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## Defense Support of Civil Authorities: An Examination of Trends Impacting Upon Police Militarization

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# DEFENSE SUPPORT OF CIVIL AUTHORITIES: AN EXAMINATION OF TRENDS IMPACTING UPON POLICE MILITARIZATION

*Kevin H. Govern\**

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### *I. Introduction*

In recent years, images of United States police wearing helmets and masks, carrying military-style weapons, and riding in armored or even mine-resistant armored vehicles have become increasingly prevalent with media depictions of responses to civil disorder and a purported nationwide trend of police militarization.<sup>1</sup> At the same time, the Department of Defense (DOD) and the White House have released some of the federal government’s most significant policy guidance ever prescribing and proscribing defense support to civilian authorities, reflecting over two centuries of past military engagement with civil authorities, responses to present emergencies and disasters, and future anticipated political, fiscal, and security realities.<sup>2</sup> Specifically, DOD Instruction 3025.21 “Defense Support of Civilian Law Enforcement Agencies,” was issued on February 27, 2013, supplementing DOD Directive (DODD) Number 3025.18, Defense Support of Civil Authorities (DSCA).<sup>3</sup> It replaced several older DOD issuances<sup>4</sup> on military assistance to civilian law enforcement

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1. See *Police Militarization*, ACLU, <https://www.aclu.org/issues/criminal-law-reform/reforming-police-practices/police-militarization> (describing the nationwide trend of police militarization) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

2. Portions of the following have been adapted from U.S. MILITARY OPERATIONS: LAW, POLICY, AND PRACTICE 797–829 (Geoffrey S. Corn et al. eds., 2015).

3. See DEP’T OF DEF. INSTR. 3025.21, DEF. SUPPORT OF CIVILIAN L. ENF’T AGENCIES (Feb. 27, 2013), <https://www.dtic.mil/whs/directives/corres/pdf/302521p.pdf> (establishing DOD policy and replacing DoDDs 3025.12, 5525.5, and 5030.46), published in 78 Fed. Reg. 71 (Apr. 12, 2013) (to be codified at 32 CFR § 182), <http://www.fas.org/sgp/news/2013/04/dsclea.pdf>. It is important to note that Department of Defense Directive (DODD) 3025.18 is also still in effect. See DEP’T OF DEF. DIRECTIVE 3025.18, DEF. SUPPORT OF CIV. AUTH. (DSCA) (Dec. 29, 2010), <http://www.dtic.mil/whs/directives/corres/pdf/302518p.pdf> (incorporating and canceling DOD Directive 3025.1 and 3025.15 (references a and b)).

4. See, e.g., *What are the DoD Issuances*, WASH. HEADQUARTERS SERV’S., <http://biotech.law.lsu.edu/blaw/dodd/general.html> (“A [DOD Instruction] is a DoD issuance that implements the policy, or prescribes the manner or a specific plan

and civil disturbances, and affects the way in which Active and Reserve Component forces implement nearly fifty-year-old civil disturbance contingency plans in the Twenty-First Century. Months after the disastrous effects of the October 2012 Superstorm Sandy,<sup>5</sup> and weeks prior to the devastating April 15, 2013 Boston Marathon bombings,<sup>6</sup> the May 20, 2013 El Reno tornado in Oklahoma,<sup>7</sup> and the summer 2013 wildfires in both Arizona<sup>8</sup> and Colorado,<sup>9</sup> the DOD issued an instruction clarifying the rules for the involvement of military forces in civilian law enforcement. The instruction establishes DOD policy, assigns responsibilities, and provides procedures for DOD support to Federal, State, tribal, and local civilian law enforcement agencies, including responses to civil disturbances within the United States.

The defense support instruction requires that senior DOD officials develop “procedures and issue appropriate direction as necessary for defense support of civilian law enforcement agencies in coordination with the General Counsel of the Department of

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of action for carrying out the policy. . . . A Regulation is a document of general application designed to implement, interpret, or prescribe procedural requirements”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

5. See, e.g., *Superstorm Sandy: Before, During and Beyond*, NAT’L PUB. RADIO, <http://www.npr.org/series/164212970/full-coverage-superstorm-sandy> (providing news coverage on Superstorm Sandy) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

6. See, e.g., *Boston Marathon Terror Attack Fast Facts*, CNN (Apr. 8, 2016, 7:18 AM), <http://www.cnn.com/2013/06/03/us/boston-marathon-terror-attack-fast-facts> (reporting on the Boston Marathon bombings) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

7. See, e.g., Kendis Gibson, *Oklahoma Tornado 2013: Death toll rises to 18*, WJLA (June 3, 2013), <http://www.wjla.com/articles/2013/06/oklahoma-tornado-2013-death-toll-rises-to-12-89611.html> (reporting on the death toll from the Oklahoma Tornado) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

8. See, e.g., *Report: Arizona Wildfire Grew Quickly, Was Erratic*, CBS 5 / KHPO (Jul. 15, 2013, 10:28 PM), <http://www.cbs5az.com/story/22848108/report-arizona-wildfire-grew-quickly-was-erratic?autostart=true> (reporting on the Arizona wildfires in 2013) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

9. See, e.g., Saddie Gurman, Ryan Parker & Joey Brunch, *Colorado Wildfires Consume Homes, Force Evacuations*, DENV. POST, (June 11, 2013, 3:29 PM), <http://www.denverpost.com/2013/06/11/colorado-fires-consume-homes-force-evacuations> (reporting on the Colorado wildfires in 2013) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

Defense, and in consultation with the Attorney General of the United States,” including “tasking the DOD Components to plan for and to commit DOD resources in response to requests from civil authorities for [civil disturbance operations].”<sup>10</sup> Military officials are to coordinate with “civilian law enforcement agencies on policies to further DOD cooperation with civilian law enforcement agencies” and the heads of the combatant commands are instructed to issue procedures for “establishing local contact points in subordinate commands for purposes of coordination with Federal, State, tribal, and local civilian law enforcement officials.”<sup>11</sup> This is especially important in the realm of so-called complex catastrophes that would overwhelm local and state agencies individually and require federal agency involvement with the DOD supporting an overall effort.<sup>12</sup>

Also in February 2013, Deputy Secretary of Defense Ashton Carter issued a memorandum to define complex catastrophe as:

Any natural or man-made incident, including cyberspace attack, power grid failure, and terrorism, which results in cascading failures of multiple, interdependent, critical, life-sustaining infrastructure sectors and causes extraordinary levels of mass casualties, damage, or disruption severely affecting the population, environment, economy, public health, national morale, response efforts, and/or government functions.<sup>13</sup>

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10. See DEPT OF DEF. INSTR. 3025.21, *supra* note 3, at 10 (describing the responsibilities for the Assistant Secretary of Defense for Homeland Defense and Americas’ Security Affairs).

11. See *id.* at 12 (describing the responsibilities for the Heads of the DOD Components).

12. See Christopher DeHart, *Army North Hosts Northern Command Complex Catastrophe Session*, U.S. N. COMMAND (June 6, 2013), <http://www.northcom.mil/Newsroom/Article/563636/army-north-hosts-northern-command-complex-catastrophe-session> (quoting Major Chris Byrd, civil support planner with the Army North Operations Section, “Cooperation and coordination become vital components to successfully dealing with a complex catastrophe situation”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

13. See Memorandum from Deputy Sec’y of Def., Dep’t of Def., to Sec’ys of the Military Dep’ts et al. (Feb. 19, 2013), <https://wss.apan.org/2530/Staff%20Sections/DSCA/Complex%20Catastrophe%20Definition.pdf> (establishing the DOD definition of “complex catastrophe.”).

This was especially significant to enable the DOD to “assess a broader range of forces, defense installations assets, and other DOD capabilities that could aid in response to complex catastrophes,”<sup>14</sup> as well as align DOD efforts with the 2011 Presidential Policy Directive 8, “National Preparedness,”<sup>15</sup> and other key sources of policy and strategic guidance, and prioritize strategy, policy and planning, and preparedness.

At nearly the same time, DOD issued its Strategy for Homeland Defense and Defense Support of Civil Authorities to address the range of “current and emerging threats to the homeland and natural and manmade hazards inside the United States for the period 2012-2020 [...] in keeping with current fiscal realities.”<sup>16</sup>

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14. *See id.* (explaining the significance of the DOD definition of “complex catastrophe.”).

15. *See Presidential Policy Directive 8: National Preparedness*, HOMELAND SEC. (Mar. 30, 2011), <https://www.dhs.gov/presidential-policy-directive-8-national-preparedness> (“Presidential Policy Directive / PPD-8 is aimed at strengthening the security and resilience of the United States through systematic preparation for the threats that pose the greatest risk to the security of the nation, including acts of terrorism, cyberattacks, pandemics, and catastrophic natural disasters”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). In this PPD, the President:

[D]irect[ed] the development of a national preparedness goal that identifies the core capabilities necessary for preparedness and a national preparedness system to guide activities that will enable the Nation to achieve the goal. The system will allow the Nation to track the progress of our ability to build and improve the capabilities necessary to prevent, protect against, mitigate the effects of, respond to, and recover from those threats that pose the greatest risk to the security of the Nation.

The Assistant to the President for Homeland Security and Counterterrorism shall coordinate the interagency development of an implementation plan for completing the national preparedness goal and national preparedness system. The implementation plan shall be submitted to me within 60 days from the date of this directive, and shall assign departmental responsibilities and delivery timelines for the development of the national planning frameworks and associated interagency operational plans described below.

*Id.*

16. *See* Leon E. Panetta, *Forward* to U.S. DEP’T OF DEF., STRATEGY FOR HOMELAND DEF. & DEF. SUPPORT OF CIV. AUTH.’S (Feb. 2013), <https://www.hsdl.org/?view&did=732192> (elaborating on the priorities for the core DOD missions) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

Part II of this chapter overviews the historic laws and policies that are the foundations for defense support to civilian authorities, particularly in the context of support to law enforcement agencies and the prevention of or response to civil disorders. This sets the stage for a non-exhaustive historical assessment in Part III of 20th and 21st century examples of defense support to civil authorities, broken down into the eras of: the early to mid-20th Century; mid to late-20th Century; the late 1970s through early 1990s; and the so-called “Garden Plot” civil disturbance plan being revisited in real-world application; and the early 2000s through 2010s, putting the Federal Government’s National Response Plan (NRP) (later called National Response Framework–NRF) to test in contemporary operations under policies extant at the time of this chapter’s writing and under the limitations of the 2015 Executive Order directing better coordinated Federal support for state, local and tribal law enforcement equipment acquisition. This will set the stage for the way ahead described in Part IV, considering the current framework for future national response to disasters and emergencies.

## *II. Historic Laws as the Foundations for Defense Support*

Defense support of civil authorities policy changes must be read in light of an evolution, rather than revolution, involving over a century of federal troop deployments and 200-plus years of legal precedent, starting with the United States Constitution. Article I, Section 8 is the wellspring from which military to support civil authorities draws sustenance. Specifically, “Congress shall have power . . . to provide for calling forth the Militia to execute laws of the Union, suppress Insurrections, and repel Invasions.”<sup>17</sup> In conjunction with this Congressional authority, each President “shall take care that the Laws be faithfully executed” consistent with Article II, Section 3.<sup>18</sup> Read in conjunction with those provisions, the basis for Federal government support, including DOD assistance, to State and local authorities arises under the Tenth Amendment, inasmuch as “The powers not delegated to the

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17. U.S. CONST. art. I, § 8.

18. *Id.* at art. I, § 3.

United States by the Constitution, nor prohibited by it, are reserved to the States respectively.”<sup>19</sup>

President George Washington found need to issue a proclamation in 1794 summoning 13,000 federalized militia troops, led by Treasury Secretary Alexander Hamilton and Virginia governor Henry Lee, to march into western Pennsylvania to act against the Whiskey Rebellion over excise taxes in Pennsylvania. Subsequent legislation empowered the president to use regular military forces as well, and laws passed during the Civil War and Reconstruction periods further strengthened the executive’s use of federal troops, as well as setting forth limitations on its use.<sup>20</sup>

The Insurrection Act of 1807 was one of the first and most important United States laws still in force on this subject, and was followed some 71 years later by the Posse Comitatus Act of 1878, which continues to limit executive authority to conduct military law enforcement on United States soil. Each of those and other civil support laws has evolved over time—consistent with the times and the popular will expressed through Congress.

The Insurrection Act, (codified, as amended, at 10 USC § 331–335) has changed from its 1807 inception many times, with most notable alterations in the mid-twentieth century. This succinct law has consistently exempted federal (and federalized troops) from legal prohibitions on employment and deployment on US soil in the following instances:

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19. *Id.* at amend. X § 3.

