

MIPT National Memorial Institute
for the Prevention of Terrorism

Preventing terrorism or mitigating its effects

**MANAGING TERRORISM'S
CONSEQUENCES:
LEGAL ISSUES**

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MANAGING TERRORISM'S CONSEQUENCES: LEGAL ISSUES

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PREFACE

Catastrophic terrorism threatened the United States before September 11th. On one hand, our extraordinary military strength compels any adversary to consider tactics that do not involve direct confrontation. On the other hand, our openness enables adversaries to choose among thousands of potential targets, destruction of any could foment the mass panic that is the terrorists' aspiration.

But before September 11th, terrorism could be a sideline concern for most government officials -- a problem that was hypothetically horrible but, as yet, not comparable to the pressing demands and crises that leaders must constantly face. Obviously, with the attacks on the World Trade Center and the Pentagon, any casual dismissal of the threat of catastrophic terrorism is nonsense. These recent tragic events have shown, all too clearly, that catastrophic terrorism is not just the stuff of movies. There are people who seek the collapse of our way of life, and they are financially and intellectually capable of implementing complex attack schemes to cause immeasurable harm.

The fundamental purpose of catastrophic terrorism is to disrupt social order and to display government's inability to protect people. Terrorism thus projects fear, not only of the consequences of violence but from the pervasive sense that devastation may be inflicted anywhere at any time and that the foundations of social order are frail and shallow. For this reason, enabling officials to prevent most terrorism and to respond to isolated cases serves to diminish the reason for the threat and thus acts as a deterrent. If officials from the highest levels of the national security community to the local fire chief are ready for catastrophic terrorism, not only will lives be saved during a catastrophic event, but the likelihood of that event happening is reduced.

Now, multiples of ten billion dollars are budgeted for terrorism prevention and response, and the topic dominates the attention of anyone in a position of responsibility. The terrorism threat demands the concerted efforts of many professional disciplines: social scientists, economists, scientists, engineers, the medical community, etc. In this effort, the legal community has a unique role. Terrorism is a crime that poses a deep threat to the rule of law, and lawyers are increasingly called upon to ensure that this threat is a dismal failure. Even more fundamentally, laws organize the delegation of authority among myriad levels of government and agencies with diverse missions; understanding that organization of authority is crucial to countering the terrorist threat.

Terrorism planners have long been concerned that American laws relevant to managing the consequences of terrorism are confused or contradictory or gap-ridden. That concern is unfounded. The deeper one delves into these issues, the more impressive is the law's texture and nuance, enabling responses that are respectful of myriad policy agendas. The bad news is not the law's condition -- the bad news is that there is no systematic treatment of terrorism consequence issues that can serve as a guide for emergency planners and responders.

It was the realization of a need for a legal guide or manual that led the National Commission on Terrorism to recommend:

The President should direct the preparation of a manual on the implementation of existing legal authority necessary to address effectively a catastrophic terrorist threat or attack. The manual should be distributed to the appropriate federal, state, and local officials and be used in training, exercises, and educational programs.

The President should determine whether any additional legal authority is needed to deal with catastrophic terrorism and make recommendations to Congress if necessary.

The Memorial Institute for the Prevention of Terrorism (MIPT) responded to this recommendation by commissioning, in early 2001, preparation of such a manual. This Manual on legal issues of consequence management is the product of that initiative.

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MANAGING TERRORISM'S CONSEQUENCES: LEGAL ISSUES

INTRODUCTION

Planning for emergencies in order to manage them effectively is a task that most communities in the United States perform with considerable sophistication. However, terrorism demands new and immediate responses to often unpredictable, unknown violence. Until 2001, no one could have planned for airplanes as bombs or innocuous letters as carriers of fatal disease. When this kind of disaster occurs, government can only respond, amid the horror and fear of what could yet occur, through the known set of social, political and legal structures. Thus, the risks of catastrophic terrorism present unique problems, and response officials may not be aware of or trained to cope with these problems.

This monograph looks at our country's federal and legal system and how it has been used in other kinds of crises, to offer a framework from which to address new threats. It begins by describing the laws Congress has established for dealing with disasters, emergencies and acts of war, then looks at the President's inherent authority for dealing with unanticipated crises, and at state and local emergency powers. Finally, it explores what legal liability may attach to those who respond to an emergency. The monograph identifies relevant statutory authority and case law, to define the limits of what acts government may reasonably initiate and what acts may be found unreasonable by the courts.

A. BRIEF OVERVIEW OF EMERGENCY PLANNING

The Federal Emergency Management Agency (FEMA), now within the Department of Homeland Security, has primary federal responsibility for disaster preparedness and response. In addition to federal relief efforts, FEMA administers several cooperative federal-state programs and provides assistance, oversight, and partial funding for state and local preparedness efforts. Every state now has a comprehensive disaster response statute outlining the state's disaster management program. State statutes and regulations define the role of local governments in disaster response. Local and state personnel form an interdependent network of resources for responding to emergency situations.

At all levels of government, the first step in emergency management consists of planning. Appropriate planning means that resources, trained personnel, and procedures are in place when a disaster occurs. Plans usually include an assessment of potential hazards, descriptions of the roles of various agencies and organizations command structure, protocols for requesting assistance, and treatments of various discrete functions within the total response effort such as public evacuation, medical assistance, etc. In addition to planning, most disaster preparedness programs include a regular disaster training regimen for response staff and operational tests such as drills and exercises.

In an actual disaster, a network of responders is activated, each fulfilling a specific role according to the response plan. The activities of the various parties involved are coordinated through communications and usually a military-like command structure. Major decisions, such as evacuations, are made by the legally designated executives. They are implemented through a hierarchy of support agencies and personnel, ranging down to "street-level" operations such as directing traffic.

There are advantages that derive from such plans. They improve the quality of emergency preparedness and response and help ensure compliance with regulatory requirements. A particular advantage can be gained in speed. Moreover, emergency planning can arrange for specialized resources such as specially trained medical services or vehicles and communications equipment. And emergency planning institutionalizes coordinated planning, providing a mechanism to prevent erosion of coordination over time due to budget cuts, personnel changes, or loss of institutional knowledge.

B. MANAGING CATASTROPHIC TERRORISM AND THE PARADIGM OF EMERGENCY RESPONSE

Managing catastrophic terrorism entails applications of emergency response that have been developed in connection with natural events such as hurricanes or forest fires. Ten specific aspects of emergency response to catastrophic terrorism deserve attention.

1. Potential Relevance of Foreign and Counter Intelligence

Most emergency planning that focuses on accidents or natural disasters has little if any need for foreign intelligence. Catastrophic terrorism, uniquely, presents risks of disaster caused by groups whose commission of a heinous crime is part of a strategic attack perhaps in support of a foreign power. For this reason, virtually every terrorism expert has identified the premium value of advance intelligence. Typically, gaining intelligence is the responsibility of the national security community and the FBI, agencies that are not usually engaged in emergency response planning. There is, therefore, a need to link communities so that crucial information can be rapidly distributed to maximize its utility.

2. Need for Pre-Attack Area-Wide Investigations

Advance planning for catastrophic terrorism response must include discussion of law enforcement's authority to undertake pre-disaster interdiction. Indeed, catastrophic terrorism response may actually begin before the attack when information indicates that it is imminent. At that point, law enforcement capabilities must be mobilized to conduct investigations to detect the terrorists and prevent them from carrying out their schemes. Intelligence might be able to pinpoint the object of an investigation, but more likely law enforcement officials will have to conduct area-wide investigations that might intrude upon the personal liberty of innocent persons. These types of highly-charged, broadly-applied investigations must be carried out with extreme care, pursuant to a well-considered plan wherein federal as well as state and local law enforcement officials effectively coordinate their responses, in order to minimize the chances that officials will over-react in the name of preventing terrorism.

3. Mass Casualties

Catastrophic terrorism threatens casualties in the tens or even hundreds of thousands. For example, a chemical attack in an enclosed sports arena could immediately victimize everyone in attendance. That level of casualties will place enormous strains on public services, primarily on the provision of medical care. Therefore, in connection with planning for catastrophic terrorism, the capability of mobilizing extraordinary resources is essential which means that resources outside of the affected area are likely to be required.

4. Disease, Perhaps Contagion

An act of biological terrorism presents monumental problems for emergency management. Most communities are prepared to cope with the spread of natural disease in connection with an accident, and conventional emergency response providers must be ready to address the risk of a naturally-occurring epidemic. Yet, bio-terrorism threatens altogether different types of disease with far greater virulence. Officials may not even know that their community has been attacked until later, well after symptoms become manifest. The pathogen itself is likely to be little known to medical service providers (it may even be a bio-engineered new organism); vaccines and antidotes are likely to be in short supply, and their efficacy is not assured; and the number of persons needing treatment is likely to be overwhelming. If the pathogen is contagious, mechanisms of quarantine must be quickly and effectively established -- a social condition that Americans have not experienced for decades.

5. Panic

The objective of catastrophic terrorism, as stated earlier, is to engender widespread panic. An attack with a biological or chemical agent having mass casualties is likely to accomplish that objective. Even persons wholly unaffected by the event itself are likely to strain society's capability to respond, perhaps by fleeing the area (clogging highways and other routes) and perhaps by turning to criminal behavior. It will be essential for community leaders to gain control of the situation; however, a clever terrorist might purposely target those leaders in order to increase the widespread perception that the government is incapable of governing. The necessity of engaging the media in planning for catastrophic terrorism is therefore a crucial aspect of terrorism response planning.

6. Central Importance of Apprehending the Perpetrators

A catastrophic terrorist event is the consequence of a deliberate act. Finding and apprehending the perpetrators is paramount both to reassure the public and to prevent those terrorists from repeating the attack (or threatening to do so). The priorities of criminal investigations are not always consistent with the priorities of emergency response. For example, emergency responders are trained to overturn a site of destruction to save lives; law enforcement officials are trained to maintain a crime scene for evidence of how that crime occurred. Determining, in the planning process, who has ultimate authority to make sensitive decisions in response to a catastrophic terrorist event is crucial.

7. Necessity of Response Measures in Other Locales

An act of catastrophic terrorism could have a broad and not necessarily contiguous geographic scope. If, for example, there is a biological attack, persons from the affected community may travel to other places, unwittingly carrying the pathogen with them. Even if the pathogen is not transported to another community, officials in that second community will not know that fact and must therefore adopt prevention measures. As a result, an attack in one place is likely to have ripple effects throughout the nation, especially throughout the transportation industry. Because of the high speed and volume of travel, officials in every community must rapidly close (or at least restrict) use of airports, trains, highways, etc. once an attack happens, regardless of where it happens. The actions taken to shut down aviation throughout the nation on September 11th demonstrate how reactions to terrorism are not confined to the attack site.

