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15. Abstract: The events of September 11, 2001 brought home that the use of weapons of mass destruction (WMD) in the U.S. is a likely future event. In response to this potential threat, the federal government has built the federal response plan. This plan addresses both crisis response and consequence management. The Department of Defense (DoD) plays only a supporting role in these areas, being subordinate to the Federal Bureau of Investigation for crisis response and to the Federal Emergency Management Agency for consequence management.

The local, state, and federal response systems may initially be overwhelmed and unable to respond in the event of multiple WMD strikes within the U.S. Given the personnel and assets possessed by DoD, it is likely in this case that DoD will be designated the lead federal agency for consequence management. DoD is not currently prepared for such an event. Questions of scope of authority to respond and scope of mission need to be answered before response efforts can begin.

The current statutory regime is confusing and there is no available plan within DoD that specifically contemplates DoD as the lead federal agency. The combination of these may well lead to confusion and a slow response by DoD assets at a time when speed is of the essence. These statutes should be rewritten to clarify the expected DoD mission and DoD should initiate a deliberate plan that specifically contemplates DoD as the lead federal agency for consequence management.

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THE DEPARTMENT OF DEFENSE AS LEAD FEDERAL AGENCY
IN CONSEQUENCE MANAGEMENT: POISED FOR SUCCESS?

by

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A paper submitted to the Faculty of the Naval War College in
partial satisfaction of the requirements of the Joint Military Operations Department.

The contents of this paper reflect my personal views
and are not endorsed by the Naval War College, the
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Abstract The events of September 11, 2001 brought home that the use of weapons of mass destruction (WMD) in the U.S. is a likely future event. In response to this potential threat, the federal government has built the federal response plan. This plan addresses both crisis response and consequence management. The Department of Defense (DoD) plays only a supporting role in these areas, being subordinate to the Federal Bureau of Investigation for crisis response and to the Federal Emergency Management Agency for consequence management. The local, state, and federal response systems may initially be overwhelmed and unable to respond in the event of multiple WMD strikes within the U.S. Given the personnel and assets possessed by DoD, it is likely in this case that DoD will be designated the lead federal agency for consequence management. DoD is not currently prepared for such an event. Questions of scope of authority to respond and scope of mission need to be answered before response efforts can begin. The current statutory regime is confusing and no there is no available plan within DoD that specifically contemplates DoD as the lead federal agency. The combination of these may well lead to confusion and a slow response by DoD assets at a time when speed is of the essence. These statutes should be rewritten to clarify the expected DoD mission and DoD should initiate a deliberate plan that specifically contemplates DoD as the lead federal agency for consequence management.		
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"States, terrorists, and other disaffected groups will acquire weapons of mass destruction and mass disruption and some will use them. Americans will likely die on American soil, possibly in large numbers."¹

INTRODUCTION

A radio call is made to the Joint Forces Command Crisis Action Center and the watch officer is informed that nuclear explosions have been reported in Washington D.C. and seven other major cities throughout the continental United States. As she listens quietly, she learns that the nation's federal response plan for weapons of mass destruction² (WMD) events is incapable of response and the Department of Defense (DoD) now has the mission of consequence management at these eight scenes until the federal system recovers. Through the Joint Chiefs of Staff, the president has directed the military to respond immediately to the eight WMD sites. You are the joint task force (JTF) commander given the task of leading the consequence management response.³

With the events of September 11, 2001, a new era dawned in the United States. Unlike other terrorist events in the U.S., the destruction of the World Trade Center and the attack on the Pentagon brought home to the U.S. public that it must expect and plan for terrorist events on U.S. soil. A significant responsibility in such preparation includes preparing for managing the consequences of successful terrorist acts. The existing local, state, and federal response systems proved up to the task on September 11th. However, they may not do so in the future.

¹ Hart-Rudman Commission, U.S. Commission on National Security for the 21st Century, (Washington DC: 2001).

² Weapons of mass destruction are defined in joint doctrine as weapons that are capable of a high order of destruction and/or usage in such a manner to destroy large numbers of people. Weapons of mass destruction can be high explosive or nuclear, biological, chemical or radiological weapons. Joint Chiefs of Staff, Department of Defense Dictionary of Military and Associated Terms, Joint Pub 1-02 (Washington, DC: 12 April 2001).

Within the context of the above scenario, this paper investigates whether the current federal response system is optimized by statute and DoD plan for the JTF commander tasked with fulfilling the lead federal agency role in consequence management. In analyzing this question, the paper examines the DoD role in the federal response plan, the DoD command and control structure relating to homeland defense, existing constitutional and statutory bases for the domestic use of troops, and existing DoD plans designed to fulfill DoD's supporting role in consequence management. Throughout this examination, this paper asks whether DoD and its subordinate agencies are prepared to become the lead federal agency for consequence management efforts. Analysis indicates that DoD is not prepared for this role and this paper concludes with recommendations to improve DoD's readiness in this vital area.

