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# Posse Comitatus and Nuclear Terrorism

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Few constraints, if any, remain on what terrorists are capable of and willing to do. In the past decade terrorists have released sarin gas on a Tokyo subway, buried radiological materials in a Moscow park, delivered anthrax through the US mail, and killed thousands in a well-coordinated suicide attack on the World Trade Center and the Pentagon. Terrorists have proven themselves to be both more bloodthirsty and more innovative than previously imagined. The possibility that state sponsorship of these groups could include providing them with weapons of mass destruction (WMD) cannot be ignored. In such a world it no longer seems implausible to discuss the terrorist use of nuclear weapons.

The federal government recognizes the threat of WMD terrorism within the United States and has been earnestly preparing to combat it since at least 1995. However, many questions remain regarding the military's role in domestic terrorist incidents--the current debate over instituting a commander-in-chief (CINC) for homeland security is only one example. As long as the federal bureaucracy defines terrorism as a law enforcement issue rather than a national security issue, the Department of Defense faces considerable legal limits on its ability to act to counter domestic terrorism. While these restraints are significant impediments to DOD's response, the principles enshrined in Posse Comitatus and in the federalist system are, nevertheless, necessary guarantors of American democracy that should not--and need not--be violated, even in a national emergency.

The likely federal response to a nuclear incident currently suffers from conflicting and confusing guidance that is dependent on too many external factors to be timely and therefore effective. In the end, however, the federal response would be almost totally dependent on the Defense Department for its resolution. Given the legal limits placed on DOD's actions, this situation is a disaster waiting to happen. As Juliette Kayyem, executive director of Harvard's Executive Session on Domestic Preparedness, has remarked, "In a terrorist attack, this confusion could produce at least two unwanted outcomes. First, it could cause institutional inertia, leading ultimately to more deaths and even greater destruction. Second, it could give rise to overreaction and fear, resulting in unnecessary uses of power." [1]

Although it may be possible to improve the response capabilities of civilian agencies (for example, the FBI's Critical Incident Response Group), the reality of a military response in an emergency cannot be denied. Therefore, it is necessary to expand DOD's legal authority to act in a domestic nuclear terrorist incident, but without violating important American principles of government. The best way to accomplish this is through an expansion of DOD's ability to declare a National Defense Area (NDA) in dealing with nuclear incidents.

## Constitutional and Legal Limitations

The most fundamental limitation placed on the military's actions in domestic affairs is the well known but poorly understood Posse Comitatus Act of 1878.[2] Originally intended "to end the use of federal troops to police state elections in former Confederate states,"[3] this Reconstruction Era law is used today to keep the military out of domestic law enforcement. This restriction was one of the principal issues in the investigation of the military's involvement in the Waco disaster and continues to bedevil DOD domestic counterdrug and counterterrorist operations.

However, Posse Comitatus is not the absolute prohibition that many consider it to be.[4] A rather significant loophole is written directly into the law:

Whoever, *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.[5]

Thus, almost any presidential decision or congressional legislation can circumvent Posse Comitatus rather easily.[6] In fact, "the trend during the 1990s has been for the federal government to erode the prohibitions of the Posse Comitatus Act in order to meet a variety of modern law enforcement challenges." [7] Significant recent exceptions to the act have included disaster relief operations under the Stafford Act,[8] the "drug exception" authorized by Congress to fight the "war on drugs,"[9] immigration enforcement operations along the Mexican border,[10] and the military assistance provided to state and local governments under the Domestic Preparedness Program.[11]

Most disturbing is the tendency to ignore Posse Comitatus restrictions during emergencies (real or simply perceived). Political pressure to "do something" too often results in military involvement in domestic affairs. In the words of another writer, "The fact is that the political interest in stopping drug and alien smuggling is currently greater than the concern as to whether the military is being injected into a traditional civilian law enforcement role contrary to the principles upon which the Posse Comitatus Act was founded." [12] After the attacks on 11 September, uniformed troops became regular fixtures at the nation's airports, military overflights of our major cities was accepted and even welcomed, and Navy ships were dispatched off the coasts of Washington, D.C., and New York City. The same writer has noted that "through a gradual erosion of the act's provisions over the past twenty years, Posse Comitatus today is more of a procedural formality than an actual impediment to the use of US military forces in homeland defense." [13]

