

***WMD CONSEQUENCE MANAGEMENT  
LEGAL SEMINAR II***

**SEMINAR REPORT**



**Defense Threat Reduction Agency  
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SAIC **strategies** GROUP  
CREATING KNOWLEDGE, INTEGRATING SOLUTIONS

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## Executive Summary

On 19-20 November 2002, Defense Threat Reduction Agency – Advanced Systems and Concepts Office sponsored and the Office of General Counsel hosted the *Weapons of Mass Destruction Consequence Management Legal Seminar II*, the second part of a series of seminars designed to explore the legal issues regarding the responsibility and authority of Federal and State departments and agencies that may arise during the consequence management (CM) phase of a weapons of mass destruction (WMD) event in the United States. This four-part seminar series will:

- Identify and develop a consensus on the applicable Federal statutes, directives, regulations, and instructions pertaining to CM;
- Identify applicable state statutes pertaining to such issues as martial law and quarantine;
- Identify shortfalls in, and potential solutions for, Federal legislation and guidance documents pertinent to WMD-CM;
- Contribute to the development of a Federal Legal Reference Deskbook for WMD-CM.

Two Working Groups were formed during Seminar I (2-3 May 2002) to address the legal issues raised during consideration of a hypothetical WMD event - the detonation of a radiological dispersal device (RDD) in downtown, Central City, USA. The Working Groups were organized according to the stages of response to a domestic WMD event. Working Group I was to consider the issues identified in the *Planning, Notification, and Deployment* response stages and Working Group II was to address the issues *Response and Deactivation* stages. Prior to Seminar II, the issues addressed by the Working Groups were reorganized into three related topic areas according to subject matter with overlapping authorities and inter-organizational considerations. (See **Appendix C**) The Working Groups addressed the following three topics and associated legal issues that relate to WMD consequence management:

### **Topic 1 -- Military's Role in WMD Consequence Management**

- Events/Authorities triggering Federal response actions in absence of an emergency declaration
- Use of the military, to include *Posse Comitatus*, federalizing the National Guard, and Titles 10 and 18
- Military Response, to include mobilization authority and pre-event actions
- Limits and liability of the military's use of force against civilians during WMD-CM

### **Topic 2 -- Quarantine and Medical Responders**

- Quarantine and Evacuation Authorities
- Licensure requirements and liability for medical responders
- Standardization of WMD emergency response, to include interoperability, standard operating procedures, equipment, and training

### **Topic 3 -- Issues of Communication in WMD Consequence Management**

- Communicating information to the public
- Information sharing, to include the impact of H.R. 4598, classification issues, and effective use of the media
- Liability attendant to non-disclosure of threat information

On Day One of the Seminar, the three Working Groups assembled to discuss the issues in light of the following objectives:

- Identify the relevant references for each issue;
- Identify and prioritize the principal 3 references relevant to the issue;
- Identify the shortfalls with existing authority, and;
- Identify relevant issues lacking interagency consensus.

DTRA invited the Working Groups to utilize a common template to guide the discussion and to form the basis for the Working Groups' presentations on Day Two, should the format be acceptable to the Group. (See **Appendix D**) Working Groups addressing Topic 1, *Military's Role in WMD Consequence Management* and Topic 2, *Quarantine and Medical Responders* presented their findings on Day Two using the template. While the members of the Working Group concerned with Topic 3, *Issues of Communication in WMD Consequence Management*, utilized the template as a basis for discussion, they devised an original format for the presentation on Day Two. All Working Group presentations for the Plenary Session on Day Two are captured in **Appendix E**.

The Working Group members and the attendees to the Seminar received a copy of *Preliminary Topical References*. The compilation contains ten collections of references each of which sets out the current domestic legal authorities and implementing regulations identified as potentially applicable to a particular issue. The Topical References, as revised by the Working Groups during the Seminar, as well as the Working Group reports that identify shortfalls in legislation and/or regulations, contribute to the development of the ultimate product of this DTRA initiative – a Federal WMD-CM Legal Reference Deskbook to address the legal issues of a WMD event in the continental United States.

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## **Weapons of Mass Destruction Consequence Management Legal Seminar II**

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### **Working Group Session**

**Mr. Ray Heddings**, Associate General Counsel, DTRA opened the conference on November 19<sup>th</sup> by welcoming the participants, and by explaining that the ultimate goal of the series of conferences was to produce a legal desk reference book that would outline the government's response plan to a WMD attack. Mr. Heddings reviewed the previous meetings that had established the issues that the working groups were to develop, pointing out that many recognized the need for a unified response plan to a WMD attack prior to 9/11. He stressed the importance of the final product of the seminars and he lauded its potential value as a comprehensive legal field manual for first responders.

**Mr. Anthony Russell**, Senior National Security Analyst of SAIC, then explained that the need for the proposed book arose from the concern on the part of first responders across various departments and agencies that no single set of guidelines existed for them to follow. Many were concerned about the legal consequences of their actions, and felt that the risks and consequences of a WMD attack ought to be better codified.

The Working Groups worked on Day One with the purpose of developing a common understanding of the legal issues and potential conflicts that may arise during a multi-agency consequence management (CM) response to a WMD event. This common understanding of the salient legal issues ultimately will be recorded in the WMD-CM legal reference deskbook. The substance of the Working Groups discussions on Day One is incorporated in the following report of their presentations during the Plenary Session.

### **Plenary Session – November 20<sup>th</sup>**

**Mr. Robert L. Brittigan**, General Counsel, DTRA, opened the Plenary Session of the Conference on 22 November by welcoming the participants to the second Weapons of Mass Destruction Consequence Management Legal Seminar. He discussed the changes occurring in homeland security in the past year, noting that after the collapse of the World Trade Center in September 2001, Federal policy has been evolving to focus on the protection of the homeland. This evolution has involved standing up NORTHCOM, creating new legislation, and establishing the Office of Homeland Security and the Department of Homeland Security. As the United States attempts to meet the challenges of the new century, it is necessary to examine the laws, regulations, directives, and executive orders to find the questions that need answers and legal challenges that require attention.

The Defense Threat Reduction Agency is not responsible for identifying Federal legal policy, Mr. Brittigan emphasized. This seminar is an attempt to identify some of the challenges that currently exist within the legal sphere regarding weapons of mass destruction. In bringing together Federal government attorneys active within this area of the law, DTRA facilitates an opportunity for discussion, research, and finally the creation of a desktop volume to include the pertinent legislation surrounding the issues relative to a WMD incident.

The genesis of this project, in May 2001, was the realization that a great deal of legal work was being done in this area, but cross communication was not robust enough for Federal agency lawyers working

within the field to know *what* was being done and *by whom*. This gave rise to the possibility that the lawyers were duplicating efforts and, of greater concern, gaps in WMD-CM legal work existed because everyone assumed that someone else was handling a specific aspect. DTRA's goal, at the end of this series of Seminars, is to facilitate the creation and dissemination of a deskbook to lawyers in the Federal government, working in the field, so that, at the very least, all will be aware of the same legal authorities.

In May, 2002, DTRA convened the first WMD-CM Legal Seminar, which featured Dr. Robert Kadlec from the Office of Homeland Security, and Mr. Peter Verga from the Department of Defense. The Seminar featured a spirited exchange in which open questions were identified and Working Groups were established to address them. The Working Groups labored during the inter-regnum, Mr. Brittigan stated, and gathered on the previous day to finalize their interim reports. DTRA appreciates their dedication and efforts. The Participants in the first Seminar and the Working Groups reflect a broad cross section of the government and, taken together, capture the key players in WMD-CM. Today, Mr. Brittigan said, additional key players have attended the Seminar, including Northern Command and the Coast Guard. DTRA looks forward to their participation in the continuing process of developing the WMD-CM Federal Legal Reference Deskbook. Finally, Mr. Brittigan emphasized that, to facilitate open discussion, conference documents would not ascribe comments or questions to a particular speaker.

## ***Detection and Prevention for Homeland Security***

**Mr. Stephen King**, the White House Office of Homeland Security (OHS) Director of Investigations and Law Enforcement, acts as the law enforcement representative to Homeland Security Advisor, Tom Ridge. His responsibilities include conducting strategic assessments of analyzed intelligence and law enforcement information, coordinating and monitoring interagency law enforcement and investigation responses to threats and incidents, and acting as the OHS representative to several interagency Working Groups. He is the law enforcement representative to OHS' Incident Support Group, runs the Law Enforcement & Investigations Policy Coordination Committee, and chairs working groups on communications, bio-research investigations strategic plans, and hostile surveillance. Additionally, he assisted in developing and drafting [Homeland Security Presidential Directive \(HSPD\)-3](#), which created the Homeland Security Advisory System. Prior to joining OHS, Mr. King was Assistant United States Attorney in the Eastern District of New York.

Mr. King stated that his discussion would cover the following broad areas:

- Current structure and function of the OHS for the information sharing mission
- Homeland Security Advisory System
- Threat Countermeasures and Incident Management Directorate
- Department of Homeland Security
- Challenges for law enforcement

### **Information Sharing Infrastructure in the Office of Homeland Security**

*"The formation and structure of the HSC and the OHS promote a more effective government working body."*

Established on October 8, 2001 by [Executive Order 13228](#), and further detailed in [HSPD-1](#) of October 29, 2001, the Homeland Security Council (HSC) began to face the challenge of protecting the American homeland. The structure of the Council loosely follows that of the National Security Council. Governor Tom Ridge, the President's Advisor for Homeland Security, chairs the body with the Principals Committee

consisting of the Chiefs of Staff to the President and Vice President and representatives from the Departments of Treasury, Defense, Justice, Health and Human Services, Transportation, and Agriculture, the Central Intelligence and Federal Emergency Management Agencies, and the Office of Management and Budget. Representatives of additional organizations are invited to participate as necessary for specific issues.

The Homeland Security Council is a policy making, not an operational body, the infrastructure of which was designed to a) identify issues relating to terrorism and the security of the homeland and b) ensure that the interagency body coordinates the development of policies to address issues of concerns. This function is facilitated by the Policy Coordinating Committees (PCC) and the Deputies Committee, in addition to the Principals Committee, and, ultimately, the President. The PCC, which coordinates interagency development and implementation of homeland security policies, is an active part of creating a more effective and efficient government body. These eleven committees range in size and composition, and each committee acts as a policy body, exploring issues, finding challenges, and developing policies. From these committees, issues and policies move up through the Deputies and Principles Committees before moving to the Office of the President.

The Office of Homeland Security has three long-term goals:

- Moving information from the Federal to the State and local levels, i.e., to all governmental organizations and agencies that need it;
- Creating an effective system of communicating within the government at large, and on a smaller scale, within individual departments and agencies, and;
- Disseminating intelligence and classified information from the national to the state and local levels in order to assist in the prevention of a terrorist- or WMD-related incident.

Mr. King emphasized that OHS is not interested in creating new government; rather, OHS aims at a more efficient government. The system created within OHS is designed to work quickly and is effective in assembling agencies to produce a result.

As the government moves to face the challenges of protecting the homeland, several legal issues have arisen. Many of these concern privacy. The Office of Homeland Security and the interagency members have worked with the Department of Justice and OHS Council to ensure that issues of privacy and other Constitutional rights are not impinged upon by the security measures being considered.

### **Homeland Security Advisory System**

The system emerged from the recognition that there was a need for establishing a baseline for alerting the public of the risk of terrorist attacks, Mr. King stated. Too many localities and agencies had their own alert systems and there was a need for one comprehensive guide to facilitate a common understanding of a "heightened state of alert." The [Homeland Security Advisory System](#), mandated by HSDP-3, is the result of a survey of alert systems around the nation, and review by an interagency body of the proposed common system. The Departments of Defense and State are exempted from the system.

For each state of alert, the Advisory System recommends specific actions for each agency. Mr. King highlighted the efficacy of the system with a recent example. In mid-September, the level of alert was raised because of information from the intelligence community. The Attorney General, together with the Homeland Security Council assessed the totality of the information available to the U.S. Government and determined that it was necessary to raise the alert level.

## **Threat Countermeasures and Incident Management Directorate**

The Threat Countermeasures and Incident Management Directorate (TCIM) monitors threats to the United States homeland and coordinates with the National Security Council. The Office of Homeland Security Coordination Center, which operates 24 hours a day, seven days a week, plays a significant role, monitoring and reporting to TCIM intelligence, law enforcement, and open source materials relating to possible terrorist threats and/or future domestic incidents. TCIM then coordinates interagency countermeasures, to include alerting a high-level interagency group that then will meet immediately to assess the situation. The OHS Incident Support Group (ISG) will support the high level group when activated.

## **Department of Homeland Security**

The primary mission of the Department of Homeland Security is the protection of the American people within the territorial borders of the United States from terrorist attacks. In order to successfully achieve its mission, the Department consolidates several different organizations and agencies with the purpose of creating one voice within one department to meet the following goals:

- Protect the American homeland;
- Protect borders, transportation and ports;
- Synthesize and analyze homeland security intelligence;
- Coordinate communication with state and local government, industry and the American people, and;
- Protect Americans at home against bio-terrorism.

In order to achieve its mission, the Department of Homeland Security has four divisions: Border and Transportation Security; Emergency Preparedness and Response; Chemical, Biological, Radiological, and Nuclear Countermeasures, and; Information Analysis and Infrastructure Protection. Mr. King states the Office of Homeland Security will continue to exist after the Department begins operation.

## **Challenges Facing Law Enforcement**

The environment currently facing the Federal government remains uncertain. In order to best protect the homeland, many challenges must be faced and overcome to the degree possible. Law enforcement and intelligence organizations must remain vigilant. There must be an increasingly successful effort to share information throughout the Federal agencies and organizations as well as with state and local counterparts. The flow of information must be secure and run from the national levels to States and localities, as well as from the State and local levels to the Federal government. Such communication patterns will prevent small cases or pieces of information from leading to bigger incidents due to investigatory oversight or omission. In order to meet the contemporary challenge of preventing a terrorist incident and protecting the American people, it is imperative that the different communities share information, follow every lead, and adapt to an unconventional thought process. This new threat requires ideas and policies that move beyond conventional thinking.

### **Meeting the Challenges**

*"Use every lawful tool in the legal arsenal and be aggressive."*



## ***Collection and Dissemination of Intelligence Information***

**Mr. M.E. (Spike) Bowman** presently serves as Deputy General Counsel (National Security Law) of the Federal Bureau of Investigation (FBI). His responsibilities include espionage, international and domestic terrorism, and threats to United States information and other critical infrastructure. As a former Naval Officer, Mr. Bowman served in numerous capacities, including as military counsel to the Director of the National Security Agency; the Force Judge Advocate for Naval Logistics Command, Pacific; the Head of International Law at the Naval War College, and; the EUCOM's Legal Representative to Italy.

Mr. Bowman stressed the importance of collecting and disseminating information in the fight against terrorism. Because the information available to intelligence officers today is so vast, Mr. Bowman called intelligence information the best weapon the United States possesses to combat terrorism. The gathering of intelligence and other information is far different than it was in the past. Phone taps, he said, are no longer sufficient means of collecting this wealth of information, and intelligence gathering has become an increasingly complicated and difficult task.