THESIS

The operational commander tasked with leading the consequence management effort at a WMD site will have little time to sort through many difficult issues. Ample historical precedent exists to use federal forces in such a role, but the enabling statutory regime is confusing and available DoD plans do not contemplate DoD as the lead federal agency for consequence management. This failure to anticipate DoD as the lead federal agency for consequence management operates to make crisis action planning more difficult and may deny the JTF commander the clarity of mission necessary to be effective. Accordingly, Congress, the president, and DoD must undertake measures to ensure the JTF commander has clear authority, a clear mission, and an existing plan created, staffed, and exercised with DoD as the lead federal agency for consequence management.

³ Consequence management generally encompasses those emergency measures necessary to restore order to the

WEAPONS OF MASS DESTRUCTION AND THE FEDERAL RESPONSE PLAN

While the suggested scenario may seem more fiction than possible fact given the inherent difficulties in obtaining the necessary materials and technology for building nuclear weapons, our recent history includes the 1993 bombing of the World Trade Center in New York City, the 1995 bombing of the Murrah Federal Building in Oklahoma City, and the destruction of the World Trade Center and attack on the Pentagon on September 11, 2001. There is no shortage of states and terrorists attempting to acquire weapons of mass destruction intending to use them against the U.S. and its people.⁴

In preparation for, and in response to this threat, the U.S. has created and evolved a federal response plan through Presidential Decision Directives,⁵ statutes,⁶ and interagency

scene.

⁴ Central Intelligence Agency, Unclassified Report To Congress On The Acquisition of Technology Relating To Weapons of Mass Destruction and Advanced Conventional Munitions: 1 January to 30 June 2001, (Washington, DC: 2002), http://www.cia.gov/cia/publications/bian/bian_jan_2002.htm, [31 January 2002]. Dominic Turnbull, "The West at War." Sunday Mirror, (11 November 2001), Newsgroup File, Most Recent Two Years. Lexis-Nexis. Dayton, OH: Lexis-Nexis. [24 January 2002]. "Osama bin Laden yesterday claimed that his al-Qaeda network had stockpiled nuclear weapons and warned: 'We will use them.'" Dennis Overbye and James Glanz, "A Nation Challenged, Nuclear Fears; Pakistan Atomic Expert Arrested Last Week, Had Strong Pro-Taliban Views," The New York Times, (2 November 2001), Newsgroup File, Most Recent Two Years. Lexis-Nexis. Dayton, OH: Lexis-Nexis. [24 January 2002]. "[American intelligence experts] said that Al Qaeda ... has made repeated attempts to buy fissionable material that could be turned into a bomb." Khidir Hazma, "Saddam and Nukes; He poses a bigger threat than bin Laden." Tulsa World, (16 December 2001), Newsgroup File, Most Recent Two Years. Lexis-Nexis. Dayton, OH: Lexis-Nexis. [24 January 2002]. David Krieger, "Preventing a terrorist mushroom cloud." The Humanist, (1 January 2002), Newsgroup File, Most Recent Two Years. Lexis-Nexis. Dayton, OH: Lexis-Nexis. [24 January 2002]. "Former Russian Security Advisor Aleksandr Lebed has stated that some eighty to 100 suitcase-size nuclear weapons in the one kiloton range are missing from the Russian arsenal." Unknown Author, "Turkish police seize weapons grade uranium." Agence France Presse, (7 November 2001). Newsgroup File, Most Recent Two Years. Lexis-Nexis. Dayton, OH: Lexis-Nexis. [24 January 2002].

⁵ Presidential Decision Directive 39 states that U.S. policy is to deter, defeat, and respond to all terrorist attacks on U.S. territory or against U.S. citizens of facilities, wherever they may be located. The directive includes a response on terrorism section that requires "the ability to respond rapidly and decisively to terrorism ... to protect Americans ... and provide recovery relief to victims, as permitted by law." This directive also assigns the Federal Emergency Management Agency the responsibility for ensuring the federal response plan is capable of managing consequences of terrorist acts. President, Presidential Decision Directive 39, "U.S. Policy on Counterterrorism," 21 June 1995, <<http://www.fas.org/irp/offdocs/pdd39.htm>> [11 January, 2002], 6. Presidential Decision Directive 62 further clarifies respective roles for federal agencies in counter-terrorism. President, Presidential Decision Directive 62, "Combating Terrorism," 22 May 1998, <<http://www.fas.org/irp/offdocs/pdd62.htm>> [11 January 2002].

