



DEPARTMENT OF THE ARMY
UNITED STATES MILITARY ACADEMY
West Point, NY 10996

MADN-SOC

23 SEP 05

MEMORANDUM

SUBJECT: Katrina Lessons-Learned: National Contingency Planning for Domestic Incidents

Bottom Line

A significant, if not principal, factor in the federal government's failure to respond adequately to Hurricane Katrina was the lack of a credible federal process for developing and coordinating national contingency plans for specific domestic incident scenarios. DoD and DHS must develop, in partnership and on an urgent basis, contingency plans for specific domestic incident scenarios that meet the same standards of specificity, coordination, commitment of assets, and resourcing as current US Government contingency plans for major theater wars overseas. (See recommendation at TAB A). Changes to current law are *not* necessary to develop such plans or to authorize the employment of active duty military forces to respond to domestic incidents within the United States.

The Problem

Currently, national contingency plans to ensure the protection of American citizens on American soil are subordinate, as a matter of planning, to the protection of citizens – our own and others' – on foreign soil. Remarkably, there is no single plan for integrating DoD and DHS activities in the event of simultaneous catastrophic attacks on the homeland, and major theater war overseas. While overseas warplans serve to protect US vital interests, there is no interest more vital than the protection of our own citizens within our own territory.

Federal policy and national law promulgated both before and after 9/11 provide sufficient authority and guidance to develop national contingency plans for specific domestic incident scenarios, and to mobilize and deploy DoD assets. However, DoD has resisted, as a matter of policy, the commitment (or even the discussion of commitment) of assets to domestic plans, coordinated in advance among federal agencies, and vertically with state and local governments and private sector entities. While DoD has exercised significant initiative over many years to develop its own capabilities and internal plans for domestic response, and is extremely responsive to specific agency requests for assistance, such efforts proved insufficient for bringing DoD's formidable capabilities to bear in the Katrina response in a coordinated and timely manner.

In spite of several days of warning, the vast majority of what DoD eventually deployed post-Katrina did not mobilize until after the storm hit, and required a build-up of many days.¹ (See timeline of military support at TAB B, which is admittedly incomplete). Many of the assets that DoD eventually deployed would likely have been previously identified had there been a coordinated interagency and intergovernmental contingency plan for a catastrophic event in the Southeast United States, not to mention a specific plan for New Orleans itself, the vulnerability of which was well understood. And while it's possible that DoD itself had already identified such assets as a result of its own internal processes, such facts weren't known by other agencies, and certainly weren't pre-coordinated with DHS, the State of Louisiana and the City of New Orleans. Units eventually deployed apparently did not receive warning orders, and necessary movement did not begin, even though a worst-case and previously anticipated and modeled scenario was developing with three full days of warning (26, 27, and 28 Sep, after Katrina had already made landfall in Florida as a Category 1 on the evening of 25 Sep).

There is no way to know for sure, but had the assets which were eventually deployed been previously identified in a contingency plan, and had those assets mobilized during the three-day interval from 26-28 September, the federal government likely could have helped save many lives, and helped prevent or at least significantly curtail the lawlessness and suffering that unfolded in the first several days after the storm. The United States doesn't fight wars without such preparation and planning – there is no logical reason why we should respond to domestic disasters without such preparation.

The principal problem regarding the federal Katrina response was not an issue of law, Presidential policy, warning, capability or willingness. The principal problem was a lack of planning and coordination between federal agencies – principally DoD and DHS – and between the federal government and state and local authorities. Consequently, the President has initiated a comprehensive review of the government response to the hurricane, declared that the armed forces will have a broader role in future incidents, and has directed DHS to undertake an immediate review, in cooperation with local counterparts, of emergency plans in every major city in America.

Current National Policy Provides a Sufficient Foundation

While changes in national policy are surely forthcoming, existing policy provides a sufficient foundation for ensuring an effective federal response to events on the scale of Katrina.

¹ Based on a quick and cursory review, it appears that the USS Bataan and HSV Swift, out of Naval Station Ingleside, Texas, were the only significant active duty military assets to pre-deploy. Katrina made landfall at 6:10 am on Monday, 29 August. Three days later, on Thursday, 1 September, US NORTHCOM announced it was sending a six-member planning team from Joint Task Force-Civil Support, was transporting 8 swift water rescue teams from California, and was readying the Iwo Jima Amphibious Readiness Group to sail from Norfolk and arrive off the Louisiana coast in five days. On the same day, DHS announced that DoD was anticipating moving the hospital ship USS Comfort from Baltimore. On Saturday, 3 September, the President announced the deployment of 7,000 more active-duty forces.

On July 16, 2002, the President released the *National Strategy for Homeland Security*, which directed the consolidation of existing federal emergency response plans (p. 42), creation of a national incident management system (pp. 42-43), and a review of legal authority for military assistance in domestic security (p. 48). While DHS has developed and is implementing the National Response Plan (NRP) and the National Incident Management System (NIMS), no progress (at least none in coordination with other agencies outside DoD) has been made in reviewing the military's legal authorities.

The Homeland Security Act of 2002 created statutory requirements for comprehensive emergency response plans (such as the NRP), directed creation of the NIMS, vested DHS with the responsibility to provide the federal government's response to major disasters and to coordinate federal response resources, and conveyed the sense of Congress that "the Posse Comitatus Act is not a complete barrier to the use of the Armed Forces for a range of domestic purposes, including law enforcement functions, when the use of the Armed Forces is authorized by Act of Congress or the President determines that the use of the Armed Forces is required to fulfill the President's obligations under the Constitution to respond promptly in time of war, insurrection, or other serious emergency." (See TAB C)

In February 2003, the President released Homeland Security Presidential Directive-5 (HSPD-5), "Management of Domestic Incidents" (see TAB D). HSPD-5 designated the Secretary of Homeland Security as the principal federal official for domestic "incidents of national significance." Katrina was the first incident so declared. HSPD-5 also directed development of the National Response Plan to align Federal coordination structures, capabilities, and resources into a unified, all-discipline, and all-hazards approach to domestic incident management.