There are many challenges to securing information and more challenges arise as the mission has evolved into sharing information among agencies, departments, and organizations. The lack of interoperability between the various intelligence and law enforcement agencies in the United States increases the difficulty of sharing information. The lack of communication among the agencies is so great, Mr. Bowman stated, that collecting intelligence is easier than sharing intelligence. Referring to the generally-held notion that the FBI possesses and keeps all the “gold nuggets” of knowledge available about international terrorists, Mr. Bowman stated that while the FBI has a great deal of knowledge, the lack of a standardized method of sharing it prevents the intelligence agencies from reviewing all relevant information in U.S. possession. Additionally, the challenge is not just sharing within the Federal system, but sharing within the organizations themselves. Comparatively speaking, the Department of Defense (DoD) has established a successful means of communicating within the DoD. Other Departments have not been as successful.

### **History of Information Gathering**

Mr. Bowman spoke about the history of our intelligence gathering culture and the forces that formed the present system. The United States Government is permitted to collect and disseminate surveillance on "U.S. persons" only pursuant to specific authorities. In response to a later question, Mr. Bowman defined a U.S. person as a citizen, an association of U.S. persons, a U.S. corporation, or a person who is in the country for lawful reasons (e.g., legal aliens).

Early in the 20<sup>th</sup> century, cablegrams were used to communicate. These were sent via cable companies who maintained carbons of the original cable. During an espionage scare after World War I, the amount of information gathered was so vast that the FBI was overwhelmed with collecting intelligence. The Attorney General accepted the help of volunteers from the American Protective League who not only collected information but also took such actions as placing wiretaps and detaining and arresting individuals suspected of disloyalty. The FBI and the Army began gathering information on U.S. citizens in response to the Bolshevik threats of the 1930s. The primary method used by the FBI to track information was to collect and review carbon copies of the telegrams and telegraphs. As technology advanced, information gathering became easier. In the 1960s, magnetic tape became a means of gathering vast amounts of information, primarily on people communicating overseas. Robert Kennedy applied this method of gathering information to the national criminal element.

In the 1970s the Church Committee began investigating the government's method and culture of intelligence gathering and prepared a report. The Church Committee found that the intelligence community had been engaged not only in unlawful practices but also activities that were socially unacceptable. Legislation was proposed that would limit the ability of the Federal government to monitor U.S. citizens. President Ford anticipated the legislation by issuing an Executive Order that limited the scope of the Intelligence Community's powers vis-à-vis U.S. citizens. Presidents Carter and Reagan issued similar orders limiting the ability of the intelligence community to collect and spread information about U.S. citizens, with President Reagan's [Executive Order 12333](#) continuing to provide the guidelines for domestic intelligence gathering. In addition, the intelligence community has been given guidance under the [Foreign Intelligence Surveillance Act \(FISA\)](#), the [Freedom of Information Act](#), and the [Electronic Communications Privacy Act](#), all of which aim to foster an open government and the privacy of the citizenry. As a result, the government is prohibited from easily transmitting information regarding U.S. citizens among the intelligence agencies.

### **Information Gathering and Sharing Currently and the Way Ahead**

Due to the nature of its mission, the FBI has the greatest authority to collect and disseminate surveillance. Consequently, it maintains a vast amount of information that other intelligence agencies or organizations would like to have. Information on non-U.S. persons can be disseminated with need or reason if, as required by FISA, non-relevant information on U.S. persons is redacted. Information on U.S. persons may be shared with other agencies pursuant to procedures implementing the Privacy Act and/or E.O. 12333. When Congress passed FISA in the 1970s, it required the government to prove that there is a "criminal nexus" to a national security crime if the subject is a U.S. citizen suspected of aiding a foreign entity against the United States before the government is allowed to conduct surveillance against that individual.

In addition to the current information collection authority of the FBI, Mr. Bowman identified the need of the intelligence community for a second bill in Congress, similar to the [USA PATRIOT Act](#), to give intelligence agencies the authority to review the business and educational records of U.S. persons. Mr. Bowman asserted that a number of potential foreign terrorists may be in the country as students, or may have business ties that could link them to known terrorist organizations.

**New Information Gathering Tool**  
*"The intelligence community [IC] would like to see a second version of the PATRIOT Act, allowing the IC to gather business and educational records on U.S. persons"*

One of the biggest drawbacks to an agency being unable to share its information freely, Mr. Bowman stated, is that the agency possessing the information may not be the agency best capable of handling or responding to that information. In an attempt to combat this and other challenges, the FBI has established joint task forces with State and local governmental officials. Coordinating with State and local officials via the joint task forces not only enable the FBI to share its information with people who are in a position to make use of it, it expands the number of eyes and ears of the Bureau, and the dissemination of information is streamlined in the process. Sharing intelligence information with State and local officials raises troublesome issues, however. If the information is classified, the officials must have the proper clearance to view the information, and the proper training to handle, store, and transmit the classified material. The Attorney General and the Director of Central Intelligence have responsibility for providing the requisite training to the States. How to share pertinent information with people such as first responders who do not have security clearance is also an area of concern.

In the question and answer session following his address, Mr. Bowman was asked to discuss the evolving approach to terrorism detection. He stated that, prior to September 11, 2001, the primary focus of the

intelligence community centered on visible, well-known terrorist organizations. Groups like al'Qaeda, Hezbollah, and Islamic Jihad were known entities and their somewhat centralized nature made them easier to trace. The events of September 11<sup>th</sup> made it clear that a centralized authority is not required for terrorists to function effectively. Terrorist training camps are providing would-be terrorists with the training they need to function individually or in small cells with little or no connection to a central authority.

One participant questioned whether there was a need to tighten export controls to prevent high-powered data encryption programs from falling into the hands of terrorists. Mr. Bowman stressed that the United States would continue to develop its response to encrypted information by anticipating and countering new encryption methodologies, rather than by trying to reign in export practices that the government had little hope of stopping. The United States would try to stay ahead of the commercially available technology, rather than trying to censor it.

Another participant wondered whether the military's role in dealing with terrorist threats against the United States might somehow be linked to the Homeland Security Advisory System through the Department of Homeland Security. The questioner envisioned levels of military involvement commensurate with the current threat warning level. Mr. Bowman replied that he found the prospect unlikely, due to the difficulties posed by posse comitatus. Mr. Bowman also expressed doubt that increased involvement by U.S. citizens in terrorist activities would lead to change in legislation regarding the domestic capabilities of the military.

## **Topic 1 – Military's Role in WMD Consequence Management**

The Working Group used the stated seminar objectives to frame their discussion and format their presentation to the other seminar participants. The group noted that, although it included civilian lawyers working for the military, as well as lawyers from the Federal law enforcement community, its membership was heavily weighted towards military legal officers. Accordingly, the group recognized that its discussions and debates often reflected the relative homogeneity of the group.

The Working Group began the session with four issues for discussion:

- Events/Authorities triggering Federal response actions in absence of an emergency declaration
- Use of the military, to include posse comitatus, federalizing the National Guard, and Titles 10 and 18
- Military Response, to include mobilization authority and pre-event actions
- Limits and liability of the military's use of force against civilians during WMD-CM

### **Triggers for Federal and Military Response Actions**

Working Group members decided to combine the issues *Events/Authorities triggering Federal response actions in absence of an emergency declaration* and *Military Response, to include mobilization authority and pre-event actions*. They concurred that, for this Seminar, they would focus on events and authorities that trigger a military response, leaving for the Seminar III issues related to the broader Federal response to weapons of mass destruction events. The group noted that it was not clear how the recently established Northern Command and Department of Homeland Security would impact the military's response to future WMD events.

Several participants stated that events were themselves triggers, not the authorities that guide the response to an event. One participant noted that, for the DoD the "trigger" for response is usually a request from another Federal agency. Another noted that a broad listing of events, broken out by type (chemical, biological, etc.) and matched with the appropriate guiding authorities, could be extremely useful.

### **National Guard**

The Working Group engaged in a discussion of the role of the National Guard in weapons of mass destruction consequence management (WMD-CM). One participant stated that Federal law enforcement relied on the Guard for transportation assistance on September 11, 2001. The group noted that provisions of [Title 10](#) and [Title 32](#) of the United States Code apply directly to the Guard. Local Guard members, under Title 32 authority, represent the local military response to WMD events. Some debate on the National Guard's role under Title 32 ensued. One participant noted that it primarily covered training exercises, but another pointed out that [32 U.S.C. §502](#) specifically states that a member of the National Guard can be ordered to "perform training or other duty." "Other duty" is not defined, and this provision could enable the Guard to perform a number of different missions, such as airport security. One participant opined that, should a WMD event occur, Guard forces would be quickly federalized.

While all agreed that the Guard probably would be among the first to respond to a WMD event, there was some disagreement regarding the visibility of this response to DoD. One participant stressed that, as

assets of the State Governor, Guard units did not necessarily factor into DoD's response planning. Another disagreed, stating that DoD would likely look to both Guard and Reserve units for assistance with WMD-CM. This is sometimes problematic, as some Guard members also serve as civilian first responders (e.g., as police, fire, and medical personnel).

The group recommended that further work be undertaken to determine the National Guard's status with regards to consequence management response, with due consideration for its differing roles and authorities depending on its status as a state or Federal entity.

### **Immediate Response**

The Working Group engaged in a lengthy discussion regarding DoD's authorities and responsibilities when immediately responding to a WMD event. The view was expressed that many authorities center on actions to be taken following an event, while authority to preempt or limit the effects of an event are less clear. There was consensus that local commanders can respond to protect lives and property, and mitigate human suffering without an order from headquarters. Further, all agreed that the commander was also responsible for requesting guidance from higher headquarters as soon as possible. One participant's view was that the authority to immediately respond without an explicit order was a function of a time when communications between local commanders and higher headquarters could be compromised or completely severed by a disaster. However, given advances in communications technologies, such unguided response is unlikely to occur in the future. Some within the group dissented, however, pointing out that communications were problematic during both September 11, 2001 and the Presidential inauguration. Other participants noted that it is not clear which level of higher headquarters would be responsible for giving an order to respond: would responsibility end with another military commander, or with the Service Secretary? There was no general consensus on this point.

The group considered when immediate response authority would begin and when it would end. While some participants expressed doubts that commanders either acting to preempt an event or responding to an obvious event that soon would be declared a disaster would ever be reprimanded, others maintained that guidance and statutes written to address these concerns might be necessary. The view was expressed that, in the case of a WMD event, it was not a question of if or when a local commander would respond, but the scope of the response. For instance, the question may not be whether troops would be dispatched to the scene, but whether they would be armed.

Many in the Working Group expressed the view that immediate response authority lasted for 72 hours. However, other participants noted that no statute specifies this length of time. One participant noted that a FORSCOM Emergency Preparedness Course cited 72 hours; in contrast, the Center for Law and Military Operation's DOPLAW Handbook notes only that immediate response authority is "short-lived." Key guidance documents for WMD-CM, including the [CONPLAN](#) and [DoD 3025.1-M](#), "Manual for Civil Emergencies," do not list a specific length of time for immediate response.

There was consensus that immediate response authority ends when civilian authorities can take charge of the situation. The group also agreed that in past disasters, a local commander's immediate response authority was recognized as terminated when the Federal Emergency Management Agency (FEMA) arrived on the scene. However, it was not clear to the participants who would make the decision to terminate the local commander's authority or how it would be communicated at the operational level. Additionally, the argument was made that immediate response authority could also be considered finished when DoD started to receive requests from other Federal agencies for assistance. Furthermore, the DoD may also encounter difficulties coordinating its own response. Local units who immediately respond to a WMD event may be unaware of the arrival or authorities of a DoD Joint Task Force assembled in another region and dispatched to the scene of the event.

Several participants shared anecdotes of circumstances where local commanders responding to civilian requests for assistance either were never reimbursed for this assistance or were later judged to have acted outside of their immediate response authority. They questioned whether a statute should address immediate response issues of time or reimbursement. One participant noted that immediate response authority was created by Supreme Court interpretations of the President's authority to act as Chief Executive. Essentially, the President has great discretion to act with flexibility in response to a domestic WMD event. To seek a legislative definition would invite Congress to place limits on the President's authority. A possible alternative for reimbursement issues could be a provision within interagency agreements whereby other agencies agree to reimburse DoD when they initiate a request for DoD assistance, even if this request comes before a presidential declaration. The group did not reach a consensus on how such immediate response reimbursement issues could be addressed. However, the group agreed that local commanders would generally respond immediately to any crisis with whatever assets he considered necessary to save lives or prevent damage, irrespective of reimbursement considerations. If current ambiguities related to immediate response authorities put commanders at risk, they must be addressed. The issues of reimbursement and the lifespan of DoD's immediate response authority were cited as topics to be investigated further.

### **On-Scene Military Interaction with Law Enforcement Agencies**

The group discussed the relationship between the military and Federal law enforcement on the scene of a domestic WMD event. Participants noted that provisions within [Title 18](#) allow the Attorney General to request military assistance in responding to chemical, biological or radiological attacks. There was also consensus that, a WMD event within the United States would be considered a criminal act, the FBI would be in charge at the scene, even if the WMD event occurs on a military base. [Presidential Decision Directive \(PDD\) 39](#) clearly articulates and the Federal Response Plan reaffirms that the FBI is the lead Federal agency (LFA) for crisis management<sup>1</sup> and decides when to transition from crisis to consequence management.

One participant emphasized that while the FBI's authorities in regards to WMD-CM were clear under the law, operationally the transition from DoD to FBI management of the incident scene does not go smoothly in Federal consequence management exercises such as TOPOFF. Military commanders have not always recognized the full authority of the FBI as the LFA for crisis management when they arrive at the crime scene. In particular, FBI access to DoD personnel for the purposes of questioning has not always been granted. Thus, the transition from immediate military response to a disaster to FBI treatment of the area as a crime scene is often problematic. The Working Group agreed that this is a training issue; both Federal law enforcement and military commanders must be educated on Federal consequence management authorities.

### **Legal Authorities Relevant to Triggers for Federal and Military Response**

The Working Group identified the following legal authorities as relevant to consideration of the triggers for Military response actions:

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<sup>1</sup> PDD 39, U.S. Policy on Counterterrorism, states:

Crisis Management includes measures to identify, acquire, and plan the use of resources needed to anticipate, prevent, and/or resolve a threat or act of terrorism. The laws of the United States assign primary authority to the Federal Government to prevent and respond to acts of terrorism; State and local governments provide assistance as required. Crisis management is predominantly a law enforcement response.

- [Stafford Act](#)
- [PDD 39, U.S. Policy on Counterterrorism](#)
- [PDD 62](#)
- [PDD 63](#)
- [E.O. 13231, Critical Infrastructure Protection in the Information Age](#)
- [DoDD 3025.1, Military Support to Civil Authorities \(MSCA\)](#)
- [DoD 3025.1-M, Manual for Civil Emergencies](#)
- [10 U.S.C. §371, et seq.](#)
- [18 U.S.C. §§ 175, 229, 831](#)
- [32 U.S.C. §§ 502, 715](#)
- [Interagency Domestic Terrorism CONPLAN Plan](#)
- [Federal Response Plan](#)
- [50 U.S.C. §2301, et seq., Defense Against Weapons of Mass Destruction Act](#)
- Critical Infrastructure Protection Plans

### **Shortfalls in Existing Authorities**

The Working Group summarized the shortfalls in existing authorities related to Federal and military response triggers as follows:

- Lack of guidance regarding timeline for commander's authority to act for immediate response actions
- Lack of guidance regarding law enforcement authority
- Lack of statutory authority for military assistance for incidents other than Chemical, biological, radiological, nuclear, and high-yield explosive (CBRNE)
- Authority of National Guard, acting under [Title 32](#), to cross State lines pursuant to Emergency Management and Assistance Compacts

### **Issues Lacking Interagency Consensus**

Personnel from Federal agencies and the Military Components participating in the Working Group did not agree on the substance of the following issues:

- Lack of guidance regarding reimbursement for immediate response
- Transition from DoD response to law enforcement

## **Use of the Military**

Next, the Working Group considered legal issues attendant to use of the military for WMD consequence management, to include posse comitatus, federalizing the National Guard, and [Titles 10](#) and [18](#) of the United States Code.