⁶ Defense Against Weapons of Mass Destruction Act of 1996. Public Law 104-210. (11 October 1996).

plans and agreements⁷ for responding to WMD events in the U.S. The U.S. Government Interagency Domestic Terrorism Concept of Operations Plan (Terrorism Response Plan) splits lead federal agency responsibility for responding to the scene of a WMD event into the two broad categories of crisis management and consequence management. The Federal Bureau of Investigation (FBI) is the lead federal agency for crisis management which is understood to be a predominantly law enforcement function and includes measures to identify, acquire, and resolve terrorist incidents.⁸

Consequence management is essentially an emergency management function and includes measures to protect public health and safety, restore essential government services, and provide emergency relief to organizations and individuals affected by the terrorist acts.⁹ The Federal Emergency Management Agency (FEMA) is the lead federal agency for consequence management.¹⁰

As noted above, the Terrorism Response Plan does not assign the Department of Defense (DOD) as the lead federal agency for either crisis response or consequence management. Instead, despite the organic capabilities and scale found nowhere else in the federal government, DoD is assigned only a supporting role in responding to WMD events within the homeland.¹¹ Many might argue this is as it should be since the primary role for the U.S. military should be fighting and winning the nation's wars. However, this argument

⁷ Federal Emergency Management Agency, Federal Response Plan, (Washington, DC: April, 1999). <<http://www.fema.gov/r-n-r/frp/frpbpln.htm>> [27 December 2001].

⁸ Federal Emergency Management Agency, U.S. Government Interagency Domestic Terrorism Concept of Operations, (Washington, DC: January, 2001). <<http://www.fema.gov/r-n-r/conplan/conplan.pdf>> [23 November 2001], 3-4, B-1.

⁹ Ibid.

¹⁰ Ibid., 4.

¹¹ Ibid.

misses the point for, as Secretary of the Army White recently noted in remarks to Congress, homeland security is “the most important aspect of the Department of Defense.”¹²

Regardless, a scenario of the magnitude presented above where local, state, and federal agencies are incapable of responding due to the size and scope of the WMD events may present the country’s leadership with no choice but to turn to DoD to lead consequence management efforts. More than one study has suggested that DoD must be prepared for a role as the primary consequence manager in WMD response efforts and existing statutes and available DoD plans do not contemplate this possibility.¹³ “There are neither plans for the DoD to assume a lead agency role nor exercises rehearsing this capability. Hence these demanding tasks would have to be accomplished on an ad hoc basis by the military.”¹⁴ As will be seen, this lack of planning contributes to a lack of preparation within DoD for such a lead agency role.

EXISTING COMMAND STRUCTURE

In response to the events of September 11th, President Bush created the Office of Homeland Security to be headed by the Assistant to the President for Homeland Security.¹⁵ Among other responsibilities, the Assistant to the President is charged with primary responsibility for coordinating domestic response efforts in the “immediate aftermath of a terrorist attack” within the U.S.¹⁶ The Assistant to the President is expected to interface with the military on homeland defense issues through the National Command Authority and the Joint Chiefs of Staff.

¹² Thomas E. White, “Statement,” U.S. Congress, Senate, Committee on Armed Services, On the Role of DoD in Homeland Security, 107th Congress, 1st sess., 25 October 2001. 2.

¹³ National Commission on Terrorism, Countering the Changing Threat of International Terrorism (Washington, DC: 2000), <<http://w3.access.gpo.gov/nct/>> [22 November 2001], 39-40. Anthony Cordesman, Defending America, Redefining the Conceptual Borders of Homeland Defense, (Center for Strategic and International Studies, Washington, DC: 2001), 277-279, 444.

¹⁴ National Commission on Terrorism, 39-40.

¹⁵ President, Executive Order 13228, “Establishing Office of Homeland Security,” Federal Register 66 (10 October 2001), 51812.

Within DoD, the North American Aerospace Defense Command (NORAD) is assigned responsibility for both aerospace warning and aerospace control of both Canada and the U.S.¹⁷ The NORAD commander is also dual hatted as the commander of the U.S. Space Command. Given its mission, NORAD has responsibility for threats to the homeland arriving through air and space. The Joint Forces Command is assigned the role of maritime and land homeland defense as well as responsibility for military assistance to civil authorities in support of domestic disaster relief, WMD response, and civil disturbance response.¹⁸ The Joint Forces Command also acts as the primary force provider for the combatant commands, being responsible for providing all non-geographically assigned forces to these commands. Lastly, the Joint Forces Command has a primary mission of developing and testing joint doctrine.