During the development of each of these documents, the goal that DoD consistently, aggressively, and successfully pursued was inclusion of language that made provision of military support to civilian authorities conditional on military readiness (meaning readiness to carry out DoD's overseas warfighting requirements; for example, see paragraph 9 of HSPD-5 at TAB D). During the interagency planning for a significant domestic terrorist attack coincident with the planned invasion of Iraq (unclassified name was Operation Liberty Shield), DoD refused to discuss, let alone commit, specific assets to support such an event, insisting that the Department would respond to specific agency requests when they arose.

In July 2004, The Homeland Security Council (HSC) – in partnership with the Department of Homeland Security (DHS), the federal interagency, and state and local homeland security agencies – developed and published fifteen all-hazards planning scenarios for use in national, federal, state, and local homeland security preparedness activities. The scenarios were designed to be the foundational structure for the development of national preparedness standards and federal, state, and local contingency plans.² Scenario 10 (Major Hurricane) predicts 1,000 fatalities, evacuations of one million people, and serious damage to 100,000 homes. Apparently, the DoD has made no serious effort to coordinate its plans for this scenario (to the extent such plans exist) with the other relevant agencies of the federal government.

² See http://www.globalsecurity.org/security/library/report/2004/hsc-planning-scenarios-jul04_intro.htm

Current Law Provides Sufficient Authority

The Constitution of the United States directs the federal government to protect the country, both domestically and against external threats, in a single guarantee to the states: “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence” (Article IV, Section 4).

Both the Insurrection Act and the Stafford Act vest the DoD with significant statutory authority and responsibility for domestic response (see TABS E and F), and the Posse Comitatus Act poses no significant impediment to the domestic employment of federal military forces in response to an event like Hurricane Katrina (see TAB G). The DoD’s interpretation of Posse Comitatus is more strict than the law requires, and the Congress has authorized significant exceptions (e.g. drug interdiction). DoD’s overly restrictive interpretation of Posse Comitatus is not unlike the pre-9-11 Attorney General guidelines, which interpreted the Foreign Intelligence Surveillance Act of 1978 (FISA) in an overly restrictive manner, jeopardizing national security (see pages 78-80 of the 9-11 Commission Report). We can expect that post-Katrina legislation will provide explicit statutory authority to do that which the law already allows, much as the USA PATRIOT Act provided explicit authority to do that which FISA already allowed. DoD’s stringent legal interpretation of Posse Comitatus is not consistent with DoD’s aggressive legal interpretation of other statutes relevant to the war on terror, particularly statutes regarding DoD’s intelligence and information gathering authorities (including authority to gather and maintain information on US persons for the purpose of ensuring the force protection of domestic US military facilities). The idea that the visible use of active duty military forces on US soil, under intense public scrutiny, is a greater threat to civil liberties than the gathering and maintaining of information on US persons (the fact of which is unbeknown to virtually all Americans, and the process of which is classified and not subject to scrutiny) is simply not credible.

Current DoD Policy is Not Sufficient to Support Federal Government Constitutional Responsibilities

DoD treats assets (such as strategic airlift to move materiel, mobile hospitals to augment the HHS and VA contingency medical system, or military police for civil order) as tied to its overseas requirements, and will only consider the diversion of such assets for domestic purposes on a case-by-case basis in response to a specific agency request. To respond to such requests, the DoD administers the Joint Directorate of Military Support (JDOMS) process, which previously had been administered by the Army G3 under the Secretary of the Army’s authority to act as Secretary of Defense’s executive agent for military support. While the JDOMS process is extremely responsive in terms of answering agency requests, it is nonetheless a reactive, case-by-case system.

DoD has done significant internal planning and made significant adaptations over the last decade to ensure DoD has organic capability to deal with domestic incidents. DoD created and fielded WMD Civil Support Teams (mandated by the Nunn-Lugar-Domenici legislation in 1997), and established Joint Task Force-Civil Support in 1999. The Joint Staff began exploring the creation

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of a Unified Command for homeland defense beginning as early as 1997 (largely as a result of the Army's initiative), seriously considered such a plan in 1999 (though deferred the plan for future consideration, due in part to anticipated opposition from civil libertarian groups), vested Joint Forces Command with significant homeland security responsibilities in 1999, and created US Northern Command (NORTHCOM) in 2002, the first time since World War II that a unified combatant command had geographic responsibility for military operations in the United States. For years, the Army G3 has coordinated The Army Plan (TAP) process and developed the Mission Task Organized Force (MTOF, which drives Army force structure requirements) based on "simultaneity stacks" that incorporate domestic incidents. But those are internal DoD processes designed to identify capabilities and generate requirements, not plans to bring specific capabilities to bear in concert with other agencies.

While DoD established NORTHCOM in 2002, it did not reorient any operational military forces towards the homeland security mission. NORTHCOM today consists of a 4-star command headquarters (about 500 personnel), the North American Aerospace Command (NORAD), Joint Force Headquarters-Homeland Defense (JFHQ-HD; about 160 personnel), Joint Task Force-Civil Support (JTF-Civil Support about 160 personnel), and Joint Task Force-6 (JTF-6; about 160 personnel). NORTHCOM assumes operational control of forces "chopped" from other combatant commands on a situation-dependent basis, and will become involved in a domestic incident "only when an emergency exceeds the capabilities of local, state and federal agencies." As a matter of policy, NORTHCOM provides support that is "limited, localized and specific."

DoD has undertaken to improve its coordinating mechanisms with DHS, having established a Homeland Defense Coordination Office at DHS headquarters to coordinate with DHS' nascent "Integration Staff," or "I-Staff." DoD-DHS cooperation is apparently improving (according to officials in both DoD and DHS). However, DoD's underlying policies regarding domestic incidents has not changed.

DoD doctrine also distinguishes between "homeland defense" and "homeland security."³ While the distinction appropriately reflects that the DoD should act in support of civilian agencies in domestic, or "homeland security," contingencies, it has also reinforced the pervasive interpretation and culture within the Pentagon that domestic military missions are subordinate to, and a distraction from, readiness for overseas warfighting requirements.