Although Posse Comitatus as a matter of law may be rapidly weakening, the principles embodied in the act serve an important and essential role within the American constitutional system. Even during a domestic nuclear terrorist incident, further erosions of Posse Comitatus are neither necessary nor advisable. Advocates of an expanded military role correctly note that many of the homeland defense missions they envision for the Army have a firm constitutional basis, including the Preamble's call to "insure domestic tranquility" and "provide for the common defense." [14] However, these analysts sometimes fail to acknowledge the Founding Fathers' significant concerns regarding the effects of a large standing army on a democratic government. As evidenced by the Second and Third Amendments to the Constitution, the Framers clearly preferred a small standing army to be augmented by a "well-regulated militia" in times of crisis over a larger, permanent military force. George Washington, the first American Commander-in-Chief, endorsed a standing army only under limited conditions: "'Altho' a large standing army in time of peace hath ever been considered dangerous to the liberties of a country, yet a few troops, under certain circumstances, are not only safe, but indispensably necessary." [15] The Anti-Federalists went further, calling standing armies "that bane to freedom, and support of tyrants, and their pampered minions; by which almost all the nations of Europe and Asia, have been enslaved." [16]

Despite the Founding Fathers' preference for them, reliance upon slow-forming militias for national defense is obviously no longer possible from a strategic standpoint in the modern world. This fact, however, makes Posse Comitatus even more important, rather than less. The existence of a large standing army in a democratic nation requires significant restrictions to be placed upon the military's domestic role for the sake of both the government and the military. As Air Force Colonel Charles Dunlap has remarked, "There are relatively few modern examples where systematic use of the military to meet internal security threats has been good for democracy or, for that matter, the military itself." [17] The absence of restrictions on the military runs the risk of jeopardizing democratic institutions and of dragging the military away from its principal mission of defending the nation and into domestic politics. Thus, Posse Comitatus and the principles it embodies are more than "merely legal bars that could be corrected by additional legislation." [18] There is nothing about Posse Comitatus that needs to be "corrected" except, perhaps, to strengthen it.

Ironically, probably the greatest proponent of continuing such restrictions on the US military is the military itself. DOD regularly resists further erosion of Posse Comitatus even as the Congress and, to a lesser extent, Presidents have called upon DOD's impressive capabilities to fight everything from the war on drugs to the weather. No doubt DOD's reluctance is based as much on a desire to husband resources as it is on a desire to honor certain principles, but the military is definitely the most consistent opponent of further military involvement in law enforcement affairs. In any event, as noted by Ms. Kayyem, "Neither concern about the public response to such an increased role, nor the Department of Defense's historical reluctance, however, stand as a legal bar to the use of the military." [19]

## **"I'm from the government and I'm here to help."**

The assumption that the federal government could automatically and easily step in and resolve a domestic nuclear terrorist incident is mistaken. Law enforcement (including responses to terrorism) is fundamentally a local issue to be dealt with by city, county, and state officials. The role of the federal government in such a local concern is justifiably limited by the federalist structure of the American system of government. As the Tenth Amendment makes clear, the states and the people retain all powers not specifically delegated to the federal government by the Constitution.[20] Thus, the presumption that federal agencies have the ability, even the right, to take command of a local situation just because it is deemed important by Washington rests on shaky ground.

Virtually all federal response plans attempt to finesse this issue by assuming local officials have asked for federal help, usually by the governor or the President declaring a state of emergency. However, when applied to a military response to a nuclear terrorist incident, this assumption runs into several potential difficulties. While it is highly unlikely any governor would believe his or her state has the resources to handle such an incident on its own, numerous factors may complicate and slow a federal response precisely when such delays can least be tolerated.

It is entirely plausible that the federal government would receive a nuclear terrorist threat first (for example, via intelligence channels) and local officials might not even be aware they should be asking for federal help. While federal officials have a moral obligation to inform their local counterparts in such a situation, "federal authorities are not required--indeed, in some cases they are prohibited from doing so--to notify other federal, state, and local officials about potential terrorist attacks." [21] State and local officials, for their part, might hesitate to inform the federal government (or to authorize a federal response once informed) if the threat is at all questionable in nature, due to fears of inciting mass hysteria without sufficient reason. As Fred Iklé has noted, "Local officials at the state, county, or municipal level who are reluctant in a crisis to relinquish local assets for regional or national purposes may exploit unclear authorities to delay action." [22]

The local authorization of a military response is another potential concern. While attempting to keep an already tense situation under control, few state and local officials would relish the thought of the military rolling into town with weapons at the ready. Moreover, asking for federal help after a disaster (when the Army shows up with shovels and sandbags, rather than M-16s) is far different from authorizing a military response in an as-yet-unresolved crisis in which the possibility for disaster remains an open question.