8. Damage to Infrastructure

Any emergency strains the capabilities of essential infrastructure such as medical services, water supply systems, electric power, etc. The purpose of planning is to enable those sectors to respond to those strains. Terrorists might deliberately choose those sectors as the targets of the attack precisely because their collapse would reduce response capabilities and inflate panic levels. One variant of catastrophic terrorism -- cyber-terrorism -- has the essential motif of undermining critical infrastructures dependent upon computer systems such that an attack on those systems (perhaps from thousands of miles away) could cause those systems to cease functioning. This type of attack could be a terrorist's delight as it would cause extraordinary panic without physically destroying very much and without posing much risk whatsoever to the terrorist himself. Thus, there is a need not only to incorporate critical infrastructure sectors into planning but also to implement special means of protection for those sectors.

9. Civil Rights Considerations

Because of the need to conduct broad investigations, the likelihood of panic and of mass casualties, and the reasons for preventing movement or for instituting quarantines, there is a profound risk that civil rights will be curtailed. This risk exists during any period of social stress. Yet, in connection with catastrophic terrorism, some Americans may believe that the terrorists' ethnic group is broadly responsible. Ironically, infringing on a group's civil rights would serve terrorists' interests as it would show that the government is the "brutal leviathan" that the terrorists allege it to be. There is no underlying justification for subverting civil rights or singling out particular groups in the name of counter-terrorism. Yet, virtually every expert agrees that a failure to properly plan for responding to catastrophic terrorism raises risks of racial or ethnic discrimination. Planning efforts relevant to catastrophic terrorism should be guided by the need for judicious responses.

10. Dealing with Foreign Nationals

A principal difference between response to terrorist acts versus natural disasters is the potential involvement of foreign nationals. First responders must have a useable checklist of how to deal with such persons so as to limit subsequent legal consequences and foster swift and sure action by law enforcement, while preserving fundamental legal principles

C. ORGANIZATION OF THE VOLUME

This volume is comprised of five chapters, an annex, and a law review bibliography.

CHAPTER I -- FEDERAL DISASTER AND EMERGENCY ASSISTANCE

Discussion of the President's authority under the Stafford Act, the Federal Response Plan, and related laws and plans. Sets forth consequence management responsibilities of federal agencies.

CHAPTER II -- EXTRAORDINARY PRESIDENTIAL AUTHORITY

Discussion of the President's authority to invoke martial law and under the Insurrection Statutes; of the role of the military in domestic activities under the Posse Comitatus Act; of the authority of the National Guard. Sets forth statutory grants of and restrictions on special powers in times of extraordinary emergencies.

CHAPTER III -- STATE AND LOCAL EMERGENCY RESTRICTIONS

Discussion of state emergency authorities; and judicial evaluation of emergency restrictions including quarantines, curfews, restrictions on interstate travel, and commandeering of resources. Sets forth the state and local legal authorities that would be called upon to cope with a terrorism event as well as the primary legal rules concerning the use of those authorities.

CHAPTER IV -- LIABILITIES OF EMERGENCY RESPONDERS

Discussion of bases for holding federal and state emergency responders liable for tort and violation of constitutional rights. Sets forth the case law that establishes principles of reasonableness in connection with emergency response.

CHAPTER V -- LEGAL CHALLENGES FOR THE PUBLIC HEALTH SECTOR

Discussion of a wide array of unique legal issues concerning the ability of public health planners and providers to manage the consequences of a catastrophic terrorist event. Sets forth statutory framework relevant to the public health sector as well as principles of potential liability.

ANNEX -- MODEL STATE EMERGENCY PUBLIC HEALTH POWERS ACT

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CHAPTER I -- FEDERAL DISASTER AND EMERGENCY ASSISTANCE

INTRODUCTION

State officials have primary legal responsibility for coping with emergencies, including terrorist events. The federal government provides supplementary assistance if the emergency poses challenges that cannot be successfully met with state resources exclusively. The initial responders will most likely be local personnel: police, fire, and other emergency services. Issues within the scope of their authority are theirs to address without recourse to federal approval. Moreover, the Governor executes overall consequence management leadership, especially when extraordinary measures such as quarantines are appropriate. Yet, for numerous reasons, responsibility for managing a terrorist event's consequences is more complicated; to characterize the federal role as "supplementary," while legally accurate does not portray the situation.

A terrorist event is, of course, a national security challenge that threatens every American, even those who are geographically remote from the attack site. The consequences are likely to strain any single state's resources. Only the federal government has the depth of money, equipment, and personnel to meet the demands of a truly catastrophic attack. Other factors support an enlarged federal role. Unlike a natural calamity, law enforcement has a paramount mission; the FBI has unquestioned authority over that facet of terrorism response. Although law enforcement and consequence management are designed to operate in parallel, the overlap, integration, and confusion of obligations might blur this distinction.

Perhaps the most important reason for starting a discussion of consequence management with federal response authorities and capabilities is that federal agencies have developed plans, accumulated resources, and focused attention on relevant tasks to a far greater extent than any state. Thus, while there is widespread respect for state prerogatives, there is also widespread deference to the sophistication and assets of the federal response system.

This chapter describes the responsible federal authorities for performing functions associated with reducing vulnerabilities to terrorist attacks and managing an attack's consequences. This material is complicated: many agencies are responsible for many tasks. Yet, some complexity is inevitable: terrorism can involve different weapons in different places with varying effects, and the specialized capabilities for responding to those implications are located throughout government. Moreover, while efficiency and organization are virtues well worth achieving, some amount of duplication and overlap may be preferable to a patchy response capability that lacks depth and flexibility in time of need.

This chapter contains six sections. Section 1 describes Stafford Act authorities and obligations that are the legal foundation for declaration of a disaster or emergency. Section 2 describes the organizational responsibilities established by the Federal Response Plan. Section 3 focuses on the Federal Response Plan's assignment of functional tasks. Section 4 discusses the specific allocation of environmental responsibilities after a disaster or emergency. Section 5 lists many of the federal teams and support groups that could have relevant responsibilities. Section 6 discusses federal disaster assistance directed at victims of the September 11, 2001 attacks.

[As this volume was completed, Congress passed and the President signed legislation establishing the Department of Homeland Security (DHS). Many specific questions concerning authority for

specific response functions remain to be resolved. The following discussion highlights the new Department's major responsibilities in connection with response to terrorism.]

DHS, the second largest Federal department with a budget of \$37 billion, consolidates various agencies, offices, and selected functions of other departments into four primary areas: border and transportation security; emergency preparedness; countermeasures against chemical, biological and radiological and nuclear weapons; and information analysis and infrastructure protection. The Emergency Preparedness and Response directorate will oversee domestic disaster preparedness training and coordinate government disaster response. It will bring together FEMA, chemical, biological, radiological and nuclear response assets of Health and Human Services (HHS), The Nuclear Incident Response Team of the Department of Energy, Domestic Emergency Support Teams of the Justice Department, and the National Domestic Preparedness Office of the FBI.

A special office of the DHS Secretary, devoted solely to state and local concerns, has been created to streamline intergovernmental activities related to domestic security. Also, there is an intergovernmental affairs office for coordinating federal homeland security programs with local officials; it gives state and local officials one primary contact instead of many and provides an additional primary contact for training, equipment, planning, and emergency response. This office also manages federal grant programs for firefighters, police, and emergency medical personnel, and sets standards for state and local preparedness activities and equipment to ensure that funds are used appropriately.

DHS coordinates several other elements of state and local governments' domestic preparedness and emergency response:

Communication -- DHS is responsible for all federal communications related to terrorist threats. It coordinates the provision of specific threat information to local law enforcement, sets the national threat level, and maintains a central repository of critical information on potential terrorist threats that to be shared with state and local authorities.

Incident Management -- DHS establishes a comprehensive national incident management system to work with federal, state, and local public safety organizations for terrorist incident response. Existing federal emergency response plans are consolidated into one all-hazard plan and manage and coordinate federal entities supporting local response efforts.

Critical Infrastructure Protection -- DHS assumes responsibility of coordinating a national effort to secure the nation's infrastructure. The department gives state, local, and private agencies one primary contact for coordinating protection activities.

Grants Administration -- DHS administers all domestic disaster preparedness grant programs for first responders that had been managed by the Justice Department, Health and Human Services, and the Federal Emergency Management Agency. A comprehensive federal emergency response plan has been developed to encompass state and local government plans for domestic preparedness.

Pharmaceutical stockpile -- Custody of the national pharmaceutical stockpile has been moved to DHS, although Health and Human Service continues to determine the contents and HHS scientists decide which vaccines and antibiotics are placed into the stockpile.

1. THE STAFFORD ACT

The federal government has long had a role in disaster relief and civil defense.¹ The Disaster Relief Act of 1950, authorized the federal government's disaster relief efforts under the President's coordination. Passed at the same time, the Federal Civil Defense Act of 1950 recognized civil defense as a distinct policy principle.² The Robert T. Stafford Disaster Relief and Emergency Assistance Act,³ (the Stafford Act) amended the Disaster Relief Act to revise and broaden the scope of relief programs. Congress intended to provide an orderly and continuous means of federal assistance to state and local governments by encouraging and providing support for coordinated preparedness and hazard mitigation measures. The Stafford Act authorizes restoration of essential government services and provision of emergency relief to affected governments, businesses, and individuals. The Federal Emergency Management Agency (FEMA), since its creation in the late 1970s, is responsible for coordinating both disaster and civil defense preparedness across federal agencies.⁴ When the Civil Defense Act was repealed in 1993, most of its provisions were incorporated as Title VI of the Stafford Act.⁵

1.1. Triggers of Federal Assistance and Response

Under the Stafford Act, federal assistance is triggered by a Presidential declaration of a major disaster or an emergency. The type of available federal assistance depends on whether the situation is an emergency or major disaster. Both types of assistance generally require a request from the Governor. The President's determination to grant assistance is discretionary, not mandatory.

- Disaster assistance is typically broad in scope and includes long-term recovery programs and federal assistance to supplement state and local efforts and resources. It could be available in response to a terrorist attack involving a fire, flood, or explosion.⁶ A biological or chemical attack would be less likely to qualify as a major disaster because, except for fire, flood, or explosion, the definition focuses on natural catastrophes.
- Emergency assistance -- typically (but not necessarily) narrower in scope -- may be provided in response to: "any occasion or instance for which, in the determination of the President, federal assistance is needed to supplement state and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe."⁷ A terrorist attack using WMD would likely be an "emergency."

1.1.1. Disaster

The Stafford Act authorizes the President, upon a Governor's request, to declare a major

¹ As early as 1941, President Franklin Roosevelt urged citizens to become informed about civil defense. Proclamation No. 2519, 55 Stat. 1693 (1941).

