

CRS Report for Congress

Received through the CRS Web

Terrorism and the Military's Role in Domestic Crisis Management: Background and Issues for Congress

Updated January 27, 2003

name redacted
National Defense Fellow
Foreign Affairs, Defense, and Trade Division

Terrorism and The Military's Role in Domestic Crisis Management: Background and Issues for Congress

Summary

The United States faces a number of significant national security threats, ranging in scope from intercontinental ballistic missiles to the use of weapons of mass destruction (WMD) by terrorists. The debate over the seriousness of the various threats intensified recently, even before the events of September 11, 2001. Various studies and commissions recommended far reaching changes in the U.S. approach to domestic preparedness and response to threats to the homeland, many now being implemented. Many experts believe the probable long term effects of a WMD attack by terrorists on the population, environment, and the economy make it imperative that the U.S. be fully prepared to either deter or interdict an attempted terrorist attack.

This paper reviews the current legislation and policies that govern the military's role when supporting law enforcement in a domestic terrorism crisis and highlights some of the issues confronting the U.S. government. To fully understand the military's role in domestic crisis response it is necessary to explore existing national-level structures and response options prior to the involvement of military forces. Crisis management is predominately a law enforcement function that manages the resources necessary to prevent or resolve a terrorist incident, including one involving WMD. Current U.S. government terrorism response policy is contained in presidential directives. Among other matters, these directives address National Security Council structure and federal agency crisis response roles when responding to a domestic terrorism incident. The creation of the Department of Homeland Security and U.S. Northern Command has not yet changed the basic roles and relationships described herein.

Many federal agencies are available to assist the Federal Bureau of Investigation (FBI) in dealing with a terrorist threat or in the resolution of an actual terrorist incident. The Department of Defense (DoD), as a supporting agency in domestic law enforcement operations, has developed and maintains plans and capabilities to respond to threats or acts of terrorism, including those involving the use of nuclear, biological, or chemical weapons. In a domestic crisis, DoD may be called upon to assist in several different ways ranging from actual interdiction of the terrorists to the loaning of specialized equipment for use by law enforcement agencies. DoD has published specific policy for assistance to civil law enforcement officials in emergencies involving terrorism and WMD. U.S. terrorism policy is an issue of growing policy debate. Most experts believe that a comprehensive national strategy for domestic terrorism is a critical step in defeating the threat. Some say more effectively employing DoD's capabilities during domestic crisis response operations, or new relationships based on the recent creation of the Department of Homeland Security are the best methods to ensure success against domestic terrorism. Lastly, newly proposed congressional oversight roles are seen by many as an important factor in a more effective response to domestic terrorism. This report will be updated should major changes occur to the relationships described.

Contents

Introduction	1
The Forecast Trend	2
Current U.S. Government Policy	5
Crisis Management of Domestic Terrorism Events	6
National Level Crisis Management Structure	7
The National Security Council	8
The FBI Crisis Management Structure	8
The FBI Operational Response	9
The Critical Incident Response Group	10
The Domestic Emergency Support Team	10
The Military's Role in Domestic Crisis Management	11
DoD Policy	11
The <i>Posse Comitatus</i> Act	12
Requests for Technical Assistance	13
Military Technical Assistance Operational Response	13
Searches and Evidence	15
Disposition and Transportation of a WMD	15
Reimbursement	15
Training	15
Requests for Tactical Assistance	16
Constitutional Authority	16
The Insurrection Statutes	16
Military Tactical Assistance Operational Response	17
Conclusion and Issues for Congress	19
National Strategy	19
Employing the Full Range of DoD Capability	20
New Federal Structures	21
Congressional Oversight	22
Conclusion	23

List of Figures

Figure 1: Terrorism Becoming More Lethal	3
Figure 2. NSC Terrorism Response Policy Structure	7
Figure 3: FBI Joint Operations Center	9

Terrorism and the Military's Role in Domestic Crisis Management: Background and Issues for Congress

Introduction

The United States faces a wide range of national security threats, from intercontinental ballistic missiles to the use of weapons of mass destruction (WMD)¹ by terrorists. The debate over the seriousness of the various threats has intensified recently. Various studies and commissions have recommended far reaching changes in the approach to domestic preparedness and response to threats to the homeland. The threat of domestic terrorism has generated a wide ranging debate regarding all organizational aspects of the problem, including the approach from a strategic perspective and the more focused aspects of organizational structure, budgetary priorities, and intelligence collection. Several recent studies have proposed a greater role for the U.S. military in combating terrorism while others call for the creation of entirely new structures to combat the complete spectrum of threats to the United States, including terrorism and the use of WMD by terrorists.²

This paper³ outlines current legislation and policies that govern the military's role when supporting law enforcement in a domestic terrorism crisis. It also highlights some of the issues confronting the U.S. government. The military forces designed to respond to a crisis differ significantly from units designed to support the post-crisis consequence management of a terrorist incident. As such, they are governed by different directives and levels of authorization for their employment.

¹ Weapon of Mass Destruction is defined in the *United States Government Interagency Domestic Terrorism Concept of Operations Plan* as any device, material, or substance used in a manner, in a quantity or type, or under circumstances evidencing an intent to cause death or serious injury to persons or significant damage to property." It is generally accepted that any amount of chemical, biological, radiological, or nuclear (CBRN) material constitutes WMD.

² See, for example, Report from the National Commission on Terrorism, *Countering the Changing Threat of International Terrorism* available on the Internet at [<http://www.fas.org/irp/threat/commission.html>] and The United States Commission on National Security/21st Century, *Road Map for National Security: Imperative for Change*, Washington, DC, January 31, 2001.

³ This report was first published by (name redacted) on April 19, 2001, under the supervision of (name redacted), Specialist in National Defense, Foreign Affairs, Defense, and Trade Division, CRS. It has been updated by (name redacted).

Until recently, terrorism to many Americans was a remote, if frightening possibility that affected only individuals or groups outside the territorial boundaries of the United States. Events of the past decade indicate that the terrorist threat has changed significantly in ways that make it more dangerous and much more difficult to counter. The terrorist attacks of the 1970s and 1980s usually had clear political objectives. These attacks resulted in just enough bloodshed and loss of life to gain attention to the terrorists' cause yet not enough to alienate them from the public support they sought. Bombings, kidnappings, and aircraft hijacking were accomplished by declared, identifiable groups with specific political goals in mind. In contrast, the decade of the 1990s has produced a different type of terrorism - terrorism designed to produce massive casualties with little regard for distinct political goals and often no claims of responsibility. Recent examples of this type of attack, such as the World Trade Center bombing in New York City, the Alfred P. Murrah Federal Building bombing in Oklahoma City, the East African Embassy bombings in 1998, and destruction of the World Trade Center in 2001 make it appear that a terrorist's aim is to kill as many people as possible. The possible inclusion of weapons of mass destruction in the terrorists' arsenal now makes this an even more dangerous proposition.

Recently, in the trial of the perpetrators of the East African Embassy bombings, a witness testified that Usama bin Laden's group, al Qaeda (Arabic for "the Base"), sought to acquire chemical and nuclear material to use against the United States.⁴ Although it is unknown whether al Qaeda was successful in acquiring the material, the probability that terrorist groups who have openly threatened the United States are attempting to acquire a WMD capability is a serious escalation of this dangerous problem.