20. Presidential emergency power was established in six statutes in 1792, 1795, 1807, 1871, and 1878: Calling Forth Act of 1792, ch. 28, 1 Stat. 264 (repealed 1795); the Militia Act of 1795, ch. 36, 1 Stat. 424 (repealed in part 1861 and current version at 10 U.S.C. §§ 331–35 (2013)); the Insurrection Act of 1807, ch. 39, 2 Stat. 443 (current version at 10 U.S.C. §§ 331–35 (2013)); the Suppression of the Rebellion Act of 1861, ch. 25, 12 Stat. 281 (current version at 10 U.S.C. §§ 331–35 (2013)); specific parts of the Ku Klux Klan (Civil Rights) Act of 1871, ch. 22, §§ 3–4, 17 Stat. 13, 14–15 (expired in part 1873 and current version at 10 U.S.C. § 333), and; the Posse Comitatus Act of 1878 (current version at 18 USC § 1385 (2013). *See, e.g.*, Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149 (2004) (discussing the first five statutes). *See also* PAUL J. SCHEIPS, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1945-1992, 449–52 (2005), [http://www.history.army.mil/html/books/030/30-20/cmh\\_pub\\_30-20.pdf](http://www.history.army.mil/html/books/030/30-20/cmh_pub_30-20.pdf). Troop presence in the South for supposedly partisan political ends led to the Posse Comitatus Act of 1878, “restoring an earlier national consensus that military intervention in civil affairs should occur only when specifically authorized in the law.” *Id.*



§ 331. Federal aid for State governments

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

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

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

§ 333. Interference with State and Federal law

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

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

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

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

§ 334. Proclamation to disperse

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

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

For purposes of this chapter, the term “State” includes the unincorporated territories of Guam and the Virgin Islands.<sup>21</sup>

For a brief year, the Insurrection Act was expanded under the 2007 John M. Warner Defense Authorization Act, then brought back to longstanding language in the subsequent fiscal year.<sup>22</sup> In

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21. 10 U.S.C. §§ 331–335 (2012); *see also* John R. Brinkerhoff, *The Role of Federal Military Forces in Domestic Law Enforcement*, JOINT CTR. FOR OPERATIONAL ANALYSIS J. (2004), <http://www.narbo.org/posse%20comitatus.pdf> (analyzing the Insurrection Act for the President’s authority to authorize federal troops to enforce the law). Brinkerhoff explained:

Title 10, Section 331 was enacted in 1792 in response to challenges to the taxing power of the federal government. It allows the President, at the request of a governor or state legislature, to put down an insurrection by calling into federal service sufficient militia to “suppress the insurrection.”

Title 10, Section 332 was enacted in 1861 at the outset of the Civil War. It allows the President to use the armed forces to enforce the laws or suppress a rebellion whenever, in his opinion, unlawful obstructions, combinations, or assemblages or rebellion against the authority of the United States make it impractical to enforce the laws using the course of judicial proceedings.

Title 10, Section 333 was enacted in 1869 during the Reconstruction Era. It allows the President to use the armed forces or militia to respond to insurrection, domestic violence, unlawful combination, or conspiracies that prevent a state government from enforcing the laws.

Title 10, Section 334 was enacted in 1861. It prescribes that the President shall issue a proclamation calling on insurgents to disperse before using the militia or armed forces to enforce the law.

*Id.*

22. On September 30, 2006, the Congress modified the Insurrection Act as part of the 2007 Defense Authorization Bill (repealed as of 2008). The so-called “Insurrection Act Rider,” Section 1076 of the law, changed Section 333 of the Insurrection Act, and widened the President’s ability to deploy troops within the United States to enforce the laws. Under this act, the President could also deploy troops as a police force during a natural disaster, epidemic, serious public health emergency, terrorist attack, or other condition, when the President determines that the authorities of the state are incapable of maintaining public order. The bill also modified Section 334 of the Insurrection Act, giving the President authority to order the dispersal of either insurgents or “those obstructing the enforcement of the laws.” The law changed the name of the chapter from “Insurrection” to “Enforcement of the Laws to Restore Public Order.” The 2008 Defense Authorization Bill, repealed the changes made in the 2007 bill. *See, e.g.*, Kevin H. Govern, “*Making Martial Law Easier*” in *the U.S.*, 1 HOMELAND SEC. REV. 221, 221–30 (2007) (finding that the re-examination of domestic employment and deployment of military forces did not make martial law easier).

2011, President Obama signed the National Defense Authorization Act for Fiscal Year 2012 into law, in which Section 1031, clause “b,” article 2 defines a “covered person,” i.e., someone possibly subject to detention, as the following:

A person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.<sup>23</sup>

The so-called Posse Comitatus Act (codified, as amended, at 18 U.S.C. § 1385) uses a Latin term found in sixteenth-century English law meaning “to have the right to an armed retinue.”<sup>24</sup> The Posse Comitatus Act passed on June 18, 1878, prohibiting federal troops from supervising Confederate state elections in the latter portion of the Reconstruction Era.<sup>25</sup> It originally applied only to the US Army, but was amended after the US Air Force was created to include those forces in 1956, then has applied by DOD regulation to include US Navy and US Marine Corps forces as well. The Posse Comitatus Act reads now, as follows:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.<sup>26</sup>

Further, 6 U.S.C. § 466 is an unusual codification of a “sense of Congress reaffirming the continued importance and applicability of the Posse Comitatus Act,” in particular the following subsections providing for exceptions and exemptions:

(4) Nevertheless, by its express terms, the Posse Comitatus Act is not a complete barrier to the use of the Armed Forces for a

23. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1031 (b)(2), 125 Stat. 1298, 1562 (2011).

24. Charles Holloway, *Posse Comitatus*, CHARLES HOLLOWAY (July 4, 2012), <http://www.charlesholloway.co.uk/2012/07/posse-comitatus/> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

25. Kevin Govern, *Lawful Military Support To Civil Authorities In Times of Crisis*, JURIST, (May 2, 2013, 12:30 PM), <http://jurist.org/forum/2013/05/kevin-govern-posse-comitatus.php> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

26. 18 U.S.C § 1385 (2012).

range of domestic purposes, including law enforcement functions, when the use of the Armed Forces is authorized by Act of Congress or the President determines that the use of the Armed Forces is required to fulfill the President's obligations under the Constitution to respond promptly in time of war, insurrection, or other serious emergency.

(5) Existing laws, including chapter 15 of Title 10 (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.<sup>27</sup>

The Posse Comitatus Act has prohibited troops under federal authority (that is Title 10 Active Component troops and "federalized" Title 32 National Guard troops) from generally conducting law enforcement duties on United States soil absent congressionally legislated or constitutionally enumerated authority or exception. By comparison and contrast, The Reserve components of the Armed Forces are: The Army National Guard of the United States, The Army Reserve, The Navy Reserve, The Marine Corps Reserve, The Air National Guard of the United States, The Air Force Reserve, and The Coast Guard Reserve (10 U.S.C. § 10101).<sup>28</sup> Federal troops use exceptions to the Insurrection Act and Posse Comitatus Act would be intelligence, military equipment, training, advice or facilities usage, amongst other matters in support of civilian law enforcement under 10 U.S.C. § 381,<sup>29</sup> or troop employment and deployment during a

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27. 6 U.S.C. § 466 (2012).

28. 10 U.S.C. § 10101 (2012); see also John H. Ebbighausen, *Unity of Command for Homeland Security: Title 32, Title 10, or a Combination*, DEF. TECH. INFO. CTR. (2006), <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA451789> (explaining history of the National Guard) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); see also NCC Staff, *An Important Landmark Anniversary for the National Guard*, NAT'L CONST. CTR. (June 3, 2016), <http://blog.constitutioncenter.org/2016/06/an-important-landmark-anniversary-for-the-national-guard/> (citing with authority The National Defense Act, Pub.L. 64-85, 39 Stat. 166, enacted June 3, 1916) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

29. 18 U.S.C. § 381 (2012).

biological, radiological, or nuclear event under 18 U.S.C. § 382.<sup>30</sup> Also, § 1004 of the National Defense Authorization Act for Fiscal Year 1991, as amended,<sup>31</sup>

allowed the Secretary of Defense to provide support for the counterdrug activities of any other department or agency of the federal government or of any state, local, or foreign law enforcement agency if certain criteria, set out in the statute [were] met.<sup>32</sup>

Under that authority, in September 2011, the GAO reported \$1.35 billion in costs for DOD support to the Department of Homeland Security (DHS) in two separate counternarcotics border operations in four border states—Operation Jump Start and Operation Phalanx—conducted by National Guard forces in Title 32 status from June 2006 to July 2008 and from June 2010 through September 30, 2011, respectively.<sup>33</sup> The GAO further noted that between 1989 and 2011, the DOD “estimate[d] the cost of using active duty Title 10 forces nationwide in support of drug law enforcement agencies (with additional operational costs borne by the military services) at about \$10 million annually.”<sup>34</sup>

The 1988 Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. §§ 5121-5207) authorizes the President to release federal funds and assistance to states for use in disaster response and declare an emergency or major disaster at the request of a state (or US territory) governor, as well as the mayor of Washington, D.C.<sup>35</sup> What the Stafford Act does not authorize is the use of the military to perform law enforcement functions ordinarily prohibited by the Posse Comitatus Act.

The Heritage Foundation has assessed that “[a]fter the passage of the Stafford Act in 1988, the number of declared federal disasters dramatically changed, steadily rising from an average of

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30. 18 U.S.C. § 382 (2012).

31. National Defense Authorization Act for Fiscal Year 1991, H.R. Res. 4739, 101st Cong. (1990) (enacted).

32. Davi M. D’Agostino, Observations on the Costs and Benefits of an Increased Department of Defense Role in Helping to Secure the Southwest Land Border, GOV’T ACCOUNTABILITY OFFICE 1, 8 (2011), <http://www.gao.gov/assets/100/97733.pdf>.

33. *Id.* at 3.

34. *Id.*

35. 42 U.S.C. §§ 5121–5207 (2012)

28 per year under President Ronald Reagan, to an average of 130 per year under Presidents George W. Bush and Barack Obama.”<sup>36</sup> An “emergency” under the Stafford Act is “any occasion or instance for which . . . Federal assistance is needed to supplement State and local efforts and capabilities . . . or to lessen or avert the threat of a catastrophe.”<sup>37</sup> A “major disaster” is defined as “any natural catastrophe (including any hurricane, tornado, storm, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion.”<sup>38</sup>

Upon the request of the governor, the President may task the DOD to provide any emergency work the President deems essential for the preservation of life and property in the immediate aftermath up to ten days prior to a presidential declaration of an emergency or major disaster.<sup>39</sup> Emergency work can include the clearance and removal of debris and wreckage and the restoration of essential public facilities and services.<sup>40</sup>

The declaration of an emergency under the Stafford Act requires that the governor of the affected state first make a determination that the situation is of such severity and magnitude that the state is unable to respond effectively without federal assistance, which determination must include a detailed definition of the type and amount of federal aid required, except where the President determines that a disaster implicates preeminently federal interests.<sup>41</sup>

Finally, DOD policy under color of the Stafford Act allows commanders to provide immediate response in the guise of resources and assistance to civil authorities prior to, or in the

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36. David Inserra, *Top 5 Priorities for Homeland Security in 2016*, HERITAGE FOUND. (Jan. 11, 2016), <http://www.heritage.org/research/reports/2016/01/top-5-priorities-for-homeland-security-in-2016> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

37. 42 U.S.C. § 5122(1) (2012).

38. *Id.* § 5122(2).

39. *Id.* § 5170b; see also Jennifer Elsea & R. Chuck Mason, *The Use of Federal Troops for Disaster Assistance: Legal Issues*, CONG. RESEARCH SERV. 1, 4–5 (2008), <http://www.fas.org/sgp/crs/natsec/RS22266.pdf> (summarizing the possible constitutional and statutory authorities allowing the use of federal troops to assist States in handling a natural disaster).

40. *Id.* at 4.

41. 42 U.S.C. § 5191 (2012).

absence of a declaration if disaster overwhelms the capabilities of local authorities and necessitates immediate action “to save lives, prevent human suffering, or mitigate great property damage within the United States” but “does not permit actions that would subject civilians to the use of military power that is regulatory, prescriptive, or compulsory.”<sup>42</sup>

Aside from the Stafford Act basis for support, Section 1208 of the 1990 National Defense Authorization Act<sup>43</sup> has allowed the Secretary of Defense to transfer to Federal and State agencies personal property of the Department of Defense, including small arms and ammunition, that the Secretary determines is: (A) suitable for use by such agencies in counter-drug activities; and (B) excess to the needs of the Department of Defense.<sup>44</sup> In 1996, Congress replaced Section 1208 with Section 1033,<sup>45</sup> which subsequently became 10 U.S.C. § 2576a.<sup>46</sup>

The Defense Logistics Agency (DLA) notes that “[s]ince its inception, the 1033 program has transferred more than \$5.1 billion worth of property. In 2013 alone, \$449,309,003.71 worth of property was transferred to law enforcement.”<sup>47</sup> As part of its outreach to civilian agencies, the DLA predicted that “[i]f your law enforcement agency chooses to participate, it may become one of the more than 8,000 participating agencies to increase its

42. DEF. SUPPORT OF CIVILIAN L. ENFT AGENCIES, *supra* note 3, at § 4g; see also Elsea & Mason, *supra* note 39, at 5 (citing Jim Winthorp, *The Oklahoma City Bombing: Immediate Response Authority and Other Military Assistance to Civil Authority (MACA)*, ARMY LAWYER 3–15, (1997)).