² Ch. 1228, 64 Stat. 1245 (1951).

³ 42 U.S.C. § 5121 *et seq.* (2000).

⁴ Reorg. Plan. No. 3 of 1978, 5 U.S.C. app. § 1, *reprinted in* 92 Stat. 3788 (1978); *see also* 42 U.S.C.A. § 68 (West); Exec. Order No. 12148, 44 Fed. Reg. 43,239 (1979); Exec. Order No. 12656, 53 Fed. Reg. 47,491 (1988).

⁵ 108 Stat. 3111.

⁶ *Id.* § 5122(2). Explosions that the President determines to be sufficiently severe to warrant assistance are explicitly within the statutory definition of "major disaster."

⁷ *Id.* § 5122(1).

disaster.⁸ The Governor's request must be based on a finding that the disaster is too severe and sizeable for state and local response capabilities to be effective -- federal assistance is therefore necessary. Moreover, the Governor must have taken appropriate action under state law and directed execution of the state's emergency plan. State emergency officials should:

- survey the extent of private and public damage in the affected areas;
- with FEMA officials, conduct a Preliminary Damage Assessment (PDA), to be included in the Governor's request, that estimates the extent of the disaster and its impact on individuals; (Normally the PDA is completed prior to the submission of the Governor's request; however, if the event is obviously severe or catastrophic, the request may be submitted prior to the PDA.)
- estimate the types and extent of federal disaster assistance required;
- consult with the FEMA Regional Director on eligibility for federal disaster assistance; and
- advise the FEMA regional office that the Governor intends to request a Presidential declaration.

Once the President declares a major disaster, the FEMA Director has broad authority to "direct any Federal agency, with or without reimbursement, to utilize its authorities and the resources granted to it under Federal law in support of state and local assistance efforts."⁹ Moreover, at the President's direction, federal agencies may provide work or services essential to meeting immediate threats to life, property, or public health and safety, including using, lending, or donating federal equipment, supplies, facilities and personnel to state and local governments. In addition, the President may implement specific longer-term assistance programs after the declaration of a major disaster, including:

- repair, reconstruction, restoration, or replacement of federal facilities;¹⁰
- contribution of funds to repair, restore, reconstruct, or replace state and local public facilities;¹¹
- debris removal and wreckage assistance;¹²
- temporary housing assistance;¹³
- unemployment assistance;¹⁴
- grants to individuals and families to meet disaster-related expenses;¹⁵
- food coupons to low-income households;¹⁶

⁸ *Id.* § 5170.

⁹ *Id.* § 5170(a)(1).

¹⁰ *Id.* § 5171.

¹¹ *Id.* § 5172.

¹² *Id.* § 5173.

¹³ *Id.* § 5174.

¹⁴ *Id.* § 5177.

¹⁵ *Id.* § 5178.

- legal services to low-income households;¹⁷
- crisis counseling assistance and training;¹⁸ and
- temporary public transportation.¹⁹

The federal government may pay for all assistance and no less than 75% of the costs under the major disaster relief provisions.

1.1.2. Emergency

The federal government can provide relief when, upon request of a Governor, the President declares an emergency. The procedure to request for federal assistance in dealing with an emergency is basically the same as that for assistance in responding to a major disaster, with one addition: a request for assistance in an emergency must also define the type and extent of Federal aid required.²⁰

To be considered for aid, the request for emergency declarations must be submitted to the President within five days after the need for assistance is apparent, but no longer than thirty days after the incident. The period may be extended provided a written request, submitted within the thirty-day period, stipulates the reasons for the delay.²¹ In addition to the Governor's findings that the situation is of such severity and magnitude that effective response to save lives or lessen the threat is beyond the capability of the State and requires supplementary federal assistance, the request must include confirmation of appropriate action taken, information describing resources already employed, information describing agency efforts, and identification of the type and extent of aid required.²²

As with disasters, FEMA has broad authority upon a Presidential declaration of emergency: to coordinate federal relief efforts; provide technical and advisory assistance, and health and safety measures; and assist in distributing medicine, food, and consumable supplies. It also may authorize debris removal and provide temporary housing assistance.²³ The federal government may pay for up to all, but no less than 75% of costs for assistance rendered under the emergency relief provisions. However, total assistance for one emergency may exceed \$5 million only if the President determines that: (1) continued assistance is immediately required; (2) there is a continuing risk to lives, property, or public health or safety; and (3) needed assistance will not otherwise be provided on a timely basis.²⁴

The President may unilaterally exercise any of the emergency assistance authorities when he determines that an emergency involves a subject area for which the United States exercises exclusive

¹⁶ *Id.* § 5179.

¹⁷ *Id.* § 5182.

¹⁸ *Id.* § 5183.

¹⁹ *Id.* § 5186.

²⁰ *Id.* § 5191(a).

²¹ 44 C.F.R. § 206.35 (2003).

²² *Id.* § 206.35(c) (2003); 44 C.F.R. § 206.36(a) (2003).

²³ 42 U.S.C. § 5192(a) (2000).

²⁴ *Id.* § 5193(b).

or preeminent responsibility and authority.²⁵ He need not consult a Governor prior to a determination if an immediate response is necessary. The President declared an emergency under this provision in response to the bombing of the Federal Building in Oklahoma City, Oklahoma in April 1995.

Immediately after an incident that may ultimately qualify for Stafford Act assistance but before the President's declaration of an emergency, a Governor may ask that the President determine that the requested emergency work is essential to preserve life and property and direct the Secretary of Defense to use Defense Department (DoD) resources for "any emergency work which is made necessary by such incident and which is essential for the preservation of life and property."²⁶ The request must be submitted within 48 hours of the incident's occurrence.²⁷ The emergency work, for no more than ten days, may include debris and wreckage removal and temporary restoration of essential public facilities and services.²⁸ During its work, DoD must advise the FEMA Regional Director and the State of its progress in order to assure continuity at the end of the ten-day period.²⁹ When the emergency is declared, both the Federal and State Coordinating Officers must cooperate to maintain this continuity.³⁰

The request for DoD resources includes:

- information describing the types and amount of DoD emergency assistance being requested;
- confirmation that the Governor has taken appropriate action under state law and directed the execution of the state emergency plan;
- a finding that the situation is of such severity and magnitude that effective response is beyond the capabilities of the state and local government for the preservation of life and property;
- a certification by the Governor that the state and local government will reimburse FEMA for the non-Federal share of costs, which may range from nothing to 25%; and
- an agreement facilitating the work by freeing the federal government from damages and providing assistance in local jurisdictional matters.³¹
- The cost of any DOD assistance may be reimbursed by FEMA out of disaster relief funds under the Stafford Act, to the extent funds are available.³² This authority is rarely employed.

1.2. Determinations

1.2.1. Processing Requests for a Declaration of an Emergency

A Governor sends a request for a Presidential declaration of disaster or emergency to the

²⁵ *Id.* § 5191(b).

²⁶ *Id.* § 5170(b)(c)(1).

²⁷ 44 C.F.R. 206.34 (2003).

²⁸ 42 U.S.C. § 5170b(3)-(4) (2000).

²⁹ 44 C.F.R. § 206.34(g) (2001).

³⁰ *Id.* § 206.42.

³¹ *Id.* § 206.34 (b)(5).

³² 42 U.S.C. § 5197(e) (2000).

FEMA Regional Director who must acknowledge it in writing. The information obtained during assessment and consultations with federal and state officials concerning local capabilities and resources is analyzed and submitted with a recommendation to the Assistant Director. The FEMA Director thereupon recommends a course of action to the President³³ in light of the Public Assistance Program and the Individual Assistance Program. Under the Public Assistance Program, the Regional Director considers:

- the estimated cost of the assistance (measured against the statewide population to give a measure of the per capita impact within the state);
- localized impacts (impact of the disaster is evaluated at the county and local level as well as the Tribal and American Indian levels because sometimes there are high concentrations of damages that might warrant federal assistance even if the statewide per capita is low);
- insurance coverage in force or that legally should be in force;
- amount of hazard mitigation already accomplished by the state or local government;
- disaster history within the last twelve months; and
- other programs of federal assistance.³⁴

In evaluating the need for assistance under the Individual Assistance Program, the severity, magnitude and impact of the disaster must be determined according to:

- the concentration of damages (a high concentration of damages generally indicates a greater need for federal assistance than widespread and scattered damages);
- trauma (the number of injuries or deaths, the disruption of normal community functions and services and emergency needs such as loss of power or water);
- special populations (such as low-income, elderly or the unemployed);
- voluntary agency assistance;
- insurance; and
- average amount of individual assistance by state.³⁵

The Regional Director also considers the timeliness of the Governor's request and reasons for delays in submitting the request. Courts have upheld FEMA's refusal of a request not submitted within thirty days of the incident's occurrence.³⁶

1.2.2. Following the President's Declaration

The Regional Director notifies the Governor and other federal agencies of a declaration or its denial. If the President declares an emergency, the declaration must be published in the Federal Register.³⁷ Thereupon, the Regional Director notifies the Governor of the designations of assistance

³³ 44 C.F.R. § 206.37(b) (2003).

³⁴ *Id.* § 206.48(a); 42 U.S.C. § 5170(c)(4) (2000).

³⁵ 44 C.F.R. § 206.48(b) (2003).

³⁶ *Kan. v. Fed. Emerg. Mgmt. Agency*, 751 F. Supp. 1495 (D.C. Kan. 1990).

³⁷ National Emergencies Act, Transferred to 18 U.S.C.S. § 4122 (1996).

and eligible areas. Within thirty days of the incident's end, the Governor may submit a written request justifying authorization for additional areas or types of federal assistance.³⁸

The President may direct federal agencies to support state and local assistance efforts so long as that support does not conflict with other emergency missions.³⁹ The President has designated FEMA as the lead federal agency for the coordination and direction of Federal assistance,⁴⁰ and delegated his authority to the FEMA Director and subordinate officials, including the Federal Coordinating Officer (FCO).⁴¹ FEMA also has primary responsibility for establishing Federal disaster assistance policy and coordinating Federal emergency preparedness, planning, management, and disaster assistance functions.

Upon declaration of either a disaster or emergency by the President, the FEMA Director appoints an FCO to initiate federal assistance. The Regional Director designates a Disaster Recovery Manager (DRM) to exercise the authority of the Regional Director in a major disaster or emergency. The Governor designates a State Coordinating Officer (SCO) who coordinates all state and local assistance efforts with those of the federal government. The Governor also designates a Governor's Authorized Representative (GAR) who administers federal assistance programs on behalf of state and local governments. The GAR is responsible for the state compliance with the FEMA-State Agreement.⁴²

2. THE FEDERAL RESPONSE PLAN: ORGANIZATIONAL RESPONSIBILITIES

FEMA has coordinated development of the Federal Response Plan (FRP), a signed agreement among twenty-seven Federal departments and agencies including the American Red Cross, which:

- outlines how the Federal Government plans to assist state and local governments;
- describes the policies, planning assumptions, concept of operations, response and recovery actions, and responsibilities that guide Federal operations; and
- provides the mechanisms to coordinate delivery of Federal resources.