The Forecast Trend

Many recent government and private sector reports and studies conclude that the United States is becoming increasingly vulnerable to terrorism.⁵ Although terrorism is defined in different ways by various U.S. government agencies,⁶ it is generally

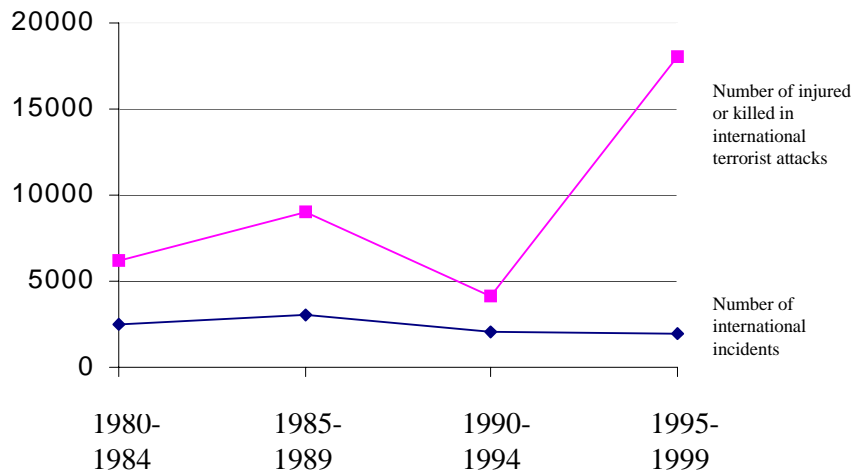
⁴ Colum Lynch, "Bin Laden Sought Uranium, Jury Told," *Washington Post*, February 8, 2001, p. A2.

⁵ See for example: Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction (Gillmore Commission), *I. Assessing the Threat* and *II. Toward a National Strategy for Combating Terrorism*; GAO Report GGD-99-107, *Combating Terrorism: Observations on Federal Spending to Combat Terrorism*; and CSIS Homeland Defense Working Group Report *Defending the U.S. Homeland: Strategic and Legal Issues for DoD and the Armed Services*.

⁶ The FBI defines terrorism as including "the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives." DoD defines terrorism as "The calculated use of violence or threat of violence to inculcate fear; intended to coerce; or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological." The State Department, by statute, defines terrorism as "premeditated, politically motivated violence perpetrated against noncombatant targets by (continued...)"

accepted that terrorism is a crime designed to coerce others into actions they would not otherwise take or into refraining from actions that they desire to take. Today's terrorists, like their predecessors, seek to instill fear, undermine government authority, and possibly goad the government into overreacting to the incident or threat. What has changed in the past decade is the willingness of the terrorist to inflict indiscriminate casualties as evidenced by the data in Figure 1. In the preceding decade, the United States emerged as the only superpower, and as such, the most lucrative target for terrorists.

Figure 1: Terrorism Becoming More Lethal



Source: Countering the Changing Threat of International Terrorism. Report from the National Commission on Terrorism, p. 5.

Although many analysts agree that terrorists are most likely to use conventional explosives, their use of a WMD in the U.S. is now seen as a possibility. For example, the United States Commission on National Security/21st Century states:

The combination of unconventional weapons proliferation with the persistence of international terrorism will end the relative invulnerability of the U.S. homeland to catastrophic attack. A direct attack against American citizens on American soil is likely over the next quarter century.⁷

⁶ (...continued)
subnational groups or clandestine agents.”

⁷ The United States Commission on National Security/21st Century. *Road Map for National Security: Imperative for Change*, Washington, DC, January 31, 2001, p. viii. This group, also known as the Hart/Rudman Commission, looked broadly at all future national security threats, to include terrorism.

The release of a chemical agent into the Tokyo subway system by the Aum Shinrikyo terrorist group in 1995 demonstrated the devastating possibilities of a WMD attack as well as the difficulties of using a WMD to produce mass casualties. The group spent millions of dollars using highly skilled technicians with an overall result that probably produced far fewer casualties than conventional explosives.⁸ However, the global cultural and political impact of the attack was massive.

Although terrorists have long intended to harm the public, now they may possess much greater capabilities to do so. A former member of al Qaeda described the terrorist group's world-wide corporate structure of multiple businesses and bank accounts from Africa to Europe and Asia.⁹ By purchasing an excess U.S. military business jet and flying it to Sudan where it was to be used for transporting the terrorist organization's weapons, al Qaeda vividly portrayed its ability to effect undercover transactions.¹⁰

The Central Intelligence Agency and the National Intelligence Council forecast the following trends that may affect the future security of the United States:

Asymmetric threats in which state and non-state adversaries avoid direct engagements with the US military but devise strategies, tactics, and weapons - some improved by "sidewise" technology - to minimize US strengths and exploit perceived weaknesses.

Internal conflicts stemming from religious, ethnic, economic or political disputes will remain at current numbers or even increase in number.

Prospects will grow that more sophisticated weaponry, including weapons of mass destruction - indigenously produced or externally acquired - will get into the hands of state and non-state belligerents, some hostile to the United States. The likelihood will increase over this period that WMD will be used either against the United States or its forces, facilities, and interests overseas.

Chemical and biological threats to the United States will become more widespread; such capabilities are easier to develop, hide, and deploy than nuclear weapons. Some terrorists or insurgents will attempt to use such weapons against US interests - against the United States itself, its forces or facilities overseas, or its allies.¹¹

⁸ Two attacks on the Tokyo subway system by Aum Shinrikyo, one in June 1994 and another in March 1995, produced 19 deaths and approximately 5500 injuries. The March 1995 attack resulted in the greater amount of casualties, many of which were psychosomatic. For a more detailed account of Aum's development and failed attacks see David Rapoport, "Terrorism and Weapons of the Apocalypse," *National Security Studies Quarterly*, Summer 1995, pp. 56-58.

⁹ Alan Feuer, "Jihad Inc. Finds a Business in Terrorism," *New York Times*, February 13, 2001, p. C17.

¹⁰ Vernon Loeb, "Jet Purchase, Bin Laden Linked," *Washington Post*, February 15, 2001, p. A20.

¹¹ Central Intelligence Agency and National Intelligence Council, *Global Trends 2015*, pp. (continued...)

The consequences of failing to deter, detect, or preempt terrorist attacks, some possibly with WMD, would be devastating. In addition to the tragedy of hundreds or thousands of dead and injured citizens, the long lasting serious economic and psychological damage to American society could well prove to be the terrorists' greatest victory.

Current U.S. Government Policy

The implications of a successful WMD attack against the United States goes beyond the potential loss of life, mass casualties, and infrastructure damage of a single incident. Many experts say the probable long term affects of such an attack on the population, environment, and the economy make it imperative that the U.S. be fully prepared to either deter or interdict an attempted attack by force if necessary. Should an incident take place, the U.S. government must be prepared to manage the consequences of the attack. These two responses - crisis and consequence management - are the cornerstones of current U.S. policy towards combating terrorism.

Presidential Decision Directive 39 (PDD 39), signed in June 1995, is the foundation for current U.S. policy for combating terrorism.¹² The document spells out three objectives for confronting terrorism: 1) reduce the nation's international and domestic vulnerabilities to terrorism; 2) deter terrorism; and 3) respond to terrorism rapidly and decisively. PDD 39 designates Lead Federal Agencies¹³ for international and domestic terrorism policy. The Lead Federal Agency for combating terrorism overseas is the Department of State (DOS) and the agency designated to respond to terrorist attacks on U.S. soil is the Department of Justice (DoJ) through the Federal Bureau of Investigation (FBI). The Federal Emergency Management Agency (FEMA) has primary responsibility to lead federal efforts to deal with the consequences and collateral second and third order effects of terrorist WMD attacks on American soil.¹⁴

PDD 39 pays particular attention to WMD and includes language stating "The United States shall give the highest priority to developing effective capabilities to detect, prevent, defeat and manage the consequences of nuclear, biological or

¹¹ (...continued)

8-9 & 38. Available at [<http://www.odci.gov/cia/publications/globaltrends2015/>].

¹² Although PDD-39, *U.S. Policy on Counterterrorism*, is a classified document, a redacted copy with the unclassified portions is online at [<http://www.fas.org/irp/offdocs/pdd39.html>].