43. National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, 103 Stat. 1352 (1989).

44. See *id.* (adding that the Secretary shall carry out this section in consultation with the Attorney General and the Director of National Drug Control Policy in accordance with § 1208(1)(3)); see also 10 U.S.C. § 2576a(b) (2012) (noting that the Secretary of Defense may transfer personal property under [Section 2576a] only if six express conditions are met).

45. See Taylor Wofford, *How America’s Police Became an Army: The 1033 Program*, NEWSWEEK (Aug. 13, 2014, 10:47 PM), <http://www.newsweek.com/how-americas-police-became-army-1033-program-264537> (“[T]he 101st Congress in 1990 enacted the National Defense Authorization Act. . . . It was called 1208 Program. In 1996, Congress replaced Section 1208 with Section 1033”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

46. 10 U.S.C. § 2576a (2012).

47. Kevin H. Govern, *Defense Support of Civil Authorities to Natural and Man-Made Disasters*, in U.S. MILITARY OPERATIONS: LAW, POLICY, AND PRACTICE 806 (Geoffrey S. Corn et al. eds., 2016).

capabilities, expand its patrol coverage, reduce response times, and save the American taxpayer's investment."<sup>48</sup> Critics of the program, such as the ACLU, claimed "a disturbing range of military gear [is] being transferred to civilian police departments nationwide" and alleged "one-third of all war materiel parceled out to state, local, and tribal police agencies is brand new."<sup>49</sup>

As "one of the five armed forces within the US and the only military organization within the [DHS]," the US Coast Guard (USCG), under 14 U.S.C. §§ 1–894, is the "[N]ation's leading maritime *law enforcement* agency" with "broad, multi-faceted jurisdictional authority" limited neither by the Insurrection Act nor by the Posse Comitatus Act.<sup>50</sup> However, under 14 U.S.C. § 3 as amended by section 211 of the Coast Guard and Maritime Transportation Act of 2006,<sup>51</sup> the USCG operates as a service in the Department of the Navy upon the declaration of war and when Congress so directs in the declaration, or when the President so directs.<sup>52</sup>

President George W. Bush signed The Homeland Security Act of 2002<sup>53</sup> into law on November 25, 2002,<sup>54</sup> creating the DHS

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48. *Id.*

49. Matthew Harwood, *To Terrify and Occupy*, ACLU (Aug. 14, 2014, 9:59 AM), <https://www.aclu.org/blog/criminal-law-reform-free-speech/terrify-and-occupy> (on file with the Washington and Lee Journal of Civil Rights and Social Justice); *see generally War Comes Home: The Excessive Militarization of American Policing*, ACLU (June, 2014), <https://www.aclu.org/sites/default/files/assets/jus14-warcomeshome-report-web-rell1.pdf>.

50. *Office of Law Enforcement (CG-MLE): Mission*, Office of Law Enforcement (CG-MLE), U.S. COAST GUARD, <http://www.uscg.mil/hq/cg5/cg531/> (last modified June 12, 2013) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); *see generally* 14 U.S.C. §§ 1–894 (2012).

51. Coast Guard and Maritime Transportation Act of 2006, 14 U.S.C. §§ 1–894 (2012).

52. *See* 14 U.S.C. § 3(b) (2012) ("Upon the declaration of war if Congress so directs in the declaration or when the President directs, the Coast Guard shall operate as a service in the Navy, and shall so continue until the President, by Executive order, transfers the Coast Guard back to the Department of Homeland Security."); *see also Missions*, U.S. COAST GUARD, <https://www.uscg.mil/top/missions/> (last updated Mar. 20, 2014) ("Upon the declaration of war or when the President directs, the Coast Guard operates under the authority of the Department of the Navy") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

53. Homeland Security Act of 2002, 6 U.S.C. § 101 (2012).

54. Office of the Press Secretary, *President Bush Signs Homeland Security Act*, WHITE HOUSE: PRESIDENT GEORGE W. BUSH (Nov. 25, 2002),



as an organization to “lead the unified national effort to secure America, . . . prevent and deter terrorist attacks and protect against and respond to threats and hazards to the Nation, . . . ensure safe and secure borders, welcome lawful immigrants and visitors, and promote the free-flow of commerce.”<sup>55</sup>

Empowering DHS to take a “nationwide approach for Federal, State, and local governments to work effectively and efficiently together to prepare for, respond to, and recover from domestic incidents, regardless of cause, size, or complexity,”<sup>56</sup> President Bush then issued Homeland Security Presidential Directive 5 (HSPD-5), assigning the responsibility of developing a National Incident Management System (NIMS) to the DHS secretary, including a mandate for an NRP (later called NRF). The following four HSPD-5 criteria define when the DHS shall assume overall Federal incident management coordination responsibilities:

- (1) A Federal department or agency acting under its own authority has requested DHS assistance,
- (2) The resources of State and local authorities are overwhelmed and Federal assistance has been requested,
- (3) More than one Federal department or agency has become substantially involved in responding to the incident, or
- (4) The Secretary has been directed by the President to assume incident management responsibilities.<sup>57</sup>

The NRP authorized “immediate action to save lives, prevent human suffering, or mitigate property damage,” and a pre-approved authority under *in extremis* “Immediate Response” conditions.<sup>58</sup> The DOD considers imminently serious conditions

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<https://georgewbush-whitehouse.archives.gov/news/releases/2002/11/20021125-6.html> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

55. DEPT OF HOMELAND SEC., SECURING OUR HOMELAND: U.S. DEPARTMENT OF HOMELAND SECURITY STRATEGIC PLAN 4 (2004), <https://www.hsdl.org/?view&did=712147> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

56. *Homeland Security Presidential Directive/HSPD-5—Management of Domestic Incidents*, U.S. GOV’T PUB. OFF. 229, 231 (Feb. 28, 2003), <http://www.gpo.gov/fdsys/pkg/PPP-2003-book1/pdf/PPP-2003-book1-doc-pg229.pdf>.

57. *Id.* at 230.

58. *The Department of Defense (DOD) Role in Incident Response: Staff Officer’s Handbook*, CTR. FOR ARMY LESSONS LEARNED, 46 (May 2006),

resulting from any civil emergency where time does not permit approval from higher headquarters.<sup>59</sup> In these situations:

[L]ocal military commanders and responsible officials from DOD components and agencies are authorized by DOD directive and pre-approval by the Secretary of Defense, subject to any supplemental direction that may be provided by their DOD component, to take necessary action to respond to requests of civil authorities consistent with the Posse Comitatus Act (18 U.S.C. § 1385).<sup>60</sup>

### *III. 20th and 21st Century Examples of Defense Support to Civil Authorities*

In recent United States history, there have been many instances and exemptions whereby federal (or federalized) troops were called upon to conduct brief operations to promote or restore law and order, other than training, on United States soil in accordance with an Executive Order or Proclamation under the Insurrection Act or some other exemption to the Posse Comitatus Act. The most salient of these examples will be discussed below.

#### *A. Early to Mid-20th Century*

In 1919, President Woodrow Wilson called out Federal troops to quell race riots in twenty cities across the United States, which commenced first in Chicago, ostensibly arising from postwar social tensions related to demobilizing World War I veterans and competition for jobs among ethnicities.<sup>61</sup> In 1932, President Herbert Hoover called upon General Douglas MacArthur, with the

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<http://usacac.army.mil/sites/default/files/publications/06-08.pdf>.

59. *Id.*

60. *Id.*

61. See Peter Perl, *In The Race Riot of 1919, a Glimpse of Struggles to Come*, WASH. POST (Mar. 1, 1999), <https://www.washingtonpost.com/archive/politics/1999/03/01/in-the-race-riot-of-1919-a-glimpse-of-struggles-to-come/ad8466e-283e-4584-bd71-3b7810dbca07/> (“The Washington riot was one of more than 20 that took place that summer. With rioting in Chicago, Omaha, Knoxville, Tenn., Charleston, S.C., and other cities. . . . President Wilson mobilized about 2,000 troops to stop the rioting”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

aid of his staff officers Majors George Patton and Dwight D. Eisenhower, to send US troops to displace and disperse a group of 20,000 aggrieved WWI veterans (the so-called "Bonus Marchers") encamped on or near the Washington Mall; this infamous incident involved the first instance of MacArthur ignoring presidential directive, when he pursued veterans and families across the Anacostia River despite Hoover's orders to stand down.<sup>62</sup>

On Labor Day in 1934, textile workers in the northeast and southeastern US began a strike against their treatment by employers at the mills.<sup>63</sup> In response to the strike, Georgia Governor Eugene Talmadge declared martial law, and arrested strikers who continued their protests.<sup>64</sup> The first arrests, including many women workers, were from the Sargent and East Newnan Cotton Mills; carried out by bayonet-armed Georgia National Guardsmen, the strikers were transported by military trucks to Fort McPherson in Atlanta:

[W]here the workers were incarcerated in outdoor holding cells formerly occupied by German prisoners of war during World War I. Those arrested were held there until the strike ended three weeks later, after the United Textile Workers (UTW) union received government assurances that the problems at southern textile mills would be investigated.<sup>65</sup>

During 1946, President Harry S. Truman sent out federal troops against 800,000 striking railroad workers—the largest strike in America's history—and Truman proposed legislation (which failed to pass) to draft striking workers into the Armed Forces.<sup>66</sup>

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62. See generally *American Experience: MacArthur, the Bonus March*, PBS, <http://www.pbs.org/wgbh/amex/macaeopleevents/pandeAMEX89.html> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

63. See Irving Bernstein, *Chapter 5: Americans in Depression and War*, U.S. DEPT OF LAB., <https://www.dol.gov/general/aboutdol/history/chapter5> ("The largest of these strikes took place during the fall of 1934 when 376,000 textile workers in hundreds of mills in New England and the South walked out") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

64. Arden Williams, *Textile Industry*, NEW GA. ENCYCLOPEDIA (Oct. 5, 2007), <http://www.georgiaencyclopedia.org/nge/ArticlePrintable.jsp?id=h-2606> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

65. *Id.*

66. *American Experience: Truman*, PBS, <http://www.pbs.org/wgbh/americanexperience/features/general-article/truman-domestic/> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

*B. Mid to Late-20th Century*

The year 1957 saw President Eisenhower federalize Arkansas National Guard troops and send Active Component troops under Executive Order 10730<sup>67</sup> to Little Rock, Arkansas to counter desegregation violence in the aftermath of the landmark *Brown v. Topeka Board of Education* case in which the United States Supreme Court ruled that segregated schools were “inherently unequal” and ordered that public schools be desegregated “with all deliberate speed.”<sup>68</sup> In 1962, President John F. Kennedy sent 16,000 Federal troops under the XVIII Airborne Corps<sup>69</sup> to Mississippi to quell the so-called “Ole Miss Riot,” in conjunction with 123 Deputy Federal Marshals, 316 US Border Patrolmen, and 97 Federal prison guards protecting James Meredith, an African-American blocked from registering at the university.<sup>70</sup> The task force arrested 200 persons, including the arrest for insurrection of a retired Major General Edwin A. Walker who resigned his commission after reprimand for political activity.<sup>71</sup> In 1963 and 1965, forces also deployed to Tuscaloosa, Tuskegee, and Selma, Alabama to counter racial violence as a result of the forced enrollment of African-American students and civil rights marches,<sup>72</sup> and in 1967 to Detroit to suppress riots there.<sup>73</sup>

The increasing number of domestic disturbances and anticipated threats to security gave rise in 1965 to the US Army Intelligence Command (USAINTC), the Army counterintelligence element conducting operations in the continental United States, utilizing 300 field and residents offices across the nation organized into seven Military Intelligence groups.<sup>74</sup> After the August 1965

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67. Exec. Order No. 10,730, 22 Fed. Reg. 7628 (Sept. 25, 1957).

68. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

69. SCHEIPS, *supra* note 20, at 101–35.

70. Exhibit, *Clemson University Office of Institutional Research in conjunction with "Integration with Dignity: A Celebration of 40 Years"*, Harvey Gantt and the *Desegregation of Clemson University* (Jan. 28, 2003), <http://www.clemson.edu/oirweb1/FB/OIRWebpage/Integration.htm>.

71. See *Walker v. Pulitzer Pub. Co.*, 394 F.2d 800 (8th Cir. 1968) (detailing an interesting perspective on the diversity defamation case instituted by Walker involving this matter).

72. SCHEIPS, *supra* note 20, at 159–64.

73. *Id.* at 177–88.

74. See John P. Finnegan, *Army Lineage Series: Military Intelligence*, 161–

Los Angeles Watts rioting, USAINTC provided crisis support and contingency planning for collecting domestic intelligence under the STEEP HILL contingency plan to be implemented in the event of deployment of federal troops.<sup>75</sup> That plan, redesigned GARDEN PLOT in 1967 (and still extant today) proved to be inadequate with respect to aiding Army commanders in civil disturbance situations;<sup>76</sup> thus, subsequent collection plans (e.g., PUNCH BLOCK, LANTERN SPIKE), with respect to military counterintelligence collection and analysis, were separate from any federal or local law enforcement capabilities.<sup>77</sup>

The years of 1967 and 1968 were especially significant—and tragic—with respect to military support to civilian authorities. The Newark, New Jersey riot response involved elements of the Army's 108<sup>th</sup> Military Intelligence Group at Ft. Devens, Massachusetts, and with the Army largely “limited to observing events, the whole burden fell upon the police and the National Guard, which reached a peak strength of 5,367 in Newark on 17 July [1967].”<sup>78</sup> The Detroit Riots of 1967 involved 5,000 Federal troops and 17,000 law enforcement officers quelling one of the deadliest and most destructive riots in US history; reaction to a police raid of an unlicensed after-hours bar escalated to a loss of 43 lives, 467 injuries, 7,200 arrests, and the destruction of 2,000 buildings.<sup>79</sup> The October 1967 march on the Pentagon was the first national protest against the Vietnam Conflict, during which 5,000–6,000 armed Army troops deferred to 300 US Deputy Marshals to deal with 35,000 protesters, and ultimately to arrest 82.<sup>80</sup> Race riots in 110 cities across the United States ensued following the April 4, 1968 assassination of the Reverend Dr. Martin Luther King Jr.,<sup>81</sup>

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63 (1997), <https://www.hsdl.org/?view&did=437576> (detailing the history of intelligence within the U.S. army).