The types of direct federal assistance are grouped into twelve Emergency Support Functions (ESFs). Each ESF is headed by a primary agency designated on the basis of its authorities, resources, and capabilities in that functional area. ESF primary agencies identify requirements in order to supply goods and services to help the State respond effectively. Other agencies are designated as support agencies for one or more ESFs. In cases where required assistance is outside the scope of an ESF, FEMA may directly task any federal agency to bring its resources to bear in the

³⁸ 44 C.F.R. § 206.40 (2003).

³⁹ 42 U.S.C. § 5170(a)(1) (2000).

⁴⁰ Stafford Act 42 U.S.C. § 5121 et. seq.; Federal Emergency Management, Exec. Order No. 12148, 44 F.R. 43239 (July 20, 1979); Assignment of Emergency Preparedness Responsibilities, Exec. Order No. 12656, 53 F.R. 47491 (Nov. 18, 1988).

⁴¹ See also Nondiscrimination, Exec. Order No. 13160; Floodplain Management, Exec. Order No. 11988; Protection of Wetlands, Exec. Order No. 11990; Federal Emergency Management Agency, Exec. Order No. 12127; Federal Emergency Management, Exec. Order No. 12148; Assignment Of Emergency Preparedness Responsibilities, Exec. Order No. 12656; Federal Emergency Management Agency Assistance In Emergency Preparedness Planning At Commercial Nuclear Power Plants, Exec. Order No. 12657; National Defense Industrial Resources Preparedness, Exec. Order No. 12919, *available at* <http://www.fema.gov/library/eo.htm>

⁴² 44 C.F.R. § 206.41 (2003).

disaster operation.

The ESFs are:

ESF 1: Transportation.

ESF 2: Communications.

ESF 3: Public Works and Engineering.

ESF 4: Fire Fighting.

ESF 5: Information and Planning.

ESF 6: Mass Care.

ESF 7: Resource Support.

ESF 8: Health and Medical Services.

ESF 9: Urban Search and Rescue.

ESF 10: Hazardous Materials.

ESF 11: Food.

ESF 12: Energy.

Lead Agency:

Department of Transportation

National Communications System

U.S. Army Corps of Engineers

U.S. Forest Service, Department of Agriculture

Federal Emergency Management Agency

American Red Cross

General Services Administration

Department of Health and Human Services

Federal Emergency Management Agency

Environmental Protection Agency

Food and Nutrition Service, Department of Agriculture

Department of Energy

The FRP includes a Terrorism Incident Annex, describing crisis response and consequence management in the context of a terrorist attack involving WMD and defining the policies and structures to coordinate functions under the Plan. The FRP also includes procedures specifically addressing hazardous materials, including chemical, biological, and other WMD.

For peacetime radiological emergencies, including acts of sabotage and terrorism, that have perceived radiological consequences within the U.S., FEMA has prepared the Federal Radiological Emergency Response Plan (FRERP) which establishes an organized and integrated capability for timely, coordinated response.⁴³ The lead federal agency and the level of response will vary depending on the type and/or amount of radioactive material involved, the location of the emergency, the actual or potential impact on the public and environment, and the size of the affected area.

2.1. Headquarters Leadership and Administration

The Director of FEMA has discretion to convene senior administrators from all FRP departments and agencies, upon declaration of an emergency or disaster or otherwise, to provide guidance and policy direction on response coordination and operational issues. An Emergency Support Team (EST) may be formed, including representatives sent from each Emergency Support Function (ESF) as well as FEMA support staff. Operating from the FEMA National Interagency Operations Center (NIEOC) in Washington, DC, the EST carries out initial operations, provides overall resource coordination for other responders in the field, and is the central source of information regarding disaster operations. The EST attempts to resolve policy issues and resource support conflicts forwarded from the ERT.

⁴³ Federal Radiological Emergency Response Plan, 61 Fed. Reg. 20,944 (1996).

2.2. On-Site Leadership and Administration

A Federal Coordinating Officer (FCO), appointed by the FEMA Director, is the senior federal official for coordinating consequence management response and recovery activities as well as timely delivery of federal disaster assistance.⁴⁴ The FCO works closely with the State Coordinating Officer (SCO), appointed by the Governor to oversee state disaster operations, as well as the Governor's Authorized Representative (GAR), who executes all necessary documents for disaster assistance.

The FCO heads the interagency Emergency Response Team (ERT) that FEMA activates and deploys to the disaster area to oversee execution of on-site operations. The ERT is the principal group that supports the FCO to coordinate the federal disaster operation. It ensures that federal resources are available to meet state requirements identified by the SCO. The Emergency Response Team - Advance Element (ERT-A) assesses the event's impact, gauges immediate state needs, and arranges for operational field facilities. The ERT for terrorist incidents has been pre-designated as the ERT-Blue Team with members of all the Emergency Support Functions (ESFs). The ERT organizational structure encompasses the Federal Coordinating Officer's support staff plus four main sections (Operations, Information and Planning, Logistics, and Administration).

Elements of the Emergency Response Team:

1. FCO Support Staff, including a Deputy FCO and/or Deputy FCO for Mitigation as well as representatives providing assistance in: equal rights, safety, environment, legal, emergency information and media affairs, congressional and legislative affairs, community relations, Office of the Inspector General, and Comptroller. A Defense Coordinating Officer assists in orchestrating military support.
2. Operations Section -- This section, comprising four branches -- Operations Support, Human Services, Infrastructure Support, and Emergency Services -- under which the twelve ESFs are organized, coordinates the delivery of federal assistance and manages the activities of emergency teams. Immediate support staff functions include Mission Assignment Coordination, Action Tracking, Defense Coordinating Element, and Mobile Emergency Response Support.
3. Information and Planning Section -- This section has two major tasks: collection, analysis, and dissemination of information about disaster operations to support planning and execution at both the field operations and headquarters levels; and coordination of short- and long-term planning at the field operations level. (See ESF #5 - Information and Planning Annex for additional information.)
4. Logistics Section -- This section plans and directs logistics operations, including control of supplies and equipment; resource ordering; delivery of supplies, equipment, and services to the DFO and other field locations; resource tracking; facility location, setup, space management, building services, and general facility operations; transportation coordination and fleet management services; information and technology systems services; administrative services such as mail management; and customer assistance. (See the Logistics Management Support Annex for additional information.)
5. Administration Section -- This section is responsible for personnel functions and employee services. Personnel functions cover tracking FEMA staff and disaster reserves deployment,

⁴⁴ Exec. Order No. 12148 (July 20, 1979) (outlining delegated responsibilities for the FICO).

hiring locals, arranging housing, and processing payroll. Employee services include providing for personnel health and safety, overseeing access to medical services, and ensuring personnel and facility security.

2.3. On-Site Operations

FEMA may activate the Regional Operations Center (ROC) to coordinate initial regional and field activities until an ERT is established and the FCO assumes coordination responsibilities. The ROC establishes communications with the affected state emergency management agency and the EST; coordinates deployment of the Emergency Response Team - Advance Element (ERT-A) to field locations; assesses damage information and develops situation reports (under ESF #5 - Information and Planning); and issues initial mission assignments. The ROC comprises a Director and FEMA staff and Emergency Support Function (ESF) representatives, as well as a Regional Emergency Preparedness Liaison Officer (REPLO) who coordinates requests for military support. Financial management activity at the ROC is monitored and reported by the Comptroller.

The Disaster Field Office (DFO) is the primary field location in each affected state to coordinate federal response and recovery operations. The FCO and SCO (State Coordinating Officer) collocate at the DFO, along with federal agency regional representatives and state and local liaison officers. Once the DFO is ready for use, the ERT-A and/or ERT-N is augmented by FEMA and other federal agency staff to form a full ERT. The CONPLAN adds: The DFO office is established in or near the designated area to support federal and state response and recovery operations.

Requests for assistance from local jurisdictions are channeled to the SCO through the designated state agencies in accordance with the state emergency operations plan and then to the FCO. ESFs coordinate with their counterpart state or local agencies to provide assistance. Federal fire, rescue, and emergency medical responders arriving on scene are integrated into the local ICS structure.

3. FUNCTIONS

3.1. Transportation ESF #1

The Transportation Department (DoT) supervises assessment of damage to the transportation infrastructure and implements emergency-related response and recovery functions, including allocation of civil transportation capacity, air and marine traffic control, search and rescue, emergency highway funding, and hazardous material containment response. The DoT also determines viable transportation networks to move people and goods to, from, and within the disaster area.

The Regional Emergency Transportation Coordinator (RETCO) sets up emergency reporting systems and communications with the federal and state coordinating officers. To coordinate movement of people and goods, the RETCO administers regional transportation operations, manages financial transactions, and provides assistance for air traffic control, search and rescue, recovery of transportation infrastructure, and mitigation efforts. When normal channels of procurement cannot provide services, ESF #1 acquires transportation services, using General Services Administration (GSA) standing schedules, as part of a contract for acquisition of goods. To coordinate acquisition of transportation capacity, the DoT manages the Movement Coordination Center (MCC) at either FEMA headquarters or in the field. In the event of capacity shortages, the DoT Crisis Management

Center (CMC) identifies sources and allocates priorities if the Defense Production Act has been implemented.

Many agencies have support duties. The Defense Department helps restore the transportation infrastructure and supports emergency operation of inland waterways, ports, and harbors. DoD provides military transportation capacity from the U.S. Transportation Command (USTRANSCOM), and it develops and executes Time-Phased Force and Deployment Lists (TPFDLs) to manage rapid, early movement of personnel, equipment and critical relief supplies. The Customs Service provides airlift and marine transportation capability. The State Department coordinates requests for and offers of transportation assistance from foreign governments.

3.2. Communications ESF #2

The National Communications System (NCS) is an inter-agency task force made up of representatives of twenty-five agencies. The NCS Manager coordinates response activities, including monitoring the status of situations and recovery efforts, and coordinates provision of telecommunications needed by the federal government. The NCS Manager appoints an NCS Disaster Area Liaison Officer to coordinate national-level telecommunications support in the disaster area, and activates Individual Mobilization Augmenters (IMAs) to support disaster responses at the DFO, regional, and national levels.