¹³ Defined in *The United States Government Interagency Domestic Terrorism Concept of Operations Plan* as "The agency designated by the President to lead and coordinate the overall federal response ... determined by the type of emergency." The Lead Federal Agency will "provide an initial assessment of the situation; develop an action plan; monitor and update operational priorities; and ensure each agency exercises its concurrent and distinct authorities under US law ..."

¹⁴ Presidential Decision Directive 39, *U.S. Policy on Counterterrorism*, The White House, Washington, DC, June 21, 1995.

chemical (NBC) materials or weapons use by terrorists.”¹⁵ It goes on to state that the highest priority in combating terrorism is to prevent the acquisition or use of a WMD capability by terrorist groups opposed to the U.S.¹⁶ PDD 62, *Protection Against Unconventional Threats to the Homeland and Americans Overseas*, reinforced PDD 39 and further clarified agency roles in combating terrorism. In both PDDs, the Department of Defense (DoD) plays a supporting role to the Lead Federal Agencies.

President George W. Bush recently signed National Security Presidential Directive-1 (NSPD-1) establishing the organization of the National Security Council under his Administration. Among other things, the document abolishes the previous system of interagency working groups and replaces them with policy coordination committees (PCC).¹⁷ The functions of the PCC dealing with terrorism and WMD are discussed below.

Crisis Management of Domestic Terrorism Events

To understand fully the military’s role in domestic crisis response it is necessary to explore the national-level structures and response options prior to the involvement of military forces. In general, the laws of the United States assign primary authority to the federal government to prevent and respond to terrorism. The FBI, through DoJ, is designated the Lead Federal Agency for crisis management of threats or acts of terrorism that take place in the United States or in international waters that do not involve the flag vessel of a foreign country. Crisis management is predominately a law enforcement function that manages the resources necessary to prevent or resolve a terrorist incident including intelligence gathering, surveillance, tactical operations, negotiations, forensics, and follow-on investigations. It also includes technical missions involving WMD such as search, render safe procedures, transfer and disposal of a device, and limited decontamination if necessary.¹⁸ The federal response to a terrorist incident is seen as a highly coordinated interagency operation that can include federal, State, and local participation. Primary federal agencies besides the DoJ and the FBI are the Federal Emergency Management Agency,¹⁹ DoD, the Department of Energy, the Environmental Protection Agency, the Department of Health and Human Services, and now the Department of Homeland Security.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ National Security Presidential Directive-1, *Organization of the National Security Council*, The White House, Washington, DC, February 14, 2001.

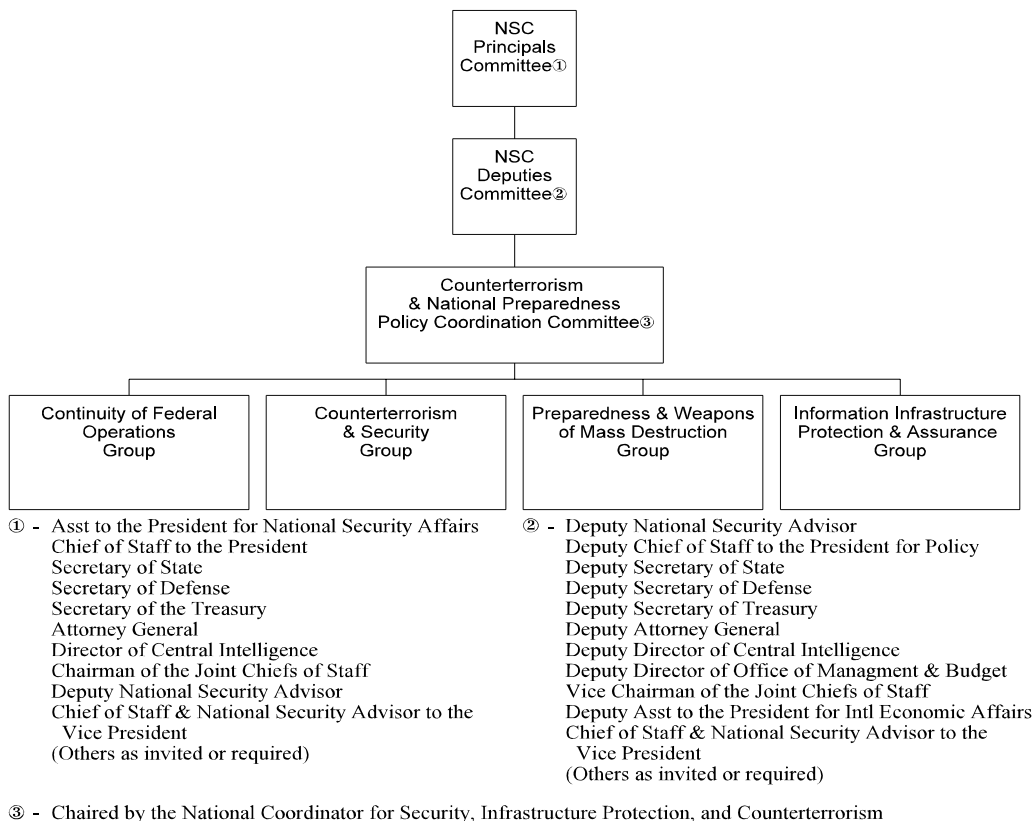
¹⁸ Federal Bureau of Investigation, *United States Government Interagency Domestic Terrorism Concept of Operations Plan*, Washington, DC, December 8, 2000, p. 7.

¹⁹ The Federal Emergency Management Agency (FEMA) is designated the Lead Federal Agency for Consequence Management of domestic terrorist incidents.

National Level Crisis Management Structure

Past experience has shown that non-federal local authorities are normally the first to respond to most emergencies or threats. Once it is determined that federal authorities should enter the coordination and decision process, those same authorities will ultimately decide if or when the federal government will begin coordination of the entire process. Some of the factors that determine how fast and to what extent federal intervention takes place are the nature of the incident, the intended target, the potential consequences of a successful incident, and the capabilities of the local authorities. *The United States Government Interagency Domestic Terrorism Concept of Operations Plan (CONPLAN)* states that the “laws of the United States assign primary authority to the federal government to prevent and respond to acts of terrorism or potential acts of terrorism.”²⁰ The federal response will surely come sooner than later if the possibility exists that a WMD is involved in the incident. Additionally, if WMD is involved, the FBI may look to DoD for assistance in earlier stages of the crisis.

Figure 2: NSC Terrorism Response Policy Structure



Source: National Security Council Memo, Implementing NSDP-1, Counterterrorism and National Preparedness, National Security Council, Washington, DC, February 28, 2001.

²⁰ CONPLAN, p. 7.

The National Security Council. The National Security Council (NSC) is the center of U.S. government efforts to coordinate the national response to threats or acts of domestic terrorism. The NSC Principals Committee, the Deputies Committee, and the Counterterrorism and National Preparedness Policy Coordination Committee (PCC) constitute the major policy and decision making bodies involved in the federal response to terrorism (see Figure 2).

The PCC has four standing subordinate groups to coordinate policy in specific areas. The Counterterrorism and Security Group (CSG) coordinates policy for preventing and responding to foreign terrorism, either internationally or domestically. The Preparedness and Weapons of Mass Destruction Group provides policy coordination for preventing WMD attacks in the United States and developing response and consequence management capabilities to deal with domestic WMD incidents. The Information Infrastructure Protection and Assurance Group handles policy for preventing and responding to major threats to America's cyberspace, and the Continuity of Federal Operations Group is charged with policy coordination for assuring the continued operation of Constitutional offices and federal departments and agencies.²¹

When the NSC is advised of the threat of a terrorist incident or actual event, the appropriate subordinate group will convene to formulate recommendations for the Counterterrorism and Preparedness PCC who in turn will provide policy analysis for the Deputies Committee. The Deputies Committee will ensure that the issues being brought before the Principals Committee and NSC are properly analyzed and prepared for a decision by the President.