The Joint Forces Command contains the Joint Task Force-Civil Support (JTF-CS), an organization created in 1999 to provide resident expertise in supporting consequence management operations. Comprised of 160 people, the JTF-CS is a small headquarters element designed to provide command and control over DoD forces in support of crisis response and consequence management operations at a WMD site. From its size alone, JTF-CS is not staffed to provide more than one or two command and control cells for supporting consequence management operations and it was never designed to command and control consequence management efforts with DoD as the lead federal agency.¹⁹

¹⁶ Ibid., 4.

¹⁷ "Mission Statement," North American Aerospace Defense Command Home Page, http://www.spacecom.af.mil/norad/about_us.htm [25 January 2002].

¹⁸ Jim Garamone, "Unified Command Plan Changes Announced," American Forces Information Service, (Washington, DC: 30 September 1999). http://www.defenselink.mil/news/Oct1999/n10071999_9910076.html. [22 November 2001].

¹⁹ Bruce Lawlor, "Military Support of Civil Authorities A New Focus for a New Millennium," Homeland Security.Org, (October 2000, updated September, 2001). <http://www.homelandsecurity.org/journal/articles/lawlor.htm> [8 December 2001]. 3.

Should the need arise, two additional response headquarter nodes exist within the Army for consequence management. These two organizations are termed response task forces (RTFs) and are small organizations designed to provide command and control for DoD forces supporting a lead federal agency in consequence management. Along with JTF-CS, these two RTFs comprise DoD's existing command and control forces that are trained to respond to WMD events.

Given problems associated with the DoD response to the events of September 11, there is recognition that the current command structure is less than ideal for homeland defense operations. Accordingly, there are ongoing discussions within DoD about consolidating the homeland defense responsibilities in a single command. The Army contends that the mission should be given permanently to the Joint Forces Command while the Air Force has advocated that NORAD should have this responsibility. News reports currently indicate that Secretary of Defense Rumsfeld is even considering establishing a completely separate combatant command for homeland defense.²⁰

Creating such a Homeland Defense Command with its own commander in chief (CINC) is a good first step in streamlining command responsibility and ensuring proper focus at the combatant command level. Once this new command is created, JTF-CS and the two RTFs should be subordinated to it and used as a model to create multiple, regionally focused, standing JTFs to ensure redundant capability exists within DoD to respond to more than two or three WMD sites at a time.

CONSEQUENCE MANAGEMENT MISSIONS FOR THE JTF COMMANDER

Once established, the standing JTFs must identify the types of missions they may be expected to perform to ensure their readiness. The first and most important consequence

management mission would be the provision of medical support to contaminated/affected people. In the event of a nuclear detonation, radiological decontamination would necessarily be a precursor to such medical support. The tasked commander would need search and rescue teams to find and evacuate those civilian casualties unable to make it to established decontamination sites. A morgue might be needed. Site security to preserve evidence for later criminal proceedings as well as to prevent additional people from becoming contaminated with radiation fallout at the scene would be necessary. This security would require roadblocks at critical points to assist with site isolation.

Similarly, roadblocks and evacuations would be necessary to protect people from the downwind fallout of the radiation. Once these areas are evacuated, looting would be expected so a law enforcement capacity with arrest powers would be necessary. Assuming the lack of functioning local and state governments, the JTF might need a temporary holding facility for people arrested for committing crimes. To better manage the scene, the JTF might need to impose a curfew to minimize civilian interference with ongoing recovery operations.

Some of these missions are familiar to military commanders and are unquestionably permissible. Others however, run afoul of many peoples' understanding of basic civil liberties and the military's role in a democracy. Many of these missions, particularly those involving policing type functions would be new and commanders and troops might understandably be reluctant to perform them, believing they lacked proper authority to undertake these missions domestically. However, the authority to use federal troops within the U.S. for each of the above missions exists and should be available to the JTF. A closer look at this authority is warranted.

²⁰ Unknown Author, "Defense Officials Close to Naming New Homeland Security Command," [Inside the](#)

THE USE OF FEDERAL TROOPS DOMESTICALLY

While many civil libertarians dislike the idea of using federal troops domestically, it has been a recurring feature since troops were first used in 1794 by George Washington to suppress the Whiskey Rebellion.²¹ Since then, federal troops have been used dozens of times domestically for a variety of purposes. The source of the authority to use them in such a fashion is clear as the U.S. Constitution itself specifically provides that Congress has the power to call forth the “militia to execute the laws of the union, suppress insurrections and repel invasions.”²² Additionally, as “Commander in Chief,” the president bears responsibility for upholding the laws of the nation.²³

Three primary statutes coupled with the above powers provide the construct for using federal troops domestically. These three primary statutes, the Insurrection Act, the Stafford Act and the Prohibited Transactions Involving Nuclear Materials section (Radiological Event Clause) of the federal criminal code provide the authority to use federal forces in responding to a domestic crisis. Each of these statutes also operates under limitations imposed by the Posse Comitatus Act (PCA).