A Federal Emergency Communications Coordinator (FECC) from the GSA deploys to the scene of a disaster to survey the status of telecommunications: the extent of damage and residual capabilities. The FECC is the telecommunications industry point of contact who coordinates industry's response and advises the FCO on telecommunications activities. In that capacity, the FECC prioritizes federal telecommunications support to responding government agencies and voluntary relief organizations and ensures that required services are provided for the response and recovery effort. Moreover, the FECC may release federal telecommunications resources, coordinate distribution of cellular phone assets, and maintain an audit trail of all telecommunications support provided. In the disaster area, the FECC also coordinates use of military telecommunications assets as well as frequencies used by those assets.

A National Communications Center (NCC) develops information collection procedures to enhance coordination of telecommunications assets. The NCC Manager gathers damage assessment data in order to ensure that adequate services are provided to support response operations. This responsibility includes identifying the telecommunication assets available within the affected area or might be brought for support, and activities of private telecommunications companies to recover and reconstruct their facilities. The NCC coordinates restoration and/or rerouting of telecommunications services and provision of new services with: telecommunications service providers when requirements cannot be fully satisfied; NCS member organizations to obtain additional telecommunications specialists; federal agencies to respond to special industry requests for assistance; and appropriate government and industry representatives to meet user requirements for cellular phone assets.

Virtually every federal support agency is charged with providing communications resources and technical personnel to assist the NCS Manager. All federal agencies must notify the FECC promptly of all telecommunications requirements and available assets and coordinate any requests for resources with the FECC. For the entire communications system, the General Services Administration (GSA) and the Federal Telecommunications Service (FTS) provide national-level

guidance; GSA regional managers supervise the training of potential FECC's within the region.

Three support agencies have significant responsibilities. FEMA installs computers and local area networks at the DFO, and it assists state and local officials to disseminate public warnings. The Department of Commerce -- National Telecommunications and Information Administration -- develops plans and procedures to assign radio frequencies. The Federal Communications Commission (FCC) reviews policies of regulated entities to provide emergency telecommunications services in order to ensure consistency with the public interest. Accordingly, the FCC also controls common-carrier facilities, services, and rates, and it assigns radio frequencies to licensees. Significantly, the FCC will investigate violations of law and initiate appropriate enforcement actions.

3.3. Public Works and Engineering ESF #3

To save lives, mitigate damage, and assist recovery activities after a major disaster or emergency, the U.S. Army Corps of Engineers (Corps) provides technical advice and engineering services, and it contracts for construction and emergency repair of water and power facilities. The Corps activates the Emergency Operations Center (EOC) and other support agencies' regional offices, and it designates personnel to staff the Regional Operations Center (ROC).

To establish communications with FEMA headquarters (HQ), the Corps sends Emergency Support Team (EST) representatives to HQ and liaison with both FEMA's Congressional Relations Officer and its Joint Information Center. The Corps also establishes communications with DoD Director of Military Support (DOMS) through the Army Operations Center (AOC). The Corps' regional office identifies requirements for remote sensing and imagery, and works with state and local officials to maximize the use of regional assets and to locate needed resources from outside the region.

Various support agencies have significant responsibilities. The Department of Agriculture (with supplemental assistance of the Department of Labor) provides engineering personnel and equipment to assist in emergency removal of debris, demolition, repair of roads and bridges, and temporary repair of essential public facilities including water supply. The National Resources Conservation Service is the regional contact for evaluating damage to water control facilities. The Department of the Interior also provides engineering support to evaluate damage to water control systems such as dams, levees, and water delivery facilities, and it will provide technical assistance on contracting, procurement, construction inspection, and environmental assessments. The Environmental Protection Agency (EPA), along with the Department of Health and Human Services, determines the portability of local water supplies and identifies hazardous materials that might affect those supplies. Also, EPA locates disposal sites for debris clearance and provides guidance to ensure cleanup of areas affected by hazardous materials.

3.4. Firefighting ESF #4

To detect and suppress wild land, rural, and urban fires, the Assistant Director for Operations, Fire & Aviation Management, Forest Service coordinates requests and provides assistance for local fire chiefs. The Disaster & Emergency Operation Specialist serves as the National Fire Suppression Liaison Officer, located at FEMA Headquarters, who tasks support agencies to fulfill responsibilities. FEMA establishes communications with State Fire Marshals in adjoining states.

In general, responsibilities are allocated on the basis of the location and type of fire. The Forest Service is responsible for suppression of wildfires on or threatening National Forest System lands. The Department of Interior has responsibility for fires on lands within its jurisdiction. The Department of Commerce supports suppression of urban and industrial fires as well as provides fire/weather forecasting. The Department of Defense is responsible for firefighting activities on U.S. military installations; for fires on nonmilitary lands, DoD provides agreed-upon personnel, equipment, supplies and, through the Army Corps of Engineers, contracts for heavy equipment and/or demolition services.

3.5. Information and Planning ESF #5

FEMA collects, analyzes, and disseminates information to provide disaster assistance. Primary responsibilities include remote sensing and reconnaissance operations, activation and deployment of assessment personnel, and GIS support to operating disaster entities. All agencies identify a point of contact to provide data and situation assessment activities that fall within their domain.

Upon declaration of a disaster or emergency, the Headquarters Information and Planning Section establishes initial liaison with the ROC where regional activities for Information Planning activities begin. State information processing operations should commence simultaneously at the State EOC. When the ERT-A, including key Information and Planning staff, deploys to the disaster response location, some of the regional staff will begin situation assessment activities at the EOC.

As the tempo of disaster operations slows, the staff is reduced, and the focus shifts to the economic impact of the disaster, the efficacy of program delivery, and identification of recovery issues. During the recovery phase, emphasis shifts from the daily action plan to long-range management plans; Information and Planning staff collates the information and facilitates the process. At least one Information and Planning staff member, normally a reports specialist, should remain on the FCO's staff until the DFO is closed in order to prepare after-action reports, daily briefings, and talking points.

3.6. Mass Care ESF #6

Mass care services include delivering shelter, food, and emergency first aid, setting up systems to provide bulk distribution of emergency relief supplies to disaster victims, and collecting information to operate a Disaster Welfare Information (DWI) system for reporting victims status and assisting in family reunification. Mass Disaster staff are directed by the American Red Cross (ARC) Senior Vice President, Chapter Services at National Headquarters in DC. The ARC establishes a temporary field headquarters with a reporting link at National Headquarters. Requests for support of state and local efforts to meet the mass needs of victims of a disaster are channeled from local jurisdictions through a designated state liaison to the FCO and then to the ARC which coordinates federal assistance.

The ARC manages the fiscal and logistical aspects of distributing emergency relief items, and it coordinates other federal agencies. FEMA prioritizes and coordinates mass care operations with other recovery activities, provides resources and logistical support, and assists in releasing casualty information to notify relatives. HHS provides medical supplies as well as technical assistance for shelter operations related to food, vectors, water supply, and waste disposal. The DoA, Forest Service and FEMA provide cots, blankets, sleeping bags, and personnel. The DoD Corps of Engineers inspects mass care shelter sites to ensure their safety for sheltering disaster

victims; if necessary, it helps construct temporary shelter facilities. The DoD Director of Military Support provides personnel, equipment, and supplies in the absence of other national disaster system resource capabilities.

3.7. Resource Support ESF #7

Within two hours after notification by FEMA of a disaster, the GSA Emergency Coordinator supports federal agencies until the regional ESF is operational; at that time, the Regional Emergency Coordinator (REC) assumes responsibility for obtaining and distributing resources. The REC establishes a mobilization center and deploys Federal Emergency Support Coordinator (s) to the DFO or regional Emergency Operations Center (EOC) as part of the Advance Element of the Emergency Response Team (ERT-A). The REC must ensure that a suitable DFO facility is acquired and ready to occupy, and it must determine the availability of suitable space in federal buildings. If space is not available or acceptable, the FEMA Regional Director or FCO arranges for suitable space elsewhere. The REC must help acquire communications, furniture, equipment and supplies to equip the DFO; all furniture and equipment is provided from small businesses in the affected area.

FEMA provides an Accountable Property Officer to ensure compliance with property management regulations and assume responsibility for federal property management. In the absence of other national disaster system capabilities, the Defense Department provides resources when provision does not conflict with the DoD's primary mission or its ability to respond to operational contingencies. FEMA also provides a Law Enforcement Liaison Officer to operate an information clearinghouse and coordinate federal law enforcement organizations to respond to disaster-related activities. Moreover, FEMA coordinates security requirements to protect federal personnel and assets. Federal police support FEMA, and contract guard services augment federal security activities.

3.8. Health Care ESF # 8

[see Chapter V Legal Challenges for the Public Health Sector]

3.9. Urban Search and Rescue ESF #9

To locate, extricate, and provide initial medical treatment to disaster victims, FEMA establishes and manages the National US&R Response System, to assist in pre-disaster training, equipment purchase, and evaluation of operational readiness. It develops procedures to effectively use and coordinate US&R assets; manages US&R task force deployment to, employment in, and redeployment from the affected area; and coordinates logistical support for US&R assets during field operations.

During the initial stages of the disaster or emergency, FEMA dispatches one or more ESTs to the affected area(s). EST staff collects assessment information from damage assessment teams, EST-A members, FEMA regional officials, and state and local officials in order to make decisions regarding the need for US&R resources. If the disaster requires use of all national-level US&R assets, the EST will develop strategies for providing additional US&R support, including use of international US&R assets, deployment of other task forces from existing sponsoring organizations (without equipment), and employment of US&R resources of unaffected states.

At the onset of the disaster, FEMA officials from the affected region designate a contact point, usually a part of the ERT, who may be represented on the ERT-A. The regional ESF #9 Leader ensures that all US&R activities are incorporated into the region's ERT structure. The

regional ESF #9 Leader coordinates deployed US&R resources and has the lead role in processing State requests for federal US&R assistance. The ESF #9 Leader establishes contact with the local Incident Commander and develops a plan to integrate national US&R resources into the local incident command structure. Based on recommendations developed by the ESF #9 Leader, decisions are made at the national level to deploy additional US&R resources. The ESF #9 Leader works with regional ESFs to obtain required equipment and supplies and passes unmet or competing requirements to the EST for further action.

The EST acts on unmet requirements for equipment and supplies and prepares Requests for Federal Assistance (RFAs) that generate mission assignments for air transport of task forces from their pre-designated airfields to Base Support Installations, mobilization centers, or other debarkation ports designated by the ERT. These RFAs are coordinated with ESF #1 Transportation and the Movement Coordination Center at FEMA Headquarters. If state and local emergency medical services resources are overwhelmed, the ESF #9 Leader on the ERT coordinates with field representatives of ESF #8 Health and Medical Services to develop procedures to transfer victims to Disaster Medical Assistance Teams (DMATs) for stabilization and transport to medical care locations.