The FBI Crisis Management Structure

The FBI's first step when a terrorist threat is discovered is to initiate a threat credibility assessment. The FBI takes immediate steps to identify, acquire, and plan for the use of federal resources to augment the State and local authorities if the threat is deemed highly credible or an incident is verified. The FBI will designate a Federal On-Scene Commander (OSC) who functions as the incident manager for the U.S. Government. Initially, incident response resources are acquired from the United States Attorney's Office in the affected area. The OSC considers the following priorities when developing the strategy to respond to the threat:

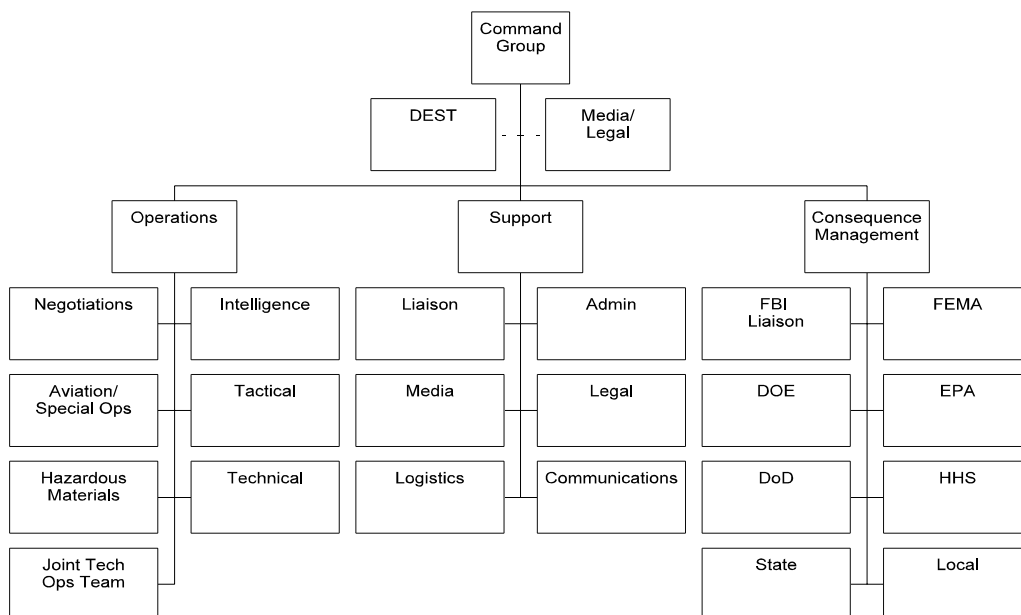
- 1) Preserving life or minimizing risk to health;
- 2) Preventing a threatened act being carried out or an existing act from being expanded;
- 3) Locating, accessing, rendering safe, recovering, and disposing of a WMD;
- 4) Rescuing, decontaminating, transporting, treating victims, and preventing secondary casualties;
- 5) Releasing emergency public information;
- 6) Restoring essential services and mitigating suffering;

²¹ National Security Council Memo, *Implementing NSDP-1, Counterterrorism and National Preparedness*, National Security Council, Washington, DC, February 28, 2001.

- 7) Apprehending perpetrators
- 8) Conducting site restoration.²²

The FBI Operational Response. The FBI manages the crisis from a local command center known as the Joint Operations Center (JOC) (see Figure 3). The JOCs primary purpose is to coordinate the law enforcement activities of the various federal, State, and local agencies responding to the emergency. The local FBI Special Agent In Charge (SAC) will establish the JOC with the express purpose of countering the threat or actual incident based on a graduated and flexible response. The JOC is designed to quickly accommodate the participation of other agencies responding to the terrorist threat or incident. FBI Headquarters in Washington D.C. activates its Strategic Information Operations Center (SIOC) to aid in coordinating national-level support to the terrorism incident site when notified that a field office has activated a JOC. The SIOC coordinates the federal response and draws upon the appropriate tactical, technical, scientific, and medical resources available from national-level organizations.²³ This is especially important when a credible nuclear, biological, or chemical terrorist threat is received. DoD, among other federal agencies, will provide liaison officers to the SIOC during a threatened or actual WMD incident.

Figure 3: FBI Joint Operations Center



Source: U.S. General Accounting Office, *Combating Terrorism: Federal Agencies' Efforts to Implement National Policy and Strategy*, Report Number GAO/NSIAD-97-254, September 1997, p. 44

²² CONPLAN, p. 9.

²³ Ibid., p. 20.

The Critical Incident Response Group. Normally, the FBI will respond initially to the incident with tactical assets from the local field office. Field office assets include Special Weapons and Tactics Teams trained in planning and executing high-risk tactical operations when called upon. When the threat or actual incident exceeds the capability of the on-scene forces, the FBI's Critical Incident Response Group (CIRG) can deploy the necessary resources to augment the local team. The CIRG was established in 1994 to give the FBI the ability to respond with the tactical and investigative expertise needed in a major terrorist incident. The CIRG can augment with crisis managers, hostage negotiators, behavioral scientists, psychologist, surveillance assets, and agents.²⁴

The tactical centerpiece of the CIRG is the Hostage Rescue Team (HRT). The team is headquartered in Quantico, Virginia, with 91 FBI Special Agents authorized and its mission is to serve as a full time national-level tactical team able to deploy to any location within four hours of notification. The HRT is also specially trained and exercised to ensure it can operate in a chemical or biological environment. The team is structured to deploy in segments, or as an entire unit depending on the severity of the crisis and it can be augmented with other law enforcement critical entities from the CIRG.²⁵

The Domestic Emergency Support Team. A critical element of effective national-level coordination is the notification and deployment of the Domestic Emergency Support Team (DEST). The DEST is a rapidly deployable, interagency team of experts to advise and support the FBI crisis management effort. The DEST can include representation from the DOE, HHS, EPA, FEMA, and DoD. It is the responsibility of DoD to provide transportation for the DEST. The FBI Director, in consultation with the Attorney General, requests that the National Security Council Deputies Committee activate and launch the DEST for on-scene advice that can include nuclear, biological, and chemical expertise. The Secretary of Defense authorizes the deployment of the DEST aircraft and all DoD personnel assigned to the team.

Specialized assistance is available from other federal, state, or local agencies such as the Departments of Transportation and Agriculture.²⁶ The DEST is incorporated directly into the existing on-site FBI crisis management structure to advise the OSC of federal-level capabilities that can be brought to bear on the incident.²⁷ Besides providing interagency crisis management assistance, the DEST can provide information management support and enhanced communications to ensure the OSC maintains connectivity with national-level decision makers during the on-going crisis. The DEST also can be organized to provide the expert advice

²⁴ U.S. General Accounting Office, *Combating Terrorism: Federal Agencies' Efforts to Implement National Policy and Strategy*, Report Number GAO/NSIAD-97-254, September 1997, pp. 40-41.

²⁵ CIRG Home Page, Tactical Support Branch. Available on the Internet at [<http://www.fbi.gov/programs/cirg/tact.htm>].

²⁶ GAO Report, *Combating Terrorism*, September 1997, p. 43.

²⁷ CONPLAN, p. 28.

required for certain explosive devices and their components including chemical, biological, nuclear, and radiological dispersal devices. Technical expertise and equipment is also available to operate in a contaminated environment in order to conduct on-site activities like threat sampling, technical measurements, tactical intelligence collection, evidence collection, and other actions.

The Military's Role in Domestic Crisis Management

PDD 39 and assorted legislation permits DoD to develop and maintain plans and capabilities to respond to threats or acts of terrorism, including use of nuclear, biological, and chemical weapons. In a domestic crisis involving WMD, DoD may be called upon to assist in several different ways ranging from actual interdiction of the terrorists to the loaning of specialized equipment for use by law enforcement agencies in the crisis. The Department of Defense has published directives establishing policy and assigning responsibility for providing military assistance to civil authorities including specific policy for assistance to civil law enforcement officials in emergencies involving terrorism and WMD.