Created in response to the growing use of federal forces in policing type functions during and at the conclusion of the Civil War, the PCA recognizes the enduring concept in the U.S. that domestic law enforcement is, and should appropriately be, a strictly civilian function.²⁴ Stated broadly, this act prohibits the use of the military as a police force within the U.S.²⁵ Some believe that the PCA operates to limit or bar federal forces from

Pentagon, (6 December, 2001). <https://ca.dtic.mil/cgi-bin/ebird.cgi?doc_url=Dec2001/s20011206officials.htm> [6 December 2001].

²¹ Robin Higham, *Bayonets In the Streets*, (Manhattan, KS: Sunflower University Press, 1969), 17.

²² U.S. Constitution, art. 1, sec. 8.

²³ U.S. Constitution, art. 2, cl. 2.

²⁴ Posse Comitatus Act, U.S. Code, Title 18, sec. 1385 (1994). Paul Stevens, U.S. Armed Forces and Homeland Defense The Legal Framework, (Washington, DC: CSIS Report, October, 2001). 22.

²⁵ Posse Comitatus Act, sec. 1385. Although the PCA only specifically applies to the Army and Air Force, DoD has imposed its policing prohibitions on the Navy and Marine Corps as well. Department of Defense

undertaking certain missions at a WMD site.²⁶ However, exceptions exist to the PCA which when properly invoked, do not limit the use of federal forces domestically.

The Insurrection Act permits the president to use federal forces to repel an invasion or insurrection and to enforce the execution of federal laws. Over the years, this statute has been invoked a number of times; providing the basis for the use of federal troops in desegregating schools in 1957 and restoring order in Los Angeles in 1992. The Insurrection Act is a “generous statutory grant of authority to the president” to use military forces in times of serious domestic emergencies caused by insurrection or invasion.²⁷ This act contains a specific exception to the restrictions of the PCA and is a primary source of authority for the JTF commander, once properly invoked by the president.²⁸

The Stafford Act also provides presidential authority of use to the JTF commander.²⁹ This act, when properly invoked by the president, permits the use of federal resources to support local and state governments facing domestic disasters such as a WMD event. This act has also been invoked numerous times for such varied events as the recovery efforts resulting from September 11th and hurricane disaster relief operations. The Stafford Act does not contain an exception to the PCA but does provide a broad grant of authority to the JTF commander to undertake disaster relief operations. The Stafford Act is the statute most likely to be invoked for consequence management efforts at a WMD site.

The last statute specifically dealing with nuclear WMD events is a somewhat recently passed amendment to the federal criminal code. The Radiological Event Clause criminalizes

Directive 5525.5, DoD Cooperation with Civilian Law Enforcement Officials, (Washington, DC: 21 February 1986). Para. B(1), and encl 4, para. C.

²⁶ Sue Cathcart, "White Says Posse Comitatus Act 'Fine' As Is," National Guard Association of the United States, (26 October 2001). <http://www.ngaus.org/newsroom/possehearing102601.asp> [25 January 2002]. (U.S. Senators Warren and Cleland, as well as Deputy Secretary of Defense Wolfowitz believe the PCA unnecessarily constrains the DoD and should be amended or rescinded.)

²⁷ Stevens, 16.

²⁸ Insurrection Act, U.S. Code, Title 10, sec. 331-334 (1994).

a number of acts associated with the wrongful possession, transfer, sale, and use of nuclear materials. This clause additionally authorizes the use of DoD forces in a federal policing role contingent upon agreement of the Attorney General and the Secretary of Defense that a nuclear related emergency exists which civil law enforcement is unable to resolve.³⁰

When invoked together, these three statutes provide ample authority for the JTF commander to undertake the missions necessary to lead consequence management efforts at a WMD site. Unfortunately, they are not consolidated into one streamlined statute, providing the necessary authority and exception to the Posse Comitatus Act all in the same place. History demonstrates that this may confuse and delay the JTF commander as he works to ensure he has the necessary mission authority to effectively manage the consequences of a WMD event.³¹

CURRENT AND DRAFT MILITARY PLANS

A recognized hallmark of the U.S. military is its attention to detail and planning. Clearly, careful thought should be given to planning operations that will affect so many lives and so much property. Accordingly, it is no surprise that the above statutes are represented in concept plans and functional plans at the Joint Forces Command level. Surprisingly though, no plan exists that specifically contemplates DoD in a lead federal agency role. Just as with the confusing statutory regime, the absence of such a plan will likely cause delays in crisis action planning and response efforts as such fundamental issues as the scope of the mission and the authority to undertake the mission are clarified and resolved.

