366.
between first responders and federal, state, and local agencies. The DSB recommended a range of new tasks for NORTHCOM, including priorities in the areas of maritime surveillance, defense against law-altitude aircraft, protection of critical infrastructure, and taking the lead in training and exercising for homeland defense. DSB was careful to recommend new tasks for NORTHCOM that do not run afoul of the PCA. Still, implementation problems are not hard to imagine. How does the NORTHCOM force that is deployed to protect the local electric utility and its operations conduct its operations alongside local law enforcement personnel? How will the military personnel be instructed to react to suspicious activities, and on whose orders?

Even assuming that authorities are clarified for making and enforcing quarantine and related measures with some military support, nettlesome issues remain concerning the rules for the use of force. At present, state law enforcement agencies, federal agencies that may be involved in a terrorism incident, and the branches of the military all have different and sometimes inconsistent rules for the use of force (RUF), the term often substituted for “rules of engagement” in domestic operations. When Insurrection Act conditions exist and applicable procedures are followed, the DoD Civil Disturbance Plan (GARDEN PLOT) rules of engagement govern United States military involvement. Although the Insurrection Act invocation permits armed military forces directly to enforce the law and to exercise authority over civilians, GARDEN PLOT rules presume that civilian authorities should exercise such authority if possible, including engaging in searches of persons and property. State National Guard and law enforcement agency rules may differ from these, and each of these may vary from state-to-state.

If federal military presence follows a Stafford Act request, standing rules of engagement from the Joint Chiefs of Staff do not apply, and federal forces would instead follow guidelines prescribed by the incident specific executive order. There is a presumption that military units deployed in a terrorist incident pursuant to the Stafford Act will not carry arms, although weapons may be deployed to the site in storage. The presumption may be overcome on the say-so of the Secretary of Defense, in consultation with the Attorney General. What rules would apply when civilians attack vaccination

157. DSB Study, supra note 137, at 77.
158. Id. at 83; other recommendations for new NORTHCOM activities are listed id. at 84.
159. Id. at 369.
160. Chairman of the Joint Chiefs of Staff Instruction 3125.01, Military Assistance to Domestic Consequence Management Operations in Response to a Chemical, Biological, Radiological, Nuclear, or High-Yield Explosive Situation,
teams or convoys distributing food and medicine? As a default, each soldier would employ an inherent right of self-defense. As is the case with the Insurrection Act situation, state-deployed Guard and local law enforcement rules are not necessarily harmonious with the federal rules.

The creation of NORTHCOM raises more questions than it answers. Among them are:

- What forces will be deployed under NORTHCOM command, and according to what legal authorities will they serve?
- How will NORTHCOM troops serve alongside state and local civilian law enforcement personnel? With state deployed National Guard units?
- How will the varying rules for the use of force between federal, state, and local military and civilian personnel be clarified and unified?

III. CONCLUSIONS: CLARIFYING THE FUTURE ROLES AND MISSIONS OF THE MILITARY IN HOMELAND DEFENSE

Law enforcement in the United States has always been diffuse, occurring at the lowest common denominators of government. The Tenth Amendment is merely a textual reference to a constitutional tradition that recognizes the importance of state and local police power, where most law enforcement is carried out. Civilian law enforcement personnel are accountable to local, mostly elected leaders, who can oversee overzealous police practices. The military is likewise subject to civilian control, but its accountability is centralized through a command authority running to the President. The centralized national command authority is not as suited as local officials are to monitor law enforcement practices and potential civil liberties infractions by military forces in the field.

The DoD has recognized "the historic tradition of limiting direct military involvement in civilian law enforcement activities." Nonetheless, through exceptions to the PCA and by engaging in activities that may not involve "direct active" law enforcement, or do not "pervade" civilian law enforcement, or are not "regulatory, proscriptive, or compulsory in nature," the military may act lawfully in a variety of capacities in a homeland terrorist crisis. Some of the anticipated roles replicate traditional law enforcement tasks. Others are more clearly in provision of emergency support for health and

safety, while in the gravest circumstances involving some form of paramilitary attack in the homeland, military forces could be engaged in war fighting on United States soil.