DoD is the Only Agency with the Breadth and Depth of Capability to Respond to Catastrophic Domestic Incidents ("Incidents of National Significance")

DoD is the only agency that has the depth and breadth of capability in the near-term to respond to an incident on the magnitude of Katrina – or more accurately, the federal government cannot respond in the near-term to an incident on the magnitude of Katrina, with sufficient depth and breadth of capability, without DoD taking a major, even preponderant, role.

³ The DoD defines "homeland defense" as "the protection of United States territory, domestic population, and critical defense infrastructure against external threats and aggression." The *National Strategy for Homeland Security* defines "homeland security" as "a concerted national effort to prevent terrorist attacks within the United States, reduce the vulnerability of the United States to terrorism, and minimize the damage and assist in the recovery from terrorist attacks."

Some may argue that DHS and FEMA should build organic capability to deal with such incidents, but DHS does not command nearly the congressional funding support as DoD, and it never will. Furthermore, DHS funding issues will always be embroiled in domestic politics to a far greater degree than DoD funding issues. Even if DHS had such support, it cannot create the necessary capability overnight, nor even within the next few years. DHS and DoD working together, with a coordinated plan to justify the congressional authorizations, could garner funds to expand DoD capabilities as necessary in the near-term to retain warfighting capability, while building appropriate organic capabilities in DHS in the mid- and long-term.

DoD should not shoulder the whole burden, but within the next few years, DoD must shoulder most of the burden. Doing so effectively requires a willingness to align specific assets and units (hospital ships, command and control assets, medical units, water purification units, military police, strategic lift and other transportation assets, search and rescue, psychological operations elements to disseminate information in the disaster area, etc) well-coordinated, specific, interagency and intergovernmental contingency plans.

Initiating National Domestic Incident Contingency Planning on an Urgent Basis

DoD and DHS must develop, in partnership and on an urgent basis, contingency plans for specific domestic incident scenarios that meet the same standards of specificity, coordination, commitment of assets, and resourcing as current US Government contingency plans for major theater wars overseas. Since Desert Storm, the US Government has known exactly what forces would flow, in what order, on what timeline, under what command arrangements, in coordination with what other agencies or foreign militaries, should war break out in Southwest Asia first, or Northeast Asia first. The US Government has known exactly what we would divert from one theater to the other should both wars break out nearly simultaneously. We made disciplined judgments of where we could assume risk in either eventuality, and applied those judgments systematically to adjust war plans, force structure, modernization requirements, and funding. Similarly, the US Government today should know exactly how federal government elements will respond to likely and/or high-consequence domestic incidents which occur as a single event, or which occur nearly simultaneously with overseas wars in one or more theaters.

Such plans will be extremely challenging to develop:

- DHS' capability and experience in highly specific contingency planning is nowhere near that of DoD's, and will remain inferior for years;
- DHS will also need to effect coordination with a broad range of other federal entities which play important roles (e.g. VA, HHS, EPA, FBI, etc.);
- The federal government will need to coordinate contingency plans with state and local authorities and governments, which have significant differences in vulnerability and circumstances, and widely varying levels of competence, organization, funding, and political will;

- The government will need to coordinate contingency plans with private sector entities (such as the Red Cross); and
- Domestic contingency planning will intersect with a fluid domestic political environment with which traditional warplanning rarely, if ever, intersects.

However, such plans are necessary, and achievable. At a minimum, they will require key players at all levels (particularly DoD) to be specific and prescriptive about what their agencies will do and provide, in coordination with other agencies, when the most-dangerous and the most-likely domestic incident scenarios occur. The United States is in a strategic environment that demands, and will always demand, the government's preparedness for catastrophic domestic events. The threat of catastrophic terrorism is a permanent strategic reality, regardless of our success in defeating particular terrorist groups. Preparedness requires planning. The federal government's efforts to accomplish this since 9-11 have been insufficient, and DoD has a major role in addressing this shortcoming.

Specifically, DoD should:

- Continue its policy stance that civilian agencies (i.e. DHS under the Homeland Security Act and HSPD-5) should remain in the lead for domestic incidents, however ...
- Reverse its policy of not committing specific assets in support of domestic incident contingency plans;
- Complete, on an expedited basis and in consultation with other federal agencies and the Congress, the legal review of military authorities directed on page 48 of the *National Strategy for Homeland Security*;
- Authorize US NORTHCOM, as the DoD executive agent with operational responsibility, to interact directly with the DHS in the development of federal and national (i.e. intergovernmental) domestic incident contingency plans, under the civilian oversight of the Assistant Secretary of Defense for Homeland Defense;
- Provide resources, assets, and expertise, within appropriate circumstances and limits, to rapidly assist DHS in building a credible contingency planning apparatus within DHS' Integration Staff (I-Staff), and expand as appropriate the Defense Coordination Office within DHS;
- Develop and coordinate the domestic incident component of the Future Years Defense Program (FYDP) in parallel to DHS' Future Years Homeland Security Program (FYHSP), to produce a single DoD-DHS program and budget plan for catastrophic domestic incidents (tied to requirements generation, force structure, and operations and maintenance funding, and the equivalent civilian program and budget functions within DHS), and the President should incorporate this integrated program into the President's budget submission;

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- Partner with DHS to interact with the Congress in a coordinated way during the authorization and appropriations processes for the integrated DoD-DHS domestic incident program and budget; and
- Apportion organic forces to US NORTHCOM as necessary to support the specific contingency plans developed above.

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Attachments

TAB A – Recommendation on DoD-DHS Relationship, from CTC Homeland Security Volume

TAB B – Timeline of Military Deployments (draft)

TAB C – Section 886 of Homeland Security Act of 2002

TAB D – Homeland Security Presidential Directive-5

TAB E – The Insurrection Act

TAB F – Section 403 of the Stafford Act

TAB G – Opinions on The Posse Comitatus Act

* The views and opinions expressed herein are my own, and do not represent the official position of the United States Military Academy, the United States Army, or the Department of Defense.