²⁹ Robert T. Stafford Disaster Relief and Emergency Assistance Act, U.S. Code, Title 42, sec. 5121 et seq. (1974).

³⁰ General Criminal Law, U.S. Code, Title 18, sec 831 (1994).

³¹ An example of the confusion that may occur is found in the federal response to the Los Angeles riots in 1992. There, the JTF Commander who responded to the riots pursuant to invocation of the Insurrection Act improperly believed that he was prohibited by the Posse Comitatus Act from undertaking policing type missions. This is an example of how critical it is to have clear authority and mission when operating domestically. Thomas Lujan, "Legal Aspects of Domestic Employment of the Army," Proceedings, U.S. Army War College Quarterly (Autumn, 1997) 88.

However, although no plan exists specifically contemplating DoD as lead federal agency for consequence management, two completed plans do exist, and two others are in draft, at the Joint Forces Command level. These plans may be of some use to the JTF commander charged with leading the consequence management efforts at a WMD site. The two existing plans are the Joint Forces Command Functional Plan 2501-97 (Functional Plan 2501-97)³² and the Joint Forces Command Functional Plan 2502-98 (Functional Plan 2502-98).³³

Functional Plan 2501-97 is the Joint Forces Command's plan designed to provide military support to civil authorities when disasters or emergencies occur and the Stafford Act is invoked.³⁴ Functional Plan 2502-98 implements the Insurrection Act and is a subordinate plan to the DoD Civil Disturbance Plan.³⁵

As noted earlier, invocation of the Stafford Act alone, as contemplated by Functional Plan 2501-97 does not include an exception to the Posse Comitatus Act. Accordingly, if the JTF commander is executing only this plan, he will be limited in the scope of his consequence management abilities by the PCA. Still, the JTF would be permitted to engage in "law enforcement" type duties when required for a primary military purpose or in emergency situations to avoid the possible loss of life, excessive suffering, or damage to federal property.³⁶

Interestingly, a primary assumption in Functional Plan 2501-97 is that terrorist acts against large population centers may produce major consequences that overwhelm local,

³² This document is entitled USACOM FUNCTIONAL PLAN 2501-97 and does not yet reflect the organizational name change from U.S. Atlantic Command to the Joint Forces Command. U.S. Atlantic Command Functional Plan 2501-97, 2 February 1998, <<https://freddie.forscom.army.mil/macaw/Word/acom2501.doc>>, [15 December 2001].

³³ U.S. Joint Forces Command Functional Plan 2502-98, 25 June 2001.

<<https://freddie.forscom.army.mil/macaw/Word/2502-98.doc>> [15 December 2001].

³⁴ Functional Plan 2501-97, 2.

³⁵ Functional Plan 2502-98, 2-3.

³⁶ Functional Plan 2501-97, 9.

state, and federal response systems.³⁷ Despite the assumption, Functional Plan 2501-97 reflects little analysis on the impact this assumption has for DoD forces, never contemplating that DoD might be the lead federal agency for consequence management by default in this case. Logically then, Functional Plan 2501-97 also does not address the command and control structure between DoD assets and other local, state, and federal agencies when DoD is in a lead federal agency status. Nonetheless, Functional Plan 2501-97 provides at least a starting point for the tasked commander when directed to be the lead for consequence management at a WMD site since it does address domestic disaster relief efforts, albeit limited by the PCA.

Functional Plan 2502-98 provides guidance and direction for civil disturbance relief operations.³⁸ In theory, this plan provides a blueprint for the conduct of civil disturbance relief operations throughout the U.S. Like Functional Plan 2501-97, Functional Plan 2502-98 does not contemplate DoD in a lead federal agency status but it does address the restoration of law and order with the Insurrection Act's granted exception to the PCA. This function provides substantial authority to the JTF as it permits dispersing unauthorized crowds, patrolling in disturbed areas, the maintenance of essential transportation and communication systems, the establishment of roadblocks, and the cordoning of certain areas.³⁹

Clearly, although Functional Plan 2502-98 does not specifically address DoD as the lead federal agency, nor the expected command and control structure when DoD is in a lead federal agency role, it nonetheless provides value to the JTF commander as a source of information. Although not responding to a civil disturbance such as the L.A. riots, many of the tools necessary to restore order in such a situation would prove useful at a WMD site.

³⁷ Ibid., Anx. T-3.

Not only does Functional Plan 2502-98 address the policing function, it also addresses the use of force domestically in some detail, providing a laundry list of potential options to be considered by the commander in tailoring force appropriately.⁴⁰ Functional Plan 2502-98 was not, however, designed to be a consequence management plan and the tenor of the plan reflects this.