This tension between the various levels of government is a fundamental and important precept of American governance. However, in an emergency situation with so much at stake, exceptions can and will be made. As long as the federal government remains the only entity capable of responding to a nuclear terrorist incident, the federal government is likely to retain the authority to act with or without local acquiescence. Assuming this as a practical matter is, however, unacceptable. Such a policy--and the legal authority to carry it out--needs to be made clear before an incident occurs. The alternative could have dire consequences for the American system.

## **Possible Repercussions**

A nuclear terrorist incident--regardless of outcome--would garner massive public attention. If, as would be expected, the military became involved, that attention would only increase. The potential legal and political repercussions warrant serious thought in advance. As Colonel Thomas Lujan, the Staff Judge Advocate for US Special Operations Command, has pointed out:

A major terrorist incident that requires the active participation of the armed forces on a domestic battlefield . . . will become the target of scrutiny unparalleled in the American experience. The level of media interest will be commensurate with that accorded to Waco, Ruby Ridge, or the Oklahoma City bombing. Additionally, our governmental investigative agencies will be galvanized, with the FBI, as the lead federal agency, defining the site as a crime scene (under current rules) and trying to conduct a complete forensic workup on all weapons and individuals involved. The Department of Justice probably will review the procedures of the FBI. These reviews will occur even in the context of a perfect operation. If it is found not to be perfect, one can rest assured that a DOD blue-ribbon panel will be appointed to get

to the bottom of the story. And notwithstanding all that scrutiny, it is highly likely that Congress will see fit to hold protracted hearings on the matter. Finally, in our society the prospect of criminal and civil litigation must also be expected.[23]

Thus, even a "perfect operation" would be subject to unprecedented scrutiny. Once a domestic nuclear terrorist incident has been resolved, this examination will focus on two issues above all others: the success of the operation and the legality of the response. Success is defined simply as preventing the detonation of the nuclear device. Legality involves keeping the operation on firm constitutional and legal grounds.

The review of a best-case scenario--in which DOD prevented detonation while acting within its legal authority--would most likely revolve around the terrorists themselves and focus on how they were able to acquire their weapon and get it into the United States. All in all, that would be a relatively painless procedure for the military that would likely result in increased funding for any additional responses to future incidents and possible expansion of legal authority to react again. This expanded authority, however, could draw DOD deeper into domestic counterterrorism and law enforcement responses, a responsibility that the military neither needs nor wants.

A successful, but illegal operation--in which DOD prevents detonation, but goes beyond its legal authority in doing so--could ultimately have the same effect. Although the military would no doubt be subjected to significant criticism and possible censure for crossing a legal boundary, the success of the mission might cause the military's authority to be expanded in the hope of repeating the success without breaking the law during the next crisis.

An operation in which DOD acted entirely within its legal authority, but failed to prevent detonation of the device could have a negative consequence of a different nature. If the military shows itself incapable of responding to a nuclear incident effectively, the responsibility could fall to other, less-capable federal assets, thus jeopardizing future responses. If, on the other hand, the military is believed to have failed as a result of excessive legal limits placed upon it, DOD's authority might be unnecessarily expanded.

Finally, the worst possible scenario--an illegal response by DOD that nevertheless results in a detonation--could combine the worst elements of the above with even more serious consequences. At the extreme (and an unplanned nuclear detonation within the United States is no doubt extreme), the President who authorized a military response of questionable legality that failed to prevent a nuclear detonation would be forced to take full responsibility for the illegal act. He might even be forced by public or political pressure to resign.

Colonel Lujan has argued that legal concerns about a military response in domestic affairs are misplaced:

Strategic leaders can take solace in the lessons learned from military participation in domestic disaster relief, for the record indicates that legal niceties or strict construction of prohibited conduct will be a minor concern. The exigencies of the situation seem to overcome legal proscriptions arguably applicable to our soldiers' conduct. Pragmatism appears to prevail when American soldiers help their fellow citizens.[24]

However, he fails to consider the possibility that the military itself might actually be blamed for causing the disaster, by accidentally causing or simply failing to prevent a nuclear detonation. In such a situation, "pragmatism" would appear to be an exceedingly weak foundation upon which to base life-and-death decisions with national and international ramifications. The possibility of blame--moral, legal, and political--being attached to everyone from the Commander-in-Chief to the troops in the field is all too real. As Ms. Kayyem has written, "The cost of ignoring the law, of having an 'apologize later' policy, would only further a terrorist's goal of wreaking havoc." [25] Such a policy also does nothing to help those currently planning the federal response.