TAB A

Recommendation on DoD-DHS Relationship

Excerpt from Chris Hornbarger, *National Strategy: Building Capability for the Long Haul*, in Russell Howard, James Forest, and Joanne Moore, Homeland Security and Terrorism (New York, NY: McGraw-Hill), 2005, pp. 272-322

1. Strengthen the Relationship Between the Department of Defense and the Department of Homeland Security. Perhaps the most important practical step for integrating national security and homeland security policy effectively is to strengthen the DoD-DHS relationship. While the Nation faces a single set of strategic risks, and a single array of adversaries, it lacks an integrated national contingency planning capability. DHS is still building a “joint staff” to conduct planning for its statutory mission (responding to terrorist attacks at home), while DoD conducts joint strategic planning for its statutory mission to fight wars abroad. But, while DoD’s planning incorporates potential “support” to DHS and other federal agencies in the event of a domestic attack, and while DoD has important statutory roles for domestic response under the Stafford Act, there is no national contingency planning process that integrates the highest level DoD and DHS plans.

There is no single plan for integrating DoD and DHS activities in the event of simultaneous catastrophic attacks on the homeland, and major theater war overseas. The idea that DoD’s plans would prioritize its overseas missions, within the sovereign territory of other nations, and subordinate its contribution to the domestic response, on our own sovereign territory, would not and should not make any sense to the American people. Yet this is exactly the dynamic that the current set of planning processes encourages. DoD treats assets (such as strategic airlift to move materiel, mobile hospitals to augment the HHS and VA contingency medical system, or military police for civil order) as tied to its overseas requirements, and will only consider the diversion of such assets for domestic purposes on a case-by-case basis in response to a specific agency request; DoD will not commit to the allocation of such assets under DHS or other agency plans. This is a recipe for chaos under the scenario painted above. The orientation of assets in contingency plans is the critical strategic question for guiding the long-term process of training, manning, and equipping government elements for specific missions.

It is also the critical strategic question driving the allocation of resources among response capabilities, and for balancing resources between near-term and long-term requirements. Accordingly, OMB, working with DHS and DoD, should supplement an interagency DHS-DoD strategic planning effort with a mechanism for integrating the Future Years Homeland Security Program (FYHSP) and the Future Years Defense Program (FYDP), and, if necessary, should develop a legislative proposal to cement this mechanism. The President should not continue the current practice of nesting separate budget and program review offices within HSC and NSC, but should allow OMB, which possesses real budget expertise and wherewithal, to effect such an integration.

The Defense Advanced Research Projects Agency (DARPA) and the Homeland Security Advanced Research Projects Agency (HSARPA) should establish a collaborative relationship on science and technology research that is relevant to both DoD and DHS. Given that the Nation faces one set of strategic risks, DoD and DHS should establish a joint net assessment office, or at a minimum establish a collaborative relationship between the DoD Net Assessment Office (which under the leadership of Andy Marshall has proven extremely useful over the years) and a new DHS Net Assessment Office nested within IAIP or within the DHS Secretariat. Finally, DHS should adopt the recommendation of James Carafano, Richard Weitz, and Alane Kochems to establish an Undersecretary for Policy to ensure the coherence of these efforts in partnership with DoD's Undersecretary for Policy.

2. Address the Cultural Aspect of Institutional Reform—Create “Jointness” in the Interagency. We learned the lesson with DoD that integrating the military services ultimately required the Goldwater-Nichols reforms to create a culture and personnel system of “jointness.” To effect the integration described above requires a similar effort. The President should propose, and the Congress should enact, a process to ensure that senior civilians (GS-15s and members of the Senior Executive Service) and senior military officers (Colonels and higher), within specific specialties, serve tours within the interagency planning apparatus described above, and in interagency entities such as the National Counterterrorism Center. The proposal should include a provision for a National Homeland Security University, which should share the campus at Fort McNair with the long-standing National Defense University. Finally, DHS should continue its efforts to integrate the disparate personnel systems of DHS as rapidly as possible, and should ensure that its joint strategic planning capability includes the most talented experts from across its subordinate entities.

...

The views expressed herein are those of the author and do not purport to reflect the position of the United States Military Academy, the Department of the Army, or the Department of Defense

TAB B

Timeline of Military Deployments for Katrina Disaster Relief (Compiled by the Brookings Institution, DRAFT)

Wednesday, 31 August 2005

- *National Guard*: 10,000 in LA, MS, AL, FL
- *Navy*: 7 ships staged or en route (with 6,000 active duty personnel)

Thursday, 1 September 2005

- *National Guard*: 13,000 in LA, MS, AL, FL
- 4,700 in LA; 2,700 in MS
- *Navy*: USS Truman (CVN 75) and USS Whidbey Island (LSD 41) preparing for departure

Friday, 2 September 2005

- *National Guard*: 22,000 in LA, MS, AL, FL
 - 6,500 in New Orleans
- *Army Corp of Engineers*: 400 on site in New Orleans
- *Navy*: USS Truman and USS Whidbey en route to Gulf Coast; USS Bataan and HSV2 Swift providing support off Gulf coastline; Navy Bureau of Medicine has contributed 85 personnel including 12 surgeons and physicians.
- *Air Force*: Helicopters: 35; aircraft used: C-5 Galaxy, C-17 Globemaster III, C-141 Starlifter, C-130 Hercules

Saturday, 3 September 2005

- President orders 7,000 additional troops deployed

Monday, 5 September 2005

- *National Guard*: 38,000
- *Active Duty Forces*: 13,000
- *Navy*: USS Truman operating south of Mississippi; amphibious ship pier side in New Orleans;
- 21 ships total; USS Iwo Jima (amphibious ship) enroute
- *Department of Defense*: 300 helicopters

Wednesday, 7 September 2005

- *Active duty and National Guard Forces*: 58,000
- *National Guard*: 41,000
- *Active duty*: 17,000 (from 82nd Airborne, 1st Cavalry, and 1st and 2nd Marine Expeditionary Force)
- *Navy*: 7,000 personnel operating off 21 naval ships south of Mississippi and Louisiana
- *Coast Guard*: 4,000
- *Department of Defense, Coast Guard and National Guard*: 350 helicopters, 75 fixed wing aircraft, 2 C-130 firefighting aircraft deployed to New Orleans
- 300,000 National Guard soldiers and airmen available for relief and security efforts in the United States

TAB C

Section 886 of the Homeland Security Act of 2002

§886. SENSE OF CONGRESS REAFFIRMING THE CONTINUED IMPORTANCE AND APPLICABILITY OF THE POSSE COMITATUS ACT.