The concern about an emerging nontraditional military role in homeland defense explains the reticence of some military and civilian leaders to support these new initiatives. Apart from the civil liberties issues, some argue that adding domestic law enforcement tasks to the set of military missions will “diminish[] combat prowess. . . . [T]here are . . . few synergies between law enforcement and military missions.” If military personnel are trained to overcome their “shoot to kill” orientation, they may sacrifice their sharpness as soldiers. Commanders of these soldiers understandably balk at the law enforcement training that may steal the war fighting skills that have been taught.

After September 11, Bush Administration officials cast the potential role for the military in homeland defense in a more positive light. With the creation of NORTHCOM and further training of National Guard and Weapons of Mass Destruction Civil Support Teams (WMD-CSTs), there exists considerable momentum for expanding the preparedness of military units for homeland roles in combat and in support of civilian authorities. In this brief final section, I will highlight a few overarching obstacles to normalizing a military role in homeland defense that are presented by a potential biological weapons attack.

A. Civil Liberties, the Use of Force, and the Military Role in a Biological Weapon Attack

Civilian law enforcement personnel are trained to protect individual rights and to presume innocence, even when dealing with the most objectionable suspects. Likewise, police are instructed to use force only when necessary and then to use as little force as possible. In contrast, soldiers are trained to kill or destroy. Asking soldiers to become cops is thus asking for trouble. Training may be a solution, but the military commanders are reluctant to lose the soldier’s traditional military sharpness. State National Guard personnel do receive civil disturbance training, however, and personnel who have not been so trained may perform only support functions during a civil disturbance.


164. United States Department of Army, National Guard Bureau Reg. 500-1, Military Support to Civil Authorities, ¶ 4-11, (Feb. 1996), available at
includes use of force, riot batons, apprehension and detention of persons, media relations, firearms training and testing, and standards of conduct.\textsuperscript{165} Use of force by state National Guard personnel is, however, governed by state law, not by federal guidelines.\textsuperscript{166} If state Guard personnel use federal equipment or property while deployed in a civil disturbance, federal guidelines similar to the DoD Civil Disturbance Plan (GARDEN PLOT) apply unless state law is more restrictive, in which case state law applies.\textsuperscript{167} The federal instruction for state-deployed Guard personnel also advises that civilian law enforcement should apprehend civilians to the extent possible. If state Guard personnel must act, personnel are bound by guidelines issued by the Attorney General in each state, according to state law.\textsuperscript{168}

If military are deployed in a civil disturbance operation, the GARDEN PLOT mission statement gives commanders discretion to use federal military forces to assist civil law enforcement in “restoring” law and order.\textsuperscript{169} The Army Field Manual indicates that such missions include crowd dispersion, patrolling areas affected by the disturbance, maintaining communication and transportation systems, setting up roadblocks, and cordonning off areas.\textsuperscript{170} Federal forces so deployed are subject to the operational command of a task force commander and may not fall under civilian or non-federal status military command.

If care is not taken to vest what may become essential law enforcement tasks in military personnel trained to perform law enforcement, a litany of civil liberties problems could arise. GARDEN PLOT rules of engagement supply guidance to forces engaged in civil disturbance operations, and a summary of the general principles is included in a pocket card that should be issued to all participating forces.\textsuperscript{171} Although the overriding principle of the GARDEN PLOT rules is to use the minimum forces necessary, considerable interpretive discretion remains with the commander. For example, the Army Field Manual states that riot control equipment should not be used if saturating the area with troops will

\begin{itemize}
\item \textsuperscript{165} http://www.ngbpdc.ngb.army.mil/pubfiles/10/108101.pdf [hereinafter NGR 500-1].
\item \textsuperscript{166} Id. at ¶ 4-4.
\item \textsuperscript{167} Id. at ¶ 4-6.
\item \textsuperscript{168} Id. at ¶ 4-6(d).
\item \textsuperscript{169} Id. at Basic Plan ¶ 3.
\item \textsuperscript{171} DOPLAW Handbook, supra note 101, at 70.
\end{itemize}
quell the disturbance. What level of force is permitted to stop someone who drives through a roadblock? What about a curfew or quarantine violator?

Military deployed in civil disturbances may detain civilians who are rioting, looting, or otherwise engaged in criminal behavior. The military instructions acknowledge that searches, seizures, and detentions must comply with the Fourth and Fifth Amendments, and that federal troops should not be involved in searches and seizures unless there is "an immediate danger of violence, destruction of evidence, or escape of violent persons unless the search is conducted without delay." Similarly, military deployed in a civil disturbance may only operate a detention facility on a temporary basis if civilian facilities cannot accommodate the numbers of detainees and if central command authority approves.