### **Posse Comitatus**

Members of the Working Group noted that key Bush Administration figures, including Office of Homeland Security Director Ridge, had testified before Congress that they did not believe it necessary to request any revisions to the [Posse Comitatus Act \(PCA\)](#).

A participant added that a handful of states have statutes that limit the uses of the National Guard due to posse comitatus concerns. Another participant stated that posse comitatus was never meant to apply to actions related to defense of the United States. The original purpose of the statute, to prevent soldiers from engaging in law enforcement activities, had been construed by case law to prohibit a broad range of activities, including defense of Federal property. As the President has the constitutional authority to

defend the United States, and the authority to use soldiers to defend its borders and its institutions, it should not be necessary to clarify this authority in a statute.

The Working Group noted that there were a number of exceptions to the general rule that the military can not engage in law enforcement activities: provisions under [Title 10](#) of the U.S. Code, including the [Insurrection Act](#); the military support to civilian law enforcement provisions under [Title 18](#); the provisions related to defending against weapons of mass destruction under [Title 50](#) of the U.S. Code, and; possibly the public health provisions of [Title 42](#). The inclusion of the public health provisions was disputed, as they do not expressly cite military support as available for enforcing quarantines and other public health actions. The view was expressed that [PDD 63](#) would allow critical infrastructure such as a civilian communications hub considered vital to national security, to be defended by troops.

The view was expressed that, in light of recent questions on posse comitatus, the Attorney General should issue an interpretation of what the Posse Comitatus Act does and does not prohibit.

## **Detailing**

The group engaged in a lengthy discussion of difficulties encountered when DoD personnel were "detailed" to other agencies for WMD consequence management. This practice, increasingly prevalent as Federal agencies turn to DoD for mission support, has caused problems in the past. One participant stated that Army National Guard members were mobilized under [Title 10](#) of the U.S. Code to assist the U.S. Border Patrol and other military personnel have been assigned similar duties. In these cases, it was argued that the soldiers, normally excluded from law enforcement duties, were not limited by posse comitatus restrictions because they were no longer considered members of DoD once they were detailed to another agency. The participant believed the Department of Justice (DOJ) Office of the Legal Counsel presented this argument.

Much of the discussion on detailing centered on an incident near the United States-Mexico border where U.S. Marines of Joint Task Force-6, assigned to an anti-narcotics mission, were fired on by a shepherd boy who may have mistaken the camouflaged Marines for predators. The Marines radioed their command post (a Border Patrol station) and received permission to defend themselves. When the shepherd fired his gun again, a member of the patrol returned fire and killed him. The Marines were later brought to trial by two state grand juries and one Federal grand jury before ultimately being acquitted. The experience revealed many of the problems with detailing DoD personnel on missions that are law enforcement in nature. Additionally, the Marines themselves followed their rules of engagement, which are fundamentally different from those of a Federal law enforcement official. Finally, there seemed to be poor communication generally between military, Federal, and State officials involved in the incident and subsequent legal actions.

Other participants noted that, in respect to border patrol duties, they requested higher headquarters to supply them with the statutory authority for detailing, and specifically requested that the statutory authority state that, in the event a person is detailed from one agency to another the laws, restrictions and prescriptions of his or her home agency no longer apply to the individual. One participant noted that the DoD Office of the General Counsel responded with an opinion based on the Transportation Security Act, which specifically authorized military personnel to be deputy air marshals. Several participants noted that they did not believe this opinion provided adequate coverage for individuals detailed for other Federal duties, stating that the authority for military personnel to serve as air marshals represented a unique instance of DoD members serving a law enforcement role. One participant stated that no comparable statutes existed for detailing to the Immigration and Naturalization Service or for the U.S. Border Patrol. The participant suggested that perhaps a statute covering all forms of detailing was necessary.



## Legal Authorities Relevant to Use of the Military

The Working Group identified the following guiding authorities as relevant to consideration of the issue of uses of the military in WMD consequence management:

- [10 U.S.C. §331, et seq., Insurrection](#)
- [10 U.S.C. §371, et seq., Military Support for Civilian Law Enforcement Agencies](#)
- [18 U.S.C. §1385, Use of Army and Air Force as Posse Comitatus](#)
- [18 U.S.C. §§ 175, 229, 831, and 2331, et seq.](#)
- [50 U.S.C. §2301, et seq.](#)
- [DoDD 3025.1, Military Support to Civil Authorities \(MSCA\)](#)
- [DoDD 5200.27, Acquisition of Information Concerning Persons and Organizations not Affiliated with the Department of Defense](#)
- [DoDD 5240.1, DoD Intelligence Activities](#)
- [DoDD 5525.5, DoD Cooperation with Civilian Law Enforcement Officials](#)
- [DoD 5240.1-R, Activities of DoD Intelligence Components that Affect United States Persons](#)

## Shortfalls in Existing Authorities

The Working Group identified the following shortfalls in guidelines related to uses of the military for WMD-CM:

- Identifying State authorities that limit use of the National Guard
- Statutory authorities for detailing troops outside DoD
- Training for military troops when they are detailed outside of DoD in support of law enforcement

## Issues Lacking Interagency Consensus:

- Common understanding regarding the limits of the [Posse Comitatus Act](#)

## Limits and Liability of the Military's Use of Force

### Use of Force

While trained in the use of force in times of war, the military is not always well equipped for use of force in other situations. The group agreed that the military is authorized to use force to quell an insurrection, but such a use of force is restricted. A soldier operating under the Insurrection Act who is ordered to clear a street, for example, cannot simply fire into a menacing crowd. The concern was expressed that in the event of WMD-CM, limits to the use of force would quickly become strained by resulting events. The opinion was expressed that troops probably would not be armed with deadly force for consequence management missions.

A participant noted that not only DoD personnel but any Federal official is vulnerable to sanctions in State courts if his or her use of force in the line of duty is considered outside the limits of reasonable use of force under the Constitution. As a result, Federal law enforcement agencies have support systems in place for law enforcement agents brought to trial. The DoD has no such system and has proven to be ill-equipped to assist personnel on trial in civilian courts.

The group noted that the U.S. Congress recently passed legislation to ensure that DoD personnel cannot be brought before the International Criminal Court. The view was expressed that perhaps a similar statute should be passed to prevent military personnel from appearing before State courts for actions taken while in the line of duty. Instead, military personnel would be processed by the Uniform Code of Military Justice (UCMJ). One participant's response to this suggestion was that the Supremacy clause does not allow the government to pass a statute that gives exclusive jurisdiction to military courts should an individual run afoul of the [10<sup>th</sup> Amendment](#).

An additional problem, one participant stated, is that different agencies and organizations of the DoD have different rules for the use of force. The participant stated that the DoD Directive on use of force for operations other than war was unclear and outdated. Updating the directive and standardizing the Rules on the Use of Force (RUFs) across DoD would be a step in the right direction.

### **Legal Authorities Relevant to the Military's Use of Force**

The Working Group identified the following authorities as relevant to the issue of the limits and liability of the Military's use of force against civilians during WMD-CM:

- [Federal Tort Claims Act, 28 U.S.C. 2671, et seq.](#)
- [4<sup>th</sup> Amendment to the U.S. Constitution](#)
- [Bivens v. Six Unknown Bureau of Narcotics Agents, 403 U.S. 388 \(1971\)](#)
- [In Re Neagle, 135 U.S. 1 \(1890\)](#)
- [Tennessee v. Garner, et al., 471 U.S. 1 \(1985\)](#)
- [Graham v. Connor, 490 US 386 \(1989\).](#)
- [DOJ and DoD Counsel opinions on the "Redford" case, \(Investigation of the Death of Esequiel Hernandez, Jr.\)](#)
- [National Defense Authorization Act of FY2003](#)

### **Shortfalls in Existing Authorities**

- Lack of protection for military personnel from Federal, State and criminal liability
  - When performing Federal duties
  - If detailed to Federal agencies outside DoD
- Lack of clarity about the requirements of detailing

### **Issues Lacking Interagency Consensus**

- Tension between Federal use of force and State National Guard RUF
- Lack of standardized RUF both within DoD and across Federal agencies

## **Topic 2 - Quarantine and Medical Responders**

### **Quarantine and Evacuation**

At the outset of the Working Group discussion of quarantine and medical responders issues, the participants agreed that most imagine a quarantine resulting from a biological event. Further it was agreed that for planning, legislation and implementation, consequence management for a biological event also encompasses consequence management for a chemical event. An attack using a chemical agent can be considered a subset of bioterrorism.

As a preliminary step to focusing on legal issues in quarantine and evacuation, the Working Group drew a distinction between isolation, quarantine, and *cordon sanitaire*, to avoid unwittingly discussing actions not accurately characterized as quarantine. The classic definition of isolation includes the separation of infected persons, usually in a hospital setting. *Cordon sanitaire* is the erection of a sanitary barrier around an affected area. Quarantine, a police power traditionally administered by the States, is generally characterized by restriction of person or persons presumed exposed and it is usually administered at the community or population level. Evacuation is a subset of Quarantine. Intra-state quarantine is reserved to the States by the [10<sup>th</sup> Amendment](#). Foreign and inter-state quarantine is a Federal power generally considered to be a regulation of foreign and interstate commerce.

#### **States**

The Quarantine Working Group initially focused on the inconsistency of quarantine regulations from State to State. Not only do the triggers for and declaration and implementation of quarantines vary, but the penalties for violating quarantine from State to State range from misdemeanor to felony. As a remedy for this major disparity between State regulations, State officials are being urged to survey their quarantine regulations and consider a more universal code. The Centers for Disease Control (CDC), along with Johns Hopkins and Georgetown Universities, have distributed texts of and are encouraging States to pass what is currently known as the [Model State Emergency Health Powers Act \(MSEHPA\)](#). Passing of the MSEHPA would standardize State quarantine authorities as well as punishment for resistance to or violations of quarantine regulations. Such consistency would simplify the legal issues that may arise in the event of a quarantine that extends beyond a State's borders as well as those issues attendant to Federal assistance to States in emergency situations.

The MSEHPA adheres to the classic definitions of isolation and quarantine. It suggests the following set of standardized quarantine conditions and principles, among others:

- Quarantine conditions must be the least restrictive
- Provide for separate confinement and regular monitoring of quarantined persons
- Immediately release quarantined persons if there is no danger or if the dangerous period has expired
- Address needs of quarantined persons in a competent fashion
- Provide safe and hygienic premises
- Respect the religious/cultural beliefs of quarantined persons to the extent possible

A State's Governor must declare a public health emergency in order to initiate quarantine under the MSEHPA. The trigger for such a declaration could be events, such as bioterrorism or outbreaks of either a novel or previously eradicated infectious agent, which bear a high probability of death or injury in a

population. The Model Act provides for quarantine via court order as well as, in extreme circumstances, quarantine with after-the-fact due process, *i.e.*, quarantine a population and then provide individuals with due process hearings once the quarantine has ended. The MSEHPA also standardizes penalties for violation of quarantine. In each State where the MSEHPA regime is in effect, violating a quarantine order constitutes a misdemeanor.

That the MSEHPA makes failure to obey quarantine a misdemeanor offense raises issues as regards military aid in enforcing quarantine and the [Posse Comitatus Act](#). Since failure to obey would be a punishable offense, any effort to enforce compliance to a quarantine situation would, in effect, be law enforcement. One participant offered that for States implementing the MSEHPA or a law based on it, the military role in a quarantine event would be of a supportive nature. Enforcement of the quarantine "law" would be the responsibility of State and local law enforcement authorities and the National Guard. The role of the military would be logistical and/or operational support, e.g., food distribution, operational maintenance of critical infrastructure, and transport of goods.

## **Federal**

### ***Quarantine Regulations***

At the Federal level, [42 U.S.C. §264](#) (Public Health and Safety Act (PHSA) §361) is the controlling authority for quarantines. This statute allows for the "apprehension, examination, and conditional release" of persons infected with a communicable disease in a qualifying stage." A qualifying stage is either a communicable stage, or a pre-communicable stage that is likely to cause a public health emergency. "Public health emergency" is not defined in the statute, leaving open the question of where such a threshold may lie. In order to initiate a quarantine under [42 U.S.C. §264](#), the government must prove that the person to be quarantined is moving or about to move to another state or is, at least, a probable source of infection to other persons.

Communicable diseases covered under the statute are specified in Executive Orders of the President on recommendation of the Secretary of Health and Human Services (HHS). The most recent of such lists was issued in 1983 and includes cholera or suspected cholera, diphtheria, infectious tuberculosis, plague, suspected smallpox, yellow fever, and suspected viral hemorrhagic fevers. In the event that a new or unlisted agent is the cause of an outbreak, it was agreed that an Executive Order on an emergency basis would not be difficult to execute. Additionally, while there is no official Federal mechanism in place analogous to the "after-the-fact" hearings provided for in the [MSEHPA](#), it is assumed that at a minimum, some type of habeas corpus proceedings would be provided in the event of a quarantine initiated pursuant to [42 U.S.C. §264](#). Such hearings would likely imitate the Model Act's post-deprivation hearings.

The quarantine statute appropriate during times of war is [42 U.S.C. §266](#) (PHSA §366). Its provisions serve to protect the military, naval forces, and other "war workers" from the communicable diseases specified in Executive Orders. It provides for the apprehension and examination of persons infected with a communicable disease in a qualifying stage or who is a probable source of infection to members of armed forces or individuals engaged in production or supply efforts.

Foreign quarantine regulations are established in 42 Code of Federal Regulations (CFR) Part 71 and include reporting of death or illness, quarantine stations, sanitary measures for carriers, articles and cargo, medical surveillance of persons arriving at U.S. ports, and the quarantine of persons arriving into the United States, if necessary.

Interstate quarantine regulations may be found at 42 CFR Part 70. These regulations implement a Federal travel permit system under which persons with cholera, plague, smallpox, typhus, and yellow fever may not travel from one State to another without a written permit issued by the Surgeon General. In addition, the statute includes provisions for Federal intervention in the event of inadequate local control of communicable diseases.

### ***Quarantine Enforcement***

While some statutes regulate enforcement of quarantine against persons, most statutes are concerned with preventing the importation and dissemination of infected goods into the stream of commerce. [42 U.S.C. §243](#) provides for State and local assistance from the National Guard and [42 U.S.C. §268](#) for the recruitment of members of the U.S. Customs Service and the Coast Guard for quarantine enforcement. The latter statute provides for the use of military officers in the enforcement of State quarantines, however it is a very old statute, dating from a time when the sea was the only means of intercontinental or otherwise long-distance travel, and it deals with seacoast installations and mostly protects ports of entry. It is the only mention of military support of State quarantine in the United States Code.

The participants agreed that the insurrection statutes, found at [10 U.S.C. §331, et seq.](#), would be applicable to quarantines during WMD consequence management.