(a) **FINDINGS.**—Congress finds the following:

(1) Section 1385 of title 18, United States Code (commonly known as the ‘‘Posse Comitatus Act’’), prohibits the use of the Armed Forces as a posse comitatus to execute the laws except in cases and under circumstances expressly authorized by the Constitution or Act of Congress.

(2) Enacted in 1878, the Posse Comitatus Act was expressly intended to prevent United States Marshals, on their own initiative, from calling on the Army for assistance in enforcing Federal law.

(3) The Posse Comitatus Act has served the Nation well in limiting the use of the Armed Forces to enforce the law.

(4) Nevertheless, by its express terms, the Posse Comitatus Act is not a complete barrier to the use of the Armed Forces for a range of domestic purposes, including law enforcement functions, when the use of the Armed Forces is authorized by Act of Congress or the President determines that the use of the Armed Forces is required to fulfill the President’s obligations under the Constitution to respond promptly in time of war, insurrection, or other serious emergency.

(5) Existing laws, including chapter 15 of title 10, United States Code (commonly known as the ‘‘Insurrection Act’’), and the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.), grant the President broad powers that may be invoked in the event of domestic emergencies, including an attack against the Nation using weapons of mass destruction, and these laws specifically authorize the President to use the Armed Forces to help restore public order.

(b) **SENSE OF CONGRESS.**—Congress reaffirms the continued importance of section 1385 of title 18, United States Code, and it is the sense of Congress that nothing in this Act should be construed to alter the applicability of such section to any use of the Armed Forces as a posse comitatus to execute the laws.

TAB D

Homeland Security Presidential Directive-5 (HSPD-5), February 28, 2003

Subject: Management of Domestic Incidents

Purpose

(1) To enhance the ability of the United States to manage domestic incidents by establishing a single, comprehensive national incident management system.

Definitions

(2) In this directive:

(a) the term "Secretary" means the Secretary of Homeland Security.

(b) the term "Federal departments and agencies" means those executive departments enumerated in 5 U.S.C. 101, together with the Department of Homeland Security; independent establishments as defined by 5 U.S.C. 104(1); government corporations as defined by 5 U.S.C. 103(1); and the United States Postal Service.

(c) the terms "State," "local," and the "United States" when it is used in a geographical sense, have the same meanings as used in the Homeland Security Act of 2002, Public Law 107-296.

Policy

(3) To prevent, prepare for, respond to, and recover from terrorist attacks, major disasters, and other emergencies, the United States Government shall establish a single, comprehensive approach to domestic incident management. The objective of the United States Government is to ensure that all levels of government across the Nation have the capability to work efficiently and effectively together, using a national approach to domestic incident management. In these efforts, with regard to domestic incidents, the United States Government treats crisis management and consequence management as a single, integrated function, rather than as two separate functions.

(4) The Secretary of Homeland Security is the principal Federal official for domestic incident management. Pursuant to the Homeland Security Act of 2002, the Secretary is responsible for coordinating Federal operations within the United States to prepare for, respond to, and recover from terrorist attacks, major disasters, and other emergencies. The Secretary shall coordinate the Federal Government's resources utilized in response to or recovery from terrorist attacks, major disasters, or other emergencies if and when any one of the following four conditions applies: (1) a Federal department or agency acting under its own authority has requested the assistance of the Secretary; (2) the resources of State and local authorities are overwhelmed and Federal assistance has been requested by the appropriate State and local

authorities; (3) more than one Federal department or agency has become substantially involved in responding to the incident; or (4) the Secretary has been directed to assume responsibility for managing the domestic incident by the President.

(5) Nothing in this directive alters, or impedes the ability to carry out, the authorities of Federal departments and agencies to perform their responsibilities under law. All Federal departments and agencies shall cooperate with the Secretary in the Secretary's domestic incident management role.

(6) The Federal Government recognizes the roles and responsibilities of State and local authorities in domestic incident management. Initial responsibility for managing domestic incidents generally falls on State and local authorities. The Federal Government will assist State and local authorities when their resources are overwhelmed, or when Federal interests are involved. The Secretary will coordinate with State and local governments to ensure adequate planning, equipment, training, and exercise activities. The Secretary will also provide assistance to State and local governments to develop all-hazards plans and capabilities, including those of greatest importance to the security of the United States, and will ensure that State, local, and Federal plans are compatible.

(7) The Federal Government recognizes the role that the private and nongovernmental sectors play in preventing, preparing for, responding to, and recovering from terrorist attacks, major disasters, and other emergencies. The Secretary will coordinate with the private and nongovernmental sectors to ensure adequate planning, equipment, training, and exercise activities and to promote partnerships to address incident management capabilities.

(8) The Attorney General has lead responsibility for criminal investigations of terrorist acts or terrorist threats by individuals or groups inside the United States, or directed at United States citizens or institutions abroad, where such acts are within the Federal criminal jurisdiction of the United States, as well as for related intelligence collection activities within the United States, subject to the National Security Act of 1947 and other applicable law, Executive Order 12333, and Attorney General-approved procedures pursuant to that Executive Order. Generally acting through the Federal Bureau of Investigation, the Attorney General, in cooperation with other Federal departments and agencies engaged in activities to protect our national security, shall also coordinate the activities of the other members of the law enforcement community to detect, prevent, preempt, and disrupt terrorist attacks against the United States. Following a terrorist threat or an actual incident that falls within the criminal jurisdiction of the United States, the full capabilities of the United States shall be dedicated, consistent with United States law and with activities of other Federal departments and agencies to protect our national security, to assisting the Attorney General to identify the perpetrators and bring them to justice. The Attorney General and the Secretary shall establish appropriate relationships and mechanisms for cooperation and coordination between their two departments.

(9) Nothing in this directive impairs or otherwise affects the authority of the Secretary of Defense over the Department of Defense, including the chain of command for military forces from the President as Commander in Chief, to the Secretary of Defense, to the commander of military forces, or military command and control procedures. The Secretary of Defense shall provide military support to civil authorities for domestic incidents as directed by the President

or when consistent with military readiness and appropriate under the circumstances and the law. The Secretary of Defense shall retain command of military forces providing civil support. The Secretary of Defense and the Secretary shall establish appropriate relationships and mechanisms for cooperation and coordination between their two departments.