75. SCHEIPS, *supra* note 20, at 161.

76. *Id.* at 143.

77. Finnegan, *supra* note 74, at 155.

78. SCHEIPS, *supra* note 20, at 174.

79. *Id.* at 177–204.

80. *See id.* at 231–66 (delineating the so-called “Spring Mobilization to End the War in Vietnam,” which became the “National Mobilization Committee to End the War in Vietnam,” was a coalition of antiwar activists formed in 1967 to organize large demonstrations in opposition to the Vietnam War).

81. Finnegan, *supra* note 74, at 156.

most critically affecting Washington D.C.; in the largest federal occupation on United States soil since the Civil War, the White House dispatched some 13,600 Federal troops, including the 3<sup>rd</sup> Infantry Division (Old Guard), and 1,750 federalized D.C. National Guard troops to augment civilian law enforcement and quell disturbances across the capitol city.<sup>82</sup> Rioting spread to Chicago, Baltimore, and other cities across the nation as the “last of the great racial disturbances of the 1960s.”<sup>83</sup>

On April 13, 1968, Secretary McGiffert took charge of the Department of Defense Civil Disturbance Steering Committee, with the US Deputy Attorney General as a member.<sup>84</sup> The committee’s job was to advise the secretary of the Army in his capacity as the executive agent in dealing with civil disturbances or other lawlessness prejudicial to public order—all of which was soon to be formally authorized by DOD Directive 3025.12, 8 June 1968.<sup>85</sup>

The year 1970 saw the peaceful as well as lethal use of military force to deal with civil disturbance. The Postal Strike of that year involved over 200,000 workers in over 30 cities,<sup>86</sup> in response to which President Richard Nixon ordered 18,500 troops into New York City under the DOD Postal Augmentation Plan, a/k/a Operation Graphic Hand, ostensibly to sort mail, but with follow-on efforts of up to 115,000 troops to deploy to 35 cities if the strike continued.<sup>87</sup> While Graphic Hand troops avoided confrontation, as did those who responded to the May 1970 New Haven demonstrations, the Ohio National Guard killed four unarmed

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82. SCHEIPS, *supra* note 20, at 267.

83. *Id.* at 335.

84. *Id.* at 342.

85. The current version of this directive is DOD DIR. 3025.12, MILITARY ASSISTANCE FOR CIVIL DISTURBANCES (MACDIS) (1994), <http://www.au.af.mil/au/awc/awcgate/dod/d302512p.txt> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

86. AMERICAN POSTAL WORKERS UNION, <http://www.apwu.org/apwu-history> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

87. For more information on Graphic Hand, see Mason R. Schaefer, *Operation Graphic Hand, 1970: The Army Moves the Mail* (presented at 2004 Conference of Army Historians, July 13–15, 2004) (copy in Historian’s files at Center of Military History). For post-strike Graphic Hand activity of the civil disturbance directorate and its successor, the Directorate of Military Support, see DCDPO Historical Summary, July 1969–June 1970, and DOMS Historical Summary, July 1970–June 1971 (*cited in* SCHEIPS, *supra* note 20, at 433).

students, with twenty-eight guardsmen acknowledging having fired live rounds during the Kent State campus protests.<sup>88</sup>

In a matter reflecting a 19<sup>th</sup> Century incident repeating itself in the late 20<sup>th</sup> Century, President Richard M. Nixon sent federal troops to Wounded Knee, SD in 1973 during a 71-day siege of properties occupied by American Indian Movement activists, with the Federal Bureau of Investigation (FBI) cordoning off the area by using US Marshals and later National Guard units.<sup>89</sup>

### *C. The Late 1970s through Early 1990s: Garden Plot Revisited*

President Jimmy Carter established the Federal Emergency Management Agency (FEMA) under the 1978 Reorganization Plan No. 3, and activated April 1, 1979, by Executive Order 12127.<sup>90</sup> Executive Order 12148 shifted disaster relief efforts to the new federal-level agency, and FEMA gained responsibility from DOD for the nation's Civil Defense.<sup>91</sup>

On September 20, 1989, President George H.W. Bush sent Active Component and federalized National Guard forces under Executive Order 12690<sup>92</sup> to St. Croix, US Virgin Islands ostensibly at the request of the Territorial Governor to quell civil disturbance and provide disaster assistance to over 50,000 inhabitants after Hurricane Hugo damaged or destroyed over 90% of the island's structures and created a significant number of hazardous oil

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88. SCHEIPS, *supra* note 20, at 406.

89. *See id.* at 434–38 (citing FREDRICK S. CALHOUN, *THE LAWMEN: UNITED STATES MARSHALS AND THEIR DEPUTIES, 1789–1989*, 297–301 (1990)). Although National Guard troops under state control could not legally conduct operations on the reservation, the state called over 400 guardsmen to active duty to ensure that the disturbance was confined to the reservation. In addition, the state police established roadblocks around the disputed area. At peak strength about 350 federal, state, and local law enforcement officers were on the scene. *Id.*

90. Exec. Order No. 12,127, 44 Fed. Reg. 19,367 (Mar. 31, 1979).

91. *See* Exec. Order No. 12,148, 44 Fed. Reg. 43,123 (July 20, 1979) (noting that FEMA absorbed the Federal Insurance Administration, the National Fire Prevention and Control Administration, the National Weather Service Community Preparedness Program, the Federal Preparedness Agency of the General Services Administration, and the Federal Disaster Assistance Administration activities from HUD) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

92. Exec. Order No. 12,690, 54 Fed. Reg. 39,153 (Sept. 20, 1989).

spills.<sup>93</sup> Under the 1967 Garden Plot contingency plan, Joint Task Force (JTF) 140 brought together Army, Navy and Coast Guard elements, with a contingent from the US Marshals Service and the FBI, for Operation Hawkeye, FEMA's first major test of disaster relief capabilities.<sup>94</sup> Military Police, augmented by medical, engineer, legal and other support personnel enforced a dusk-to-dawn curfew—but not martial law: they patrolled the island for two months, securing key installations; worked with the FBI and the US Marshals to apprehend several hundred escaped prisoners; intercepted air-dropped bundles of cocaine valued at over \$50 million; and carried out extensive training for the Virgin Island National Guard and conducted joint patrols with the St. Croix Police Department.<sup>95</sup>

Six days in early May 1992 were filled with rioting, arson, murder and mayhem on the streets of Los Angeles following the controversial acquitting of officers involved in the Rodney King beating.<sup>96</sup> Garden Plot yet again became the contingency plan under which some 10,000 activated California National Guard troops served alongside 2,500 Active Component troops, and 1,700 federal law-enforcement officers from different agencies from across the state to put down disturbances.

In August 1992, FEMA's second major test came as Hurricane Andrew struck the Florida and Louisiana coasts with 165 mph winds, making 250,000 people homeless in the affected areas. Within five days, some 20,000 National Guard and 16,000 XVIII Airborne Corps troops<sup>97</sup> deployed yet again under the Garden Plot contingency plan and FEMA's oversight, and by October, all disaster relief functions were eventually turned over to civilian contractors and Corps units returned to Ft. Bragg.<sup>98</sup> In its

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93. William Branigin, *Hurricane Hugo Haunts Virgin Islands*, WASH. POST at A1 (Oct. 31, 1989), <http://www.washingtonpost.com/wp-srv/national/longterm/hurricane/archives/hugo89a.htm> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

94. MICHAEL SULLIVAN, *THE NATIONAL AND INTERNATIONAL IMPLICATIONS OF U.S. ARMY MILITARY POLICE* 8–12 (1992).

95. *Id.* See also generally FREDERIC L. BORCH, *JUDGE ADVOCATES IN COMBAT—ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI* 276–78 (2001).

96. SCHEIPS, *supra* note 20, at 441–49.

97. Dale Carroll, *Lessons Learned from Hurricane Andrew* (Apr. 15, 1996), <http://www.iaff.org/hs/disasterrelief/resources/jointtaskforce.pdf>.

98. *Id.*



February 1993 report, "Coping with Catastrophe," the National Academy of Public Administration (NAPA) found that "major changes were needed—in the White House, in Congress, in FEMA, in other federal agencies, and in the states and localities."<sup>99</sup> NAPA identified several basic paradigms in preparedness for national security emergencies and domestic civilian emergency preparedness and response that were causes of the failed response, and proposed a "comprehensive set of recommendations to address the causes of the nation's inadequate response to ... catastrophic events."<sup>100</sup>

*D. The Early 2000s Through the 2010s—Putting the National Response Plan (Framework) To Test*

Following the September 11, 2001 terrorist attacks, the 2002 Unified Command Plan (UCP)<sup>101</sup> established U.S. Northern Command (NORTHCOM) to plan, organize and execute homeland defense and civil support missions—marking the first time these missions fell under the direction of a single unified command.<sup>102</sup> NORTHCOM's region of responsibility includes the continental United States, Alaska, Canada and Mexico, including the Gulf of Mexico and Straits of Florida as well as water space extending to approximately 500 nautical miles from the coast.<sup>103</sup> U.S. Army North/Fifth Army (USARNORTH), at Fort Sam Houston, Texas, is both the joint forces land component command (JFLCC) and the Army service component command (ASCC) to NORTHCOM.<sup>104</sup>

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99. COPING WITH CATASTROPHE—BUILDING AND EMERGENCY MANAGEMENT SYSTEM TO MEET PEOPLE'S NEEDS IN NATURAL AND MANMADE DISASTERS, NAT'L ACAD. OF PUB. ADMIN. (1993), <http://www.fas.org/irp/agency/dhs/fema/coping.pdf>.

100. *Id.*

101. News Release No. 188-02, Unified Command Plan (Apr. 17, 2002), <http://www.au.af.mil/au/awc/awcgate/unified/ucpl17apr.htm> (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Memorandum from George W. Casey, Jr., Lieutenant Gen. to Chief of Staff, U.S. Army ET. AL. (with Change-1 and Change-2 incorporated) (Feb. 4, 2003), <http://www.bits.de/NRANEU/others/strategy/UCP-1-2003.pdf>.

102. Special Briefing on the 2002 Unified Command Plan, U.S. DEP'T OF DEF. (Apr. 17, 2002), <http://www.fas.org/irp/news/2002/04/dod041702b.html> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

103. *Id.*

104. Christine Le Jeune, *Consequence Management: Steps in the Right*

Most relevant to military support to civil authorities, USARNORTH's responsibilities are:

- Execute DOD's homeland defense and civil support operations in the land domain.
- Further develop, organize and integrate DOD CBRNE response capabilities and operations.
- Build the capability to perform the Joint Force Land Component Command and the Army Service Component Command functions.
- Secure land approaches to the homeland.
- Continue to build a highly competent, disciplined workforce in a world class organization.<sup>105</sup>

USARNORTH appointed Defense Coordinating Officers, to be assigned to all ten FEMA regional offices, to more effectively coordinate the availability and employment of DOD resources.<sup>106</sup>

Notwithstanding the realignment of FEMA under the new DHS, and the lessons which should have been learned during Hurricane Andrew and prior troop deployments, federal and state response plans were not adequately revised or rehearsed before the fateful natural disasters to come. Those events were the August–September 2005 disasters of Hurricanes Katrina and Rita, the first and ninth most costly and devastating Atlantic hurricanes ever recorded.<sup>107</sup> Within the United States, and as delineated in the then-extant NRP, disaster response and planning was first and foremost a local government responsibility. States had the option of receiving disaster assistance in accordance with numerous inter-jurisdictional mutual aid agreements, such as the Emergency

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*Direction?*, NAT'L SEC. WATCH (Sept. 8, 2010), <https://www.ausa.org/file/1633/download?token=BT2FKy8w> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

105. U.S. ARMY NORTH (FIFTH ARMY), <http://www.arnorth.army.mil> (last visited Oct. 16, 2016) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). CBRNE is the abbreviation for chemical, biological, radiological, nuclear and high-yield explosive. *Id.*

106. Le Jeune, *supra* note 104, at 4.

107. SPECIAL REPORT OF THE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS, S. REP. NO. 109-322 (2006), <http://www.gpo.gov/fdsys/pkg/CRPT-109srpt322/pdf/CRPT-109srpt322.pdf>.