### ***Criminal Penalties***

[42 U.S.C. §271](#) (PHSA §368) states that a person may be fined not more than \$1,000 or imprisoned for not more than one year or both for failure to abide by quarantine regulations. Under [18 U.S.C. §§3559](#) and [3571](#), individuals may be fined up to \$250,000 if a violation of the regulation results in death or up to \$100,000 if death does not result. In addition, Federal Courts may enjoin quarantine violations pursuant to [28 U.S.C §1331](#).

### **Legal Authorities Relevant to Quarantine and Evacuation**

The Working Group identified three of the authorities mentioned above as most important to the current quarantine regime and future or enhanced quarantine regimes. In order of importance, they are:

- [The Model State Emergency Health Powers Act](#)
- [42 U.S.C. §264, Quarantine and Inspection](#)
- 42 CFR Part 70, Interstate Quarantine Regulations

### **Shortfalls in Existing Authorities**

The insufficiencies identified by the Working Group involve the operational and logistical issues relating to quarantine. Operationally, there is a need for additional guidance and authorities relating to the enforcement of quarantines and the establishment of guidelines and standards for the use of force in such efforts. Logistically, guidelines and authorities are necessary to address court hearing procedures and class consolidation and standards should be established for pre- and post-event vaccination regimes. Also, a campaign to educate the public about and equip it for quarantine should also be undertaken to make quarantine an effective measure should it be necessary for WMD consequence management.

## Licensure Requirements and Liability for Medical Responders

The Working Group determined early in its discussion on licensure and liability that this topic is mainly of concern to DoD health care providers. Civilian health care institutions normally operate at an approximate 95% occupancy rate – they do not have the capability to handle a surge in admittance or need for their services. In such events as the San Francisco earthquake, Hurricane Andrew, and the terrorist bombing in Oklahoma City, responding hospitals were pressed beyond their ability to adequately support the consequence management response needs. In such situations, it is expected that localities would need Federal assistance, provided specifically by the DoD through its military physicians. Military physicians are trained in civilian institutions and the National Guard is an expected responder to disasters. Thus, the participants generally agreed, DoD personnel have the necessary licenses and liability protection to render medical support to civilians and civilian facilities in the consequence management phase of a WMD event.

In addition to the [Federal Tort Claims Act \(28 U.S.C. § 2671 et seq.\)](#), [10 U.S.C. §1094, Sub \(d\)](#) allows military physicians with a valid license to respond in any State, Commonwealth, the District of Columbia, or Territory in execution of and acting within the scope of orders of the Secretary of Defense. To augment the efficacy of §1094, [10 U.S.C. §1089](#), known as the Gonzales Act, is the only avenue to suing a military practitioner. The Gonzales Act allows such suit only in cases of negligence. Further ensuring the legitimacy of licenses of DoD personnel across state lines, [DoDI 6025.16](#) provides for the interstate portability of licensure for military physicians/responders. Thus, military medical responders to a WMD event will be protected legally irrespective of the location of the event.

The Working Group noted that the Department of Defense is the only institution that has an official authority for license portability. For example, the FBI, which also has medical personnel such as physicians and medical examiners, has no similar authority ensuring the portability of the licenses of FBI doctors.

Currently, the [Bioterrorism Act](#) (Pub. L. 107-188, Public Health Security and Bioterrorism Act of 2002) addresses licensure issues in a few ways. The law mandates the creation of a registry and the construction of a database of licensed physicians that would allow immediate access to information on doctors in the area of a bioterrorism event. Also under the Bioterrorism Act, licensed physicians who respond in a State other than the one in which they are licensed are granted the same authorities and protections as individuals licensed in that State. Similarly, the MSEHPA, Emergency Management Assistance Compact (EMAC) legislation, and existing interstate Mutual Aid Agreements, will ensure that in the future, mechanisms will be in place for reciprocity and indemnification of out-of-state health care providers.

### Legal Authorities Relevant to Licensure and Liability of Medical Responders

In sum, the Working Group identified the following authorities as most relevant to licensure and liability in consequence management of a WMD event:

- [10 U.S.C. §1089](#)
- [10 U.S.C. §1094](#)
- [Federal Tort Claims Act \(28 U.S.C. § 2671, et seq.\)](#)
- [DoDI 6025.16](#)
- [Pub. L. 107-188, Public Health Security and Bioterrorism Act of 2002](#)
- [Model State Emergency Health Powers Act](#)
- Emergency Management Assistance Compacts

- Interstate Mutual Aid Agreements

### **Shortfalls in Existing Legislation**

The Quarantine and Medical Responders Working Group reached consensus that existing Federal laws are sufficient to adequately address the medical licensure and liability concerns attendant to WMD consequence management. The Group noted that the following improvements were necessary:

- All States should pass reciprocity laws recognizing licensure across State lines
- Government agencies and departments that retain physicians should adopt measures similar to DoDI 6025.16 to ensure the portability of licenses state-to-state.

### **Standardization of Emergency Response**

At the outset of the Working Group discussion on standardization, it was agreed that standardization did not raise legal issues. All agreed, nonetheless, that standardization is an important issue in WMD consequence management. The Working Group members agreed that the standardization of emergency communication frequencies, transmitters and receivers; fire-fighting equipment; medical equipment; and transportation equipment, among others, were important to the improvement of readiness for consequence management.

Of particular interest to the group was standardized equipment, described as essential to the interoperability of emergency responders. One participant opined that the nature of politics, unions, and the American political system almost certainly will prevent the introduction and passage of Federal legislation aimed at the nation-wide, interstate standardization of emergency response. It may be easier, one participant noted, to set Federal standards than to require disparate agencies, States, and local governments to purchase specific products. Several participants stated that, though standardization is addressed by current legislation, words like "encouraged" and "urged", used in the implementing legislation, ascribe a more permissive rather than prescriptive or binding nature to the statutes.

Standardization shows more promise in the areas of training of first responders and planning. It was suggested that the FEMA would take the lead role in training and planning.

### **Legal Authorities Relevant to Standardization of Emergency Response**

The Working Group identified the following authorities as important to standardization:

- [15 U.S.C. § 2229, Firefighter Assistance](#)
- [Pub. L. 107-56, USA PATRIOT Act](#)
- [Pub. L. 107-107, National Defense Authorization Act for Fiscal Year 2002](#)

### **Shortfalls in Existing Authorities**

As it was agreed that the current political landscape does not permit full standardization of emergency response, the Group concluded that current authorities are sufficient to the extent that they meet the current requirements. It was suggested however, that industry, private corporations, and professional organizations should begin taking steps towards a regime of standardization in this area.

## **Topic 3 - Issues of Communication in WMD Consequence Management**

The Communications Working Group began discussion by introducing one another and identifying the agency they represent in order to understand the point of view of the contributions of each participant. One participant commenced by defining consequence management as non-threat, non-apprehension, and non-law enforcement. The focal point of Federal CM should be working with State and local authorities. The Working Group started by focusing on information sharing, paying particular attention to classification issues. The participants then discussed communicating information to the public and ended with liability attendant to disclosure and non-disclosure of threat information.

### **Information Sharing**

Several challenges and issues in sharing classified information between Federal, State, and local agencies were identified by the Working Group. As a result of the discussions, the following classification issues emerged:

- Proper disclosure and dissemination of classified information
- Moving classified information from the national to the State and local levels
- Providing clearances and training to local/state officials to handle secure classified information

Additionally, in considering how to transfer relevant information to the proper officials to ensure a timely response, the Working Group considered whether the Federal law is supreme in regards to classified information. In response to the question of who has oversight of information sharing with respect to WMD-CM, one participant indicated that FEMA has a public affairs liaison officer that handles CM issues from the Headquarters (HQ) Emergency Support Team or Regional Operations equivalent. Terrorism issues would be handled between the HQ Emergency Support Team and the Lead Federal Agency. Participants agreed that bureaucratic channels, such as the Operations Center are in the critical path of information translation. One participant said that during a crisis, all information shall be shared. Another participant strongly disagreed, stating that the perception of what information is important or time-sensitive may differ depending on who has access to the information. This participant repeatedly emphasized the importance of defining the threat and the threshold that must be met for passing on information about different types of threats. The question becomes, who will make the decisions from the operations center on who gets access to information?

During discussion of who determines whether to disseminate threat information, one participant noted that information is usually transmitted to State and local governments through Federal law enforcement or other lead Federal officials. Additionally, the Office of Homeland Security has and the Department of Homeland Security (DHS) likely will transmit the information to the States and localities. The Department of Justice (DOJ), lead Federal agency for crisis management, would notify the Federal Bureau of Investigation (FBI) official in charge, who would then designate an FBI CM official. The CM official would be responsible for authorizing the dissemination of the information. Another participant referred to the [U.S. Government CONPLAN](#), identifying it is a useful reference when considering a CM event. The CONPLAN states that Federal, State and local agencies have the obligation to notify the FBI when a threat is received. On the contrary, stated another participant, the Attorney General (AG) is the main authority for determining the criticality of a threat. The CONPLAN outlines broadly CM information sharing. The [Federal Response Plan \(FRP\)](#), chartered under the [Stafford Act](#), includes more



specific guidelines for coordinating activities between the 27 Federal entities that support State and local governments during consequence management. An important component of the FRP is coordinating communications affecting the State and local governments. Included in the FRP is the Communications Annex, which affirms sharing sensitive and classified information between agencies. However, there was consensus throughout the Working Group that the FRP must be revised due to the impending consolidation of some agencies under the Department of Homeland Security (DHS).

The discussion turned to the issue of the leaking or transferring of sensitive Federal intelligence information to the State and local level and the question arose whether appropriate mechanisms are in place to share information with State and local officials. Of particular concern to several participants was whether all states have laws in place that adequately protect federally classified or sensitive information transferred to States and localities. One participant described the presumption in Texas that all information retained by the government entity is public information. According to the participant, the unofficial position of the Texas Attorney General is that sensitive information given to the State or local entity is "surrendered" information. That is, the State becomes the release authority for that information. One participant stated that FEMA general believes that information should not be released, unless the receiver has the appropriate security clearances and agrees to safeguard the information, regardless of their status. "In Texas, it wouldn't matter if you do or do not have the appropriate clearances," was the response. The FEMA representative suggested developing lists of State and local personnel with a "need to know", so Federal agencies may turn to them with information during emergency situations. The consensus among the group is that sharing sensitive information with State and local personnel "creates a security risk" and the mechanism for the sharing of information is too ambiguous.

### **Information Sharing Role of the Department of Homeland Security**

The question of two-way sharing of information arose, with participants asking whether adequate mechanisms were in place for sharing with appropriate Federal agencies time-critical information obtained from State and local agencies and officials. The obligation of State and local entities to provide information to Federal agencies other than DHS was unclear to the participants. Also unclear is the mechanism to be used by DHS to edit intelligence and other information before sending it to the intelligence community. A participant noted that the [Homeland Security Act, §§ 201 and 202](#) allow the Secretary of DHS access to all reports and analytical information relating to the threat of terrorism in the United States and all agreed that these sections are unambiguous with respect to guidelines on releasing threat information to the Intelligence Community. In this regard, a participant questioned whether [Executive Order 12958](#) will be sufficient to confer classification authority on DHS and whether [Executive Order 12333, US Intelligence Activities](#) will be significant to the Information Analysis and Information Protection Directorate of the new Department. Another participant was concerned that DHS' integration of information from various agencies might create an issue of designating which agency shall disseminate the information. Additionally, another stated, the information received by DHS may be designated as not releasable. All participants agreed that the establishment of DHS increased concerns and led to confusion among the affected Federal agencies.

### **Legal Authorities Relevant to Information Sharing**

In addition to [Executive Order 12958](#), the Working Group cited as relevant to information sharing the [USA PATRIOT Act \(18 U.S.C. §2517\)](#), which states that information related to terrorism shall be appropriately shared between Federal, State and private entities. The Working Group ultimately agreed that [H.R. 5005, the Homeland Security Act](#), was the most critical reference for sharing classified information. Subtitle H of the Act details the requirements for sharing classified information with Federal agencies and State and local personnel. The new act gives greater authority to the Secretary of Homeland Security for demands of information from any agency to include Central Intelligence Agency (CIA).

## Shortfalls in Existing Authorities

The Working Group agreed that there are many outstanding issues in the area of information sharing, especially in light of recent untested legislation on the subject. These issues include:

- Who will control the flow of information in the event of a WMD-CM event?
- How much overlap will be permissible between the new DHS, FBI and FEMA?
- Are there adequate legal and operational controls at the State and local levels for the receipt, distribution, and handling of classified information?

## Communicating Information to the Public

Discussing communication of information to the public in a WMD event, the working group asked, Who communicates that information? How much should the public know? What must the public be told? At what point is the information reliable enough to disseminate it to the public? The Working Group agreed that the [Homeland Security Act](#) is the seminal statute for disseminating threat information to the public. It mandates the Secretary of DHS to administer the color coded Homeland Security Advisory System created by the OHS. One participant noted that in cases of emergencies and disasters, the [Stafford Act](#) authorized a Federal officer to be in charge of releasing threat information to the public. This Federal officer would have theoretically reported to the President in a WMD event. Another participant disagreed, stating that Stafford Act lacks guidance on communicating information to the public. The *Communications Annex of the FRP* also discusses communications with the public. However, each of these guidelines, and likely the [Freedom of Information Act](#), and the [Privacy Act](#), will be altered by the Homeland Security Act. One participant emphasized, "Let the Secretary of DHS deal with the public."

Sheltering, evacuation, and continuing hazard warnings are the critical early communications for the public. The group was in agreement that during a WMD event, information regarding sheltering and basic needs most likely will be disseminated to the public from emergency operation centers. State and local entities likely will provide for the basic needs of the public during a WMD event; unless a Federal building is affected during a terrorist act. A participant added that consequence management starts at the State and local levels then moves up to the Federal level. In an extreme emergency, the President likely will address the public with the governor or mayor standing next to him during a press release.

One participant addressed Federal agency dissemination of information to the press. Due to the creation of DHS, it may be that the Attorney General will no longer speak on behalf of all Federal agencies. Rather he might be limited to discussing law enforcement while the Secretary of DHS addresses the other aspects of the WMD event. All participants agreed that, with the establishment of the DHS, the Secretary may be primarily responsible for all communications to the media and public. DHS also will be assessing and analyzing threat evidence whereas the FBI will focus more on collection. The participants also agreed that dealing with the public is more difficult in crisis management than in consequence management. CM only deals with managing the effects of a WMD event; most legal issues will occur during Crisis Management when constitutional concerns are more prevalent.

## Legal Authorities Relevant to Communicating Information to the Public

The Working Group identified the following relevant authorities:

- [Pub. L. 107-296, Homeland Security Act](#)

- [Freedom of Information Act](#)
- [Privacy Act](#)

### **Liability Attendant to Non-Disclosure and Disclosure of Information**

Early in the discussion of liability for (non)disclosure of threat information, the Working Group agreed that the [Federal Tort Claims Act](#) applied to Federal non-disclosure of information. Specifically, [28 U.S.C § 2680\(a\)](#), which includes the discretionary function exception, and [28 U.S.C §2680 \(f\)](#), the quarantine exception, operate effectively to prevent liability from attaching for disclosure or failure to disclose information. In fact, stated one participant, these provisions, in combination with the [Stafford Act's](#) limitation of liability provision, make it extremely difficult for a Federal employee to be held liable for acts or omissions arising during the performance of emergency response functions. Conversely, liability may be imposed on individuals acting outside their scope of authority. Another participant noted that the Federal Tort Claims Act does not afford government contractors the privilege of the discretionary function exception; however, contractors are not liable in nuclear testing situations. One participant stated that States have enacted tort claims acts and State sovereignty statutes similar to the [Federal Tort Claims Act](#) that grant protection from liability.