Nor may federal forces restrict the movement of civilian populations, such as by establishing curfews, quarantines, or other travel restrictions, although the local commander may recommend the same to local government officials. Because no federal agency including the Center for Disease Control and Prevention (CDC) can, practically speaking, enforce a quarantine or similar restriction on the civilian population, state or federal military forces may be tasked with this enforcement role. If the force is federal, only an Insurrection Act proclamation by the President or an executive order invoking defensive war powers could legitimate the military role in law enforcement.

In general, rules for the use of force are not specifically made and standardized across relevant federal, state, and local agencies. For example, what defines a successfully enforced quarantine? Is it permissible to permit "leakage" of ten or fifteen percent of the affected persons in a quarantine situation? If not, is the use of force permitted to enforce the restriction? How much force? What procedures would be required for an individual who wishes to challenge quarantine or forced vaccination? Finally, none of the laws, planning documents, or guidelines supply durational limits for the military operations prescribed.

172. FM 19-15, supra note 170, at 7-1.
173. NGR 500-1, supra note 164, at C-1-12.
175. FM 19-15, supra note 170, at 12-13; NGR 500-1, supra note 164, at C-1-12, E-5.
176. FM 19-15, supra note 170, at 6-11, 6-12.
177. This is not literally true; the Stafford Act emergency authorization for military deployment is limited to ten days. See supra text accompanying note 56. However, the Stafford Act permits military support following disaster and emergency declarations, independent of the emergency authority. Id.
B. Codification, Clarification, and Simplification

Whatever their efficacy, the existing patchwork authorities for military support in the event of a terrorist attack in the homeland are bewilderingly complex. Because written law is largely reactive this state of affairs is not surprising and it is remediable, in part by collecting and then simplifying the range of authorities reviewed above into one title of the United States Code. Redundancies should be eliminated, consistency among categories of terrorist threats and incidents may be achieved, and clarification of decision points and the relationship of federal to state and local authorities should be spelled out. In addition, a clearer and more definitive statement should indicate that the general proviso against military involvement in civilian law enforcement applies to all military actors, whatever their branch or service, including the Coast Guard.

Apart from problems of codification, the Fifth Annual Report to the President and the Congress of the Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction\(^\text{178}\) (the Gilmore Commission, for its Chair, Governor James Gilmore) conjures a “Future Vision 2009,” where statutory authority and regulations for use of the military in the homeland have significantly improved understanding of military roles and missions. In 2004, however, problems remain in establishing clear command and control, in identifying missions, in training, and even in defining what is meant by homeland defense. In part, the problems are attributable, according to an earlier report of the Commission, to “an inadequate understanding of the sequence of commitment of local, State, and Federal response.”\(^\text{179}\) Despite the fact that military forces are always under ultimate civilian command, the Commission reinforced its earlier recommendation that some agency other than the DoD be designated as lead federal agency, in part due to civil liberties concerns and in part out of concern that military leaders may not be adequately equipped to make decisions based on civilian response plans with myriad roles and missions largely unfamiliar in the military tradition.


Despite the fact that Defense Secretary Donald Rumsfeld said on July 2002 that “everyone knows that the Pentagon is not in the business of providing an armed force for the United States,” NORTHCORKit may be deployed in just such a way. Along with the still-undefined nature of its homeland defense role, NORTHCORKit work and facilities suggest that officials there are mimicking the roles in homeland security given by Congress to the Department of Homeland Security.

C. Phasing the Incident Management Tasks

All terrorist incidents are local, or at least will start that way. Presumptively, local emergency response, public health, and law enforcement personnel will manage any domestic terrorist incidents. 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 non-governmental 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 NORTHCORKit command, or larger commitments, again presumably under evolving NORTHCORKit configurations. Specific arrangements for military enforcement of operations such as quarantine are not yet addressed in the Federal Response Plan or supporting documents.

Experience with major federal exercises for terrorism preparedness have generally demonstrated major operational weaknesses in inter-agency relations and communications, and in coordinating between federal, state, and local participants. The complex and constantly changing nature of incident response plans and rules certainly contributes to the weaknesses noted in federal exercises. Isolating the military role under the still evolving Federal Response Plan reveals ongoing problems of phasing and managing.