### **DOD's Response to Nuclear Terrorism**

The prevailing unclassified Department of Defense authority on domestic nuclear terrorism is DOD Directive 3150.5, "DOD Response to Improvised Nuclear Device (IND) Incidents." [26] This directive assigns the various DOD elements their responsibilities during such a response. Most important, the directive assigns the Assistant Secretary of Defense for International Security Affairs (since changed to the Assistant Secretary of Defense for Special Operations and Low Intensity Conflict [ASD/SOLIC]) responsibility as the DOD Executive Agent. As such, ASD/SOLIC is charged with

"establishing IND response policy and . . . providing guidance to the services and DOD agencies" and coordinating "interdepartmental exercises and operations." [27] Each of the three major services is also tasked to "provide a trained response team of EOD [explosive ordnance disposal] personnel and other required support for responding to IND incidents" anywhere in the world. [28]

What the directive does not make clear is which military units would actually respond to a nuclear terrorist incident within the United States. The Army has been assigned as executive agent for domestic counterterrorism and would seem the logical choice. According to open-source DOD documents, this mission falls to the Army's 52d Ordnance Group (EOD) which:

Provides military explosive ordnance disposal (EOD)/bomb squad units to defeat or mitigate the hazards from conventional, nuclear, or chemical military munitions and weapons of mass destruction (WMD) throughout [the continental United States] as requested by local, state, [and] federal law enforcement or military authorities. [29]

However, as evidence of the conflicting guidance given to response units, the classified Chairman of the Joint Chiefs of Staff Contingency Plan that addresses DOD's counterterrorism policies assigns IND "render safe" responsibilities to a Joint Special Operations Task Force. Thus, even within a purely military response, there is the possibility of conflicting authorizations.

Whatever its response to domestic nuclear terrorism, DOD would not likely act alone. Rather, the military would act with and in support of other federal agencies, principally the Department of Energy and the Federal Bureau of Investigation.

### **DOD Support to Other Federal Agencies**

The federal response to a terrorist incident with an improvised nuclear device was apparently not given serious thought until the 1970s. One early incident occurred in May 1974, when "the FBI alerted the Atomic Energy Commission [AEC, a precursor to the Department of Energy (DOE)] to a reported [nuclear] terrorist threat in Boston." [30] Fortunately, this threat turned out to be a hoax (a 14-year old boy was attempting to extort \$1 million from the US government). However, the poor response of the AEC (it reportedly took between 12 and 15 hours to move all of the required personnel and equipment from Las Vegas to Boston) proved the need for greater planning and coordination. [31] The Nuclear Emergency Search Team (NEST) was created in early 1975 in an attempt to prevent a repeat of that poor performance. [32]

Although housed in DOE (or its precursors), NEST has always relied upon the Defense Department to perform the actual render safe procedures in a nuclear incident. [33] According to one of the original organizers of the NEST, Mahlon Gates, DOE is responsible for finding, identifying, and assessing the device, but "the Army's EOD teams are to provide access for diagnostics and perform the render safe." [34] While DOD will perform the required render safe procedures, the military remains heavily dependent on the nuclear expertise within DOE in designing those procedures. A recent DOE brochure on the NEST program describes the current joint DOE/DOD response as follows:

The ultimate goal in resolving a nuclear terrorism crisis is to keep the terrorist device from producing a nuclear yield. This involves special explosive ordnance disposal (EOD) procedures conducted by highly-trained technical personnel. DOE Joint Technical Operations Teams [JTOT] have been designated to work with military EOD teams during all phases of a crisis response. [35]

According to former DOD and current DOE official James McDonnell, the JTOT "provided not only the capability to render safe a [nuclear] device, but the team also could be tailored to the specific mission and quickly deployed." [36] John Gordon, administrator for nuclear security at the National Nuclear Security Administration (NNSA), recently offered this description of JTOT in testimony before Congress:

NEST Joint Technical Operations [Team] components support DOD and Federal Bureau of Investigation explosive ordnance disposal personnel in rendering safe a nuclear or radiological [weapon of mass destruction]. These operations may be conducted worldwide and in a non-permissive or hostile

environment.[37]

Although JTOT can support either DOD or the FBI, the FBI itself still relies upon the Department of Defense to perform nuclear render safe missions.