#### **Shortfalls in Existing Legislation**

A concern of the working group is that the Federal government immunity under the Federal Tort Claims Act may act as a disincentive to affirmatively disclosing threat information to first responders.

## Summary

To conclude the WMD Consequence Management Legal Seminar II, Mr. Ray Heddings, DTRA/GC, reviewed the status of the four primary objectives for the seminar working groups: to identify relevant references, identify relevant issues for discussion, identify shortfalls with existing legal authorities, and identify areas with lack of interagency consensus. Mr. Heddings commented that the working groups had done a tremendous amount of hard work and accomplished all of their objectives. He informed the participants that a reference list, revised to reflect the Working Groups' discussions would be sent to each participant for review. He also informed the participants that a CD would accompany the reference book and would have all references hyperlinked for accessibility. Additionally, Mr. Heddings reminded the participants that working groups would continue their work over the next six months, in preparation for Seminar III.

Mr. Robert Brittigan, DTRA/GC, added his appreciation for the hard work accomplished by each working group and their leaders.. He commented that he noticed several new wildcards, such as the creation of the Department of Homeland Security and the Northern Command, which would have a significant impact on WMD-CM planning and processes in the future. He also commented that information sharing between agencies would continue to be a fertile area for discussion. Mr. Brittigan reiterated that work would continue between now and the next seminar and reminded participants that it was not too late to raise new issues for exploration.

Since many seminar participants will be involved in the upcoming TOPOFF II WMD National Level Exercise, Mr. Brittigan proposed that the next seminar take place shortly afterwards, tentatively Tuesday, June 24 and Wednesday, June 25, 2003. This would be the last working group session of the seminar series; the subsequent meeting would be occupied with editing the WMD-CM Legal Reference Deskbook. Mr. Brittigan once again thanked all participants for their hard work and a job well done.

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# Legal Weapons of Mass Destruction Consequence Management Seminar

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## APPENDIX A: Agenda

### 19 November 2002 – Working Session

#### *Registration and Refreshments*

#### *Welcome and Introductory Remarks; Presentation of Working Group Goals and Objectives*

**Mr. Raymond Heddings**, Associate General Counsel of the Defense Threat Reduction Agency (DTRA)

#### *Organizational and Operational Developments Related to WMD Consequence Management*

**Mr. Anthony Russell**, Senior National Security Analyst, SAIC

#### *Working Group Review of Military's Role in WMD Consequence Management*

**Facilitators - Maj. Donald Twyman**, Assistant General Counsel, DTRA  
**LTC Rocky Gillette**, Deputy Staff Judge Advocate for Operations Law,  
Headquarters, First U.S. Army

#### *Working Groups Review of Quarantine & Medical Responders*

**Facilitator – Mr. James Misrahi**, Attorney Advisor, Centers for Disease Control

#### *Working Group Review of Issues of Communication in WMD Consequence Management*

**Facilitator – SMSgt. Jean Hardin**, Air Force Declassification Office

#### *Lunch*

#### *Working Groups Continue Review of Topics and Finalize Presentations*

*Mr. Ray Heddings Summarizes Progress and Reviews Timelines for Presentations*

## **20 November 2002 – Plenary Session**

### *Registration and Refreshments*

#### *Plenary Session Opening Remarks by Conference Host*

**Mr. Robert Brittigan**, General Counsel of the Defense Threat Reduction Agency

#### *Detection and Prevention for Homeland Security*

**Mr. Stephen King, Esq.**, Director of Investigations & Law Enforcement,  
Countermeasures & Incident Management Directorate, White House Office of Homeland  
Security

#### *Collection and Dissemination of Intelligence Information*

**Mr. M.E. (Spike) Bowman**, Associate General Counsel, National Security Law Unit,  
Federal Bureau of Investigation

#### *Presentation I: Military's Role in WMD Consequence Management*

#### *Presentation II: Quarantine & Medical Responders*

#### *Presentation III: Issues of Information Sharing in WMD Consequence Management*

#### *Summary of Working Groups' Accomplishments*

**Mr. Ray Heddings**, DTRA/OGC, reviews the objectives of the Working Groups and  
their progress in meeting those objectives

#### *Closing Remarks*

**Mr. Robert Brittigan**, DTRA/GC, summarizes events and identifies goals and a  
tentative date for the next seminar

## APPENDIX B: List of Participants

MAJ Ken Arnold	OSD, OGC
Ms. Lisa Baker	FBI
Mr. M.E. (Spike) Bowman	FBI
Mr. Robert Brittigan	DTRA
Ms. Carolyn "Susie" Comerford	AFDO
LTC Joseph Dice	CLAMO
Mr. Giuseppe Donadio	SAIC
MAJ Matt Fussa	USMC SJA
CDR Stephen Gallotta	Navy JAG
LTC Rocky Gillette	HQ, First U.S. Army
Mr. Robert Gonzales	HQ, Fifth U.S. Army
LTC Allen Goshi	U.S. Army Forces Command
SMSGt Jean Hardin	AFDO
Sqd. Ldr. Nina Harvey	USAF/JAI
Mr. Raymond Heddings	DTRA
Lt Col Laura Hickman	AFDO
LTC Gregory Huckabee	HQ, First U.S. Army
Ms. Laura Jennings	NIMA
LTC K.W. "Kap" Kapitan	HQ, AIA/JA
Mr. Stephen King	OHS
Mr. Raymond La Van	CIAO
COL James McAtamney	DOJ
Mr. Leo Masciana	CIAO
MAJ Mark Maxwell	Army JAG
LTC Duncan McGill	Joint Staff J3
Mr. James Misrahi	CDC
Mr. Rick Neal	FEMA
LTC Steve Parke	JTF-CST
CAPT Eugene Quarrie	USMC
Maj. Mark Pollard	USAF/JAI
Mr. Anthony Russell	SAIC
COL Jarris Sanborn	HQ, NORAD/NORTHCOM
Mr. Larry Sanders	DTRA, ASC
CDR Bryan Schroder	SJA/NORTHCOM
Lt Col Gordon Schukei	NGB
LTC Mike Smith	Army JAG
Dr. Richard Soll	SAIC
COL Gerald Tipton	OTJAG
MAJ Donald Twyman	DTRA
Ms. Lee Tyner	EPA
Ms. Jo Ann Williams	DOE

## APPENDIX C: Working Groups

### Appendix C.1: Working Groups as Formed During Seminar I

Working Group 1	Issue	Members
<b>Planning, Notification, and Deployment.</b>  <b>Mr. James Smyser, Chair</b>	Military Response, incl. <ul style="list-style-type: none"> <li>• Pre-Event</li> <li>• Mobilization authority</li> </ul>	LTC Keith Anderson, HQ, USMC
		CAPT Dan Donovan, USJFCOM
		LTC Rocky Gillette, HQ, First U.S. Army
		Ray Heddings, DTRA/GC
		James Smyser, OSD/GC
		LTC Gerald Tipton, NGB
	Events/Authorities triggering Federal response actions in absence of Emergency declaration	Ray Heddings, DTRA
		Rick Neal, FEMA
		LTC Mike Smith, HQDA
		Lee Tyner, EPA
		LTC Gerald Tipton, NG
	Liability attendant to non-disclosure of threat information	Rick Neal, FEMA
	Information Sharing (intra-and inter- Federal and State entities; with private entities). Includes, <ul style="list-style-type: none"> <li>• Classification issues</li> <li>• Impact of H.R. 3825</li> <li>• Using media effectively</li> </ul>	CAPT Dan Donovan
		Jean Hardin, AFDO
		Laura Jennings
		Rick Neal, FEMA
JoAnn Williams, DOE		



Working Group 2	Issue	Members
<b>Response and Deactivation.</b>  <b>LTC Rocky Gillette, Chair</b>	Use of the Military, to include <ul style="list-style-type: none"> <li>• Posse Comitatus</li> <li>• Federalized National Guard</li> <li>• Titles 10 &amp; 18</li> <li>• Interagency Agreements -military as last resort</li> </ul>	LTC Keith Anderson, HQ USMC CAPT Dan Donovan, USJFCOM Ray Heddings, DTRA/GC Laura Jennings, NIMA LTC Stuart Risch, HQDA LTC Gerald Tipton, NGB
	Limits and liability of the Military's use of force against civilians during WMD-CM	LTC Keith Anderson, HQ USMC CAPT Dan Donovan, USJFCOM Ray Heddings, DTRA/GC LTC Gerald Tipton, NGB
	Evacuation and Quarantine Authorities, incl. <ul style="list-style-type: none"> <li>• Independent statutory authorities for Federal and State entities</li> </ul>	James Misrahi, CDC
	Standardization of WMD emergency response, incl. <ul style="list-style-type: none"> <li>• Interoperability</li> <li>• Standardized operating procedures</li> <li>• Standardized equipment and training</li> </ul>	CAPT Dan Donovan, USJFCOM Laura Jennings, NIMA LTC Stuart Risch, HQDA
	Communicating Information to the Public	LTC Stuart Risch, HQDA
	Licensure requirements and liability for medical responders, incl. <ul style="list-style-type: none"> <li>• Interstate emergency compacts</li> </ul>	

## Appendix C.2: Working Groups as Reorganized for Seminar II

Topic 1: Military 's Role in WMD Consequence Management		
Facilitator	<b>Maj. Donald Twyman, DTRA/GC</b>	
<b>Members</b>	LTC Keith Anderson, Maj. Kenneth Arnold LTC Rocky Gillette SMSgt Jean Hardin LTC Al Goshi Mr. Ray Heddings LTC Gregory Huckabee Ms. Laura Jennings Mr. Rick Neal LTC Stephen Parke Lt Col Gordon Schukei LTC Mike Smith Ms. Lee Tyner	HQ, USMC OSD/GC HQ, First U.S. Army AFDO USA Forces Command DTRA/GC HQ, First U.S. Army NIMA FEMA JTF Civil Support NGB HQDA EPA
Working Group Issues		Members
Events/Authorities triggering Federal response actions in absence of Emergency declaration		<b>Ray Heddings*</b>
		Rick Neal
		LTC Mike Smith
		Lee Tyner
		LTC Gerald Tipton
Use of the Military, to include: <ul style="list-style-type: none"> <li>• Posse Comitatus</li> <li>• Federalized National Guard</li> <li>• Titles 10 &amp; 18</li> <li>• Interagency Agreements -military as last resort</li> </ul>		LTC Keith Anderson
		<b>LTC Al Goshi*</b>
		Ray Heddings
		Laura Jennings
		LTC Steve Parke
Military Response, to include: <ul style="list-style-type: none"> <li>• Pre-Event</li> <li>• Mobilization authority</li> </ul>		LTC Keith Anderson
		LTC Rocky Gillette
		Ray Heddings
		Maj. Kenneth Arnold
		<b>Lt Col Gordon Schukei*</b>
Limits and liability of the Military's use of force against civilians during WMD-CM		LTC Keith Anderson
		Ray Heddings
		LTC Gerald Tipton
		<b>LTC Gregory Huckabee *</b>

\* Issue lead


<b>Topic 2: Quarantine and Medical Responders</b>	
<b>Facilitator</b>	<b>James Misrahi, CDC</b>
<b>Members</b>	Ms. Laura Jennings NIMA LTC Stephen Parke JTF Civil Support Mr. James Misrahi CDC
<b>Working Group Issues</b>	<b>Members</b>
Evacuation and Quarantine Authorities, incl. <ul style="list-style-type: none"> <li>Independent statutory authorities for Federal and State entities</li> </ul>	<b>James Misrahi*</b>
Licensure requirements and liability for medical responders, to include: <ul style="list-style-type: none"> <li>Interstate emergency compacts</li> </ul>	<b>LTC Stephen Parke*</b>
Standardization of WMD emergency response, to include: <ul style="list-style-type: none"> <li>Interoperability</li> <li>Standardized operating procedures</li> <li>Standardized equipment and training</li> </ul>	Laura Jennings  <b>LTC Rocky Gillette*</b>


\* Issue Lead

<b>Topic 3: Issues of Communication in WMD CM</b>		
<b>Facilitator</b>	<b>Jean Hardin, AFDO</b>	
<b>Members</b>	Laura Jennings	NIMA
	Rick Neal	FEMA
	Ms. JoAnn Williams	DOE
<b>Working Group Issues</b>		<b>Members</b>
Communicating Information to the Public		
Information Sharing (intra-and inter- Federal and State entities; with private entities), to include: <ul style="list-style-type: none"> <li>• Classification issues</li> <li>• Impact of H.R. 3825</li> <li>• Using media effectively</li> </ul>	<b>Jean Hardin*</b>	
	Laura Jennings	
	Rick Neal	
	JoAnn Williams	
Liability attendant to non-disclosure of threat information		<b>Rick Neal*</b>

\* Issue Lead

## APPENDIX D: Working Groups' Template

	
Issue	
<b>Operative Statutes &amp; Regulations</b>	
<b>Affected Departments &amp; Agencies</b>	
<b>Lead &amp; Supporting Agency Roles &amp; Responsibilities</b>	
<b>Changing Roles Over Time?</b>	

	
Issue	
<b>Accepted Interpretation of the Law</b>	
<b>Basis for Interpretation</b>	
<b>Sufficiency of the Law:</b>	

## APPENDIX E: Working Group Presentations

### Topics & Issues for Discussion

***Topic 1: Military's Role in WMD Consequence Management (MAJ Twyman)***

- Events/Authorities triggering Federal response actions in absence of an emergency declaration
- Use of the military, to include *Posse Comitatus*, federalizing the National Guard, and Titles 10 and 18
- Military Response, to include mobilization authority and pre-event actions
- Limits and liability of the military's use of force against civilians during WMD-CM

***Topic 2: Quarantine and Medical Responders (Mr. Misrahi)***

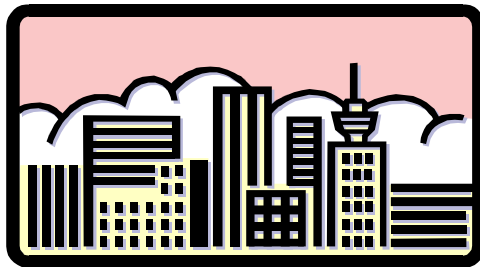
- Quarantine and Evacuation Authorities
- Licensure requirements and liability for medical responders
- Standardization of WMD emergency response, to include interoperability, standard operating procedures, equipment, and training

***Topic 3: Issues of Communication in WMD Consequence Management (Ms. Hardin)***

- Communicating information to the public
- Information sharing, to include the impact of H.R. 4598, classification issues, and effective use of the media
- Liability attendant to non-disclosure of threat information

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### Weapons of Mass Destruction Consequence Management Legal Seminar II 19 – 20 November 2002



#### Discussion Topic:

***Military's Role in WMD Consequence Management***

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### Issue 1: Events/Authorities triggering Federal response actions in absence of an emergency declaration