Two additional plans are in draft form and may provide additional guidance and direction for the JTF commander as he engages in crisis action planning and response efforts. Joint Forces Command Concept Plan 0500-98 (Draft Plan 0500-98) is an initial coordinating draft of the Joint Forces Command's plan to provide assistance to domestic authorities for consequence management in response to a chemical, biological, radiological, or nuclear event (CBRNE). Just as with Functional Plans 2501-97 and 2502-98, this plan does not currently contemplate DoD operating as the lead federal agency for consequence management.⁴¹ Additionally, JTF-CS is reported to be engaging in the deliberate planning process for responding to a nuclear event, although it is unclear how developed this plan is and whether it addresses more than one WMD event at a time.⁴²

While each of these draft plans promises to offer value to the JTF commander in the current scenario since they specifically consider WMD events, they are unlikely to be as forward thinking as they should be. Just as with Functional Plan 2501-97 and Functional Plan 2502-98, Draft Plan 0500-98 does not address actions that DoD must take when designated the lead federal agency for consequence management for a WMD event. In fact, Draft Plan 0500-98 specifically assumes that the PCA will continue to apply and that DoD

³⁸ Functional Plan 2502-98, 2-3.

³⁹ Functional Plan 2502-98, Anx. C, App. 6.

⁴⁰ Ibid.

⁴¹ U.S. Joint Forces Command Draft Plan 0500-98, <https://freddie.forscom.army.mil/maca/word/USJFCOM0500-98.doc>, [15 December 2001].

⁴² Lawlor, "Military Support Of Civil Authorities," 4.

will not be required to undertake any direct law enforcement actions.⁴³ These plans should clearly be more forward looking.

RECOMMENDATIONS

Statutory Changes

Statutory authority for the military's response to a WMD event is somewhat confusing. The two primary statutes for responding to domestic emergencies, the Stafford Act and the Insurrection Act, were not written with weapons of mass destruction in mind. Each of these statutes offers valuable authority to the president when he is crafting a military response to WMD events but neither statute is precisely on point. Of the two, the Insurrection Act provides the most sweeping authority, including a necessary exception to the PCA but the intent of this statute was to respond to civil disturbances, not to domestic disasters. The Stafford Act contemplates responding to domestic disasters but contains no PCA exception, thereby limiting the ability of the JTF commander in completely controlling a WMD scene. Lastly, the Radiological Events Clause is found in the federal criminal code and the authority given DoD by this clause seems more an afterthought to a statute criminalizing certain acts than the purpose of the statute itself. This statute also does not contemplate DoD in a lead federal agency status for consequence management roles and functions, instead simply enabling DoD, when certain preconditions are met, to respond to a radiological event to restore order.

Additionally, while the Insurrection Act and the Stafford Act are the two primary statutes providing the JTF commander his mission authority to use forces domestically in a consequence management role, other potentially applicable statutes exist. Depending upon the type of WMD event, different statutes may apply and different authority may be invoked.

⁴³ Draft Plan 0500-98, 11.

For example, different statutes apply based on whether the WMD event is radiological, biological, or chemical in nature.⁴⁴ The diversity and overlap found within these statutes promises to cause hesitation within the JTF staff as they work to understand the scope of their mission and the authority to accomplish it. The current statutory regime should be substantially rewritten to reflect the reality of multiple WMD events and DoD's likely role in responding to such events.

Congress should craft a new statute specifically identifying all of the military's potential roles in the consequence management of WMD sites. This statute should spell out the exact scope and magnitude of DoD efforts and should specifically contemplate DoD as the lead federal agency, if only for the time necessary for the local, state, and federal response plans to begin functioning. This statute should specifically address the command and control structure between the DoD, FBI, FEMA, and other federal agencies when DoD is in a lead federal agency status. The statute should also address the transition of lead federal agency authority from DoD to FEMA once FEMA becomes capable of assuming the mission. The statute should specifically except the military from prohibitions imposed on its operations during times of emergencies by the Posse Comitatus Act. Clear statutory language would do much to focus the commander's mission for consequence management, clarify his authority, and insulate the JTF commander and his forces from potential liability issues that may arise. Such clear statutory language will also aid in the development of concept plans specifically addressing DoD in an initial lead federal agency role.