Management Assistance Compact (EMAC),<sup>108</sup> under which 20,000 civilians and 46,500 Active and National Guard personnel were deployed to the Gulf Coast region to respond to these disasters.<sup>109</sup>

Aside from an estimated \$200 billion cleanup cost,<sup>110</sup> the Inspector General of the DHS said “his office had received accusations of fraud and waste in the multibillion-dollar relief programs linked to Hurricane Katrina.”<sup>111</sup> Many agencies, including the military, sought the opportunity—and resources—to “get well” and become fully equipped and ready to deploy instantly in a crisis; for instance, the then-Chief of the National Guard Bureau testified to a Congressional Committee in September 2005 that \$1.3 billion was needed immediately, part of \$7 billion for “radios, trucks, construction machinery, and medical gear” was needed for the National Guard alone.<sup>112</sup>

108. *Id.* at 10, 99.

109. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-854, EMERGENCY MANAGEMENT ASSISTANCE COMPACT: ENHANCING EMAC'S COLLABORATIVE AND ADMINISTRATIVE CAPACITY SHOULD IMPROVE NATIONAL DISASTER RESPONSE (Aug. 30, 2007), <http://www.gao.gov/assets/270/263302.html> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

110. *Ocean Facts*, NOAA, <http://oceanservice.noaa.gov/facts/coastal-threat.html> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

111. Philip Shenon, *Official Vows Investigation of No-Bid Relief Contracts*, N.Y. TIMES (Sept. 14, 2005), <http://nyti.ms/2dJaWkl> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

112. Scott Shane, *At Hearings, States and National Guard Make Appeals for Aid*, N.Y. TIMES (Sept. 29, 2005), <http://nyti.ms/2dJb1oe> (on file with the Washington and Lee Journal of Civil Rights and Social Justice). At the hearing:

General Blum said the problem had become acute as Guard units had deployed to Iraq and Afghanistan, taking the newest equipment with them and then leaving it there for replacement soldiers to use. That practice was wise, he said, but left the home front with an outdated and dwindling supply of gear, at best about 34 percent of what was needed . . . But, he said, the terrorist attacks of Sept. 11, 2001, and Hurricane Katrina showed the need for the Guard to be fully equipped and ready to deploy instantly in a crisis.

*Id.*

The continued trend towards increased resourcing for the National Guard and Army Reserve forces included an Army 2017 budget that requests “a near doubling in the Army funding line that pays for involuntary mobilizations . . . compared with the amount officials requested in 2016” in order to cope with “ongoing readiness strains within its active duty force” and a “significant uptick in its use of National Guard and Army Reserve forces to handle missions in combatant commands throughout the world.” Jared Serbu, *Army wants more*

On September 14, 2007, the DOD's Joint Staff produced overarching guidelines and principles to assist commanders and their staffs in planning, conducting, and assessing DSCA, in the guise of Joint Publication (JP) 3-28, Civil Support.<sup>113</sup> In February 2013, JP 3-28 was supplemented by a Multi-Service Tactics, Techniques, And Procedures (MTTP) publication for DSCA and integrating with national guard civil support,<sup>114</sup> and the 2007 version of JP 3-28 was superseded by, and updated through, the July 31, 2013 issuance of JP 3-28, Defense Support of Civil Authorities, which "provides the doctrinal basis for interagency coordination during DSCA operations."<sup>115</sup>

The 2010 Quadrennial Defense Review (QDR) acknowledged the increasing importance of DOD in assisting civil authorities and defending the nation from direct attacks, stating, "when responding to an event within the United States, the Department of Defense will almost always be in a supporting role."<sup>116</sup> To

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*Guard, Reserve deployments in 2017*, FED. NEWS RADIO (Feb. 29, 2016), <http://federalnewsradio.com/army/2016/02/army-wants-guard-reserve-deployments-2017/> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

113. JOINT CHIEFS OF STAFF, JOINT PUBLICATION (JP) 3-28, CIVIL SUPPORT (Sept. 14, 2007), <http://fas.org/irp/doddir/dod/jp3-28.pdf>.

114. ARMY, MARINE CORPS, NAVY, AIR FORCE, DSCA MULTI-SERVICE TACTICS, TECHNIQUES, AND PROCEDURES FOR DEFENSE SUPPORT OF CIVIL AUTHORITIES AND INTEGRATING WITH NATIONAL GUARD CIVIL SUPPORT, ATP 3-28.1 (FM 3-28.1) (MCWP 3-36.2) (NTTP 3-57.2) (AFTTP 3-2.67) (Sept. 2015), <https://fas.org/irp/doddir/army/atp3-28-1.pdf>; DEP'T OF ARMY, ARMY DOCTRINE PUBLICATION (ADP) 3-28, DEF. SUPPORT OF CIVIL AUTH.'S (July 2012), [http://www.globalsecurity.org/military/library/policy/army/adp/3-28/adp3\\_28.pdf](http://www.globalsecurity.org/military/library/policy/army/adp/3-28/adp3_28.pdf); US MARINE CORPS, MARADMINS Active Number: 589/05, USMC ROLES AND MISSIONS IN HOMELAND DEF. AND DEF. SUPPORT OF CIVIL AUTH.'S (Dec. 13, 2005), <http://www.marines.mil/News/Messages/Messages-Display/Article/894489/usmc-roles-and-missions-in-homeland-defense-and-defense-support-of-civil-author/> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

115. JOINT CHIEFS OF STAFF, JOINT PUBL'N (JP) 3-28, DEF. SUPPORT OF CIVIL AUTH.'S (July 31, 2013), [http://www.dtic.mil/doctrine/new\\_pubs/jp3\\_28.pdf](http://www.dtic.mil/doctrine/new_pubs/jp3_28.pdf).

116. See U.S. DEP'T OF DEF., QUADRENNIAL DEFENSE REVIEW REPORT 19 (Feb. 2010), [http://www.defense.gov/Portals/1/features/defenseReviews/QDR/QDR\\_as\\_of\\_29JAN10\\_1600.pdf](http://www.defense.gov/Portals/1/features/defenseReviews/QDR/QDR_as_of_29JAN10_1600.pdf). The DOD states that:

The Quadrennial Defense Review (QDR) is a legislatively-mandated review of Department of Defense strategy and priorities. The QDR will set a long-term course for DOD as it assesses the threats and challenges that the nation faces and re-balances DOD's strategies, capabilities, and forces to address today's conflicts and tomorrow's threats.

confront these security challenges, DOD, as stated in the 2010 QDR, intended to reorganize its domestic CBRNE consequence management enterprise, largely toward state National Guard. As part of this initiative, DOD has been working to create Homeland Response Forces (HRFs) tailored to deal with CBRNE incidents yet to come in America's future.<sup>117</sup>

A significant change to the law came on December 31, 2011, with the amendment of Title 10 (specifically 10 U.S.C. § 12304a) ordering the Army Reserve, Navy Reserve, Marine Corps Reserve, and Air Force Reserve to active duty to provide assistance in response to a major disaster or emergency. When a governor requests federal assistance in responding to a major disaster or emergency, the secretary of defense may, without the consent of the member affected, order any unit and any member of the Army Reserve, Navy Reserve, Marine Corps Reserve, and Air Force Reserve to active duty for a continuous period of not more than 120 days to respond to the governor's request.<sup>118</sup>

The revisions that resulted in the NRF were put to the test during the fall of 2012, when Hurricane Sandy and the northeaster that swept through the Mid-Atlantic and Northeastern United

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*Id.*

117. *Id.*; see also Le Jeune, *supra* note 104, at 4. Christine Le Jeune of the Institute of Land Warfare, Association of the United States Army (AUSA) noted that:

Several states have already announced plans for development of HRFs for each FEMA region: Ohio and Washington will launch units by October 2011, and California, Georgia, Massachusetts, Missouri, New York, Pennsylvania, Texas and Utah will follow suit in 2012. Each unit will focus on planning, training and exercising at the regional level when not engaged in consequence management operations. If necessary, HRFs will function alongside other National Guard-sourced CBRNE consequence management forces that are employed by the governors. These forces include 57 weapons of mass destruction civil support teams (WMD-CSTs) and 17 CBRNE enhanced response force packages (CERFPs), as well as federally-controlled elements such as defense CBRNE response forces (DCRFs) and two consequence management command and control elements for follow-on forces. Current thought within the National Guard Bureau is that this new construct is more responsive with a better match of lifesaving capabilities and allows for an improved balance between state and federal control.

*Id.*

118. 10 U.S.C. § 12304a (2012).

States required that the DOD provide emergency temporary power and pumping capability and to distribute fuel, food, cold-weather clothing, and other comfort items as requested by civil authorities.<sup>119</sup> Some 4,000 Active Component NORTHCOM personnel supported Hurricane Sandy relief operations in the affected area, alongside 6,618 National Guard personnel from New York, New Jersey, Connecticut and West Virginia assisting in response and recovery efforts across their affected states.<sup>120</sup>

In May 2013, NORTHCOM coordinated DOD-provided support to the FEMA and state and local response activities in response to tornado-devastated areas in Oklahoma.<sup>121</sup> The command activated the Region VI Defense Coordinating Officer, and the Defense Coordinating Element to Moore, Oklahoma, to validate, plan and coordinate potential DOD support of FEMA's disaster response operations. It also deployed search-and-rescue coordinators as part of the Federal Search and Rescue Coordination Group (FSARCG), and to facilitate DOD's support of potential life-saving and response operations. DOD will provide regional knowledge, requirements validation, and liaison support to the affected areas.<sup>122</sup>

Natural disasters continued during the summer of 2013, especially in the guise of wildfires. Personnel and equipment from Colorado-based military installations assisted local, state and federal authorities in battling the June 2013 Black Forest Fire in the southern part of the state.<sup>123</sup> Support was provided through several authorities, NORTHCOM officials said, including mission assignments, immediate response authority and mutual aid

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119. DEP'T OF DEF. OFFICE OF THE ASSISTANT SEC'Y OF DEF. FOR PUB. AFFAIRS, News Release No. 879-12, *Update on the DOD and National Guard Response to Hurricane Sandy* (Nov. 7, 2012), <http://archive.defense.gov/Releases/Release.aspx?ReleaseID=15665> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

120. *Id.*

121. *U.S. Northcom Aids Oklahoma Tornado Disaster Relief Efforts*, U.S. DEP'T OF DEF. (May 22, 2013), <http://archive.defense.gov/news/newsarticle.aspx?id=120112> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

122. *Id.*

123. *Military Bases Support Colorado Firefighting Effort*, U.S. DEP'T OF DEF. (June 14, 2013), <http://archive.defense.gov/News/newsarticle.aspx?ID=120290> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

agreements.<sup>124</sup> At least 150 Colorado National Guard troops, along with their equipment, were employed to contain 65% of blazes, affecting a twenty-two-square-mile area with at least two fatalities and the destruction of nearly 500 homes,<sup>125</sup> with the mission complete by June 22, 2013.<sup>126</sup> Arizona National Guardsmen along with California and North Carolina Air National Guard tankers and crewmembers joined the response to wildfires that killed nineteen civilian firefighters in the first week of July 2013.<sup>127</sup>

Towards the end of predicting future natural disasters on the basis of past patterns, the National Geospatial-Intelligence Agency (NGA—formerly NPIC) began in the fall of 2013 “to create a global geographic intelligence database that can anticipate future world trouble spots and humanitarian crises by combining detailed mapping with information about trends, demographics and weather patterns in those areas.”<sup>128</sup> The NGA publicly discloses it is an agency for the Department of Defense that manages and

124. *Id.*

125. Jecca Geffre, *Guard Members Man Colorado Fire Lines on Father’s Day*, U.S. ARMY (June 17, 2013), <http://www.army.mil/article/105709/> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

126. Second Regular Session, Sixty-ninth General Assembly, State of Colorado, Interim Committee Resolution Bill 12, CONCERNING THE COLORADO NATIONAL GUARD AND, IN CONNECTION THEREWITH, HONORING GUARD MEMBERS FOR THEIR FIREFIGHTING EFFORTS (Oct. 25, 2013), <https://www.colorado.gov/pacific/sites/default/files/13%20WildfireMattersResolution2.pdf>.

127. See *National Guard Responds to Arizona Wildfires*, DEF. MEDIA ACTIVITY (July 2, 2013), <http://www.dvidshub.net/video/295286/national-guard-responds-arizona-wildfires#.UdiPo1OHRmE> (noting that Arizona National Guardsmen were activated to help fight the wildfire) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Tony Perry, *Two California Air National Guard Tankers to Fight Arizona Blaze*, L.A. TIMES (July 2, 2013), <http://www.latimes.com/local/lanow/la-me-ln-air-national-guard-tankers-arizona-fire-20130702,0,6370548.story> (“Two air tankers from the California Air National Guard are being sent from Colorado to fight the Yarnell Hill blaze in Arizona . . .”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); *Charlotte National Guard Team to Fight Wildfires in Arizona*, WSOCTV (July 5, 2013), <http://www.wsocvtv.com/news/news/local/charlotte-national-guard-team-fight-wildfires-ariz/nYfPs/> (“A Charlotte Air National Guard team is preparing to battle the Arizona wildfire that took the lives of nineteen elite firefighters. The 145th Airlift Wing heads out to Arizona on Sunday”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

128. Ray Locker, *Military Maps to Focus on Natural Disasters, Analysis*, USA TODAY, Nov. 19, 2013, 9:45 AM, <http://www.usatoday.com/story/nation/2013/11/19/nga-geoanalytics-map-natural-disasters/3628911/> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

provides imagery and geospatial information for diverse military, civil, and international needs.<sup>129</sup> It further discloses that, amongst its many missions, it “assists humanitarian and disaster relief efforts by working directly with the lead federal agencies responding to fires, floods, earthquakes, landslides, hurricanes or other natural or manmade disasters.”<sup>130</sup> Such a geospatial database may prove useful if not indispensable in dealing with both foreign and domestic natural and man-made disasters.