(10) The Secretary of State has the responsibility, consistent with other United States Government activities to protect our national security, to coordinate international activities related to the prevention, preparation, response, and recovery from a domestic incident, and for the protection of United States citizens and United States interests overseas. The Secretary of State and the Secretary shall establish appropriate relationships and mechanisms for cooperation and coordination between their two departments.

(11) The Assistant to the President for Homeland Security and the Assistant to the President for National Security Affairs shall be responsible for interagency policy coordination on domestic and international incident management, respectively, as directed by the President. The Assistant to the President for Homeland Security and the Assistant to the President for National Security Affairs shall work together to ensure that the United States domestic and international incident management efforts are seamlessly united.

(12) The Secretary shall ensure that, as appropriate, information related to domestic incidents is gathered and provided to the public, the private sector, State and local authorities, Federal departments and agencies, and, generally through the Assistant to the President for Homeland Security, to the President. The Secretary shall provide standardized, quantitative reports to the Assistant to the President for Homeland Security on the readiness and preparedness of the Nation -- at all levels of government -- to prevent, prepare for, respond to, and recover from domestic incidents.

(13) Nothing in this directive shall be construed to grant to any Assistant to the President any authority to issue orders to Federal departments and agencies, their officers, or their employees.

Tasking

(14) The heads of all Federal departments and agencies are directed to provide their full and prompt cooperation, resources, and support, as appropriate and consistent with their own responsibilities for protecting our national security, to the Secretary, the Attorney General, the Secretary of Defense, and the Secretary of State in the exercise of the individual leadership responsibilities and missions assigned in paragraphs (4), (8), (9), and (10), respectively, above.

(15) The Secretary shall develop, submit for review to the Homeland Security Council, and administer a National Incident Management System (NIMS). This system will provide a consistent nationwide approach for Federal, State, and local governments to work effectively and efficiently together to prepare for, respond to, and recover from domestic incidents, regardless of cause, size, or complexity. To provide for interoperability and compatibility among Federal, State, and local capabilities, the NIMS will include a core set of concepts, principles, terminology, and technologies covering the incident command system; multi-agency coordination systems; unified command; training; identification and management of

resources (including systems for classifying types of resources); qualifications and certification; and the collection, tracking, and reporting of incident information and incident resources.

(16) The Secretary shall develop, submit for review to the Homeland Security Council, and administer a National Response Plan (NRP). The Secretary shall consult with appropriate Assistants to the President (including the Assistant to the President for Economic Policy) and the Director of the Office of Science and Technology Policy, and other such Federal officials as may be appropriate, in developing and implementing the NRP. This plan shall integrate Federal Government domestic prevention, preparedness, response, and recovery plans into one all-discipline, all-hazards plan. The NRP shall be unclassified. If certain operational aspects require classification, they shall be included in classified annexes to the NRP.

(a) The NRP, using the NIMS, shall, with regard to response to domestic incidents, provide the structure and mechanisms for national level policy and operational direction for Federal support to State and local incident managers and for exercising direct Federal authorities and responsibilities, as appropriate.

(b) The NRP will include protocols for operating under different threats or threat levels; incorporation of existing Federal emergency and incident management plans (with appropriate modifications and revisions) as either integrated components of the NRP or as supporting operational plans; and additional operational plans or annexes, as appropriate, including public affairs and intergovernmental communications.

(c) The NRP will include a consistent approach to reporting incidents, providing assessments, and making recommendations to the President, the Secretary, and the Homeland Security Council.

(d) The NRP will include rigorous requirements for continuous improvements from testing, exercising, experience with incidents, and new information and technologies.

(17) The Secretary shall:

(a) By April 1, 2003, (1) develop and publish an initial version of the NRP, in consultation with other Federal departments and agencies; and (2) provide the Assistant to the President for Homeland Security with a plan for full development and implementation of the NRP.

(b) By June 1, 2003, (1) in consultation with Federal departments and agencies and with State and local governments, develop a national system of standards, guidelines, and protocols to implement the NIMS; and (2) establish a mechanism for ensuring ongoing management and maintenance of the NIMS, including regular consultation with other Federal departments and agencies and with State and local governments.

(c) By September 1, 2003, in consultation with Federal departments and agencies and the Assistant to the President for Homeland Security, review existing authorities and regulations and prepare recommendations for the President on revisions necessary to implement fully the NRP.

(18) The heads of Federal departments and agencies shall adopt the NIMS within their departments and agencies and shall provide support and assistance to the Secretary in the development and maintenance of the NIMS. All Federal departments and agencies will use the NIMS in their domestic incident management and emergency prevention, preparedness, response, recovery, and mitigation activities, as well as those actions taken in support of State or local entities. The heads of Federal departments and agencies shall participate in the NRP, shall assist and support the Secretary in the development and maintenance of the NRP, and shall participate in and use domestic incident reporting systems and protocols established by the Secretary.

(19) The head of each Federal department and agency shall:

(a) By June 1, 2003, make initial revisions to existing plans in accordance with the initial version of the NRP.

(b) By August 1, 2003, submit a plan to adopt and implement the NIMS to the Secretary and the Assistant to the President for Homeland Security. The Assistant to the President for Homeland Security shall advise the President on whether such plans effectively implement the NIMS.

(20) Beginning in Fiscal Year 2005, Federal departments and agencies shall make adoption of the NIMS a requirement, to the extent permitted by law, for providing Federal preparedness assistance through grants, contracts, or other activities. The Secretary shall develop standards and guidelines for determining whether a State or local entity has adopted the NIMS.

Technical and Conforming Amendments to National Security Presidential Directive-1 (NSPD-1)

(21) NSPD-1 ("Organization of the National Security Council System") is amended by replacing the fifth sentence of the third paragraph on the first page with the following: "The Attorney General, the Secretary of Homeland Security, and the Director of the Office of Management and Budget shall be invited to attend meetings pertaining to their responsibilities."