DoD Policy

The Department of Defense is governed by myriad statutes and directives pertaining to domestic use of the armed forces for any law enforcement action. DoD Directive 3025.15, *Military Assistance to Civil Authorities*, provides basic policy guidelines for the Defense Department when supporting civilian law enforcement agencies. It covers “acts or threats of terrorism” and “requests for aid to civil law enforcement authorities” taking place “within the 50 states, District of Columbia, Commonwealth of Puerto Rico, U.S. possessions and territories, or any political subdivision thereof.”²⁸ When DoD evaluates requests, it considers the following criteria before providing assistance:

- 1) Legality - compliance with laws;
- 2) Lethality - potential use of lethal force by or against DoD forces;
- 3) Risk - safety of DoD forces;
- 4) Cost - who pays and the impact on the DoD budget;
- 5) Appropriateness - is the mission in the interest of DoD to conduct;
- 6) Readiness - impact of the request on DoD's ability to perform its primary mission.²⁹

The FBI recognizes four separate situations where the military may be called upon to assist in a domestic law enforcement situation involving a threat or an act of terrorism, including WMD terrorism: (1) providing technical support and assistance to law enforcement and other crisis response personnel; (2) interdicting an event and apprehending those responsible; (3) restoring law and order following an incident;

²⁸ Department of Defense Directive 3025.15, *Military Assistance to Civilian Authorities*, February 19, 1997, p. 1.

²⁹ *Ibid.*, p.2.

and (4) abating the consequences of a terrorist act.³⁰ The first two of these situations are considered crisis response and are governed by different statutes, directives, and approval authorities than the last two which are consequence management activities.

The Secretary of Defense is responsible for providing military assets that can assist in both crisis response and consequence management aspects of a WMD threat or incident upon the Attorney General's request. The Secretary of Defense also designates follow-on assets capable of providing technical assistance to the FBI when responding to the actual or threatened use of chemical, biological, or nuclear weapons, or radiological dispersal devices. In order to focus military contributions to homeland defense and assistance to civilian authorities for consequence management, DoD established a new unified, combatant command – U.S. Northern Command – in October 2002.³¹

The *Posse Comitatus* Act

Military involvement in direct law enforcement activities is normally prohibited by 18 U.S.C. Section 1385, unless otherwise specifically authorized under the Constitution or Act of Congress.³² Better known as the *Posse Comitatus* Act, 18 U.S.C. Section 1385, prohibits the use of the military in activities such as:

Arrest; seizures of evidence; search of persons; search of a building; investigation of a crime; interviewing witnesses; pursuit of an escaped prisoner; search of an area for a suspect and other like activities.³³

The *Posse Comitatus* Act, however, has not precluded the military from providing logistical support, technical advice, facilities, training, and other forms of assistance to civilian law enforcement agencies even though that assistance may aid those activities. Using a test based upon whether the military's involvement is "active" or "passive," the courts have held that providing assistance as listed above falls in the "passive" category and does not violate the *Posse Comitatus* Act.³⁴ Technical support activities such as explosive ordinance disposal and providing specialized equipment and expert advice on WMD devices is seen in the same manner. Specific statutory authorities exist that cover these contingencies.

³⁰ Office of the Legal Counsel, United States Department of Justice, *Federal Legal Authorities for Use in an Incident Involving Weapons of Mass Destruction*, May 12, 2000.

³¹ (name redacted), (name redacted), and (name redacted). *Homeland Security: Establishment and Implementation of Northern Command*. CRS Report RS21322, updated January 23, 2003, 6 pp.

³² For a comprehensive discussion of the *Posse Comitatus* Act see (name redacted) *The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law*, CRS Report 95-964, June 1, 2000.

³³ Department of Justice facsimile, *Posse Comitatus*, March 27, 2000.

³⁴ See for example *United States v. Red Feather*, 392 F. Supp. 916 (DC SD 1975).

Requests for Technical Assistance

Military technical assistance to law enforcement authorities may take many different forms, including loaning equipment, facilities, or personnel. The Secretary of Defense is the final approving authority for any requests for potentially lethal support, all support for counterterrorism operations, and certain support in situations involving WMD.³⁵ This includes support under 10 U.S.C. Section 382, *Emergency Situations Involving Chemical or Biological Weapons of Mass Destruction* and 18 U.S.C. Section 831, *Prohibited Transactions Involving Nuclear Materials*.³⁶ In general, these two statutes allow the use of military personnel, equipment, and technical assistance in non-hostile emergency situations (as determined jointly by the Attorney General and the Secretary of Defense) that pose a serious threat to the United States and its interests. A further test of the need for assistance is if civilian expertise and capabilities are not available or sufficient to counter the threat, the unique capabilities of the Department of Defense are critical to defeating the threat, and the enforcement of applicable federal law would be seriously impaired if DoD assistance was not provided.³⁷

Military Technical Assistance Operational Response. In an emergency situation, 18 U.S.C. Section 831 authorizes the Attorney General to request DoD law enforcement assistance when nuclear materials are involved. 10 U.S.C. Section 382 authorizes assistance when chemical or biological weapons are involved. When providing assistance under these statutes, the military units and personnel will remain under the military chain of command at all times. The senior on-scene federal law enforcement official (the FBI's designated OSC in most cases), may request support directly from the senior military commander at the crisis site. The planning and execution of all military support will remain the responsibility of the military commander. Any disagreements between the OSC and the military commander regarding the request for support will be referred to the Secretary of Defense and the Attorney General for resolution.

The commander of the military unit determines the appropriate technical assistance procedures based on the following priorities:

- 1) Protect human life or prevent injuries, including injury to the military personnel involved;
- 2) Prevent the use of a chemical, biological, or nuclear weapon;
- 3) Mitigate the consequences in the event of a the use of a chemical, biological, or nuclear weapon;
- 4) Protect property.³⁸

³⁵ DoDD 3025.15, p. 3.

³⁶ These sections of United States Code are available at [<http://law2.house.gov/usc.htm>].

³⁷ 10 U.S.C. Section 382 and 18 U.S.C. Section 831. Available on the World Wide Web at [<http://law2.house.gov/usc.htm>].

³⁸ DoD Executive Secretary Example Letter, *Military Technical Assistance to Civil Law Enforcement In Emergency Situations Involving Weapons of Mass Destruction and Nuclear Materials*, Undated.

Normally, military units providing technical assistance to federal law enforcement authorities will not be armed unless specifically requested through the military chain of command and authorized in advance by the Secretary of Defense and agreed to by the OSC. Members of military units, whether armed or not, will not be placed in hostile fire situations and are only authorized to use force in self-defense as defined in the Chairman of the Joint Chiefs of Staff Peacetime Rules of Engagement. The rules specify self-defense as the reasonable, necessary, and proportional force to defend him- or herself and to defend the unit against hostile intent and/or acts. Deadly force is authorized against any person demonstrating hostile intent or committing hostile acts if there is a reasonable belief that the person poses an imminent danger of death or serious physical injury to the member or to another person.³⁹ When providing technical assistance to the FBI or other law enforcement agencies, DoD expects the controlling agency to have made the incident area safe for assistance operations prior to admitting the military.

Notwithstanding the prohibitions of the *Posse Comitatus* Act,⁴⁰ the military, when providing assistance to civilian law enforcement authorities under 18 U.S.C. Section 831 and 10 U.S.C. Section 382, may extend technical advice and assessment to law enforcement personnel including:

- 1) Providing expert advice on all matters pertaining to the search, location, identification, seizure, render safe/disarm/disable procedures, handling and /or transport of a suspected WMD;
- 2) Check an area, such as a room, when trained law enforcement personnel are unavailable and there is reason to suspect that the area contains bobby traps or improvised explosive devices and render such devices safe by monitoring, containing, disabling, or disposing of them or their components or elements before a law enforcement search of the area is conducted;
- 3) Undertake appropriate rendering-safe and disposal actions, including monitoring, containing, disabling and/or disposing of or otherwise rendering safe a suspected biological, chemical, or nuclear material or device that is not weaponized;
- 4) Upon approval of the National Command Authority,⁴¹ undertake appropriate rendering-safe and disposal actions, including the monitoring, containing, disabling and /or disposing of or otherwise rendering safe a suspected WMD, to include its components or elements;

³⁹ Department of Defense Directive 5210.56, *Use of Deadly Force and the Carrying of Firearms by DoD Personnel Engaged in Law Enforcement and Security Duties*, February 25, 1992, p. 9.