From April 28 through May 3, 2014, another series of domestic natural disasters occurred, including deadly severe storms, tornadoes and flooding; in the aftermath of destruction, National Guard members worked, “in coordinated efforts with civilian agencies . . . responding to communities in several states across the south.”<sup>131</sup>

At least 62,000 unaccompanied children from Central America came across the US-Mexico border from the fall of 2013 up through the time of this writing, more than twice the number that came the previous year; they were, in the estimation of NORTHCOM Commander General Jacoby, fleeing gang activity yet “seeking legal entry into the U.S.”<sup>132</sup> General Jacoby said “the lawlessness in Central America could spawn ‘hybrid’ organizations that deal in terrorism, posing a threat to US national security.”<sup>133</sup> In providing defense support to the Department of Health and Human Services (HHS), NORTHCOM established a temporary housing facility at Joint Base San Antonio-Lackland, Texas, for the unaccompanied

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129. See *About NGA*, NAT’L GEOSPACIAL-INTELLIGENCE AGENCY, <https://www.nga.mil/About/Pages/default.aspx> (last visited Oct. 17, 2016) (noting that the NGA “is the nation’s primary source of geospatial intelligence . . . for the Department of Defense and the U.S. Intelligence Community. . . in support of U.S. national security and defense, as well as disaster relief”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

130. *Id.*

131. *National Guard Coordinates Storm Response with Civilian Agencies*, U.S. DEP’T OF DEF. (Apr. 29, 2014), <http://archive.defense.gov/news/newsarticle.aspx?id=122145> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

132. Michael De Yoanna, *Top U.S. General Says Border Kids Fleeing Gangs*, CO. PUB. RADIO (Aug. 6, 2014), <http://www.cpr.org/news/story/top-us-general-says-border-kids-fleeing-gangs#sthash.8yvdb79H.dpuf> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

133. *Id.*



children stopped by US Border Patrol who are now being cared for by HHS's Administration for Children and Families (ACF).<sup>134</sup>

On July 21, 2014, the rapid influx of those so-called "border kids" across the Mexico-U.S. border prompted Texas Governor Rick Perry to controversially deploy 1,000 Title 32 National Guard troops along the 1,254-mile border as part of the ongoing Operation Strong Safety.<sup>135</sup> That "multi-agency law enforcement initiative," first launched in the fall of 2013, was intended "to address three public safety issues identified in the region: 1) significant criminal activity; 2) significant number of commercial vehicles on the roadways; and 3) unsafe driving practices."<sup>136</sup> Governor Perry "guaranteed that the National Guard w[ould] remain on the border at least for . . . three months, which is the time that the \$36 million in the state budget that can be used to pay for them w[ould] last."<sup>137</sup> Prior to that deployment, Lieutenant General (retired) H. Steven Blum, former Chief of the National Guard Bureau from 2003 to 2009 told the media:

There may be many other organizations that might more appropriately be called upon. If you're talking about search and rescue, maintaining the rule of law or restoring conditions back to normal after a natural disaster or a catastrophe, the [National] Guard is superbly suited to that. I'm not so sure that what we're dealing with in scope and causation right now would make it the ideal choice.<sup>138</sup>

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134. *USNORTHCOM Support to Department of Health and Human Services*, U.S. N. COMMAND (May 17, 2014), <http://www.northcom.mil/Newsroom/Press-Releases/Article/563951/usnorthcom-support-to-department-of-health-and-human-services/> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

135. Leigh Ann Caldwell, *Perry Sending National Guard Troops to Border*, CNN, <http://www.cnn.com/2014/07/21/politics/perry-national-guard-border/> (last updated July 21, 2014) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

136. *Operation Strong Safety Targets Crime, Takes Back Border*, TEX. DEP'T OF PUB. SAFETY (Oct. 24, 2013), [http://www.txdps.state.tx.us/director\\_staff/media\\_and\\_communications/2013/pr102413.htm](http://www.txdps.state.tx.us/director_staff/media_and_communications/2013/pr102413.htm) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

137. *Wendy Davis Says She May Withdraw Texas National Guard from Border If Elected Governor*, FOX NEWS LATINO (Aug. 8, 2014), <http://latino.foxnews.com/latino/politics/2014/08/07/wendy-davis-questions-deployment-national-guard-on-southern-border/> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

138. Greg Sargent, *Sending in the National Guard Isn't the Answer*, WASH.

The deployment became a political campaign matter as well, with Democratic Texas gubernatorial candidate Wendy Davis “question[ing] the deployment of . . . troops on the border with Mexico to curtail illegal immigration and she promised, if elected, that she will study withdrawing them.”<sup>139</sup>

The previously discussed “1033 program,” coupled with National Guard deployment in Ferguson, MO, became the subject of critical media focus in the wake of police response to riots in August 2014, following the police shooting of crime suspect Mike Brown.<sup>140</sup> In response to calls for “demilitarization” of the police, Attorney General Eric H. Holder Jr. said “[a]t a time when we must seek to rebuild trust between law enforcement and the local community . . . I am deeply concerned that the deployment of military equipment and vehicles sends a conflicting message.”<sup>141</sup> On Friday, August 15, 2014, Senate Armed Services Chair Carl Levin (D-MI) called for a review of the so-called 1033 program.<sup>142</sup>

Missouri Democratic Senator Claire McCaskill, the chairman of the Subcommittee on Financial & Contracting Oversight, also announced she would lead a hearing on the program, and introduced on May 7, 2015 the Protecting Communities and Police

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POST (July 15, 2014), <http://www.washingtonpost.com/blogs/plum-line/wp/2014/07/15/sending-in-the-national-guard-isnt-the-answer/> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

139. FOX NEWS LATINO, *supra* note 137.

140. See, e.g., Julie Bosman & Matt Apuzzo, *In Wake of Clashes, Calls to Demilitarize Police*, N.Y. TIMES (Aug. 14, 2014), [http://www.nytimes.com/2014/08/15/us/ferguson-missouri-in-wake-of-clashes-calls-to-demilitarize-police.html?\\_r=0](http://www.nytimes.com/2014/08/15/us/ferguson-missouri-in-wake-of-clashes-calls-to-demilitarize-police.html?_r=0) (reporting the spread and increasing use of military gear by police departments, including Ferguson, and accompanying criticisms) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Jason Leopold, *Mittens, Not M4s: What Ferguson Police Really Got from the Pentagon's 1033 Program*, VICE (Aug. 26, 2014), <https://news.vice.com/article/mittens-not-m4s-what-ferguson-police-really-got-from-the-pentagons-1033-program> (disputing that the equipment worn or used by law enforcement responding to riots in Ferguson was obtained through the “1033 Program”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

141. Bosman & Apuzzo, *supra* note 140.

142. Sahil Kapur, *Senate Will Review Military Transfers to Local Police, Key Senator Says*, TALKING POINTS MEMO (Aug. 15 2014, 3:04 PM), <http://talkingpointsmemo.com/livewire/carl-levin-senate-review-military-transfers-1033> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

Act intended to “reform federal programs that send equipment and funding to local police departments.”<sup>143</sup>

In the fall of 2014, President Obama “ordered a comprehensive review of the government’s decade-old strategy of outfitting local police departments with military-grade body armor, mine-resistant trucks, silencers and automatic rifles;” the result was the January 15, 2015 Executive Order 13688 Federal Support for Local Law Enforcement Equipment Acquisition, and subsequent May 18, 2015, Law Enforcement Working Group Recommendations Pursuant to Executive Order 13688, directing executive departments and agencies to better coordinate their efforts to operate and oversee the provision of controlled equipment and funds for controlled equipment to law enforcement agencies.<sup>144</sup>

Both the Executive Order and ensuing Working Group Recommendations responded, in no small part, to accountability problems at the “184 state and local police agencies reportedly suspended from the 1033 Program for losing weapons or failing to comply with other stipulations.”<sup>145</sup> Notably, the nationally known

143. See Caroline May, *McCaskill Announces Hearing on Police Militarization*, BREITBART (Aug. 22, 2014), <http://www.breitbart.com/big-government/2014/08/22/mccaskill-announces-hearing-on-police-militarization/> (noting that Senator McCaskill is “the chairman of the Subcommittee on Financial & Contracting Oversight”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); United States Senator Claire McCaskill, *With Protecting Communities And Police Act, McCaskill Aims to Reform Federal Programs that Send Equipment to Local Police*, (May 7, 2015), <http://www.mccaskill.senate.gov/media-center/news-releases/with-protecting-communities-and-police-act-mccaskill-aims-to-reform-federal-programs-that-send-equipment-to-local-police> (providing commentary on the “Protecting Communities and Police Act” and the proposed text) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

144. Matt Apuzzo & Michael S. Schmidt, *In Washington, Second Thoughts On Arming Police*, N.Y. TIMES (Aug. 23, 2014), [http://www.nytimes.com/2014/08/24/us/in-washington-second-thoughts-on-arming-police.html?\\_r=0](http://www.nytimes.com/2014/08/24/us/in-washington-second-thoughts-on-arming-police.html?_r=0) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); *Recommendations Pursuant to Executive Order 13688 Federal Support for Local Law Enforcement*, WHITE HOUSE (May, 2015), [https://m.whitehouse.gov/sites/default/files/docs/le\\_equipment\\_wg\\_final\\_report\\_final.pdf](https://m.whitehouse.gov/sites/default/files/docs/le_equipment_wg_final_report_final.pdf); Exec. Order No. 12,360, 80 Fed. Reg. 3,451 (Jan. 16, 2015).

145. Megan Cassidy, *MCSO missing nine weapons from Pentagon’s 1033 program*, AZ CENTRAL (Aug. 27, 2014, 7:44 AM), <http://www.azcentral.com/story/news/local/phoenix/2014/08/26/mcso-weapons-pentagon-suspension-1033/14659089/> (on file with the Washington and Lee Journal of Civil Rights and Social Justice); see also Daniel Rivero & Jorge Rivas, *How Did America’s Police Departments Lose Loads Of Military-Issued Weapons?*, FUSION

sheriff of Maricopa County, Joe Arpaio, admitted on August 26, 2014 that his department had been suspended from the program and is currently missing nine firearms (“eight .45-caliber pistols and one M-16 rifle”) issued to the agency out of “200 weapons from the surplus program.”<sup>146</sup> Some 20 to 22 weapons were unaccounted for over the years, but roughly half were recovered from retired or current deputies who, incredibly, had brought them home.<sup>147</sup> Under the “1033 Program,” the Maricopa County Sheriff’s Office amassed an arsenal of “a Hummer, a tank, 90 M-16 rifles, 116 .45-caliber pistols, 34 M-14 rifles and three helicopters.”<sup>148</sup>

In contrast to media hyperbole regarding the program, the Public Affairs Officer for the Defense Logistics Agency responsible for the “1033 Program,” reports on the scope and accountability of the program that:

It’s important to note that 95 percent of items provided through the 1033 program are non-tactical—e.g., computers, office furniture, and tools—making the program a valuable source of supply for cash-strapped police forces. And requests for tactical items must be reviewed and approved by a governor-appointed coordinator in each state before the equipment is released . . . . The 1033 program database is housed on a Defense Department public website and citizens can view what their local law enforcement agencies have acquired from the program at any time.<sup>149</sup>

On August 22, 2014 Missouri Governor Jay Nixon started to withdraw National Guard forces some five days after being

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(Aug. 25, 2014, 2:01 PM), <http://fusion.net/leadership/story/americas-police-departments-lose-loads-military-issued-weapons-984250> (noting “that 184 state and local police departments have been suspended from the Pentagon’s ‘1033 program’ for missing weapons or failure to comply with other guidelines”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

146. Cassidy, *supra* note 145.

147. *Id.*

148. *Id.*

149. See Susan Lowe, *Letter to the Editor, Agency: Most Military Surplus Items given to Police are ‘Non-tactical’*, SYRACUSE.COM (Apr. 26, 2016), [http://www.syracuse.com/opinion/index.ssf/2016/04/defense\\_department\\_most\\_surplus\\_items\\_given\\_to\\_police\\_are\\_non-tactical\\_your\\_lett.html](http://www.syracuse.com/opinion/index.ssf/2016/04/defense_department_most_surplus_items_given_to_police_are_non-tactical_your_lett.html) (explaining purpose of program in letter written by Public Affairs Officer of the Defense Logistics Agency) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Govern, *Defense Support of Civil Authorities to Natural and Man-Made Disasters*, *supra* note 47, at 806.

dispatched to Ferguson to help “quell the unrest;” seven months later and 825 miles away, another deployment of 2,000-plus soldiers took place, this time from the Maryland National Guard, called out on April 28, 2015 to assist State Police efforts to prevent widespread unrest in Baltimore after the funeral of Freddie Gray who died while in police custody.<sup>150</sup>

#### *IV. The Framework for Future National Response to Disasters and Emergencies*

The second edition of the NRF, updated in May 2013, provides context for how the whole community works together and how response efforts under the myriad of documents cited up to this point relate to all other parts of national preparedness.<sup>151</sup> The NRF remains the primary instrument for applying Federal capabilities during disaster response.<sup>152</sup> It is one of the five documents of a set of National Planning Frameworks, with each covering one

150. Campbell Robertson & Marc Santora, *National Guard Troops Begin to Leave Ferguson*, N.Y. TIMES (Aug. 22, 2014), [http://www.nytimes.com/2014/08/23/us/ferguson-missouri-protests.html?\\_r=0](http://www.nytimes.com/2014/08/23/us/ferguson-missouri-protests.html?_r=0) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Kyle Jahner, *2,000 National Guard Troops Fan Out Across Baltimore*, ARMY TIMES (Apr. 28 2015), <http://www.armytimes.com/story/military/guard-reserve/2015/04/28/baltimore-national-guard-mission-freddie-gray-protests/26529499/> (on file with the Washington and Lee Journal of Civil Rights and Social Justice). At the time of this writing, the *New York Times* reported:

More than a year after the charges were announced, the prosecution is set to begin anew with the trial of Officer Edward M. Nero, who was present for the initial arrest of Mr. Gray. Trials of the remaining four officers, in addition to a retrial for Officer Porter, will follow on a schedule that stretches into the fall of 2016. Retrial for Officer Porter, will follow on a schedule that stretches into the [fall of 2016].