Technical and Conforming Amendments to National Security Presidential Directive-8 (NSPD-8)

(22) NSPD-8 ("National Director and Deputy National Security Advisor for Combating Terrorism") is amended by striking "and the Office of Homeland Security," on page 4, and inserting "the Department of Homeland Security, and the Homeland Security Council" in lieu thereof.

Technical and Conforming Amendments to Homeland Security Presidential Directive-2 (HSPD-2)

(23) HSPD-2 ("Combating Terrorism Through Immigration Policies") is amended as follows:

- (a) striking "the Commissioner of the Immigration and Naturalization Service (INS)" in the second sentence of the second paragraph in section 1, and inserting "the Secretary of Homeland Security" in lieu thereof ;
- (b) striking "the INS," in the third paragraph in section 1, and inserting "the Department of Homeland Security" in lieu thereof;
- (c) inserting ", the Secretary of Homeland Security," after "The Attorney General" in the fourth paragraph in section 1;
- (d) inserting ", the Secretary of Homeland Security," after "the Attorney General" in the fifth paragraph in section 1;
- (e) striking "the INS and the Customs Service" in the first sentence of the first paragraph of section 2, and inserting "the Department of Homeland Security" in lieu thereof;
- (f) striking "Customs and INS" in the first sentence of the second paragraph of section 2, and inserting "the Department of Homeland Security" in lieu thereof;
- (g) striking "the two agencies" in the second sentence of the second paragraph of section 2, and inserting "the Department of Homeland Security" in lieu thereof;
- (h) striking "the Secretary of the Treasury" wherever it appears in section 2, and inserting "the Secretary of Homeland Security" in lieu thereof;
- (i) inserting ", the Secretary of Homeland Security," after "The Secretary of State" wherever the latter appears in section 3;
- (j) inserting ", the Department of Homeland Security," after "the Department of State," in the second sentence in the third paragraph in section 3;
- (k) inserting "the Secretary of Homeland Security," after "the Secretary of State," in the first sentence of the fifth paragraph of section 3;
- (l) striking "INS" in the first sentence of the sixth paragraph of section 3, and inserting "Department of Homeland Security" in lieu thereof;
- (m) striking "the Treasury" wherever it appears in section 4 and inserting "Homeland Security" in lieu thereof;
- (n) inserting ", the Secretary of Homeland Security," after "the Attorney General" in the first sentence in section 5; and
- (o) inserting ", Homeland Security" after "State" in the first sentence of section 6.

Technical and Conforming Amendments to Homeland Security Presidential Directive-3 (HSPD-3)

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(24) The Homeland Security Act of 2002 assigned the responsibility for administering the Homeland Security Advisory System to the Secretary of Homeland Security. Accordingly, HSPD-3 of March 11, 2002 ("Homeland Security Advisory System") is amended as follows:

(a) replacing the third sentence of the second paragraph entitled "Homeland Security Advisory System" with "Except in exigent circumstances, the Secretary of Homeland Security shall seek the views of the Attorney General, and any other federal agency heads the Secretary deems appropriate, including other members of the Homeland Security Council, on the Threat Condition to be assigned."

(b) inserting "At the request of the Secretary of Homeland Security, the Department of Justice shall permit and facilitate the use of delivery systems administered or managed by the Department of Justice for the purposes of delivering threat information pursuant to the Homeland Security Advisory System." as a new paragraph after the fifth paragraph of the section entitled "Homeland Security Advisory System."

(c) inserting ", the Secretary of Homeland Security" after "The Director of Central Intelligence" in the first sentence of the seventh paragraph of the section entitled "Homeland Security Advisory System".

(d) striking "Attorney General" wherever it appears (except in the sentences referred to in subsections (a) and (c) above), and inserting "the Secretary of Homeland Security" in lieu thereof; and

(e) striking the section entitled "Comment and Review Periods."

GEORGE W. BUSH

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TAB E

The Insurrection Act – Sections 331-335 of Title 10 (Armed Forces), Subtitle A (General Military Law), Part I (Organization and General Military Powers), Chapter 15 (Insurrection)

The so-called Insurrection Act consists of the set of laws U.S. Code, Title 10, Subtitle A, Part I, Chapter 15, §§331-335. Those laws were originally approved resp. added on various dates:

§331: 10 August 1956

§332: 10 August 1956; derived from Act of 29 July 1861

§333: 10 August 1956; derived from Act of 20 April 1871

§334: 10 August 1956; derived from Act of 29 July 1861

§335: 11 September 1968

§ 331. Federal aid for State governments

Whenever there is an insurrections in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.

§ 332. Use of militia and armed forces to enforce Federal authority

Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.

§ 333. Interference with State and Federal law

The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—

(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or

(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.

§ 334. Proclamation to disperse

Whenever the President considers it necessary to use the militia or the armed forces under this chapter, he shall, by proclamation, immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time.

§ 335. Guam and Virgin Islands included as “State”

For purposes of this chapter, the term “State” includes the unincorporated territories of Guam and the Virgin Islands.

TAB F

Section 403 (Essential Assistance) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended by Public Law 106-390, October 30, 2000

(United States Code, Title 42. The Public Health And Welfare; Chapter 68. Disaster Relief) [As amended by Pub. L. 103-181, Pub. L. 103-337, and Pub. L. 106-390] (Pub. L. 106-390, October 30, 2000, 114 Stat. 1552 - 1575)

§ 5170b. ESSENTIAL ASSISTANCE {Sec. 403}

a. In general

Federal agencies may on the direction of the President, provide assistance essential to meeting immediate threats to life and property resulting from a major disaster, as follows:

1. Federal resources, generally

Utilizing, lending, or donating to State and local governments Federal equipment, supplies, facilities, personnel, and other resources, other than the extension of credit, for use or distribution by such governments in accordance with the purposes of this Act.

2. Medicine, food, and other consumables

Distributing or rendering through State and local governments, the American National Red Cross, the Salvation Army, the Mennonite Disaster Service, and other relief and disaster assistance organizations medicine, food, and other consumable supplies, and other services and assistance to disaster victims.