Various agencies provide support. HHS provides liaisons; medical supplies, equipment, and pharmaceuticals; supporting personnel; and veterinary support. HHS also provides patient evacuation and continuing care when state and local emergency medical services are overwhelmed. HHS ensures that non-federal medical team personnel have appropriate and valid licenses to practice in the State and that they are provided federal tort claims liability coverage for the practice of medicine. Medical teams will be registered as specialized teams under the National Disaster Medical System (NDMS).

The Department of Labor (DoL) develops workers' compensation programs for US&R task force personnel as well as claims resolution services for US&R field deployments. In addition, DoL guides and assists on compliance with Occupational Safety and Health Administration regulations before and during field deployments. The Department of Justice develops tort liability claims coverage as well as Federal Tort Claims Act claims resolution services for US&R task force and IST personnel.

The Department of Defense is the primary source for fixed-wing and rotary-wing transportation of US&R task forces. DoD is the secondary source for ground transportation, mobile feeding units, and portable shelter (i.e., tents). The Army Corps of Engineers provides pre-disaster training for US&R task force. Notably, NASA provides technical experts and training sites as well as temporary use of facilities for mobilization centers and staging areas. NASA also assists FEMA in identifying research and development of new technologies for technical search.

3.10. Hazardous Materials Protection ESF #10

[see section 4 below]

3.11. Food ESF #11

The DoA, Food and Nutrition Service (FNS) Disaster Task Force must identify, secure, and arrange for transportation of food to affected areas. The FNS Regional Disaster Coordinator is the point of contact within the Regional Office. The FNS ensures that the officials establish and maintain an information flow so that requirements for food assistance are known and accomplished.

The FNS coordinates with state officials to determine critical needs for food supplies, numbers and location of people, and usable facilities for congregate feeding. Priority for movement of critical food supplies is based on how acute is the need. The American Red Cross assesses the critical emergency requirements for food as well as longer-term sustained needs after the emergency phase is over. FEMA provides demographic information about the disaster area to help determine types and quantities of food that FNS should provide, and FEMA provides information on food sources. The DoD assesses its food supplies and facilities capable of storing dry, chilled, and frozen food. The GSA supports the FNS for procurement efforts to meet the needs of the affected population.

The FNS determines the availability of USDA foods fit for human consumption, including raw agricultural commodities (wheat, corn, oats, rice, etc.), and locates food, equipment, and storage facilities. The FNS, with EPA assistance, ensures that all identified USDA food is fit for human consumption. The HHS identifies potential problems of contaminated foods (e.g., radiation, chemical, bacterial, and viral) and offers health education as to food preparation and storage.

Transportation and distribution of food supplies is arranged by federal, state, local, and voluntary organizations. Congregate feeding arrangements are the primary outlet for disaster food supplies. The FNS ensures timely distribution of food in good condition to the proper location; establishes logistical links with organizations providing services for congregate meals; and coordinates shipment of USDA food to staging areas within the disaster area. The DoD arranges for delivery and distribution of food and distribution resources. The American Red Cross coordinates food distribution efforts of other voluntary organizations and assesses the requirements for distribution services.

The USDA, at the Secretary of Agriculture's discretion and request by the State, may approve emergency issuance of food stamps for up to thirty days to qualifying households within the affected area. The Disaster Task Force coordinates efforts to authorize disaster food stamps and expedites requests, if any, for emergency issuance of food stamps after access to commercial food channels has been restored. At the discretion of the Secretary of Agriculture, USDA may make emergency food supplies available to households for take-home consumption in lieu of food stamps for qualifying households.

3.12. Energy ESF #12

To restore the nation's energy systems, the Department of Energy (DoE) identifies support resources needed to restore energy systems; deploys response teams to affected areas to aid restoration efforts; and monitors energy system damage and repairs. Decisions relating to energy are coordinated with DoE which collects, assesses, and provides information on energy supply, demand and prices.

The Departments of Interior (DoI) and Agriculture (DoA) have significant responsibilities. The DoI Bureau of Land Management assesses damage to production and transmission systems as well as provides technical support on energy production and supply on federal lands. The DoI Bureau of Reclamation assesses hydroelectric facilities and flood control actions that affect energy production; repairs damaged hydropower generation facilities; and increases power generation at hydroelectric plants to replace losses in damaged areas. The DoA Rural Utilities Service advises on the restoration of its electrical power systems and identifies surplus power available for delivery to areas of need.

4. ENVIRONMENTAL PROTECTION AND REMEDIATION

The Environmental Protection Agency (EPA) is responsible for minimizing harm to the environment and for remedying damage from a terrorist incident. EPA's authority derives from three plans: (1) the National Oil and Hazardous Substance Pollution Contingency Plan (NCP); (2) the Federal Response Plan (FRP); and (3) the Federal Radiological Emergency Response Plan (FRERP). Additional authority derives from various PDDs including PDD 67, Continuity of Operations Planning, as well as environmental and counter-terrorism statutes. The nature of the environmental threat determines which plan has primacy. Generally, the EPA operates under the NCP when an incident has not yet been identified as terrorism-related (in which case, the EPA is the lead federal agency) or under the FRP and its terrorism incident annex if it is a terrorist incident. If the event is a terrorist incident involving nuclear materials, the EPA along with the Department of Energy operate under the FRP and the FRERP.

EPA's Office of the Emergency and Deputy Emergency Coordinator coordinates counter-terrorism preparedness and response efforts with other agencies. This office leads EPA's Emergency Response Program that provides quick response to emergency releases of hazardous substances, including both elimination of immediate dangers to the environment and communication with the public about the release and response activities. Implementation of EPA's Emergency Response Program is a coordinated effort involving EPA's ten regional offices and state and local government agencies (altogether, the National Response System (NRS)). The NRS is run through the National Response Team (NRT) which is co-chaired by EPA and Coast Guard personnel and comprises other agencies' representatives. Thirteen Regional Response Teams (RRT's), representatives from each federal agency participating in the NRT as well as state and local governments, are responsible for regional planning and preparedness activities. The NRT is responsible for distributing information and for planning and training for emergencies. Five EPA organizations have primary roles in the NRS:

Chemical Emergency Preparedness and Prevention Office (CEPPO) has primary responsibility for planning for chemical emergencies through a network of state and local emergency planning organizations, and oversees EPA international emergency response support and coordination of National Security Response issues and key agency leadership roles as part of the NRS and the FRP.

The Office of Prevention, Pesticides, and Toxic Substances has primary responsibility for community involvement and community-right-to-know.

The Office of Radiation and Indoor Air (ORIA) has primary responsibility for the FRERP and radiological expertise under the NRS. ORIA responds to emergencies ranging from accidents at nuclear power plants to transportation accidents involving shipments of radioactive materials; it will also respond to deliberate acts of nuclear terrorism.

The Office of Underground Storage Tanks is responsible for preventing petroleum releases from underground storage tanks.

The Office of Emergency and Remedial Response oversees implementation of domestic emergency response including the two major components of the National Response System program, the Superfund Removal Program and the Oil Spill Prevention, Preparedness, and Response Program, as well as disaster response under the FRP.

4.1. The National Contingency Plan (NCP)

The NCP requires four levels of contingency planning: national, regional, area and local, and site-specific industry. When a release occurs, local emergency response personnel are the first line of response; state agencies provide support if an incident exceeds local capabilities. The EPA's Local Governments Reimbursement Program may assume the costs of that response if beyond budgeted emergency funds, up to \$25,000 per incident. To encourage local responders to respond immediately, the reimbursement process is straightforward: local governments complete an LGR application form that requires information about the incident, documentation of its response costs, and certification that program requirements have been met.

If the hazardous release is large, the National Response Center (NRC) must be notified. The NRC maintains reports of all releases and spills in a national database, the Emergency Response Notification System. Reports to the NRC activate the federal government's response capabilities under the NCP. The NRC staff must notify the pre-designated EPA or Coast Guard on-scene coordinator (OSC) assigned to the area of the incident and to collect available information on the size and nature of the release, the facility or vessel involved, and the parties responsible for the release.

Approximately 200 OSCs direct and coordinate the EPA's containment, removal, and disposal efforts. The OSCs initially evaluate the size and type of the released substance and its potential hazards. Moreover, OSCs assess the local response and determine the need for federal involvement. The OSCs must ensure that the cleanup is appropriate, timely, and minimizes human and environmental damage. Activities can include control and stabilization of the agent, on-site treatment, and off-site disposal. Although in most situations local action is sufficient, the OSC can take command of the response if:

- The party responsible for the release is unknown or uncooperative;
- The OSC concludes that the release exceeds the capacity of private or non-federal officials; or
- The incident presents a substantial threat to public health or welfare.

In a terrorism situation, the OSC must notify the FBI Special Agent in Charge for the affected district. The FBI assumes the lead, and the FRP is invoked, including the EPA's responsibilities under FRP emergency support function #10. If a public health emergency exists, the OSC should notify the Department of Health and Human Services (HHS) to help respond to those conditions, and to the Occupational Safety and Health Administration (OSHA) for assistance on worker health and safety.

4.2. The Federal Response Plan ESF #10 Hazardous Materials

EPA manages the overall Federal effort to identify, contain, clean up, and dispose of hazardous releases, or prevent potential releases. EPA provides personnel, including on-scene coordinators and provide technical and administrative support and personnel, facilities, and communications for this ESF, and resolves conflicting demands for hazardous materials response resources.

4.2.1. EPA Response Actions

Within two hours of notification, the EPA and appropriate agency representatives plan for providing technical support. Communications are established with EPA regions; backup may be requested from other regions. Thereupon, the EPA assesses the environmental condition, including pathways to human and environmental exposure and priorities for protecting human health; receives damage information from reconnaissance teams, and other agencies; establishes support requirements and response priorities; works with other agencies to maximize use of available regional assets and identify resources required from outside the region; and moves resources into the disaster area.

4.2.2. Responsibilities of Support Agencies

The Coast Guard (USCG) is the lead agency within its jurisdiction. It manages the National Strike Force, consisting of three teams on the Pacific, Atlantic, and Gulf coasts that support actions to chemical responses, especially those occurring in the marine environment. It offers expertise in port safety and security, maritime law enforcement, ship navigation, and the manning, operation, and safety of vessels and marine facilities. The Departments of Defense and Energy are responsible for responding to hazardous releases from their respective vessels, facilities, and vehicles. The DoD also provides personnel and equipment as required, if consistent with DoD operational requirements.

The Department of Agriculture helps develop protective measures and damage assessments; predict the effects of pollutants on soil and their movements over and through soil; ensure the purity of food products; and address problems of livestock and poultry affected by radiation.