The FBI is responsible for prosecuting violations of the Atomic Energy Act of 1954, which includes nuclear terrorism. Current US government policy for counterterrorism is based upon Presidential Decision Directive 39 (PDD-39). The FBI has been the lead federal agency for crisis management of domestic terrorism since at least 1982,[38] and PDD-39 reaffirmed that responsibility.[39]

The FBI, however, has always looked to DOD to perform the render safe procedures on a nuclear device. A series of memoranda of understanding and interagency agreements over the past three decades makes DOD's lead role abundantly clear.[40] The more recent *Terrorism Incident Annex to the Federal Response Plan* demonstrates that this situation has not changed:

As directed in PDD-39, the Department of Defense will activate technical operations capabilities [i.e., render safe procedures] to support the federal response to threats or acts of WMD terrorism. DOD will coordinate military operations within the United States with the appropriate civilian lead agency(ies) for technical operations.[41]

As the assigned lead federal agency, the FBI is attempting to strengthen its abilities to respond to nuclear terrorism. The FBI has added personnel from DOE and the Army to its staff at the Hazardous Devices School (its bomb technician training center) to teach "local bomb technicians some basic principles of nuclear, radiological, chemical, and biological device construction and operation." [42] Once properly trained, these local bomb techs can be issued a radiation pager so that "when a bomb technician approaches a device, he or she will be able to immediately determine if it contains nuclear material" and alert the FBI.[43]

The FBI has "approximately 100 special agents" with the proper training as bomb technicians and the required security clearances to allow them access to nuclear weapon design information that could enable them to augment the local bomb tech's response.[44] However, neither the local bomb tech nor the FBI special agent is expected to render the device safe. The additional training and equipment is all designed to identify and assess a nuclear device and then "establish communications with the national response teams [i.e., the military EOD units] to ensure that the information collected is passed to the scientific teams [i.e., DOE] for further study." [45] Thus, all of the additional preparations--while clearly valuable and worthwhile--do not alter the basic reality of a military response.

As the above demonstrates, despite significant roles assigned to the FBI and DOE, the entire federal response to a domestic nuclear terrorist incident boils down to a military EOD team which, by virtue of being a DOD asset, may not have the legal authority to act in some cases.

### **Responding to Accidents and Emergencies**

Although DOD remains a supporting agency (albeit a very important one), during a domestic nuclear terrorist incident, there are radiological incidents in which DOD can assume lead federal agency responsibilities. These incidents are covered by DOD Directive 3150.8, "DOD Response to Radiological Accidents"[46] (essentially DOD's nuclear consequence management document). This directive "promulgates DOD policy and planning guidance to implement" the *Federal Radiological Emergency Response Plan (FRERP)* and "continues to authorize publication" of the *Nuclear Weapon Accident Response Procedures (NARP) Manual*. [47] Each of these documents provides far more detail than the directive itself.

The FRERP describes the roles and responsibilities of all federal agencies that may be required to participate in a radiological emergency. Specifically, the FRERP "covers any peacetime radiological emergency that has actual, potential, or perceived radiological consequences within the United States . . . and that could require a response by the federal government." [48] However, the FRERP does not address the possibility of nuclear terrorism directly. While admitting that terrorism is a "complicating dimension" requiring "specialized technical expertise/actions," the FRERP nevertheless argues that "the coordinated response to contain or mitigate a threatened or actual release of radioactive

material would be essentially the same whether it resulted from an accidental or deliberate act." [49] This statement shows the bias (as does most of the FRERP) toward consequence management, despite the fact that the FRERP is also intended to include "potential or perceived radiological consequences." This bias most likely results from the fact that the FRERP is a product of the Federal Emergency Management Agency, the lead federal agency for consequence management, and it shows, at least in part, the fuzziness of the line between crisis and consequence management in many cases.

By comparison, the *NARP Manual* is written specifically for the Department of Defense in order to "prepare for and respond to a radiological accident or event" and provide "a framework for DOD elements responding to non-DOD radiological events under the FRERP or interagency support agreements." [50] As such, it is more clearly a consequence management document than is the FRERP. The FRERP, however, most clearly explains the circumstances under which DOD can be declared the lead federal agency.

According to the FRERP, "DOD will be the [lead federal agency] if the emergency involves one of its facilities or a nuclear weapon in its custody." [51] In such a case, DOD can declare a National Defense Area around the device and effectively federalize the property it needs for the duration of the emergency. [52] The FRERP defines a National Defense Area as:

An area established on non-federal lands located within the United States, its possessions or its territories, for safeguarding classified defense information or protecting DOD equipment and/or material. Establishment of a National Defense Area temporarily places such non-federal lands under the effective control of the Department of Defense and results only from an emergency event. The senior DOD representative at the scene shall define the boundary, mark it with a physical barrier, and post warning signs. The landowner's consent and cooperation shall be obtained whenever possible; however, military necessity shall dictate the final location, shape, and size of the [area]. [53]

This is clearly an effective and necessary tool in the event of an emergency involving a US weapon. Once the area in question has been federalized, Posse Comitatus restrictions and issues of states' rights would be neutralized and the military would be able to act without those legal impediments. Moreover, given that the National Defense Area "results only from an emergency event" and only "temporarily" federalizes the area in question, once the emergency subsides (and the nuclear device is rendered safe and removed) the land reverts immediately to the original owner.