181. Id.
182. See e.g., Thomas Inglesby, Rita Grossman & Tara O’Toole, A Plague on Your City: Observations from TOPOFF, 32 Clinical Infectious Diseases 436 (2001).
incident response. If federal assets are engaged in a terrorist incident, a Defense Coordinating Officer (DCO) will be deployed to the scene, along with the Department of Homeland Security Federal Coordinating Officer (FCO). Because there are no procedures or plans that lay out the DCO tasks, an incident specific executive order will likely be drafted in the office of the Assistant Secretary for Homeland Defense (ASD/HD) and signed by the Secretary. Once deployed the DCO will likely call for JTF-CS resources, through NORTHCOM. A declaration by the President under the Stafford Act or Insurrection Act could trigger additional DoD deployment, also under NORTHCOM, most likely involving JTF-CS.

D. The National Guard

It may well be that today’s citizen militia, the National Guard, offers the best vehicle for responding to any law enforcement challenges presented by domestic terrorism. Guard personnel may be drawn when needed by a governor from a local area to perform law enforcement tasks close to home. The PCA does not constrain this use of the National Guard, but the modern reality of military training and the ongoing assignment of Guard units as reserve for the Army’s fighting force complicates their role. Worse yet, if state-deployed National Guard units become regularly deployed for local law enforcement related to counter terrorism—as security for mass transit, for example—the development of a standing domestic constabulary could raise the very fears that the PCA was designed to allay. Federalizing the National Guard on an as needed basis is currently tempting for governors who then do not pay for their deployment, but is worrisome because of the PCA and other legal limits, and because the command and accountability is no longer then local.

The Fifth Annual Report of the Gilmore Commission also supports using the National Guard as a bridge between civil and military authorities in terrorism response in the homeland. However, Guard personnel other than Civil Support Teams (CSTs) are generally trained for combat, not for responding to terrorist incidents, or for the varied tasks of law enforcement. As former Assistant Secretary of Defense Lawrence Korb put it, the military “is trained to vaporize, not Mirandize.” Moreover, current Army terrorism


response capabilities are largely located in the Army Reserve rather than the Guard. The Commission thus recommends that the DoD and state governors develop specific mission areas for Guard support during a terrorist incident, and that homeland security units and missions be organized with state Guard structures, supported by training and equipment appropriate to the tasks. Although the PCA does not constrain the law enforcement activities of state-deployed Guard forces, differing state laws may limit specific roles for Guard personnel. For example, some states have specific laws forbidding Guard personnel from performing security in airports.

In any event, if a major WMD event occurred, the Guard would likely be federalized quickly. Just what Guard forces would do is not clear. The potential for a biological weapons attack to overwhelm our public health resources suggests that National Guard elements could provide critical support to provide a back-up medical surge capacity in the cities or other locations where help is needed. An outbreak of the dimensions hypothesized here could be managed, if at all, only with thousands of surge capacity personnel, trained in distribution and dissemination of vaccines and other medical equipment and services, in transportation and communications related to the medical emergency, in enforcing quarantine or other necessary restrictions on the civilian population, and in providing essential triage when the demand for local services outstrips capacity. In the end, it is safe to say that the military role in a homeland defense emergency is evolving. What the normalized state of affairs will be is difficult to predict. However, in a public health crisis of the magnitude outlined in this article, it may be essential for soldiers to be trained to provide a public health surge capacity. Some of the tasks that would need to be performed would not call into question even traditional notions of *posse comitatus*, while others would classically be characterized as enforcing the laws. It appears likely that the new normal will include an emerging public health back-up role for the military. Some overarching issues remain, including these:

- Should the military be authorized to enforce restrictions on movement, travel, and mandatory vaccinations? If so, pursuant to which rules for the use of force?
- Can and should military personnel be trained to provide or supplement a medical surge capacity, e.g., to administer vaccinations, supply equipment, transportation, and communications, to guard medicine or

186. *Id.* at 53.
vaccination centers? If so, will new legal authorities be required?

- Should soldiers be permitted to operate civilian infrastructure facilities, such as public facilities, in the event of a public health emergency?
- What durational limits should be imposed on any authorization for the use of military in a biological weapons attack?