<b>Guiding Authority</b>	<ul style="list-style-type: none"> <li>• Stafford Act</li> <li>• PDD-39</li> <li>• DoDD 3025.1/3025.1-M</li> <li>• 10 USC 371 et seq</li> </ul>	<ul style="list-style-type: none"> <li>• CONPLAN 0500 Interagency Domestic Terrorism Response Plan</li> <li>• Federal Response Plan</li> <li>• Defense Weapons of Mass Destruction Act</li> </ul>
<b>Shortfalls</b>	<ul style="list-style-type: none"> <li>• Lack of guidance regarding timeline for commander’s authority to act under immediate response</li> <li>• Lack of guidance regarding law enforcement authority</li> <li>• Lack of statutory authority for military assistance for incidents other than CBRNE</li> <li>• Crossing state lines of national guard under title 32 status under EMAC</li> </ul>	
<b>Issues lacking Interagency Consensus</b>	<ul style="list-style-type: none"> <li>•Lack of guidance regarding reimbursement for immediate response activities</li> <li>•Turnover from DOD response to law enforcement</li> </ul>	

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### Issue 2: Use of the military, to include *Posse Comitatus*, federalizing the National Guard, and Titles 10 and 18

<b>Guiding Authority</b>	<ul style="list-style-type: none"> <li>• 10 USC 1385</li> <li>• 10 USC 331 et seq</li> <li>• DODD 5525.5</li> <li>• DODD 5240.1</li> <li>• DOD 5240.1-R</li> </ul>	<ul style="list-style-type: none"> <li>• 10 USC 371 et seq</li> <li>• CBRNE Support to DOJ Statutes</li> <li>• DODD 3025.1</li> <li>• DODD 5200.27</li> </ul>
<b>Shortfalls</b>	<ul style="list-style-type: none"> <li>• State authorities which affect national guard</li> <li>• Statutory authorities for detailing troops outside of DOD</li> <li>• Training for military troops when they are detailed outside of DOD in support of law enforcement</li> </ul>	
<b>Issues lacking Interagency Consensus</b>	<ul style="list-style-type: none"> <li>Lack of interagency understanding regarding the limits of PCA</li> </ul>	

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### Issue 3: Limits and liability of the military's use of force against civilians during WMD-CM

<b>Guiding Authority</b>	<ul style="list-style-type: none"> <li>• Federal Tort Claims Act</li> <li>• 4<sup>th</sup> Amendment to the U.S. Constitution</li> <li>• <i>Bivens v. Six Unknown Bureau of Narcotics Agents</i></li> <li>• DoDD 5210.56 et al</li> <li>• <i>In Re Neagle</i></li> <li>• <i>Tennessee v Garner; Graham v. Connor</i></li> </ul>
<b>Shortfalls</b>	<ul style="list-style-type: none"> <li>• Lack of protection for military personnel individually from federal, state, criminal liability             <ul style="list-style-type: none"> <li>▪ when performing federal duties</li> <li>▪ if detailed out to federal agencies outside DoD</li> </ul> </li> <li>• Confusion about the limits of detailing</li> </ul>
<b>Issues lacking Interagency Consensus</b>	<ul style="list-style-type: none"> <li>• Tension between federal use of force and state National Guard RUF</li> <li>• Lack of standardized of RUF both within DoD and across federal agencies</li> </ul>

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## Topics & Issues for Discussion

### *Topic 1: Military's Role in WMD Consequence Management (MAJ Twyman)*

- Events/Authorities triggering Federal response actions in absence of an emergency declaration
- Use of the military, to include *Posse Comitatus*, federalizing the National Guard, and Titles 10 and 18
- Military Response, to include mobilization authority and pre-event actions
- Limits and liability of the military's use of force against civilians during WMD-CM

### *Topic 2: Quarantine and Medical Responders (Mr. Misrahi)*

- Quarantine and Evacuation Authorities
- Licensure requirements and liability for medical responders
- Standardization of WMD emergency response, to include interoperability, standard operating procedures, equipment, and training

### *Topic 3: Issues of Communication in WMD Consequence Management (Ms. Hardin)*

- Communicating information to the public
- Information sharing, to include the impact of H.R. 4598, classification issues, and effective use of the media
- Liability attendant to non-disclosure of threat information

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# Weapons of Mass Destruction Consequence Management Legal Seminar II



## Discussion Topic: *Quarantine and Medical Responders*

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### QUARANTINE AND MEDICAL RESPONDERS

#### Quarantine and Evacuation

<b>Operative Statutes &amp; Regulations</b>	<ol style="list-style-type: none"> <li>1. Model State Emergency Health Powers Act</li> <li>2. 42 U.S.C. § 264, Quarantine and Inspection -- Federal quarantine statute</li> <li>3. Interstate quarantine regulations             <ul style="list-style-type: none"> <li>• Inadequate local control</li> <li>• Travel Permits</li> </ul> </li> </ol>		
<b>Affected Departments &amp; Agencies</b>	HHS DOD National Guard FBI/CIA USDA	OHS FEMA DOS DOJ DOT	State Law Enforcement State Public Health
<b>Lead &amp; Supporting Agency Roles &amp; Responsibilities</b>	FBI – crisis FEMA – consequence HHS – quarantine – Determines who State and local authorities – quarantine enforcement DoD – mainly SUPPORT/AUGMENT quarantine effort. Support home-bound population. Posse Comitatus issues.		
<b>Changing Roles Over Time?</b>	<ul style="list-style-type: none"> <li>• Covert Event – Health Departments and Agencies will lead</li> <li>• Overt Event – FBI/OHS lead</li> <li>• Current experience from natural outbreaks</li> </ul>		

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QUARANTINE AND MEDICAL RESPONDERS  
**Quarantine and Evacuation**

**Accepted Interpretation of the Law**

- Quarantine is valid
- No Liability – Federal Tort Claims Act
- 42 U.S.C §1983 – Bivens Action

**Basis for Interpretation**

- Basis – Antiquated
- Old court cases
  - No population quarantine in 100 years
- Uncharted Territory
- Precedent based on natural outbreaks

**Sufficiency of the Law:**

- Operational Issues of Quarantine
- How to enforce?
  - Guidelines/standards for use of force
- Logistical Issues
- Court hearing procedures – class consolidation (discrimination?)
  - Vaccination – protective measures pre/post event.
  - Educating/equipping the public – disaster relief kits



QUARANTINE AND MEDICAL RESPONDERS

**Licensure Requirements and Liability for Medical Responders**

**Operative Statutes & Regulations**

- Liability
1. 28 U.S.C. § 2671 *et seq.*, Federal Tort Claims Act
  2. 10 U.S.C. § 1089, Medical Malpractice Immunity Act (Gonzales Act)
- Licensure/Credentialing
1. 10 U.S.C. § 1084, Licensure Requirements for Health Care Professionals
  2. DoDI 6025.16 – Portability of State Licensure of Health Care Professionals
  3. Pub. L. 107 188, Public Health Security and Bioterrorism Act of 2002

**Affected Departments & Agencies**

DoD  
 HHS – ESF #8  
 State receiving hospitals

**Lead & Supporting Agency Roles & Responsibilities**

- Secretary of Defense – authorizing in EXORDs outside of DoD facilities
- PHS – Maintaining database to verify credentials, licenses, accreditations, and hospital privileges
- States – to enter into compacts for reciprocity and indemnity of out-of-state health care providers

**Changing Roles Over Time?**

- HHS – above roles as outlined in Model State Health Act and Public Health and Bioterrorism Act
- States -- above roles as outlined in Model State Health Act and Public Health and Bioterrorism Act



## QUARANTINE AND MEDICAL RESPONDERS

### Licensure Requirements and Liability for Medical Responders

#### Accepted Interpretation of the Law

Individual/sovereign immunity under Federal Tort Claims Act  
•As long as care is care is within scope and to standard

Suggestion: Federal supremacy of licensure portability over State licensing regulations?

#### Basis for Interpretation

•U.S. v. Smith, 49 U.S. 160, 111 S.C. 1180 (1991)

#### Sufficiency of the Law:

- Federal laws are sufficient
- States have yet to pass laws for reciprocity of licensure across State lines

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## QUARANTINE AND MEDICAL RESPONDERS

### Standardization of Emergency Response

#### Operative Statutes & Regulations

- 15 U.S.C. § 2229 (2001), Firefighter assistance
- Pub L 107-56, USA PATRIOT ACT
- Pub. L. 107\_107, National Defense Authorization Act for Fiscal Year 2002

#### Affected Departments & Agencies

DoD	HHS
DOJ	National Guard
FEMA	Coast Guard
State/local Emergency Responders	
State/local law enforcement	

#### Lead & Supporting Agency Roles & Responsibilities

FEMA – lead in training  
Professional Associations, etc., -- initiating, implementing standardization

#### Changing Roles Over Time?

That IS the issue – Agencies need to assume roles and take responsibility.

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QUARANTINE AND MEDICAL RESPONDERS

**Standardization of Emergency Response**

**Accepted Interpretation of the Law**

Not a legal issue – it is **PRESCRIPTIVE** rather than **OBLIGATORY/RESTRICTIVE**  
It is a public policy issue

**Basis for Interpretation**

Not a legal issue  
Nature of the political system

**Sufficiency of the Law:**

The system does not provide for any more than is already being done. Over time, the spirit of the law will be fulfilled.

**Topics & Issues for Discussion**

*Topic 1: Military's Role in WMD Consequence Management (MAJ Twyman)*

- Events/Authorities triggering Federal response actions in absence of an emergency declaration
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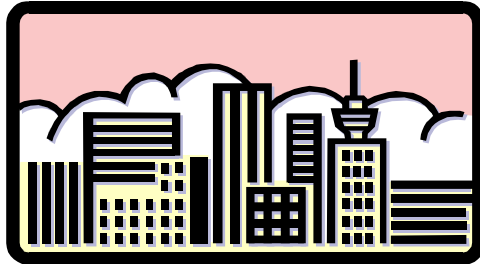
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*Topic 3: Issues of Communication in WMD Consequence Management (Ms. Hardin)*

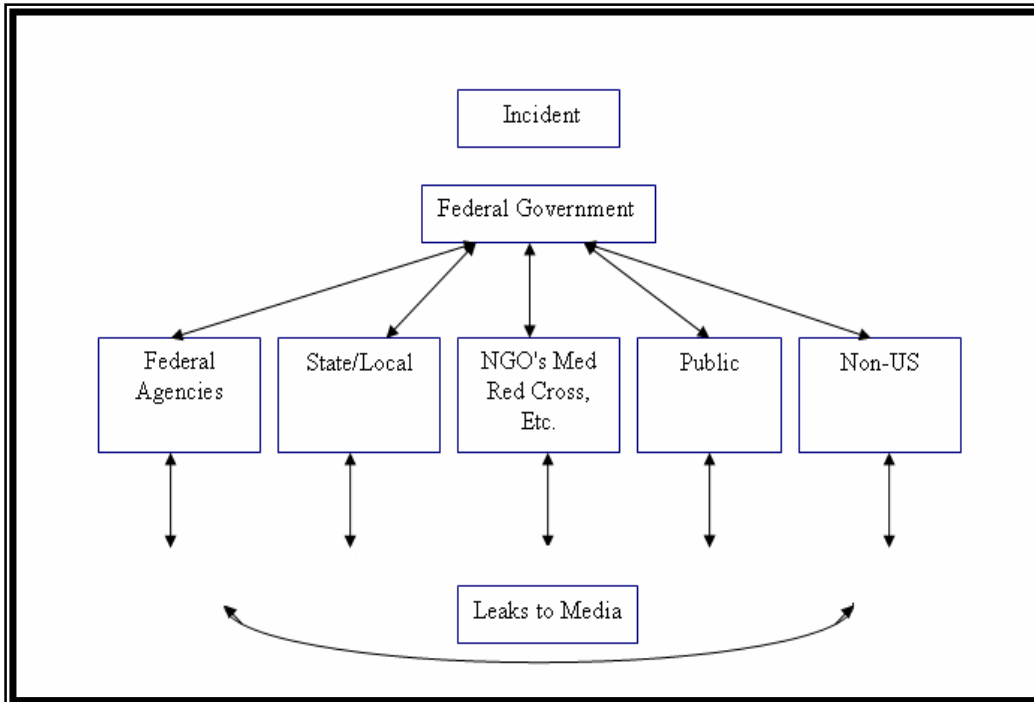
- Communicating information to the public
- Information sharing, to include the impact of H.R. 4598, classification issues, and effective use of the media
- Liability attendant to non-disclosure of threat information

**Weapons of Mass Destruction  
Consequence Management  
Legal Seminar II**



**Discussion Topic:**  
*Communication in WMD Consequence Management*

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## **INFORMATION SHARING Issues Addressed**

- Who determines information needs to be shared?
- What information gets sent to each group? Subgroup?
  - Classification – down the chain
  - Different laws for different information (Exempted/Protected) Example., Intelligence, RD
- Who is responsible for sharing information?
- How is it disseminated? (Interoperability)
- Liabilities
  - For sharing
  - For not sharing

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## **INFORMATION SHARING Primary Statutes and Regulations**

- Homeland Security Act
  - Section 891 – Sharing Classified Information
  - Section 892 – Flow of information
- Information and Intelligence
  - Executive Order (E.O.) 12333
  - E.O. 12958
  - DoDD 5240.1-R
  - Atomic Energy Act
- USA Patriot Act
- Public Health Bioterrorism Act

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## **INFORMATION SHARING Homeland Security Act Issues**

### **A. Distinction of Duties**

- Office of Homeland Security (OHS)
- FBI
- FEMA
  - Liaison – Will there be one? Who?
  - Consequence management vs. crisis management (distinction)
- Where does National Guard fit in?

### **B. Revise FRP because some agencies are integrated into Department of Homeland Security**

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## **INFORMATION SHARING Homeland Security Act Issues**

### **C. How will NORTHCOM coordinate with Homeland Security?**

### **D. Will role of National Guard change?**

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# INFORMATION SHARING

## Information and Intelligence

### 1. Integration of Multiple Sources and Breadth of Dissemination

- OHS – dissemination point?
- Homeland Security Act, Sections 203 and 204
- Protocol – Homeland Security Presidential Directive?
- OHS gets its authority subject to Presidential approval (subject to sources and methods)

### 2. States' Public Information Laws

- Create security risk for sensitive federal information held by National Guard who are activated by State (This area of law is currently ambiguous)

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# INFORMATION SHARING

## Information and Intelligence

### 2A. Do we have appropriate mechanisms to share information down to the local/event 1st responder level?

- Legal provisions to enforce this

### 3. 2-way sharing of sensitive information

- State/local to/from Federal
- OHS info back into Intel community
- Does E.O. 12333 (US Intelligence Activities) apply to the information analysis and information protection directorate?

### 4. From where will E.O. 12958 derive classification authority from the Office of Homeland Security?

- Who will call the shots?