Homeland Defense Command and Standing Joint Task Forces

At the same time Congress is clarifying the consequence management role for DoD,

⁴⁴ Armed Service Law, U.S. Code, Title 10, sec. 832 (1999), (authorizes a DoD response when a chemical or biological weapon poses a serious threat and civilian law enforcement authorities need assistance). U.S. Code Title 18, sec 229E (1998) (authorizes DoD help for a chemical weapons event). U.S. Code, Title 18, sec. 831 (authorizes DoD help in responding to a radiological event).

the DoD should create an entirely separate Homeland Defense Command to ensure unity of purpose and effort in this vital area. This CINC should work hand in hand with FEMA, the FBI, and the new Office of Homeland Security in all matters concerning homeland defense. The current bifurcated operational scheme with the Joint Forces Command in charge of protecting the homeland at sea and on land while NORAD is responsible for protecting the homeland in aerospace is confusing and could delay a prompt response to WMD events. Creating a Homeland Defense Command would also relieve both NORAD and the Joint Forces Command of day-to-day responsibility for homeland defense and allow them to focus on their more traditional roles and responsibilities.

The JTF-CS and the two regional RTFs should be folded into the new Homeland Defense Command and become the model for multiple regionally focused standing joint task forces. These task forces should be given control over the recently created National Guard WMD Civil Support Teams that are designed to provide early detection and evaluation of WMD sites. Training for the task forces should initially focus on responding to WMD events in the major metropolitan areas within their assigned regions and on interagency coordination, planning, and training.

A new homeland defense command and multiple regionally oriented standing JTFs focused on rapid response with DoD as a lead federal agency will simplify and refine command and control issues to ensure these issues are resolved when response to a WMD event becomes necessary.

Planning & Training

Existing plans do not contemplate the scope of the mission DoD would be tasked with if designated the lead federal agency for consequence management at several WMD sites. Functional Plan 2502-98 is specifically targeted at responding to civil insurrection and

unrest. Functional Plan 2501-97 contemplates disaster relief operations but it and Draft Plan 0500-98 assume DoD is a supporting agency and not the lead federal agency for consequence management at a WMD site. Additionally, Functional Plan 2502-98 and Draft Plan 0500-98 are restricted by PCA prohibitions.

Clearly, just as a new statutory scheme should be created, DoD must deliberately build a concept plan that specifically addresses worst-case scenarios such as several WMD events occurring simultaneously with the concurrent failure of the federal response plan. Functional Plan 2501-97 recognizes this possibility in its assumptions but does nothing further with it. Accordingly, a concept plan responding to multiple WMD events in major metropolitan areas should be created, staffed, and approved. Just like the statutory changes recommended earlier, this plan should specifically address the initial command and control structure, accounting for other federal agencies in a supporting role to DoD as lead federal agency until FEMA is prepared to assume lead federal agency status for the consequence management mission. This plan should include a workable time phased deployment data force list drawing heavily on the National Guard in a federalized role for support as well as considering different support capabilities found within the Coast Guard, FBI, and FEMA. Once approved, the plan should be exercised, and trained. Such training should contemplate the earlier mentioned standing joint task forces as the on scene commanders for consequence management initially. The training should also specifically target the turn over of lead consequence management authority to FEMA as well as expected interagency interaction with the FBI, Coast Guard, and other federal agencies as the federal response system begins to work.

Resourcing

Lastly, in this new era of political cooperation on homeland defense issues, Congress

must provide the funding and the manpower to implement the above recommendations. The president recently recommended a \$50 billion increase in DoD funds for the next fiscal year. If realized, some of this budget increase should be allocated to homeland defense and consequence management operations. The failure to do so risks a delayed and confused response to WMD events at a time when speed and clarity of mission are of vital importance. Such delay and confusion can only result in an increased number of casualties which is unacceptable.

CONCLUSION

The premise throughout this paper is that given the size and scope of the assumed WMD events, local, state, and federal officials are overwhelmed or incapable of beginning the task of consequence management. In this scenario, it is likely that the DoD will be designated the lead federal agency for consequence management. Some may claim this to be an unlikely event, but prudence dictates that the military should plan and exercise for it. Regardless of whether the assumption proves true though, many of the preceding recommendations are just as applicable for our current system with DoD as a supporting agency as they are for the case suggested at the beginning of this paper.

The federal response plan is a good starting point for responding to a WMD event. The plan does not, however, contemplate a worst-case scenario where the only organization that can initially respond is the DoD. Given the acts of terrorism in the last several years, it is now time to prepare for that worst-case scenario.

The events of September 11th indicate that we will likely face more than one WMD event the next time. We can expect an increasingly more sophisticated and determined enemy plotting against us in the future. Such an enemy will surely look for vulnerabilities in our response plan to exploit. To prevent this exploitation we must build a stronger, more

capable response system that provides clearer authority for the tasked commander. We must create a plan that specifically contemplates DoD in a lead federal agency status for the initial several days of WMD events. We must then train and exercise this plan so the DoD is prepared for its consequence management role when called upon. The failure to do so carries with it too much risk.

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