However, this mechanism would not be applicable in the case of a former Soviet "loose nuke" or a completely improvised terrorist device that did not contain any DOD material. The FRERP makes clear that DOD is the lead federal agency only if the incident occurs on DOD property or involves DOD materials. In all other cases, DOD is not the lead federal agency, and declaring a National Defense Area is not an option.

## **Conclusions**

Current US policies and laws are not properly aligned with the possibility of nuclear terrorism. The Department of Defense possesses the technical capability, but not the legal authority, to act as it needs to in most situations. Confusion over which level of government is authorized to act and which federal agency is, in fact, the lead federal agency could have catastrophic consequences during a domestic nuclear terrorist incident. As the National Commission on Terrorism has warned, "There is a risk that, in preventing or responding to a catastrophic terrorist attack, officials may hesitate or act improperly because they do not fully understand their legal authority or because there are gaps in that authority." [54] As a result, it is necessary to expand DOD's legal authority, but such action should be taken advisedly in calm deliberation rather than later in the middle of a crisis.

The practical effect of the current policy creates an armed FBI team to resolve the tactical situation, followed closely by an unarmed military EOD technician to perform the render safe procedures, who is in turn supported by DOE scientists back at the labs. However, there are inherent difficulties in attempting to supplant the FBI for DOD and vice versa in tactical situations. The two agencies, while both authorized to use deadly force, do so under an entirely different set of rules. The FBI essentially used military rules of engagement (ROE) of "shoot on sight" at Ruby Ridge and paid the price for it. At the same time, national leaders cannot expect the military to operate under law enforcement rules of engagement even when nominally acting in a law enforcement role. As Colonel Lujan has noted,



"Any military forces authorized by the President to restore domestic tranquility in terrorist incidents must be prepared to operate under military ROE." [55]

The current system of making "practical" exceptions to policy and laws is unacceptable. As one analyst put it,

Outdated and inflexible American legislation has produced a patchwork consisting of constitutional and statutory exceptions so that the realities of domestic operations can be performed. . . . The potential consequences of this approach include a convoluted command and control structure, decreased response time, and continuity-of-operations problems; it also leaves the federal response vulnerable to exploitation by the adversary. [56]

Conversely, clear lines of legal authority to respond to a nuclear terrorist incident have considerable deterrent value against the potential nuclear terrorist. [57]

The current response is too dependent on too many factors, including the ownership of the land on which the device is located, the source of the radiological materials in the device, the request for federal assistance from a state, and the coordination of responsibilities among various federal agencies. [58] As the FRERP explains:

In the event of an unforeseen type of emergency not specifically described in this plan [i.e., terrorism] or a situation where conditions exist involving overlapping responsibility that could cause confusion regarding [the lead federal agency] role and responsibilities, DOD, DOE, EPA, NASA, and NRC will confer upon receipt of notification of the emergency to determine which agency is the [lead federal agency]. [59]

Once a nuclear device has been discovered within the United States, the time has long since passed to debate such issues or address legal prerogatives. However, running roughshod over the Constitution is not the answer, even in a crisis. A far better solution is to provide for a reasoned, streamlined response that enables the President to act quickly, decisively, and legally regardless of the circumstances of the incident.

The authority of the President and, through him, the Department of Defense, to declare a National Defense Area should be expanded to include the site (or believed site) of any device credibly assessed to contain radiological materials anywhere within the United States. The FBI and DOE already have in place a well-established threat assessment structure that analyzes behavioral, operational, and technical aspects of a given threat. This system is used to determine when a threat is credible enough to warrant deploying the NEST and can be used to determine the proper time to declare a National Defense Area and deploy military assets. Using the existing FBI and DOE structure will also require civilian agencies to agree that a threat requires military involvement before DOD can respond and will prevent military units from claiming nuclear terrorism National Defense Areas on their own authority and without proper assessments.

Rather than creating some new authority, or changing existing Posse Comitatus or federalist restrictions, it would be better to expand existing authority to an additional, emergency-only situation that has been fully vetted in the courts. Such a change would eliminate current legal restrictions placed upon DOD with minimum disruption to existing laws and principles and without raising excessive concerns about the expansion of DOD authority into domestic affairs. Military officials should support this modification as the best way to maintain Posse Comitatus limitations while permitting the necessary military response.

The United States already envisions a uniform response using its DOD EOD teams. Now the nation should create a uniform authority for that response. Most important, granting DOD expanded authority to declare National Defense Areas in nuclear terrorist incidents will make all Americans safer.