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## **INFORMATION SHARING**

### **Making it Work**

- Develop infrastructure/policies/procedure
- Practice /Exercise
- Feedback loop

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## **COMMUNICATING INFORMATION TO THE PUBLIC**

### **Primary Statutes and Regulations**

- **FOIA/Privacy Act**
  - Critical Infrastructure protected FOIA in High (B)(2)
- **Stafford Act-communication/state-local**
  - Emergencies/Disasters
- **Homeland Security**

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## COMMUNICATING INFORMATION TO THE PUBLIC

### Who's in charge?

- CM begins at the Local Level or public information dissemination and stems up. Depends on where and what capabilities
- CM defined as dealing with the effects of the event
- State/Local Logistics Capabilities. Depends on where and what capabilities.
- Terrorism –Federal Response (FEMA)-just specific matters

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## COMMUNICATING INFORMATION TO THE PUBLIC

- **Who talks to the public?**
  - Governor/Local Elected Official-State/Local Events
  - Federal Official – More national level events
- **What information goes to public?**
  - Reliability- *Example*: Don't risk liability for defamation in law enforcement scenarios
  - to Press: ATTORNEY GENERAL responsible for law enforcement and getting information out to press
  - OHS Responsible for Other Issues

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## **COMMUNICATING INFORMATION TO THE PUBLIC**

- **Is there a mechanism to field responses from public?**
  - Is FOIA High (B)(2) adequate for CM info?
- **Safety and welfare issues-primary**
  - What public needs to know/protect information
- **Is there a Mechanism (entity) to determine what is in the public's best interest to be disseminated?**
  - Suggest putting out a website with releasable information
  - Limits on information barrier

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## **COMMUNICATING INFORMATION TO THE PUBLIC FOIA/Privacy Act Shortfalls**

### **FOIA/Privacy**

- Does the high FOIA (B)(2) exemption cover CM info?
- Protect privacy of affected individuals

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## **COMMUNICATING INFORMATION TO THE PUBLIC**

### **Homeland Security Act Shortfalls**

- Sec 201 OHS information analyses determines release of information applicable to threats
- No protocol for dissemination issues
- Are there Command/Control issues to public other than expressed in the Fed Response Plan?
- Most legal issues will occur during Crisis Management – Not Consequence Management
  - Necessary to have guidelines for both

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## **Liability Attendant to Non-Disclosure of Threat Information**

### **Primary Statutes and Regulations**

- Federal Tort Claims Act – 28 U.S.C. § 2680 (a)
- (1. Discretionary Function); 28 U.S.C. § 2680 (f)  
(2. Quarantine)
  - Stafford Act (42 U.S.C. § 5148) Nonliability-Failure of Disclosure
  - Government cannot be held liable within acting within its discretion to not disclose
- Excludes Contractors from Discretionary Function
- FOIA Act – 5 U.S.C. § 552
- DoD Directive 5200.1
- Consider States Tort Claims Act/Sovereignty Statutes

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## **Liability Issues (Disclosure/Nondisclosure):**

- Federal Torts Claims Act 28 U.S.C. § 2680
  - Is there Liability for persons acting outside the scope of their authority?
- Are there State causes of Action by Members of the public for failure to disclose?
  - Federal Torts Claims Act Covers Federal
- Are contractors liable for failure to disclose? Is there an extension of immunity?

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## **Liability Issues Relevant Issues Lacking Interagency Consensus**

- Protections for sensitive Federal information not observed/applicable to State/Local Agencies (Open Records Laws)
- Spokesperson for CM Issues in the new structure (OHS)
  - Governor/Local Elected Officials
  - Federal Officials
- 1<sup>st</sup> Responders' right to information vs. Federal officials nonliability for failure to divulge Hazards

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## **Liability Issues Shortfalls in Law**

- How far out can you attenuate the liability?  
Government immunity may act as an unintentional disincentive to affirmative disclosure of information.
- Resolution of Posse Comitatus Issues relative to Information Sharing
  - Federal/State information?
  - Status of the National Guard
- Sharing Information with the Public
  - What is threshold for Public's "Need to know"

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## APPENDIX F: Summary of Recent Legislative Provisions Related to WMD Consequence Management

Presidential Decision Directive 39, U.S. Policy on Counterterrorism, articulates the U.S. national policy on terrorism. In defining crisis management, it states:

Crisis Management includes measures to identify, acquire, and plan the use of resources needed to anticipate, prevent, and/or resolve a threat or act of terrorism. The laws of the United States assign primary authority to the Federal Government to prevent and respond to acts of terrorism; State and local governments provide assistance as required. Crisis management is predominantly a law enforcement response.

The directive defines consequence management as follows:

Consequence Management includes measures to protect public health and safety, restore essential government services, and provide emergency relief to governments, businesses, and individuals affected by the consequences of terrorism. The laws of the United States assign primary authority to the States to respond to the consequences of terrorism; the Federal Government provides assistance as required.

Many provisions in the recent legislation discussed below address crisis management or law enforcement concerns as well as consequence management. The USA PATRIOT Act and the Homeland Security Act, for instance, address in great detail concerns related to law enforcement and the sharing of terrorist threat information among Federal, State, and local entities. Indeed, much of the discussion in Seminar II was also concerned with the legal authorities related to law enforcement and crisis response. No doubt, this is due to the universally agreed notion that the best way to manage WMD events is to ensure that they do not occur. Nevertheless, DTRA's WMD Consequence Management Legal Seminar aims at capturing the legal authorities related to WMD consequence management and their interpretations and insufficiencies. The following summaries of recent legislation focus on the consequence management provisions in the Acts. These provisions specifically address some of the issues examined during Seminar II, for example:

- The USA PATRIOT Act expands upon the authorities for requesting military assistance
- The Public Health Security and Bioterrorism Preparedness and Response Act addresses standardizing response to a public health emergency, and establishing interstate quarantine restrictions
- The Homeland Security Act addresses dissemination of information and intelligence.

Such a focus makes clear that Congressional action has tackled some concerns of the participants in the first WMD CM Legal Seminar that "the current legal architecture pertaining to WMD consequence management can be improved to better equip and prepare the Nation in *anticipation* of future needs." Concerns and questions expressed by some participants in WMD CM Legal Seminar II also validate provisions in recent Federal legislation related to WMD consequence management.

## The USA PATRIOT Act of 2001

Pub. L. 107-56, The Uniting and Strengthening of America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, was signed into law by President George Bush on October 26, 2001. Some of the Act's provisions relating to consequence management include, but are not limited to:

- Funding for Certain Counterterrorism and Incident Management Activities
- Attorney General's Authority to Request Military Assistance
- Grants for Victims and Victims' Services
- Revisits Terrorism as Defined in the United States Code
- Enhances Preparedness for and Response to Terrorism

### **Increases Funding for Certain Counterterrorism and Incident Management Activities**

Section 101 of the Act establishes a Counterterrorism fund, not limited to any fiscal year, in the Treasury Department to reimburse Department of Justice components for:

- Reestablishing the operational capability of offices or facilities that may have been destroyed in any terrorist incidents
- Supporting counterterrorist actions and the investigation and prosecution of terrorists
- Conducting terrorism threat assessments of Federal agencies and their facilities.

The fund would also reimburse Federal departments and agencies for any costs they incur in detaining in foreign countries individuals accused of terrorism in violation of U.S. laws. Section 103 increases funding to the FBI through FY04 for the Technical Support Center and other technical and operational activities.

### **Broadens Authority of the Attorney General to Request Military Assistance**

Section 18 U.S.C. §2332e previously read:

*18 U.S.C. § 2332e. Requests for military assistance to enforce prohibition in certain emergencies*

The Attorney General may request the Secretary of Defense to provide assistance under section 382 of title 10 in support of Department of Justice activities relating to the enforcement of section 2332c . . . of this title during an emergency situation involving a chemical weapon of mass destruction. The authority to make such a request may be exercised by another official of the Department of Justice in accordance with section 382(f)(2) of title 10 . . .

The USA PATRIOT Act struck from the text "2332c", which related to use of chemical weapons and which was repealed in 1998, and inserted "2332a", which relates to the use or threat, attempt or conspiracy to use weapons of mass destruction, defined as weapons that are chemical, biological, radiological, nuclear, and other specified explosive devices. The Act also strikes from the text of §2332e "chemical", which modified "weapon of mass destruction". The effect of these changes is to authorize the Attorney General to request military assistance during emergencies involving all types of WMD, and not simply those involving biological and chemical weapons. Section 382(f) of title 10 details the types of and conditions under which military assistance may be requested and rendered.

### **Expands Authority to Make Grants for Victims and Victims' Services**

Among other things, Section 624 of Title VI of the USA PATRIOT Act Amends the Victims of Crime Act of 1984 (42 U.S.C. §10603(b)) to allow the Director of the Bureau of Justice Assistance Programs to make supplemental grants not only to States, but also to victim service organizations, public agencies, including those of Federal, State and local governments, and nongovernmental organizations that provide



various types of assistance to crime victims, including victims of "terrorist acts or mass violence occurring within the United States."

### **Revisits the Definitions of Terrorism in the United States Code**

Section 2331, et seq. of Title 18, U.S. Code defines and criminalizes terrorism. Section 802 of the USA PATRIOT Act adds and defines "domestic terrorism" in the definitions section, §2331. Prior to this amendment, 18 U.S.C. §2331 defined only "international terrorism", "national of the United States", "person", and "act of war". Section 802 defines "domestic terrorism" as activities that:

- (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
- (B) appear to be intended--
  - (i) to intimidate or coerce a civilian population;
  - (ii) to influence the policy of a government by intimidation or coercion; or
  - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
- (C) occur primarily within the territorial jurisdiction of the United States.

Section 808 of the USA PATRIOT Act amends the definition of the Federal crime of terrorism found in 18 U.S.C. §2332b, which describes and criminalizes "acts of terrorism transcending national boundaries." Section 808(1) gives the Attorney General investigative authority over an expanded list of crimes in addition to the federal crime of terrorism, the definition of which is expanded by Section 808(2), to include for instance, damage to computers, and acts on aircrafts that involve homicide or attempted homicide. Section 813 of the Act includes acts of terrorism as a racketeering activity under 18 U.S.C. §1961.

Section 817 of the Act expands the Biological Weapons Statute at 18 U.S.C. §175, making it a crime not only to develop, produce, stockpile, transfer, retain, and possess biological agents, toxins or delivery systems for use as a weapon, but also to simply possess such items knowingly in a type or quantity not "reasonably justified" by a peaceful purpose.

### **Programs to Enhance Preparedness for and Response to Terrorism**

#### *First Responders Assistance Act*

Section 1005 of the USA PATRIOT Act authorizes the Attorney General to make terrorism prevention and antiterrorism training grants to States and local governments to improve the ability of law enforcement, firefighters and first responders to prevent and respond to terrorist acts. The terrorism prevention grants may be used for activities such as purchasing equipment to protect responders, hiring additional intelligence personnel, and funding programs and purchasing equipment to improve interoperability for incident management. The Antiterrorism Training Grants may be used for activities related to, among others, enhancing threat assessment capabilities, community outreach, and community stabilization after a terrorist event. Congress appropriated \$25,000,000 for each of FY2003-2007

#### *Grant Program for State and Local Domestic Preparedness Support*

Section 1014 requires the Office for State and Local Domestic Preparedness Support of the Office of Justice Programs, for FY2002-2007, to make grants to States and localities to enhance their ability "to prepare for and respond to terrorist acts including events of terrorism involving weapons of mass destruction and biological, nuclear, radiological, incendiary, chemical, and explosive devices."

## **Public Health Security and Bioterrorism Preparedness and Response Act of 2002**

The Public Health Security and Bioterrorism Preparedness and Response Act ("Bioterrorism Act") was signed by President Bush on June 12, 2002, to become Public Law 107\_188. The purpose of the Act is "to improve the ability of the United States to prevent, prepare for, and respond to bioterrorism and other public health emergencies." It is a comprehensive Act, addressing the following facets of bioterrorism preparedness and response:

- National preparedness for public health emergencies, especially bioterrorism, to include the Strategic National Stockpile and emergency authorities
- Controls on bioterrorism agents and toxins
- The safety and security of the food, drug and drinking water supply

Several provisions of the Act validate and address some of the concerns and questions raised by the participants in Legal WMD CM Seminars I and II.

### **National Preparedness and Response**

The Bioterrorism Act includes significant amendments to the Public Health Service Act (42 U.S.C. §201, et seq.) aimed at ensuring that the United States, from the Federal to the local levels, in the public and private sector, will be prepared in the event of domestic bioterrorism or other public health emergency.

#### *Bioterrorism Preparedness Plans*

Section 101 of the Bioterrorism Act adds Title 28 to the Public Health Service Act (PHSA), mandating that the Secretary of Health and Human Services (Secretary) develop and implement a national strategy for and to coordinate Federal, State, and local activities on bioterrorism and other public health emergency preparedness and response. The coordinated national preparedness plan must address Federal assistance to States and localities to:

- Ensure appropriate detection and response capacities at the State and local levels, including:
  - Surveillance and reporting mechanisms
  - Laboratory readiness
  - Training and equipment for emergency responders
- Develop and maintain vaccines against biological agents and other medical countermeasures
- Coordinate Federal, State, and local planning, preparedness, and response activities for all phases of a public health emergency
- Improve the readiness of the response capabilities of health care facilities.

The Secretary must report to the Congress biennially on progress on the plan and its goals and, significantly, make recommendations to Congress on any additional legislative authorities necessary for implementing the plan and for protecting the public health in an emergency. Other reports required of the Secretary by Congress, e.g., studies of vulnerabilities of rural communities, medically underserved communities, and vulnerable sections of the population, e.g., children, as well as studies of volunteer and private sector involvement in emergency response, indicate a Congressional intent to comprehensively address the challenging issues in national preparedness and response to public health emergencies.

Section 137 authorizes the Secretary to make grant awards or enter into cooperative agreements with States and localities to facilitate their preparing and implementing bioterrorism and other public health emergency preparedness and response plans.. The activities the eligible States and localities may conduct using the award include: purchasing supplies, equipment, and countermeasures; conducting exercises that test their health emergency response capabilities; developing and implementing specified medical care components of the State plans; training public health laboratory and other health care personnel;

developing and enhancing participation in relevant information sharing systems; enhancing ability to communicate with the public in a public health emergency; contamination prevention planning; training and planning for the protection of responders, and; triage and transportation management

#### *Organization for Public Health Emergency Preparedness and Response*

Section 102 establishes within the Department of Health and Human Services (HHS) an Assistant Secretary for Public Health Emergency Preparedness. The Assistance Secretary is an appointee reporting directly to the Secretary, responsible for coordinating between HHS and other U.S. agencies, departments, and offices, and between the HHS and State and local entities responsible for emergency preparedness. He is also responsible for coordinating HHS activities relating to bioterrorism and other public health emergencies, including the National Disaster Medical System (NDMS), and coordinating HHS's efforts to enhance State and local preparedness for a bioterrorism attack or other public health emergency. NDMS is a federally coordinated system the Secretary may activate to provide health and other services to the victims of a public health emergency when local capabilities are overwhelmed. HHS, the Federal Emergency Management Agency (FEMA), the Department of Defense (DoD) and the Department of Veterans Affairs work in collaboration with States, localities, and the private sector to ensure resources are available for effective response to a bioterrorism attack or other public health emergency.

Recognizing the essential role of the Centers for Disease Control and Prevention (CDC) in preventing and responding to public health emergencies, Congress makes extensive appropriations, in Section 102 of the Bioterrorism Act, for constructing and upgrading the facilities and capabilities of the CDC. The Secretary of HHS is directed to carry out a wide range of activities to that end, including improving personnel training, communications networks, laboratories, and public health surveillance and reporting. Congress also authorizes the Secretary to facilitate the creation of secure, integrated communications and surveillance networks between and among Federal, State, local, entities, including private and public health care facilities, for sharing information regarding and recommending methods of handling public health emergencies.