Jess Bidgood, *2nd Officer's Trial Over Freddie Gray Nears as Baltimore Tries to Move On*, N.Y. TIMES (May 9, 2016), <http://www.nytimes.com/2016/05/10/us/2nd-officers-trial-over-freddie-gray-nears-as-baltimore-tries-to-move-on.html> (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Jaweed Kaleem & Matt Pearce, *Riots in Milwaukee after Police Shooting: 'The People are Fed Up.'* L.A. TIMES (Aug. 15, 2016), <http://www.latimes.com/nation/la-na-milwaukee-unrest-20160814-snap-story.html> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

151. DEPT OF HOMELAND SEC., NAT'L RESPONSE FRAMEWORK, (2d ed., 2013), [https://www.fema.gov/media-library-data/20130726-1914-25045-1246/final\\_national\\_response\\_framework\\_20130501.pdf](https://www.fema.gov/media-library-data/20130726-1914-25045-1246/final_national_response_framework_20130501.pdf).

152. Panetta, *supra* note 16, at 8.

preparedness mission area: Prevention, Protection, Mitigation, Response or Recovery.<sup>153</sup> Replacing the 2008 NRF, which superseded the corresponding sections of the NRP (2004, with 2006 revisions), it presents the DHS' guiding principles that "enable the whole community to work together to prevent, protect against, mitigate, respond to, and recover from the effects of incidents regardless of cause, size, location, or complexity."<sup>154</sup> In its most current iteration, the NRF establishes a comprehensive, national, all-hazards approach to domestic incident response. When Federal military and civilian personnel and resources are authorized to support civil authorities, command of those forces will remain with the Secretary of Defense. DOD elements in the incident area of operations and National Guard forces under the command of a Governor will coordinate closely with response organizations at all levels.<sup>155</sup>

The government has an inherent emergency power, in addition to those powers specifically set forth in law, as well as executive order, and policy. In addition to the Posse Comitatus Act, The Insurrection Act, and the Stafford Act, Executive Order 12630, provides for governmental actions and interference with constitutionally protected property rights.<sup>156</sup> Department of Defense regulations assert another exception that does not rest on statutory authority, but is available in very limited circumstances and covers:

Actions that are taken under the inherent right of the U.S. Government . . . to ensure the preservation of public order and to carry out governmental operations within its territorial limits, or otherwise in accordance with applicable law, by force, if necessary.<sup>157</sup>

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153. *National Planning Frameworks*, FEMA, <http://www.fema.gov/national-planning-frameworks> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

154. Panetta, *supra* note 16, at 3.

155. *See id.* ("Dep't of Def. is a supporting agency for each of the 15 Emergency Support Functions (ESFs) and each of the 6 Incident Annexes of the National Response Framework."). For an explanation of the 15 ESFs, and the 6 Incident Annexes of the National Response Framework *see* DEP'T OF HOMELAND SEC., *supra* note 151.

156. Exec. Order No. 12,360, 53 Fed. Reg. 8,859 (Mar. 15, 1988).

157. *See* Elsea & Mason, *supra* note 39, at 3 (citing DEP'T OF DEF. DIRECTIVE NO. 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS, ENCL.

The emergency power, according to DOD directives, is available to protect Federal property and functions, and to authorize

prompt and vigorous Federal action, including use of military forces, to prevent loss of life or wanton destruction of property and to restore governmental functioning and public order when sudden and unexpected civil disturbances, disaster, or calamities seriously endanger life and property and disrupt normal governmental functions to such an extent that duly constituted local authorities are unable to control the situation.<sup>158</sup>

When employed or deployed after civil disturbances or natural disasters, federal troops from the DOD would and will receive direction from FEMA, in accordance with the NRF to work solo or in concert with other federal agencies to provide personnel, equipment, supplies, facilities, and managerial, technical, and advisory services. Support scenarios could include: a Presidential Declaration of a Major Disaster;<sup>159</sup> an Order to Perform Emergency Work Essential for the Preservation of Life and Property;<sup>160</sup> and, a Presidential Declaration of an Emergency.<sup>161</sup>

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4, 14 (Jan. 15, 1986), [http://www.fas.org/irp/doddir/dod/d5525\\_5.pdf](http://www.fas.org/irp/doddir/dod/d5525_5.pdf).

158. *Id.*

159. *Disaster Declarations*, FEMA, <http://www.fema.gov/disasters> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

160. AIR UNIV., FED. RESPONSE PLAN, BASIC PLAN 7 (2003), <http://www.au.af.mil/au/awc/awcgate/frp/frpbasic.pdf>.

161. *See* 50 U.S.C. §1621 (2012). This declaration under Congressional statutory and Article II Constitutional authority provides that:

(a) With respect to Acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power, the President is authorized to declare such national emergency. Such proclamation shall immediately be transmitted to the Congress and published in the Federal Register.

(b) Any provisions of law conferring powers and authorities to be exercised during a national emergency shall be effective and remain in effect

(1) only when the President (in accordance with subsection (a) of this section), specifically declares a national emergency, and

(2) only in accordance with this chapter. No law enacted after September 14, 1976, shall supersede this subchapter unless it does so in specific terms, referring to this subchapter, and declaring that the new law supersedes the provisions of this subchapter.

In all but the instance of a Presidential Declaration of Emergency, the governor of an affected state or territory must request assistance regardless of any state or local capacity to render disaster assistance.<sup>162</sup> The NRF allows DHS to coordinate federal agencies that work alongside state and local agencies. In the words of past DHS Secretary Michael Chertoff, these scenarios do not "supersede the state and local government," but "fit with the state and local government in a comprehensive response plan."<sup>163</sup>

Plans are only useful if reviewed, rehearsed, and effectively implemented when contingencies arise. Towards that end, the DHS exhorts that effective preparedness is a critical precondition for successful response, and encourages a "higher level of readiness" of "engaged partnerships with elected and appointed officials, dedicated emergency management practitioners, nongovernmental organizations, and the private sector, "by drawing a sharper focus on the value of the following preparedness activities: planning, organizing, training, equipping, exercising, and applying lessons learned."<sup>164</sup> For end-users of the NRF,

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*Id.*

In addition to such immediate response authority, military installations may have concluded mutual aid agreements with local agencies based on pre-coordinated conditions regarding fire, emergency medical services, hazardous materials, and public safety, and may also receive requests for assistance via an action requires form in a mission assignment process. See DEP'T OF DEF. INSTRUCTION 6055.17, DOD INSTALLATION EMERGENCY MGMT. (IEM) PROGRAM (Jan. 13, 2009) (incorporating Change 1 (Nov. 19, 2010)), <http://www.dtic.mil/whs/directives/corres/pdf/605517p.pdf>. With regards to response for all-hazards incidents, see DEP'T OF DEF. INSTRUCTION 3020.40, DOD POLICY AND RESPONSIBILITY FOR CRITICAL INFRASTRUCTURE 14 (Jan. 14, 2010) (incorporating Change 2 (Sept. 21, 2012)), [http://www.fas.org/irp/doddir/dod/d3020\\_40.pdf](http://www.fas.org/irp/doddir/dod/d3020_40.pdf); DEP'T OF DEF. INSTRUCTION 3020.45, DEF. CRITICAL INFRASTRUCTURE PROGRAM (DCIP) MGMT (Apr. 21, 2008), <http://www.dtic.mil/whs/directives/corres/pdf/302045p.pdf>; DEP'T OF DEF. INSTRUCTION 3020.52, DOD INSTALLATION CHEMICAL, BIOLOGICAL, RADIOLOGICAL, NUCLEAR, AND HIGH-YIELD EXPLOSIVE (CBRNE) PREPAREDNESS STANDARDS (May 18, 2002), <http://www.dtic.mil/whs/directives/corres/pdf/302052p.pdf>; DEP'T OF DEF. INSTRUCTION 6440.03, DOD LAB. NETWORK (DLN) (June 10, 2011) <http://www.dtic.mil/whs/directives/corres/pdf/644003p.pdf>.

162. CSIS & ARNOLD & PORTER LLP, FED. AUTH.'S FOR DISASTER RESPONSE 1 (2005), [http://csis.org/files/media/csis/events/051128\\_rolesauthorities.pdf](http://csis.org/files/media/csis/events/051128_rolesauthorities.pdf).

163. *Federal Officials Hold News Conference on Katrina Response*, CNN (Aug. 15 2005), Transcript, <http://transcripts.cnn.com/TRANSCRIPTS/0508/31/lol.01.html> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

164. FED. EMERGENCY MGMT. AGENCY, NATION RESPONSE FRAMEWORK (NRF)-



preserving, and protecting private and public assets, the “[m]astery of these key functions supports unity of effort, and thus [the] ability to save lives, protect property, and meet basic human needs.”<sup>165</sup>

The future is unpredictable, so in conjunction with state and federal plans, cities across the United States are taking steps to be in a better position to respond to disasters. *USA Today* reported that many local preparedness plans focus on how to protect critical infrastructure and how to keep critical systems functioning during and after a natural and man-made disaster.<sup>166</sup> The Rockefeller Foundation announced in May 2013 that it would fund “Chief Resilience Officer” (CRO) positions in 100 cities, on six continents in 20 countries for five years.<sup>167</sup> In April 2014, San Francisco became the first city to benefit from a CRO; Patrick Otellini brings to the CRO role a background in public policy, private sector dealings with complex planning, building and fire code issues, and experience as San Francisco’s Director of Earthquake Safety.<sup>168</sup> Chicago became the most recent city, at the time of this writing, to hire a CRO, formerly the deputy commissioner in the city’s Department of Water Management since 2012.<sup>169</sup> “CROs will have

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FACT SHEET 1 (2014), <http://www.fema.gov/pdf/emergency/nrf/NRFOnePageFactSheet.pdf>.

165. Sarah Twombly, *Q & A with The World’s First Chief Resilience Officer*, ROCKEFELLER FOUND. (Apr. 9, 2014), <http://www.rockefellerfoundation.org/blog/q-with-worlds-first-chief-resilience> (on file with the Washington and Lee Journal of Civil Rights and Social Justice). By June 4, 2014, the world’s second CRO had been appointed, outside the U.S. in Medellin, Colombia. See Sarah Twombly, *Introducing Medellin’s Chief Resilience Officer*, ROCKEFELLER FOUND. (June 4, 2014), <http://www.rockefellerfoundation.org/blog/introducing-medellins-chief-resilience> (expanding on concept of Chief Resilience Officer) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

166. Greg Toppo, *Cities Step Up Disaster-Response Planning*, USA TODAY (June 9, 2013, 6:48 AM), <http://www.usatoday.com/story/news/nation/2013/06/09/cities-resilience-officer/2373911/> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

167. See *id.* (explaining that CROs will work to ensure cities will “emerge even stronger from these kinds of shocks and stresses,” Rockefeller president Judith Rodin further told *USA Today*, “[W]e can’t predict everything, but we can prepare for many things and prepare our capacity to rebound more effectively when they hit.”).