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## NOTES

1. Juliette N. Kayyem, "U.S. Preparedness for Biological Terrorism: Legal Limitations and the Need for Planning," BCSIA Discussion Paper 2001-4, ESDP Discussion Paper ESDP-2001-02, John F. Kennedy School of Government, Harvard University, March 2001, p. 1.

2. Black's Law Dictionary defines "posse comitatus" as "the power or force of the county. The entire population of a county above the age of fifteen, which a sheriff may summon to his assistance in certain cases as to aid him in keeping the peace, in pursuing and arresting felons, etc." Quoted in Eric V. Larson and John E. Peters, *Preparing the U.S. Army for Homeland Security: Concepts, Issues, and Options*, RAND MR-1251/A (Santa Monica, Calif.: RAND, 2001), Appendix D, "Overview of the Posse Comitatus Act," p. 243.

3. Ibid.

4. For example, the commander of the Joint Task Force that responded to the Los Angeles riots in 1992 wrongly believed his troops were unable to engage in any law enforcement activities. See Thomas R. Lujan, "Legal Aspects of Domestic Employment of the Army," *Parameters*, 27 (Autumn 1997), 90.

5. U.S. Code, Title 18, sec. 1385, emphasis added. The law originally included only the Army. According to Lujan, the Air Force was added in 1956. According to Larson and Peters, the Navy and Marine Corps were made subject to the law by DOD Regulation (32 C.F.R. sec. 213.2, 1992).

6. Paul Schott Stevens, "U.S. Armed Forces and Homeland Defense: The Legal Framework," Center for Strategic and International Studies, Washington, D.C., October 2001, p. 23.

7. Craig T. Trebilcock, "Posse Comitatus--Has the Posse Outlived its Purpose?" Center for Strategic and International Studies Homeland Defense Working Group, Washington, D.C., March 2000, p. 2.

8. Lujan, pp. 83-85.

9. Larson and Peters, pp. 244-45.

10. Trebilcock, "Posse Comitatus--Has the Posse Outlived its Purpose?" p. 2.

11. This assistance was provided as part of the Defense Against Weapons of Mass Destruction Act of 1996. For a more complete list, see General Accounting Office, *Military Personnel: Full Extent of Support to Civil Authorities Unknown but Unlikely to Adversely Impact Retention*, GAO-01-9 (Washington: GAO, January 2001), Appendix II, "Compendium of Major Legal Authorities Authorizing DOD Support to Civil Organizations," pp. 23-31.

12. Trebilcock, "Posse Comitatus--Has the Posse Outlived its Purpose?" pp. 2-3.

13. Craig T. Trebilcock, "The Myth of Posse Comitatus," *Journal of Homeland Defense*, 27 October 2000, p. 1.

14. Larson and Peters, pp. 5-6.

15. George Washington, "Sentiments on a Peace Establishment," 2 May 1783, as quoted in Gregory J. W. Urwin, "The Army of the Constitution: The Historical Context," in . . . *to insure domestic Tranquility, provide for the common defence*. . . , ed. Max G. Manwaring (Carlisle, Pa.: US Army War College, Strategic Studies Institute, 2000), p. 34.

16. "Objections by a Son of Liberty," *New York Journal*, 8 November 1787, as quoted in Urwin, p. 41.

17. Charles J. Dunlap, Jr., "Where Domestic Security and Civil Liberties Collide," in Manwaring, p. 210.

18. Fred C. Iklé, "Defending the U.S. Homeland: Strategic and Legal Issues for DOD and the Armed Services," Center for Strategic and International Studies Homeland Defense Working Group, Washington, D.C., January 1999, p. 17.

19. Kayyem, p. 11.

20. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." US *Constitution*, 17 September 1787. See also Kayyem, p. 4.