#### *Communications in Public Health Emergencies*

Issues of communication with public in the event of bioterrorist attack or other public health emergency are addressed by section 104 of the Bioterrorism Act. Among other things, the section mandates that Secretary establish the Emergency Public Information and Communications Advisory Committee (EPIC Advisory Committee) with a one-year timetable to report on "appropriate ways to communicate public health information regarding bioterrorism and other public health emergencies to the public." In coordination with the EPIC Advisory Committee, the Secretary must develop a strategy and means to effectuate such communications. Congress also requires a study on and recommendations regarding the ability of local public health care entities to maintain communications connectivity and operability in the event of a public health emergency.

#### *Licensure of Health Care Professionals Responding to a Public Health Emergency*

The Secretary of HHS is required, under Section 107 of the Act, to create and maintain an emergency verification system for the advance registration of health professionals in order to verify their credentials, licenses, and privileges when those professionals volunteer to provide health care services during a public health emergency. In recognition of the problem that some states do not recognize the licenses of other States, or do so only through formal, time-intensive process, Congress authorizes the Secretary to "encourage each State to provide legal authority during a public health emergency for health professionals authorized in another State to provide certain health services to provide such health services in the State." Federalism concerns prevent Congress from mandating that States recognize the credentials of health professionals from other States in a public health emergency.

#### *Movement Toward Standardization of Response to a Public Health Emergency*

Section 108 of the Bioterrorism Act requires that the Secretary of HHS establish a Working Group on Bioterrorism and Other Public Health Emergencies (Working Group), in coordination with the heads of the Departments of Justice, Defense, Energy, Labor, and Veterans Affairs, the Environmental Protection, Federal Emergency Management, and Central Intelligence Agencies, and other appropriate Federal officials. The Working Group is responsible for assisting in and making recommendations on, among other things, the following:

- safety, training, and protective measures for medical and other emergency responders;
- facilitating the availability of priority countermeasures;
- developing common equipment standards to protect against biological agents;
- developing and improving joint planning and training programs, between medical and other first responders, hospitals and other health facilities, for managing the consequences of public health emergencies;
- developing Federal, State, and local strategies for communicating with the public;
- revising the Federal Response Plan as necessary to clarify Federal responsibilities for investigating “suspicious outbreaks of disease,” and;
- enhancing Federal coordination with and support of State and local emergency medical services.

#### *The Strategic National Stockpile*

Subtitle B of the Bioterrorism Act mandates that the Secretary of HHS, in coordination with the Secretary of Veterans Affairs and in consultation with the Working Group, maintain, review, and revise, a stockpile of drugs, vaccines, and other medical products and devices, as appropriate to secure the health of the of the U.S. population, including children and other vulnerable populations, in the event of a bioterrorist attack or other public health emergency. The Stockpile must contain an adequate amount of smallpox vaccine and potassium iodide. The President, under Section 127, must make available to State and local governments, from the national stockpile, potassium iodide in sufficient amounts to protect populations within 20 miles of a nuclear power plant. Under Section 122, the Secretary may accelerate approval, pursuant to the Food, Drug and Administration Act, of priority countermeasures.

#### *Clarifying Quarantine Provisions*

Section 142 of the Bioterrorism Act amends the PHSA, 42 U.S.C. §264(b), to authorize regulations for the apprehension, detention, and release of persons to prevent the spread of communicable diseases specified in Executive Orders on recommendation from the Secretary of HHS in consultation with the Surgeon General. The prior provision required the National Advisory Health Council to make recommendations before the issuance of quarantine rules. Additionally, 42 U.S.C. §266 is amended to authorize the Secretary, in consultation with the Surgeon General, to institute wartime quarantine. Additionally, the infected person does not have to be “in a communicable stage” to be detained and examined; rather, the Secretary simply needs to have a reasonable belief that the individual is believed to be infected with a communicable disease. Previously, the Surgeon General, with recommendations from the National Advisory Health Council, had wartime quarantine authority. The Council also no longer recommends regulations that provide for apprehending individuals, as was specified in 42 U.S.C. §264(d). The authority of the Secretary to institute interstate quarantine is expanded as well. Individuals need not be in a communicable stage of a communicable disease to be detained and examined; if in a “qualifying stage”, i.e., a communicable stage *or* a pre-communicable stage of a disease that likely would cause a public health emergency if transmitted, the Secretary may detain and examine them.

Other provisions of the Act deal with issues such as food, drug, and water supply security, regulatory controls on biological toxins, and animal and plant health inspection activities, much of which aim to increase public health security and the effectiveness of public health emergency response.

# Homeland Security Act

## **The Department of Homeland Security**

Public Law 107-296, The Homeland Security Act of 2002, was signed by President Bush on November 25, 2002 and marks an extensive Federal government reorganization effort for the protection of the homeland. The Act creates the Department of Homeland Security (DHS), which is a combination of new organizations and the consolidation of 22 existing Federal entities with responsibilities related to security of the American homeland. Section 101 of the Act creates DHS and defines its primary mission to include preventing terrorist attacks within the United States, reducing U.S. vulnerability to terrorism, and mitigating damage and assisting in recovery from terrorist attacks on the homeland. The Secretary of DHS is responsible for coordinating with State and local entities with respect to homeland security. The Act specifies, however, that the responsibility for investigating and prosecuting terrorism remains vested in the law enforcement agencies with jurisdiction over terrorist acts, except to the extent those entities and functions have been transferred to DHS. The Department is organized according to its major functions, with each major functional office headed by an Under Secretary appointed by the President with the advice and consent of Congress.

### *Information Analysis and Infrastructure Protection*

This Directorate for Information Analysis and Infrastructure Protection is responsible for:

- accessing, analyzing, and appropriately disseminating law enforcement, intelligence, and other information from Federal, State, and local agencies and the private sector to identify and assess terrorist threats to the United States
- assessing and developing a national plan for, and, in coordination with Federal, State, and local entities, making recommendations regarding the vulnerabilities of key resources and critical infrastructure vulnerabilities
- integrating information analyses and assessments to identify priorities for protective and supportive measures
- administering the Homeland Security Advisory System, to include:
  - "exercising primary responsibility for public advisories related to threats to homeland security"
  - providing specific warning information and countermeasures and protective measures advice
  - making recommendations regarding the sharing of law enforcement, intelligence, and other information related to homeland.

In exchanging information with State and local governments and the private sector, the Directorate must ensure that the material is protected from unauthorized disclosure and that sharing the information protects intelligence sources and methods in accordance with the National Security Act of 1947. (Section 201) Section 202 authorizes the Secretary of DHS to access from any Federal agency all information necessary to perform his duties and Section 221 requires the Secretary to establish appropriate procedures for the sharing of information, including procedures to ensure the security and confidentiality and to protect the constitutional and statutory rights of those who are subjects of such information.

In the Homeland Security Information Sharing Act (Homeland Security Act, Sections 891, *et seq.*), Congress requires the President to devise and implement procedures for the sharing and safeguarding of homeland security information of all classification levels. Homeland security information is broadly defined as any information (excluding individually identifiable information collected solely for statistical purposes) possessed by a Federal, State, or local agency that "relates to the threat of terrorist activity; relates to the ability to prevent, interdict, or disrupt terrorist activity; would improve the identification or investigation of a suspected terrorist or terrorist organization; or would improve the response to a terrorist act." The procedures prescribed by the President must apply to all Federal agencies and must not alter the

current requirements and authorities for classification and for protecting sources and methods. The information systems for sharing homeland security information must be capable of transmitting, and restricting or filtering, as necessary, both classified and unclassified information. The National Intelligence Authorization Act for fiscal year 2003 also contains many of the provisions of the Homeland Security Information Sharing Act.

#### *Chemical, Biological, Radiological, Nuclear, and other Countermeasures*

Section 302 provides that the Directorate of Science and Technology is responsible for research, development, test, and evaluation efforts in support of DHS' missions. A major component of its mission is identifying and developing chemical, biological, radiological, nuclear, and other countermeasures and devising, with other Federal agencies, a national plan for the Federal Government's civilian countermeasures development efforts. Additionally, the Directorate must facilitate the procurement of technologies to prevent the importation of and to detect, prevent, and protect against the use of weapons of mass destruction. It must also devise a system for the transfer of such technologies and other developments to Federal, State, and local government, and to private entities.

#### *Border and Transportation Security*

As specified in Section 402 of the Act, the Directorate of Border and Transportation Security is responsible for securing the borders and the transportation infrastructure of the United States from terrorist attack. Its responsibilities include: preventing terrorists and terrorist instruments from entering the United States; securing the borders, territorial waters, places of entry, and air, sea, and land transportation systems of the homeland; carrying out the immigration and specified customs functions of the United States, and; administering the animal and plant import and entry inspection functions of the Department of Agriculture, excluding related quarantine activities. To facilitate the execution of the specified functions, Section 411 transfers to the Directorate, among others, the U.S. Customs Service, the Transportation Security Administration, the Office of Domestic Preparedness, and Section 441 transfers the functions and authorities of the Immigration and Naturalization Service, which will be abolished after such transfer. Section 888 transfers the Coast Guard to the Secretary of DHS from the Secretary of Transportation; however, the Coast Guard must remain as distinct entity within the Department and its transfer does not affect its roles and mission when operating as a service in the Navy.

#### *Emergency Preparedness and Response*

Title V of the Homeland Security Act establishes the Directorate of Emergency Preparedness and Response. The responsibilities of the Directorate include coordinating and providing the Federal Government's response to terrorist attacks and major disasters. This function requires, among other things:

- managing the response
  - directing the Strategic National Stockpile, the National Disaster Medical System (NDMS), the Nuclear Incident Response Team (NIRT), and the Domestic Emergency Support Team
  - overseeing the Metropolitan Medical Response System (MMRS)
- coordinating other Federal Government resources.
- ensuring the effectiveness of emergency response providers in the event of terrorist attacks and other emergencies;
- aiding in the recovery from terrorist attacks and major disasters;
- consolidating all Federal emergency response plans into a single national plan;
- building a comprehensive national incident management system;
- enhancing the effectiveness of the Nuclear Incident Response Teams through, among other things, establishing standards for the team and conducting joint and other exercises and training,
- designing programs for the development and provision of interoperative communications technology to emergency response providers.

Section 503 transfers to DHS the Federal Emergency Management Agency (FEMA), the Domestic Emergency Support Teams, and HHS' Office of Emergency Preparedness, Strategic National Stockpile, NDMS, and MMRS.

Section 504 specifies that the NIRT operates as an organizational unit of DHS in an actual or threatened terrorist attack or other emergency in the United States; The Department of Energy and the Environmental Protection Agency maintain responsibility for organizing, training, equipping, and otherwise utilizing the Team.

Section 507 specifies the functions of FEMA within DHS, reaffirms the Agency as the lead agency for the Federal Response Plan (FRP), and directs FEMA to revise the FRP within 60 days of the Act's enactment to reflect the establishment of and to incorporate the Department.

### **Coordination at All Levels of Government and with the Private Sector**

A major theme in the Homeland Security Act is increased cooperation among Federal, State, and local government, and other public and private entities. For instance, the Directorate for Information Analysis and Infrastructure Protection, in Section 201, is directed to coordinate with private entities in a variety of ways, including analyzing information obtained from and disseminating, as appropriate, information to the private sector detecting, deterring, and responding to terrorist threats or attacks. Section 508 requires the Secretary of DHS to use, to the maximum extent practicable, national private sector networks and infrastructure to respond to WMD and other major disasters. Section 509 expresses the sense of Congress that the Secretary should use, to the extent possible, commercial off-the-shelf information technology systems and avoid competing with commercial goods and services the Department needs. Section 801 establishes the Office for State and Local Coordination within the Office of the Secretary to coordinate the Department's programs for and relationships with State and local governments. Responsibilities include assessing and advocating for the resources needed by States and localities to implement the national plan for combating terrorism and providing State and local governments with the information, technical support, and other resources they need for homeland security efforts.

### **Reaffirming the Posse Comitatus Act**

Congress, in Section 886, "reaffirms the continued importance of the section 1385 of title 18, United States Code" and emphasizes that the Homeland Security Act does not alter in any way the applicability of the Posse Comitatus Act to any uses of the Armed Forces to execute the laws except as expressly authorized by the Constitution or Act of Congress. Some of the Congressional findings on this issue include:

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

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.

## National Defense Authorization Act of FY2003

The Bob Stump National Defense Authorization Act of Fiscal Year 2003 (Defense Authorization Act) was signed by President Bush on December 2, 2002 and became Public Law No. 107-314.

### *Department of Defense Organization for Homeland Defense*

Title IX of the Defense Authorization Act addresses how the Department of Defense (DoD) is organized for its homeland security and intelligence missions. Section 901 establishes an Under Secretary of Defense for Intelligence to perform the intelligence duties to be prescribed the Secretary of Defense. The new office within the DoD does not alter the roles and authorities of the Secretary of Defense or the Director of Intelligence as articulated in the National Security Act of 1947. The Secretary of Defense must report to Congress within 90 days on the missions and structure of the office and its place within DoD and the Intelligence Community.

Section 902 creates an Assistant Secretary of Defense for Homeland Defense responsible for overall supervision of DoD's homeland defense activities. The Section also allocates to the Under Secretary of Defense for Policy responsibility for "overall direction and supervision for policy, program planning and execution, and allocation and use of resources for the activities of the Department of Defense for combating terrorism."

Section 911 requires the Secretary of Defense to report to Congress no later than March 1, 2003, with the implementation plan for the U.S. Northern Command, established on October 1, 2002. Similarly, section 924 requires the commander of the U.S. Joint Forces Command to report to Congress with the outline of a plan for "the development and implementation of a joint national training concept together with the establishment of a joint training complex for supporting the implementation of that concept." Among other things, the report should discuss options for the development of a joint urban warfare training center in that complex that could also be used for homeland defense and consequence management training for Federal, State, and local entities.

### *DoD Support of Homeland Security Activities*

Title XIV of the Act deals with various measures related to homeland security. Section 1401 requires the Secretary of Defense to designate a senior DoD official to coordinate all the Department's efforts to identify, assess, deploy, and transfer to Federal, State, and local first responders defense technology items and equipment to enhance public safety, including the safety of first responders, and bolster homeland security. Section 1402 requires the development of a comprehensive plan for improving the preparedness of military installations for preventing and responding to terrorist attacks, including the threat of use or use of weapons of mass destruction. Section 1403 requires the establishment of 23 additional Weapons of Mass Destruction Civil Support Teams, to bring the total of such teams to 55. The Act requires that every U.S. State, the District of Columbia, and territory have at least one team.

Congress requires, in section 1404, a comprehensive assessment and report by the Secretary of Defense on the responsibilities, mission, and plans for military support of homeland security. The report must address, among other things:

- consequence management for terrorist attacks
- military support to civil authorities
- changes instituted in DoD to accommodate the homeland security support mission
- the relationship of DoD to other Federal, State, and local governmental entities, to include the National Guard and Reserve Components, with respect to homeland security
- roles and responsibilities of DoD's intelligence components
- DoD's capability to respond to a terrorist attack involving weapons of mass destruction



- the need for and feasibility of developing and fielding DoD regional chemical-biological incident response teams across the United States.

Section 1405 expresses the sense of Congress that, to the extent authorized by law, the Secretary of Defense should provide, as appropriate and feasible, assistance to local first responders to improve their capabilities to respond to domestic terrorist incidents.