⁴⁰ As the *Posse Comitatus* Act is a statute and not a constitutional provision it can be circumvented by subsequent statutory provisions, which authorize the military's use in a law enforcement role. Most notably, the language of the provisions of 10 U.S.C. Sections 371-381, which allow the military, among other things, to loan, maintain and operate equipment when supporting domestic law enforcement agencies and train domestic law enforcement personnel, does not state that they are an exception to *Posse Comitatus*. These sections of U.S. Code are available at [<http://law2.house.gov/usc.htm>].

⁴¹ Joint Publication 1-02, *Dictionary of Military and Associated Terms* defines the "National Command Authorities" as "The President and the Secretary of Defense or their duly deputized alternates or successors."

- 5) Participate in the questioning of suspects by law enforcement personnel, only when necessary to determine the characteristics of the suspected WMD device, its components or elements for the purpose of rendering it safe;
- 6) Provide and operate specialized equipment or vehicles;
- 7) Provide other assistance as requested by the Attorney General or lawfully delegated representative and approved by the Secretary of Defense.⁴²

Searches and Evidence. Military personnel may search non-DoD property during an emergency involving WMD when there is reason to suspect that the area contains booby traps and trained FBI personnel are not available. The FBI may ask the military to clear the area of hazardous devices prior to a law enforcement search of the area. Possible criminal evidence encountered during the search may be brought to the attention of the FBI. The FBI and the senior military commander will determine the procedures to use when performing the technical assistance requested based on safety to the public, the unit, and surrounding property. The military may consider preservation of forensic evidence when choosing the assistance technique. Military personnel will not compromise safety standards in order to enhance the survival or collection of evidence for law enforcement purposes.

Disposition and Transportation of a WMD. When a suspected or actual WMD is rendered safe or otherwise made safe for transportation, federal law enforcement officials are responsible for obtaining approval to dispose of the device, including approval of the ultimate disposal site. If the FBI specifically requests DoD assistance through the Attorney General in the transportation and disposal of the WMD, it must be approved by the Secretary of Defense. The transportation of the WMD from the incident site is not viewed as technical assistance under 10 U.S.C. Section 382 or 18 U.S.C. Section 831. As such, it must be authorized and funded under a different authority. The specific nature of the device (chemical, biological, radiological, or nuclear) is a critical factor when considering disposition and transport. Also, the evidentiary imperatives of the law enforcement process are considered before deciding on the disposal location and method of transportation.

Reimbursement. Military assistance provided by DoD under 10 U.S.C. Section 382 or 18 U.S.C. Section 831 may not require reimbursement to DoD under the provisions of 10 U.S.C. Section 377, *Reimbursement*. Section 377 states that if in DoD's judgment, the assistance is provided in the normal course of training or operations and the result of the support provides a benefit to the military that is equivalent to that which the military unit would receive from normal training or operations, no reimbursement is necessary.⁴³ DoD evaluates each situation separately and normally attempts to resolve reimbursement issues prior to deploying forces.

Training. DoD requires that all personnel likely to participate in providing assistance to federal law enforcement agencies be adequately trained and meet the minimum operational standards set within each military unit. Specialized units may

⁴² DoD Executive Secretary Example Letter, *Military Technical Assistance to Civil Law Enforcement In Emergency Situations Involving Weapons of Mass Destruction and Nuclear Materials*, Undated.

⁴³ 10 U.S.C. Section 377. Available at [<http://law2.house.gov/usc.htm>].

train in methods for defeating WMD devices to prepare for possible employment in domestic law enforcement situations. The Department of Justice, in coordination with the FBI provides the military an orientation package addressing how military members may participate in the search and seizure of evidence or take the necessary precautions to avoid degrading or destroying the evidence. All military personnel likely to support law enforcement agencies are also trained in the rules of engagement they are to follow when assisting civil law enforcement members in the performance of their duties. This is particularly important when the Secretary of Defense has authorized that the military personnel be armed when performing their duties because of the danger involved in the mission.

Requests for Tactical Assistance

Employing a military tactical force in response to a domestic law enforcement emergency concerning terrorism and WMD could take place in two situations - 1) armed conflict-like situations that threaten the continuity of government and 2) a threat endangering public safety that is beyond the tactical response capability of law enforcement. Most feel the more likely scenario for employment of a tactical military force in a domestic situation will be alleviating a public safety threat that requires capabilities exceeding the traditional law enforcement functions of arrest and prosecution. In either case, employment of a military force to resolve a domestic terrorist incident, whether or not some type of WMD is involved, will mean acting outside of statutory limitations normally imposed on the military when assisting law enforcement agencies.

Constitutional Authority. Only the President can authorize the employment of active duty military in a domestic situation. Although not expressly stated in the Constitution, it is a generally accepted constitutional interpretation that the President has authority under his Commander in Chief powers to direct the conduct of military action to include the employment of a military force to repel a sudden attack against the United States. Among several other situations, if the President determined that a terrorist situation threatened national survival or continuity of government or to ensure public safety, he could order the employment of the military in a domestic role.⁴⁴

The Insurrection Statutes. Title 10 U.S.C. Sections 331-334, known as the Insurrection Statutes, authorize the President to seek military assistance to support civilian law enforcement authorities when confronted with a rebellion, unlawful obstruction, or combination of assemblage which makes enforcement of the law by

⁴⁴ Other federal criminal statutes authorize the Attorney General to seek DoD assistance in their enforcement when necessary. See 18 U.S.C. Section 351 (murder, kidnaping, attempts and conspiracies involving Members of Congress, Cabinet Members, Supreme Court Justices and other senior government officials); 18 U.S.C. Section 112, 1116(d) (assault, murder or manslaughter of foreign officials, diplomats and other internationally protected persons); 18 U.S.C. Section 1751(i) (murder, kidnaping, attempts and conspiracies involving the President, Vice President, President-elect and Presidential Office employees). Available at [<http://law2.house.gov/usc.htm>].

duly constituted civilian authorities impracticable.⁴⁵ If the President found it necessary to employ the military in a domestic situation involving terrorism and WMD, invoking the Insurrection Statutes could allow the military to operate outside the traditional military support to law enforcement (technical assistance) and the prohibitions of the *Posse Comitatus* Act.

The President may, when requested by a state legislature, or governor when the legislature cannot be convened, send active military forces to suppress an insurrection against state authority.⁴⁶ Normally the state authorities will specify to the President that the violence cannot be brought under control by state and local law enforcement agencies and the state National Guard. The President may also take unilateral action by invoking Sections 332 and 331 of the Insurrection Statutes when he finds that widespread unlawful activities “make it impracticable to enforce the laws of the United States” or when the violence “hinders the execution of the laws of that State, and of the United States within that State” or obstructs the execution of federal law.⁴⁷

If the President either receives a request for assistance from a state or decides to take unilateral action under the Insurrection Statutes, he would execute the process in two steps following 10 U.S.C. Section 334, *Proclamation to Disperse*. First, the President would issue a proclamation commanding all persons engaged in acts of domestic violence and disorder in the affected area to cease and desist and to leave the area peaceably. The President would then immediately issue an executive order authorizing the Secretary of Defense to use active duty members of the armed forces to suppress the violence described in the proclamation. The Secretary would be authorized to determine when the active military forces should be withdrawn from the area. The order would also require the Secretary to coordinate law enforcement policies with the Attorney General.⁴⁸

Military Tactical Assistance Operational Response. If military force is authorized by the President, DoD has a variety of options. The most likely option in the case of terrorism (especially a WMD situation) would involve tactical assistance in the form of a Joint Special Operations Task Force (JSOTF). The task force is an agile, highly trained special mission force available to the FBI if a threat or an actual incident of domestic terrorism is considered beyond the tactical response capability of law enforcement. In such a case, the FBI On-Scene Commander would request that the FBI Director recommend that the Attorney General seek DoD support for the situation. The FBI would normally ask for military support only if its assets are overwhelmed by multiple threats or incidents, or if the specific target, including a suspected or known WMD, is beyond the capability of FBI tactical and technical assets. The JSOTF may include or have immediate access to specially trained personnel capable of dealing with various types of WMD. The Attorney General will begin the process by conferring with the Secretary of Defense to determine if military

⁴⁵ 10 U.S.C. Sections 331-333. Available at [<http://law2.house.gov/usc.htm>].