21. Kayyem, p. 16.
22. Iklé, p. 18.
23. Lujan, p. 94.
24. Ibid., p. 85.
25. Kayyem, p. 4.
26. An IND is defined as "a device incorporating radioactive materials designed to result in the dispersal of radioactive material or in the formation of a nuclear-yield reaction. Such devices may be fabricated in a completely improvised manner or may be an improvised modification to a US or foreign nuclear weapon" in DOD Directive 3150.5, "DOD Response to Improvised Nuclear Device (IND) Incidents," 24 March 1987. It should be noted that this definition covers virtually every possible device including radiological dispersal devices (RDDs), a Russian "loose nuke," or a stolen US warhead.
27. Ibid., p. 3.
28. Ibid., pp. 3-4.
29. Department of Defense, Office of Combating Terrorism Policy and Support, "Combating Terrorism Activities, FY2001," Washington, D.C., 14 January 2000, p. 352.
30. Mahlon E. Gates, "The Nuclear Emergency Search Team," in *Preventing Nuclear Terrorism: The Report and Papers of the International Task Force on Prevention of Nuclear Terrorism*, ed. Paul Leventhal and Yonah Alexander (Lexington, Mass.: Lexington Books, 1987), p. 397.
31. According to Gates, the AEC's preparations were also complicated by multiple, oftentimes-conflicting phone calls from Washington, D.C. Ibid., p. 398.
32. Ibid.
33. Render safe procedures (RSP) are defined as, "The portion of the explosive ordnance disposal procedures involving the application of special explosive ordnance disposal methods and tools to provide the interruption of functions or separation of essential components of unexploded ordnance to prevent an unacceptable detonation" in Department of Defense, *Nuclear Weapon Accident Response Procedures (NARP) Manual*, DOD 3150.8-M (Washington: DOD, December 1999), p. 17.
34. Gates, p. 400.
35. Department of Energy, "Nuclear Emergency Search Team" brochure, internet, <http://www.dp.doe.gov/emergencyresponse/PDF/nest.pdf>, accessed 25 April 2001.
36. James F. McDonnell, "Local Bomb Squads Bolster Response to Nuclear Terror," *National Defense*, September 1999, p. 38.
37. Testimony of General John A. Gordon, USAF Ret., Undersecretary of Energy and Administrator for Nuclear Security, National Nuclear Security Administration, Department of Energy, before the Committee on Appropriations, United States Senate, 8 May 2001.
38. General Accounting Office, *Combating Terrorism: Federal Agencies' Efforts to Implement National Policy and Strategy*, GAO/NSIAD-97-254 (Washington: GAO, September 1997), p. 39. It is unknown which, if any, federal agency had the lead prior to 1982.

39. The Federal Emergency Management Agency (FEMA) is the lead federal agency for consequence management, and the State Department acts as the lead federal agency for international terrorist incidents. DOD supports the lead federal agency in all cases.
40. "Memorandum of Understanding Between the Energy Research and Development Administration [ERDA] and the Federal Bureau of Investigation for Responding to Nuclear Threat Incidents," 11 June 1976. This memorandum was modified in June 1982 to include DOE (which replaced ERDA) support of the FBI response to non-nuclear Sophisticated Improvised Explosive Devices (SIEDs). The FBI, however, retained responsibility for requesting DOD EOD support as appropriate. See, "Modification to Memorandum of Understanding between the Department of Energy and the Federal Bureau of Investigation for Responding to Nuclear Incidents," June 1982. See also, "Joint Federal Bureau of Investigation, Department of Energy, and Department of Defense Agreement for Response to Improvised Nuclear Device Incidents," 27 February 1980; "Memorandum of Understanding Between the Department of Justice, the Department of Defense, and the Department of Energy for Response to Domestic Malevolent Nuclear Weapon Emergencies," 1991.
41. Federal Emergency Management Agency, *Federal Response Plan, Terrorism Incident Annex* (Washington: GPO, April 1999), p. TI-11.
42. McDonnell, p. 38. See also, FBI, "Five-Year Interagency Counter-Terrorism and Technology Crime Plan: An Excerpt of Strategies for Enhancing Federal Support for State and Local Counter-terrorism Efforts," February 1999.
43. *Ibid.*, p. 39.
44. *Ibid.*
45. *Ibid.*
46. Department of Defense, Directive 3150.8.
47. *Ibid.*, p. 1.
48. Federal Emergency Management Agency, *Federal Radiological Emergency Response Plan (FRERP)*, 1 May 1996, p. I-2.
49. *Ibid.*, p. II-3.
50. Department of Defense, DOD 3150.8-M, p. 45.
51. FRERP, "Appendix C: Federal Agency Response Missions, Capabilities and Resources, References, and Authorities," p. C-6.
52. A similar mechanism exists for DOE or NASA to claim a National Security Area during a similar incident.
53. FRERP, "Appendix B: Definitions," p. B-3.
54. National Commission on Terrorism, *Countering the Changing Threat of Terrorism* (Washington: GPO, 7 June 2000), p. 37.
55. Lujan, p. 94.
56. Sean M. Maloney, "Domestic Operations: The Canadian Approach," *Parameters*, 27 (Autumn 1997), 150.
57. Iklé, p. 18.
58. For additional complicating factors, including declarations of a state of emergency, of martial law, and of war, see Iklé, p. 17.

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