3. Work and services to save lives and protect property

Performing on public or private lands or waters any work or services essential to saving lives and protecting and preserving property or public health and safety, including--

- A. debris removal;
- B. search and rescue, emergency medical care, emergency mass care, emergency shelter, and provision of food, water, medicine, and other essential needs, including movement of supplies or persons;
- C. clearance of roads and construction of temporary bridges necessary to the performance of emergency tasks and essential community services;
- D. provision of temporary facilities for schools and other essential community services;
- E. demolition of unsafe structures which endanger the public;
- F. warning of further risks and hazards;
- G. dissemination of public information and assistance regarding health and safety measures;

- H. provision of technical advice to State and local governments on disaster management and control; and
- I. reduction of immediate threats to life, property, and public health and safety.

4. Contributions

Making contributions to State or local governments or owners or operators of private nonprofit facilities for the purpose of carrying out the provisions of this subsection.

b. Federal share

The Federal share of assistance under this section shall be not less than 75 percent of the eligible cost of such assistance.

c. Utilization of DOD resources

1. General rule

During the immediate aftermath of an incident which may ultimately qualify for assistance under this title or title V of this Act [42 U.S.C. §§ 5170 et seq. or 5191 et seq.], the Governor of the State in which such incident occurred may request the President to direct the Secretary of Defense to utilize the resources of the Department of Defense for the purpose of performing on public and private lands any emergency work which is made necessary by such incident and which is essential for the preservation of life and property. If the President determines that such work is essential for the preservation of life and property, the President shall grant such request to the extent the President determines practicable. Such emergency work may only be carried out for a period not to exceed 10 days.

2. Rules applicable to debris removal

Any removal of debris and wreckage carried out under this subsection shall be subject to section 5173(b) of this title [42 U.S.C. § 5173(b)], relating to unconditional authorization and indemnification for debris removal.

3. Expenditures out of disaster relief funds

The cost of any assistance provided pursuant to this subsection shall be reimbursed out of funds made available to carry out this Act.

4. Federal share

The Federal share of assistance under this subsection shall be not less than 75 percent.

5. Guidelines

Not later than 180 days after the date of the enactment of the Disaster Relief and Emergency Assistance Amendments of 1988 [enacted Nov. 23, 1988], the President shall issue guidelines for carrying out this subsection. Such guidelines shall consider any likely

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effect assistance under this subsection will have on the availability of other forms of assistance under this Act.

6. Definitions

For purposes of this section--

A. Department of Defense

The term 'Department of Defense' has the meaning the term "department" has under section 101 of title 10, United States Code.

B. Emergency work

The term "emergency work" includes clearance and removal of debris and wreckage and temporary restoration of essential public facilities and services.

(Pub. L. 93-288, title IV, § 403, as added Pub. L. 100-707, title I, § 106(a)(3), Nov. 23, 1988, 102 Stat. 4697.)

TAB G

Opinions on Posse Comitatus

Excerpts from Gary Felicetti and John Luce, *The Posse Comitatus Act: Liberation from the Lawyers in Parameters*, Autumn 2004 (Carlisle Barracks, PA: US Army War College), pp. 94-107

“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 under this title or imprisoned not more than two years, or both.”

— Posse Comitatus Act, 18 U.S.C. § 1835 (2000).

“Much has been written about the Posse Comitatus Act. As a few others have noted, much of this commentary is “just plain nonsense.”² The majority opinion, however, including that of the Department of Defense, maintains that this 19th-century law strictly limits almost all DOD participation in any activity related to “law enforcement” or “homeland security.”³ This fundamental mischaracterization, while understandable, is potentially dangerous to national security and has done nothing to protect civil liberties.”

...

This article introduces the actual history and meaning of the Posse Comitatus Act, distinguishing clearly between the law and a misleading DOD regulation that requires an army of lawyers to navigate. Despite what you’ve heard, the Posse Comitatus Act is not a significant impediment to DOD participation in law enforcement or homeland security.”

...

“The *National Strategy for Homeland Security* states:

Unless we act to prevent it, a new wave of terrorism, potentially involving the world’s most destructive weapons, looms in America’s future. It is a challenge as formidable as any ever faced by our nation. . . . Today’s terrorists can strike at any place, at any time, and with virtually any weapon. Securing the American homeland is a challenge of monumental scale and complexity. But the US government has no more important mission.³⁶

Unfortunately, current DOD policy on the Posse Comitatus Act—a set of overbroad limits that bear little resemblance to the actual law, combined with a bewildering patchwork of exceptions—impedes this important mission. It is a rotten legal foundation for US Northern Command and creates bizarre situations where the US Navy perceives itself to have less authority to conduct some national defense missions as threats get closer to America.³⁷

In addition to potentially impeding national security, this misguided policy is dangerous to American civil liberties and erodes respect for the rule of law. It holds up the Posse

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Comitatus Act as a strict legal and quasi-constitutional limit that is easy to discard or ignore when practical necessity appears to require it. In the end, the law becomes in some military eyes a “procedural formality,” used to ward off undesired and potentially resource-depleting missions while not imposing any real controls.³⁸

It’s past time to acknowledge that DOD policy on the department’s role in law enforcement and homeland security has almost nothing to do with the Posse Comitatus Act. Let’s get the policy into the light of day, move the lawyers off center stage for a few minutes, and resolve the important issue of how to best secure the American homeland while protecting civil liberties.”

Excerpt from Major Craig T. Trebilcock, U.S. Army Reserve, The Myth of Posse Comitatus, October 2000

“The erosion of the Posse Comitatus Act through Congressional legislation and executive policy has left a hollow shell in place of a law that formerly was a real limitation on the military’s role in civilian law enforcement and security issues. The plethora of constitutional and statutory exceptions to the act provides the executive branch with a menu of options under which it can justify the use of military forces to combat domestic terrorism. Whether an act of terrorism is classified as a civil disturbance under 10 U.S.C., 331–334, or whether the president relies upon constitutional power to preserve federal functions, it is difficult to think of a domestic terrorism scenario of sizable scale under which the use of the military could not be lawfully justified in view of the act’s erosion. The act is no longer a realistic bar to direct military involvement in counterterrorism planning and operations. It is a low legal hurdle that can be easily cleared through invocation of the appropriate legal justification, either before or after the fact.”