⁴⁶ 10 U.S.C. Section 331.

⁴⁷ 10 U.S.C. Section 332 and 333.

⁴⁸ Office of the Legal Counsel, United States Department of Justice, *Federal Legal Authorities for Use in an Incident Involving Weapons of Mass Destruction*, May 12, 2000.

support is appropriate using the same criteria employed in a technical assistance situation.

The OSC will also request that the FBI Director ask the Attorney General to deploy the emergency support team if it has not already been launched to the incident site. The DoD component of the DEST will include liaison officers familiar with the capabilities of the military units most likely to be tasked to support the FBI in a potentially hostile domestic terrorism situation. The launching of the DEST aircraft and all DoD personnel assigned to the team must be authorized by the Secretary of Defense. The military liaison officers assigned to the DEST are allowed to report directly to DoD and contingency planning for possible military intervention may begin. The commander of the JSOTF is integrated directly into the command group of the FBI JOC in order to gain first-hand knowledge of the tactical situation. Technical assistance operations may run in concert with military tactical assistance planning. DoD may undertake precautionary steps, such as the prepositioning of a limited number of military forces near the incident site with the approval of DoJ and the OSC.

When the OSC anticipates that federal military assistance is necessary to resolve the incident, he will immediately notify the FBI Director who will advise the Attorney General of the situation. After consultation with the Secretary of Defense, the Attorney General will advise the President that conditions warrant the employment of federal military forces. If the President decides to approve the use of military force, he invokes the Insurrection Statutes as previously discussed. The Attorney General, through the FBI, remains responsible for coordinating all activities for federal, State, and local agencies assisting in the resolution of the incident and the administration of justice in the affected area.

When presidential approval to use military force is granted, the Attorney General will advise the FBI who will notify the OSC. The Secretary of Defense will advise the commander of the military task force who in turn will begin coordination with the OSC for transfer of operational control of the incident site to the military. Responsibility for the tactical phase of the operation is transferred to military authority when the OSC relinquishes command and it is accepted by the military commander. The OSC may revoke the military authority at any time prior to the assault phase of the operation if he determines that military intervention is no longer required provided that the military commander agrees a withdrawal of forces can be accomplished without endangering the safety of his personnel.

Once the incident is resolved, the military commander will return on-scene authority and responsibility to the OSC. The military forces will normally evacuate the area to a mutually agreed upon relocation site to prepare for redeployment to their home station. However, key military personnel may be requested to remain at the incident site if the OSC determines their presence is necessary in the investigative process. The FBI will provide the military members the appropriate constitutional and procedural safeguards, including the presence of military counsel if required by the circumstances. The FBI will also, to the extent permitted by law, protect the identity of the military members participating in the event and any sensitive tactics, techniques, and procedures used by the military during the operation.

The decision to employ active military forces against a target in the United States, especially if it involves American citizens, remains a sensitive and complicated issue with numerous potential political and legal ramifications. Questions remain concerning the appropriateness of the use of federal troops and how military force should be employed in the United States.⁴⁹

Conclusion and Issues for Congress

A number of intelligence and terrorism experts argue that the trend toward terrorists' use of WMD is not as great a danger as other, more traditional national security threats. But, because of the serious implications of the successful use of a WMD by terrorists on American soil, it is most likely not an event that the American public is willing to accept either. To successfully combat the possibility of a terrorist incident, especially one using WMD, the current interagency domestic crisis management policies and structures should be analyzed to determine their effectiveness against the current threat and their adaptability to the future threat.

There are many critical issues concerning U.S. terrorism policy overall and domestic terrorism specifically. Several issues that could significantly affect the nation's crisis response capabilities were explored in recent national-level commissions. Most experts believe that a comprehensive national strategy coherently linking national policy with the capabilities of the many agencies charged with domestic terrorism responsibilities is a critical step in defeating the threat. Many experts also contend that the United States would be better served by employing the full range of DoD's capabilities during domestic crisis response operations.⁵⁰ Some see the creation of an entirely new agency with responsibility for "homeland defense" as the best method to ensure success against domestic terrorism.⁵¹ Lastly, newly proposed congressional oversight roles are seen by many as an important factor in a more effective response to domestic terrorism.

National Strategy

The current national strategy for terrorism is seen by many as an uncoupled system of plans that individually respond to various aspects of the threat but do not collectively ensure a comprehensive response capability in the event of a credible

⁴⁹ See for example: Charles J. Dunlap, Jr., *Where Domestic Security and Civil Liberties Collide*, Papers from the Conference on Homeland Protection, Strategic Studies Institute, U.S. Army War College, October 2000; David B. Kopel and Joseph Olson, *Preventing a Reign of Terror: Civil Liberties Implications of Terrorism Legislation*, A Symposium on Domestic Terrorism, Oklahoma City University Law Review, Summer/Fall 1996 Issue; and Walter Gary Sharp, Sr., *Balancing Our Civil Liberties with Our National Security Interests in Cyberspace*, Texas Review Law and Policy, Vol. 4, No. 69, 1999.

⁵⁰ See for example Report from the National Commission on Terrorism, *Countering the Changing Threat of International Terrorism* available at [<http://www.fas.org/irp/threat/commission.html>].

⁵¹ See for example The United States Commission on National Security/21st Century, *Road Map for National Security: Imperative for Change*, Washington, DC, January 31, 2001.

threat or actual terrorism act on American soil. As a starting point, most observers recommend the United States articulate an end state to which it should aim to accomplish its combating terrorism policy.

For example, there is no one definition of terrorism to use when coordinating interagency combating terrorism policy. The State Department, the Department of Justice, and DoD, all use definitions with subtle, yet far-reaching differences. If terrorism is defined as merely a legal issue, then law enforcement takes priority. In legal terms, terrorist-related acts are now arson, murder, or kidnapping. If terrorism is seen as affecting national security, it is a political or military issue that could end with response by military forces to prevent, deter, or interdict the terrorist act.

With no specific national objectives for which federal, State, and local agencies can gauge progress or measure capability, terrorism policy, it is argued, becomes an exercise in executing programs within a set budget. The general policies that involve preparation for interdicting a threatened terrorist act have no clear priority of implementation among those responsible for executing the policy. Comprehensive threat and risk assessments concerning the possible use of WMD by terrorists would allow federal authorities to make judgments as to whether funding is at the proper level overall, as well as allocations for specific programs. These same assessments could assist in establishing priorities and reducing or eliminating duplication of effort in combating terrorism programs.

Employing the Full Range of DoD Capability

Current statutory authority allows the U.S. military to act in a support role in domestic crisis response. Even if the President invokes the Insurrection Statutes allowing a military response to a specific situation, federal law enforcement personnel remain in overall charge of the operation. It is debatable what affect the employment of the military as a Lead Federal Agency in a domestic crisis response role during limited terrorist attacks would have on the military's capabilities and probability of success. The military appears to have sufficient capability to respond to the narrow mission of interdicting a domestic terrorist event prior to its execution or responding to a situation in progress when the FBI either does not have the capability or is overwhelmed by multiple contingencies.