168. Twombly, *supra* note 165.

169. Nausheen Husain, *Data: Eyeing Sustainability, Chicago Hires First Resilience Officer*, CHI. TRIBUNE, May 1, 2016, <http://www.chicagotribune.com/news/plus/ct-graphics-chief-resilience-officer-hired-htmlstory.html> (on file with the

a wide range of duties, including developing a communications system that can reach anyone during a storm, or a transportation system to get people to safety in the event of a hurricane or weather-related disaster.”<sup>170</sup> These CROs will necessarily need to closely coordinate for DOD support and operate in a complex interagency-public-private partnership with FEMA, in accordance with city, state, corporate and NRF guidelines.<sup>171</sup>

In a so-called mega-catastrophe, however, when the status of every state’s stability is uncertain, that willingness to share breaks down.<sup>172</sup> In cases like these, the resources and competencies of the DOD will be in great need.<sup>173</sup> In planning for such complex catastrophes, military leaders at all levels and federal partners from FEMA met on June 5, 2013 to participate in a one-day tabletop exercise hosted by USARNORTH to tackle different complex catastrophe scenarios that comprised the most serious crises imaginable, in a whole-of-government response to them.<sup>174</sup> The elaborate scenario “started with a massive earthquake rumbling throughout Southern California [with] cascading effects that followed included mudslides, broken dams, fires, flooding and massive property damage, not to mention the potential loss of life,

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Washington and Lee Journal of Civil Rights and Social Justice).

170. *U.S. Cities Preparing for Disasters*, HOMELAND SEC. NEWS WIRE (June 13, 2013), <http://www.homelandsecuritynewswire.com/dr20130613-u-s-cities-preparing-for-disasters> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

171. At the time of this writing, Berkeley, California, became the next city to appoint a Chief Resilience Officer. See Charles Siler, I ‘Chief Resilience Officer,’ BERKELEYSIDE (Aug. 7, 2014, 7:00 AM), <http://www.berkeleyside.com/2014/08/07/berkeley-appoints-first-chief-resilience-officer/> (discussing Timothy Burrough’s appointment) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). A week after that appointment, Oakland, California, hired Victoria Salinas as its Chief Resilience Officer. See Will Doig, Oakland Hires Its First “Chief Resilience Officer,” PUBLICCEO (Aug. 14, 2014), <http://www.publicceo.com/2014/08/oakland-hires-its-first-chief-resilience-officer/> (noting Victoria Salinas’ appointment) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

172. See Paul Stockton, *DoD and the Problem of Mega-Catastrophes*, in THREATS AT OUR THRESHOLD HOMELAND DEFENSE AND HOMELAND SECURITY IN THE NEW CENTURY 21, 30 (Bert Tussing ed., 2007) (explaining that fear and disarray become widespread during mega catastrophes, creating a demand on the Department of Defense).

173. *Id.*

174. DeHart, *supra* note 12.

and turned a very bad situation into a worst-case scenario.”<sup>175</sup> Amongst the many lessons re-learned or real-world experiences validated, the exercise demonstrated that after state and local authorities had reached their capacity in dealing with previous disasters, additional federal authorities, such as the Department of Justice may have to assist local authorities with response to civil unrest and other challenges.<sup>176</sup> The next such tabletop exercise will have taken place by June 6, 2016, Cascadia Rising, anticipating the required response for a magnitude 9.0 earthquake, will take place concurrently with USNORTHCOM’s Ardent Sentry exercise.<sup>177</sup>

The FBI has aptly observed that “[t]here’s no room for failure—when it comes to weapons of mass destruction, even a single incident could be catastrophic.”<sup>178</sup> A “second nuclear age” in which the threat of attack by various weapons of mass destruction always looms large over the United States and beyond.<sup>179</sup> “In accordance with direction from the Chairman of the Joint Chiefs of Staff, the Army provides the bulk of the Defense Chemical, Biological, Radiological, and Nuclear Response Force for Fiscal Year [FY] 2013 and beyond.”<sup>180</sup> According to the National Guard Posture Statement, some “97% of America lives within a five-hour response of a National Guard Homeland Response Force or Chemical, Biological Radiological, Nuclear (CBRN) Enhanced

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175. *Id.*

176. *Id.*

177. Eric Holdeman, *Cascadia Subduction Zone Exercise 2016: Cascadia Rising*, EMERGENCY MGMT. (June 15, 2014), <http://www.emergencymgmt.com/emergency-blogs/disaster-zone/cszeexercise2016cascadiarising.html> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

178. 2scottmontgomery, *FBI.gov: WMD Directorate Created July, 2006*, BLOGSPOT (July 26, 2011, 12:43 PM), <http://2scottmontgomery.blogspot.com/2011/07/fbigovwmd-directorate-created-july-2006.html> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

179. See, e.g., Paul Bracken, *Biological Weapons as a Strategic Threat*, 116 PUB. HEALTH REP. (Supp. 2) 5–8 (2001) (“[W]e’re seeing a spread of weapons of mass destruction and what I call the second nuclear age.”). See generally Kevin H. Govern, *Agroterrorism and Ecoterrorism: A Survey of Indo-American Approaches Under Law and Policy to Prevent and Defend Against the Potential Threats Ahead*, 10 FLA. COASTAL L. REV. 223 (2009).

180. NAT’L GUARD BUR., NATIONAL GUARD AND RESERVE EQUIPMENT REPORT FOR FISCAL YEAR 2013 2–5 (2013), <http://palazzo.house.gov/uploadedfiles/ngr%20equipment%20report%20fy2014.pdf>.

Response Force Package.”<sup>181</sup> If weapons of mass destruction are ever used on U.S. soil, the Army Reserve’s consequence management capabilities, in particular, will prove indispensable in providing mission-ready soldiers and equipment to augment civilian law enforcement and other first-responder capabilities.<sup>182</sup> Towards that end of readiness, “[s]pecialized units like the National Guard’s Weapons of Mass Destruction Civil Support Teams conducted 1,720 response, standby, and assist missions in FY12.”<sup>183</sup>

Former Secretary of Defense Leon Panetta warned the nation in fall 2012 of a potential coming “cyber Pearl Harbor; an attack that would cause physical destruction and the loss of life . . . [that] would paralyze and shock the nation and create a new, profound sense of vulnerability.”<sup>184</sup> Beyond the realms of four-dimensional operations on land, in and below the seas, and in the air and space, is a so-called “fifth domain”<sup>185</sup> or “fifth dimension” of warfare” in which civilian law enforcement may have little to no capacity to discern cybercrime activity from cyberwarfare.<sup>186</sup> In an era where

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181. NAT’L GUARD BUR., 2014 NATIONAL GUARD POSTURE STATEMENT SUSTAINING AN OPERATIONAL FORCE 9 (2014), <http://www.nationalguard.mil/portals/31/Documents/PostureStatements/2014%20National%20Guard%20Bureau%20Posture%20Statement.pdf>.

182. NAT’L GUARD BUR., NATIONAL GUARD AND RESERVE EQUIPMENT REPORT FOR FISCAL YEAR 2013 *supra* note 180, at 2–5 (“The Army provides specific capabilities for Federal military assistance to civilian agencies in the event of an attack against the United States . . . . These capabilities come from all Army components in support of Northern Command’s (NORTHCOM’s) mission to support civil authorities in the event of a disaster.”).

183. NAT’L GUARD BUR., 2014 NATIONAL GUARD POSTURE STATEMENT, *supra* note 181, at 27. Towards that end, “Lifesaving Capabilities” include: 10 Homeland Response Forces, totaling 5,660 Guard members, 17 Chemical, Biological, Radiological, Nuclear (CBRN) Enhanced Response Force Packages, called CERFPs, totaling 3,332 Guard members, 57 Weapons of Mass Destruction Civil Support Teams (WMD-CSTs), each with 22 full-time National Guard members, conducted in excess of 1,720 response, standby, and assist missions in FY12.

184. *Remarks by Secretary Panetta on Cybersecurity to the Business Executives for National Security, New York City*, U.S. DEP’T OF DEF. (Oct. 11, 2012), <http://archive.defense.gov/transcripts/transcript.aspx?transcriptid=5136> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

185. *War in the Fifth Domain*, ECONOMIST, (July 1, 2010), <http://www.economist.com/node/16478792> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

186. *Fighting in the Fifth Dimension*, AL JAZEERA WORLD, (Feb. 19, 2012), <http://www.aljazeera.com/programmes/aljazeeraaworld/2011/10/20111019169394>

the keyboard and mouse have become weapons of conflict as well as tools for peace, DOD will continue to use its significant capability and expertise in support of a whole-of-government approach to protect the Nation.<sup>187</sup> The policy and legal authorities governing DOD's domestic activities—such as Defense Support to Civil Authorities—extend to cyber operations, as they would in any other domain.<sup>188</sup> “DOD will continue to work closely with its interagency partners, including the Departments of Justice and Homeland Security, to address threats to the United States from wherever they originate.”<sup>189</sup>

#### V. Conclusion

Past is certain to be prologue when it comes to both causes and effects of natural and man-made disasters. As then-Lieutenant Colonel Michael L. Sullivan, one of Operation Hawkeye's key Military Police commanders noted in the aftermath of disaster assistance and civil disturbance operations post-Hurricane Hugo, military forces have tremendous capabilities to “restore public order and essential services following a natural disaster, to train local law enforcement personnel to improve services, and to operate in a complex cultural and political setting.”<sup>190</sup> Still, in keeping with the Nation's great traditions of our military forces being subject to civilian control, Lt. Gen. Perry Wiggins, commanding general, USARNORTH has noted that:

In 99 percent of the cases [in providing support to civil authorities], the DoD will be supporting another principal fellow agency in the response . . . and that's important to understand in the difference of operating in the homeland. In the homeland, the strength of our nation resides in our

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02528.html (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

187. DEPT OF DEF., CYBERSPACE POLICY REPORT: A REPORT TO CONGRESS PURSUANT TO THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2011, Section 934, at 2 (2011).

188. *Id.* at 1.

189. *Id.*

190. SULLIVAN, *supra* note 94, at 36.

ability to respond at all levels—local, state and federal. It's that synergy that creates the solution to the things in the homeland that challenge us in addressing our threats.<sup>191</sup>

The day after the tragic Boston Marathon bombings, Secretary of Defense Chuck Hagel pledged to provide any support from DOD that law enforcement agencies deem necessary as they investigated “this cruel act of terror,”<sup>192</sup> and Chairman of the Joint Chiefs of Staff Martin Dempsey told Members of Congress that DOD officials were in “constant contact with state and federal agencies.”<sup>193</sup> Consistent with this preparedness, the NORTHCOM Commander has testified before Congress that,

The commands' approach is to defend the homeland “forward” and in-depth through trusted partnerships with fellow combatant commands, our hemispheric neighbors, and the interagency community. We carry out our primary missions of homeland defense, security cooperation, and civil support with a focus on preparation, partnerships, and vigilance.<sup>194</sup>

The 209-year history of the Insurrection Act, the 138-year-old Posse Comitatus Act, and other current and future laws, executive orders, defense policies, and regulations will continue to strictly delineate the limits to the military's role in cooperating with civil authorities when future domestic disasters strike, and the prescriptions and proscriptions on

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191. Christopher DeHart, *Army North CG Leads Panel on North American Security, Missions at AUSA Conference*, U.S. ARMY (Nov. 4, 2013), [https://www.army.mil/article/115077/army\\_north\\_cg\\_leads\\_panel\\_on\\_north\\_american\\_security\\_missions\\_at\\_ausa\\_conference](https://www.army.mil/article/115077/army_north_cg_leads_panel_on_north_american_security_missions_at_ausa_conference) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

192. Jim Garamone, *Armed Forces Press Service, DOD News: Hagel Says DOD Will Provide Support After Cruel Act of Terror*, U.S. DEP'T OF DEF. (Apr. 16, 2013), <http://archive.defense.gov/news/newsarticle.aspx?id=119782> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

193. *Id.*

194. *NORAD and U.S. Command Posture Statement Before the H. Armed Services Comm.*, 113th Cong. 4 (2014), [http://www.northcom.mil/Portals/28/Documents/2014%20NC%20Posture%20Statement\\_Final\\_HASC.pdf](http://www.northcom.mil/Portals/28/Documents/2014%20NC%20Posture%20Statement_Final_HASC.pdf) (statement of General Charles H. Jacoby, Jr., United States Army, Commander, United States Northern Command and North American Aerospace Defense Command).

providing military equipment and training to civilian law enforcement, if not limits on so-called police militarization.<sup>195</sup>

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195. For an excellent yet brief commentary on the role of the military in dealing with international natural and man-made disasters, see ELIZABETH FERRIS, AUSTRALIAN CIVIL-MILITARY CENTRE, FUTURE DIRECTIONS IN CIVIL-MILITARY RESPONSES TO NATURAL DISASTERS 1–10 (2012), <https://www.brookings.edu/wp-content/uploads/2016/06/05-civ-mil-disasters-ferris.pdf>. Ferris notes that “[o]ver the last ten years natural disasters affected more than 2.4 billion people—the equivalent of one-third of the earth’s population—and they have wrought over \$910 billion in damages—equivalent to approximately 18 percent of global GDP.” *Id.* at 3–6. Ferris also makes five observations regarding civil-military relations in international natural disaster response:

- (1) The military will increasingly be called to respond to sudden-onset natural disasters, both at home and abroad.
- (2) Generally there are fewer political tensions in civil-military relations at times of natural disaster compared with in conflict settings.
- (3) International actors, military or civilian, simply are not—and perhaps cannot be—fast enough in immediate response.
- (4) In the three phases of disaster management - prevention, response and recovery - the military’s role is most needed and accepted in the response phase and least in the recovery phase.
- (5) The military generally has more experience in preparedness activities hence an importance area of preparedness concerns developing more effective civil-military coordination mechanisms.

*Id.*