The Department of the Interior and the Department of Commerce, NOAA provide assistance and expertise on natural resources and hazards, as to appropriate cleanup and restoration alternatives, and on geological and meteorological conditions. Health and Human Services assesses health hazards to protect both response workers and the public health; determines if illnesses, diseases, or complaints may be attributable to exposure to a hazardous substance; establishes disease/exposure registries and conducts appropriate testing; and provides information on the health effects of toxic substances. The Department of Labor, OSHA, provides advice regarding hazards to persons engaged in response activities. OSHA may take other necessary actions to ensure that employees are protected.

4.3. Radiological Incidents Federal Radiological Emergency Response Plan

The FRERP integrates EPA's commitments pursuant to the CONPLAN, the FRP, and the NCP; organizes management of radiological incidents and emergencies; and coordinates the EPA OSCs, regional radiation programs, and relevant EPA Offices. Each EPA region has a regional radiation program to provide support, including Protective Action Guidances, to state and local officials. In addition to the EPA, the Nuclear Regulatory Commission and the Department of Energy advise and help coordinate the federal effort to mitigate the radiological consequences of an emergency.

If a nuclear emergency occurs, EPA's staff, equipment, and laboratories provide scientific and technical support to state and local governments and other federal agencies. EPA also measures exposure to radioactivity in the environment. The EPA has established guidelines for protecting the public from radiation exposure, such as when to evacuate or relocate citizens. The Radiological Emergency Response Team (RERT), a special response force, is the primary nuclear emergency

response mechanism. RERT capabilities include conducting environmental monitoring, performing laboratory analyses, and providing guidance on measures to protect the public. The RERT can provide on-site monitoring and mobile laboratories for field analyses of samples as well as technical expertise in radiation monitoring, radiation health physics, radionuclide analysis and risk assessment.

The National Air and Radiation Environmental Laboratory (NAREL), on the Gunter Annex of Maxwell Air Force Base in Montgomery, Alabama, is a comprehensive environmental laboratory for measuring environmental radioactivity and evaluating its risk. The NAREL emergency response teams support EPA's emergency preparedness with a mobile radioanalytical laboratory and radiation survey and communications equipment. The Environmental Radiation Ambient Monitoring System (ERAMS) measures radioactivity and other contaminants, employing 260 sampling stations in North America.

4.4. Specialized Support from the EPA

EPA's Environmental Response Team (ERT) provides technical support for assessing, managing and disposing of hazardous waste. The ERT also provides twenty-four hour access to special decontamination equipment for chemical releases as well as risk assessment, multimedia sample, on-site safety, clean-up techniques, water supply decontamination, and disposal of contaminated material. In response to a nuclear, chemical, or biological incident, the ERT can provide portable instrumentation capable of radiation detection and identification as well as various entry capabilities to assist at the scene. These capabilities include: monitoring instruments, analytical instruments, and personal protective equipment.

EPA's National Enforcement Investigations Center (NEIC) is the technical support center for enforcement and compliance assurance programs. NEIC teams perform inspections and technical evaluations of facilities that manufacture or handle hazardous substances. NEIC support for site-specific environmental forensic evidence handling can be requested through the Criminal Investigations Division Regional Office. The EPA has twelve research laboratories with programs in field monitoring and analytical and technical support for quality assurance programs related to air, water, and solid waste. Five labs can deploy mobile units to a contaminated site for chemical and biological analysis.

5. SPECIAL RESPONSE TEAMS FOR WMD EVENTS

5.1. Department of Defense

Joint Task Force Civil Support -- Provides military assistance to civil authorities by supporting FEMA and establishing command and control of designated DoD forces. Commands all federal military forces on site for consequence management.

Chemical/Biological Response Team (C/B-RRT) -- Controlled by the U.S. Army Chemical-Biological Defense Command (CBDCOM). Coordinates and integrates DoD's technical assistance for the neutralization, containment, dismantlement, and disposal of chemical or biological materials, and assists first responders in dealing with consequence management. Provides specialized technical advice to the Joint Task Force for Civil Support; offers links to U.S. Army experts in various disciplines, including agent detection and disposal and assistance from medical authorities.

U.S. Army Technical Escort Unit (TEU) -- Provides chemical/biological advice, assessment, sampling, detection, field verification, packaging, escort, and render safe for chemical/biological

devices or hazards. Samples, detects, and identifies chemical agents; renders safe, packages, and escorts chemical munitions or devices.

U.S. Army Special Medical Augmentation Response Team -- Nuclear/Biological/Chemical --

Provides world-wide technical advice in detecting, neutralizing, and containing chemical, biological or radiological hazardous materials in a terrorist event, including: (1) advice to medical treatment facilities on handling contaminated patients; and (2) authorities on determining follow-on medical resources, supplies, and equipment to resolve the incident.

U.S. Army Special Medical Augmentation Response Team B Aero Medical Isolation -- Provides a rapid response evacuation unit to transport and provide patient care under conditions of biological containment to service members or U.S. citizens exposed to certain contagious and highly dangerous diseases; provides highly specialized patient care during evacuation to medical facilities.

U.S. Marine Corps Chemical-Biological Incident Response Force (CBIRF) -- Furnishes a trained rapid response force to support consequence management, including force protection or mitigation in the event of a terrorist incident, domestically or overseas. Samples, detects, and identifies chemical agents as well as four biological agents. Performs casualty search, extraction, and decontamination; triage and emergency medical treatment in contaminated zone; first aid, advanced cardiac life support, and trauma support initially for 250 patients. Administers 1,500 nerve agent antidotes.

U.S. Army Radiological Advisory Medical Team -- Assists and furnishes radiological health hazard guidance to the OSC at an incident site and the installation medical authority. Monitors contaminated medical facilities and equipment. Provides guidance about health hazards from radiological contamination. Provides advice for appropriate medical treatment, and treats victims.

5.2. Department of Health and Human Services

Management Support Teams -- Established by National Security Decision Directive 47, 1982; Federal Response Plan; and Presidential Decision Directives 39 and 62. Six to eight personnel at Rockville, Maryland, plus eighteen to twenty collateral duty Department of Veterans Affairs personnel. Manages federal medical teams and assets deployed for accident response; coordinates federal civilian medical teams.

National Medical Response Teams (NMRT) -- Established by Federal Response Plan and President Decision Directives 39 and 62. Four teams at Washington, DC (non-deployable); Winston-Salem, North Carolina; Denver, Colorado; and Los Angeles, California, with thirty-six collateral duty members per team. Decontaminates casualties from a hazardous materials incident, provides medical care, and deploys with antidotes and medical equipment; collects and secures contaminated material, e.g., victims' clothing; provides decontamination capability and casualty triage; provides extensive medical care; and administers antidotes and other medications. Each team has a supply of pharmaceuticals to treat 5,000 people.

Disaster Medical Assistance Teams -- Established by National Security Decision Directive 47; Public Health Service Memorandum of Understanding with each team and team sponsor; Federal Response Plan; Presidential Decision Directives 39 and 62. Forty-four teams at locations nationwide with thirty-four collateral duty members per team. Provides emergency medical care, patient stabilization, and triage during a disaster; assists in transport of victims from incident site to medical facilities such as hospitals.

Disaster Mortuary Operational Response Teams -- Established by Federal Response Plan;

Presidential Decision Directives 39 and 62; Public Health Service/National Association for Search and Rescue memorandum of understanding. Ten teams at locations nationwide with twenty-five to thirty-one collateral duty members per team. Provides identification and mortuary services, including decontamination of fatalities and advice on effects of decomposing fatalities, to state and local health officials in the event of major disasters and emergencies; performs recovery, identification, and processing of fatalities.

5.3. Department of Energy

Radiological Assistance Program Teams (RAP) -- Provides the initial DoE radiological emergency response; assists federal agencies, state and local governments, private business, or individuals in incidents involving radiological materials; conducts initial site assessments; advises decision-makers on steps that can be taken to evaluate and minimize the hazards of a radiological emergency. Several regionally based Radiological Assistance Teams (RATS) provide quick response capability to calls for radiological assistance by identifying the presence of radioactive contamination at the incident scene.

Accident Response Group (ARG) -- Technical response group for nuclear accidents. Provides equipment and technical assistance for weapon damage, risk assessment, safe recovery, packaging, transportation and disposal of damaged weapons.

Nuclear Emergency Search Team (NEST) -- Provides technical response to resolve incidents involving improvised nuclear and radiological dispersal devices. The team can search, locate, and identify devices or material; move, render safe, or disable devices; and mitigate damages.

Federal Radiological Monitoring and Assessment Center -- Collects, evaluates, and distributes off-site radiological data for the lead federal agency, state and local governments. Coordinates federal resources for off-site monitoring needs at the site of a radiological emergency. Acts as the control point for federal assets that assess off-site radiological conditions. Gathers radiological data from multiple sources, including Radiological Assistance Program teams and the Aerial Measuring System.

Atmospheric Release Advisory Capability (ARAC) -- A computer-based atmospheric dispersion modeling capability operated by Lawrence Livermore National Laboratory (LLNL). When a nuclear, chemical, or other hazardous material is or may be released into the atmosphere, ARAC's capability consists of meteorologists and other technical staff using 3-D computer models and real-time weather data to project the dispersion and disposition of radioactive material in the environment.

Aerial Measuring System (AMS) -- Measures, and tracks ground and airborne radioactivity using fixed-wing and rotary-wing aircraft; detects and surveys where radioactive material is deposited on the ground or the path of radioactive plume; provides quick surveys over a large area to determine the severity of the incident. Rotary-wing aircraft provide more detailed measurements of contamination.

Radiation Emergency Assistance Center/Training Site -- Provides medical advice and on-site assistance in triage, diagnosis, and treatment of all types of radiation exposure events; provides medical consultation and on-site assistance for the treatment of all types of radiation exposure incidents.

5.4. Department of Veterans Affairs

Medical Emergency Radiological Response Team -- Provides technical advice, radiological monitoring, decontamination expertise, and medical care for institutional health care providers; monitors radioactivity beyond the contaminated site; decontaminates victims; provides specialized medical care for radiation trauma.

5.5. Federal Emergency Management Agency

Emergency Response Team -- Established by the Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 et. seq. Size depends on the severity and magnitude of the incident. Collateral duty team members are geographically dispersed at FEMA headquarters and 10 regional offices. Coordinates federal response and recovery activities within a state; establishes field office if required; provides disaster assessment coordination and expertise to States and FEMA regions.

5.6. Nuclear Regulatory Commission

Regional Incident Response Teams -- Executes responsibilities of the lead federal agency during incidents at licensed nuclear power plants; leads and coordinates federal actions related to the radiological technical response at incident site; reviews actions the regulated entity is taking to correct problems; provides analysis and consultation for actions taken to protect public health and safety.

5.7. Federal Bureau of Investigation

Joint-Terrorism Task Force -- Multi-agency task force in most major metropolitan areas, comprised of local, state, and federal law enforcement representatives dedicated to investigating acts of terrorism.