What appears to be the main stumbling block to better coordination and response between the FBI and the military is the numerous and often confusing statutory and regulatory authorities that govern the use of the military in a domestic situation. Different statutes apply to a situation depending on whether it is a nuclear, chemical, or biological threat or incident. Many experts assert that a clearly specified legal authority in place prior to the use of federal military forces in a domestic situation could allow for a more streamlined and effective use of these forces while ensuring civil liberties and law enforcement concerns are respected. Different laws apply when employing the military in a tactical role as opposed to providing non-hostile technical assistance. Current laws may tend to delay or complicate military involvement in the situation which could reduce effectiveness. Another issue is that some in DoD see the use of crisis response forces in a domestic situation as not being a legitimate mission. They express concern about the effect such use has on the preparation of those forces to fight and win our nation's wars. Reduced force

structure and shrinking budgets also make it difficult to focus on taskings outside of their primary mission. Some express concern over widespread use of the military in domestic situations and the effect it could have on civil rights. They contend the military is not trained to carry out police work, although others point out that military forces do train in law enforcement situations and regularly exercise with federal agencies in crisis response situations in the United States.⁵²

Laws that more clearly specify the military's role in domestic crisis response would most likely make committing resources, personnel, and effort to that role more successful while at the same time continuing to protect the civil liberties of our citizens.

New Federal Structures

Several recent studies and legislative initiatives proposed new governmental structures to alleviate what they contend is the federal Government's fragmented approach to homeland security. Recommendations dealing with combating terrorism issues range from creating an independent homeland defense agency responsible for the entire spectrum of security to reorganizing the existing structure with more focus on current terrorism issues and threats. These recommendations tended to concentrate on the consequence management side of the combating terrorism issue - how the nation should prepare to respond to the aftermath of a successful terrorist attack. Many of these debates were resolved when the Administration proposed and Congress mandated the formation of the Department of Homeland Security, formed in January 2003.⁵³ The narrower mission of crisis response - interdicting or deterring an attack with either law enforcement or military forces - receives much less attention in the proposals.

Many of the suggestions for creating a new agency were grounded in the perceived need for a unified national framework for combating terrorism. The new structure would be responsible for planning and integrating the activities of the multiple government agencies involved in terrorism policy, budget considerations, and operations. Most importantly supporters say, the agency would coordinate the federal response with local and state authorities to make full use of all resources available. While all these suggestions may make great strides towards focusing federal, State, and local consequence management programs on the current challenges, they do not necessarily make a contribution to crisis response issues.

Many argue that the existing operational capabilities, processes, and procedures that the FBI possesses as the Lead Federal Agency for domestic crisis management are currently working well with DoD as a supporting agency. By most accounts, the

⁵² See for example Charles J. Dunlap, Jr., *Where Domestic Security and Civil Liberties Collide*, Papers from the Conference on Homeland Protection, Strategic Studies Institute, U.S. Army War College, October 2000 and David B. Kopel and Joseph Olson, *Preventing a Reign of Terror: Civil Liberties Implications of Terrorism Legislation*, A Symposium on Domestic Terrorism, Oklahoma City University Law Review, Summer/Fall 1996 Issue.

⁵³ (name redacted). *Homeland Security: Department Organization and Management*, CRS Report RL31493, updated January 15, 2003.

FBI has a clear and unambiguous relationship with military crisis response forces. Military training in domestic law enforcement scenarios is sufficient to prepare for the employment of crisis response forces in a support role under the lead of the FBI. Exercises designed to simulate both technical assistance and tactical support of a domestic terrorist incident, including the use of WMD, have been successful.⁵⁴ The statutory and regulatory authorities guiding the use of the military in domestic situations tends to complicate the administrative process of military involvement, thereby slowing down the operational response. But, advocates claim that the existing processes and structures for terrorism crisis response appear to work well overall while protecting civil liberties.

Congressional Oversight

Congress has taken a proactive approach to the significant challenges associated with combating terrorism. Recent legislation like the Nunn-Lugar-Domenici Domestic Preparedness Program has been successful in enhancing domestic consequence management capabilities at the federal, State, and local levels. However, other attempts to legislate policy and structure for combating terrorism have been less successful. Proposals to create an Office of Terrorism Preparedness and a new Deputy Attorney General for Combating Domestic Terrorism during the last Congressional session, while initially receiving wide support, were eventually not approved when the final version of the bill emerged. The proposals were an attempt to create a structure that would have budgetary and policy oversight on the dozens of departments and agencies responsible for responding to terrorist attacks. With over \$11 billion in the fiscal year 2001 combating terrorism budget, Congressional oversight of increasingly complex and rapidly growing programs is a considerable task.

Responsibility for reviewing the combating terrorism budget is now divided among a number of key Congressional committees in both houses. Several recent studies have recommend a new approach to providing oversight for both combating terrorism policy and budget. A special joint committee or one in each chamber with a full-time staff having the necessary experience and background in terrorism issues that would bridge these jurisdictional boundaries has been proposed.⁵⁵ Proponents point to the permanent select committees on intelligence that each chamber now employs for oversight of an equally complicated issue. The objective is to help eliminate duplication in programs and funding and develop a more coherent national plan for combating terrorism.

⁵⁴ The May 2000 congressionally mandated TOPOFF (Top Officials) Exercise was comprised of competing and complicated crisis and consequence management scenarios. The crisis response portion tested the complete technical and tactical response capabilities of the FBI and selected military forces in a WMD situation. The exercise after-action report is still in coordination with an anticipated release in May 2001.

⁵⁵ Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction (Gillmore Commission), *II. Toward a National Strategy for Combating Terrorism*, December 15, 2000, p. 17.

Additionally, Congress may wish to undertake a thorough review of the current statutes and other legislation affecting domestic combating terrorism policy, with a view toward facilitating increased cooperation among federal agencies charged with combating terrorism responsibilities.

Conclusion

Most experts agree that the United States is vulnerable to terrorism. While intelligence experts contend that the use of a WMD is less likely than the more conventional forms of terrorism, the consequences of a successful attack could be massive. Many believe that current U.S. policy for dealing with domestic terrorism lacks coherent focus. Recent proposals for restructuring national-level organizations to deal with a major terrorist event have mostly centered on the consequence management aspect. Crisis response cooperation between the FBI and the military is well demonstrated. The military has demonstrated that it understands its supporting role to law enforcement and is prepared to act with technical assistance or tactical forces as called upon. Recent changes in the NSC policy structure will most probably take some time to have an effect on policy or operational issues. Additionally, reshaping national strategy on domestic terrorism, more clearly articulating the military's statutory authority or limitations in domestic situations, and providing critical and focused congressional oversight and assistance to those functions would clearly enhance the capabilities of crisis response forces to deter or interdict a possible terrorist incident.

EveryCRSReport.com

The Congressional Research Service (CRS) is a federal legislative branch agency, housed inside the Library of Congress, charged with providing the United States Congress non-partisan advice on issues that may come before Congress.

EveryCRSReport.com republishes CRS reports that are available to all Congressional staff. The reports are not classified, and Members of Congress routinely make individual reports available to the public.

Prior to our republication, we redacted names, phone numbers and email addresses of analysts who produced the reports. We also added this page to the report. We have not intentionally made any other changes to any report published on EveryCRSReport.com.

CRS reports, as a work of the United States government, are not subject to copyright protection in the United States. Any CRS report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS report may include copyrighted images or material from a third party, you may need to obtain permission of the copyright holder if you wish to copy or otherwise use copyrighted material.

Information in a CRS report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to members of Congress in connection with CRS' institutional role.

EveryCRSReport.com is not a government website and is not affiliated with CRS. We do not claim copyright on any CRS report we have republished.