Hazardous Materials Response Unit (HMRU) -- Offers sampling, detection, and identification capabilities of NBC agents. Equipped with a variety of personal protective and rescue equipment.

Evidence Response Teams (ERTs) -- Provides crime scene documentation and evidence collection in support of criminal investigations.

6. VICTIM COMPENSATION FUND OF 2001

To assist victims of the September 11, 2001, terrorist attacks, Congress established the September 11 Victim Compensation Fund of 2001 (Victim Fund), enacted as part of the Air Transportation Safety and System Stabilization Act⁴⁵ (Act). The Federal government, not the airlines, will finance the Victim Fund and thus assumes liability for injuries that could be attributable to a private company. This fund:

- limits an airline's liability related to the September 11 crashes to the amount of its insurance coverage;
- gives crash victims or their survivors an alternative (the Victim Fund) to litigation. In return, a Victim Fund claimant gives up all rights to sue the airline (but not other entities).

The Victim Fund replaces civil litigation with a binding no-fault compensation program, administered by a Special Master appointed by the Attorney General.⁴⁶ There is no cap on Victim

⁴⁵ Air Transportation Safety and System Stabilization Act, Pub. L. 107-42, 115 Stat. 231 (2001).

⁴⁶ *Id.* § 404(a); *see also* regulations defining the administration of the Victim Fund were published December 12, 2001.

Fund payouts, but punitive damages are not allowed. The Special Master determines appropriate due process rights for claimants.⁴⁷ The Act disallows judicial review of the Special Master's determinations, although a claimant may make one appeal to the Special Master. Under the Act, a victim must show the Special Master:

1. that a Sept. 11 crash caused physical injury or death to a passenger or someone at a crash site;
2. the compensation sought, based on lost earnings, pain and suffering;
3. any collateral sources of compensation arising for the crashes, such as life insurance, pension funds, death benefits, and payments by government entities.

Claimants must file with the Victim Fund within two years after regulations have been published, or by December 12, 2003.⁴⁸ The Special Master must make a determination on a claim within 120 days of receipt.⁴⁹ The claim will be reduced by payments from collateral sources.⁵⁰ The Special Master must issue payment within 20 days of making his determination.⁵¹

Id. § 407.

⁴⁷ *Id.* § 405(b).

⁴⁸ *Id.* § 405(a)(3).

⁴⁹ *Id.* § 405(b)(3).

⁵⁰ *Id.* § 405(b)(6).

⁵¹ *Id.* § 406(a).

CHAPTER II -- EXTRAORDINARY PRESIDENTIAL AUTHORITY

INTRODUCTION

The September 11th attack was a grave national security crisis for the United States. An attack involving weapons of mass destruction could have far more devastating consequences. It is not difficult to envision a severe crisis scenario that overwhelms civilian agencies and relief capabilities. Clearly, the consequence management system including the Federal Response Plan, discussed in the previous chapter, does not provide for this type of disruption. Events of this magnitude inevitably focus the nation's eyes on the President, upon whom lies the ultimate responsibility to restore order.

Yet, the President's authority, like all governmental authority in this nation, is constitutionally delegated and therefore limited. The President may not exercise unbounded power merely because there is a crisis.¹ There is an inherent tension here between the nation's need to survive an extreme crisis with the nation's need to preserve its system of constitutional governance. Neither value is inherently predominant over the other. Rather than attempt to prioritize the need for security as more or less important than upholding the Constitution, it should be understood that the President's authority to deal with crises may be legislatively specified. According to the Supreme Court, the President's authority is greatest when acting pursuant to an explicit congressional authorization.

First, when the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum. Second, when the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Finally, when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.²

Thus, in a domestic emergency situation, the powers of the President and Congress are interdependent and reciprocal.³

This chapter begins with a discussion of the President's constitutionally-unarticulated extraordinary powers during a crisis, specifically his power to declare martial law. But as the latter sections of this chapter reveal, questions as to the limits of that power are virtually moot in view of the extensive legislated grants of authority relevant to coping with a terrorism crisis. Section 2 considers restrictions on domestic use of the military, including the Posse Comitatus Act. Section 3

¹ *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (rejecting President Truman's Executive Order directing the Commerce Secretary to take control of the nation's steel mills and to keep them running. Despite Truman's concern that a steel industry strike during the Korean War would weaken national defense and endanger the nation's well-being and safety, the Court held that the Constitution did not give the President such broad authority).

² *Id.* at 637 (Douglas, J., concurring).

³ Paul Stevens, U.S. ARMED FORCES AND HOMELAND DEFENSE: THE LEGAL FRAMEWORK, CSIS 13 (2001).

describes the National Guard's status and potential uses. Section 4 identifies statutory provisions that could, in an emergency, broaden Presidential authority.

1. THE PRESIDENT'S RESIDUAL AUTHORITY

A scholar has argued that, despite the *Youngstown* holding, most of the Court would agree that:

the President does possess 'residual' or 'resultant' powers over and above, or in consequence of, his specifically granted powers to take at least temporary actions in the case of a serious national emergency; and second, that the Court would defer to the President's reasonable finding of such an emergency as a question for the "political" departments of government.⁴

The oath of office requires the President to affirm that he will execute his office and do his best to preserve, protect and defend the Constitution of the United States, which requires the President to ensure that the laws are faithfully executed. Accordingly, "the President should have the inherent authority, in fact the responsibility, to preserve the nation, even if it means taking extreme actions not specified in the Constitution."⁵ Support for this 'residual' authority can be found in *Cuningham v. Neagle*, where the Court stated that the President's powers are not simply "limited to the enforcement of Acts of Congress," but include "rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution."⁶ The *Neagle* Court recognized the President's inherent authority to take measures to protect a Supreme Court Justice who had been threatened with personal attack while discharging his duties. The Court interpreted Article II, Section 3 as charging the President with the duty to "take care that the Laws be faithfully executed."⁷

1.1. Martial Law

Martial law has been described as "the rule which is established when civilian authority in the community is made subordinate to military, either in repelling invasions or when the ordinary administration of the laws fail to secure the proper objects of the government."⁸ It is the law of military necessity administered by the General of the Army.⁹ Declaration of martial law authorizes the military to perform all acts that are reasonably necessary to maintain and restore public order. Notably, never in U.S. history, including the Civil War, has a President declared nation-wide martial law nor ordered such drastic steps as cessation of interstate commerce.

Most of the judicial decisions involving a Presidential use of martial law are pre-1900, and none of those decisions held that martial law is *per se* unconstitutional, nor impeded the Executive's power to address severe crises.¹⁰ The few Supreme Court decisions concerning martial law reveal that the *necessity* of safeguarding the public against insurrection, riot and disorder both justifies and

⁴ *Id.*

⁵ Major Kirk L. Davies, *The Imposition of Martial Law in the United States*, 49 A.F. L. Rev. 67, 88 (2000).

⁶ *Cuningham v. Neagle*, 135 U.S. 1, 64 (1890).

⁷ *Id.* at 64.

⁸ Major William E. Birkhimer, *MILITARY GOVERNMENT AND MARTIAL LAW*, 357, 371 (3rd ed. Revised, Franklin Hudson Publishing Co., 1914).

⁹ *United States v. Diekelman*, 92 U.S. 520, 526 (1876).

¹⁰ Davies, *supra* note 5, at 90; Stevens, *supra* note 3, at 14.

limits martial law.

In both *Luther v. Borden*¹¹ and the *Prize Cases*,¹² the Supreme Court upheld the President's mobilization of the militia and blockade of seaports as authorized by the Commander-in-Chief's duty to faithfully execute the laws of the land during extreme domestic emergencies. In *Luther*, the Court upheld President Tyler's mobilization of Massachusetts and Connecticut militia. In the *Prize Cases*, the Court deferred to President Lincoln who defended his blockading the ports of southern states during the Civil War under his own constitutional war-power authority without congressional authorization. Similarly, the Supreme Court in *In re Debs* upheld the authority of President Cleveland to send federal troops to Chicago to enforce an injunction against Eugene Debs and the American Railway Union. "If the emergency arises, the army of the nation, and all its militia, are at the service of the nation to compel obedience to its laws."¹³

*In Re Ex parte Milligan*¹⁴ suggests limits on Presidential authority. In 1862, President Lincoln's Secretary of War suspended the writ of habeas corpus for persons arrested for disloyal practices. Milligan, a confederate sympathizer, was convicted of treason by a military commission and sentenced to hang. The Supreme Court overturned Milligan's conviction because the civil courts remained open despite the proclamation of martial law. Congress had established procedures for suspension of the writ; Milligan's conviction by military commission was contrary to overt congressional intent. The military's action exceeded mere control of the civilian population, inserting itself into the judicial realm where there was no need for it to operate. The Court ruled that martial law is allowed only: (1) during dire conditions of necessity or war; (2) when the courts are closed; and (3) only in the actual war area.¹⁵

These decisions suggest that the extent of Presidential authority to invoke martial law depends on what action Congress has taken and on how extreme are the circumstances. His authority is greatest in an active theater of military operations where the civilian courts cannot act and where the only substitute for civilian authority to preserve safety is the temporary and local imposition of martial law.¹⁶

1.2. World War II Internment Cases

Following the attack on Pearl Harbor, President Roosevelt issued Executive Order 9066, which authorized military personnel to detain and relocate Japanese-Americans. In a series of decisions, the Supreme Court deferred to the Executive's determination of the appropriateness of this behavior. The Court's analysis in these cases was that, in war, the Court should not substitute its judgment for those who have constitutional authority to make such decisions. In *Hirabayashi v. United States*, the Court emphasized that decision-makers have wide discretion in the area of war powers, noting that the Court's inquiry does not go beyond whether the decision-makers had reasonable bases for their decision.¹⁷ If the decision-makers know of circumstances that afford a

¹¹ *Luther v. Borden*, 48 U.S. 1 (1849).

¹² *In re Amy Warwick*, 67 U.S. 635 (1862) [hereinafter *Prize Cases*].

¹³ *In re Debs*, 158 U.S. 564, 582 (1895).

¹⁴ *Ex Parte Milligan*, 71 U.S. 2 (1866).

¹⁵ See Davies, *supra* note 5, at 106-107 (according to Davies, "[p]erhaps the most important point from *Milligan* is that any exercise of emergency power by the President must be viewed in conjunction with congressional will").

¹⁶ See Stevens, *supra* note 3.

¹⁷ *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943).

rational basis for the decision, it should be upheld.

The Court's decision in *Korematsu v. United States* suggested that the principle of necessity proves that conditions can justify otherwise unacceptable actions.¹⁸ But in *Ex Parte Endo*,¹⁹ Ms. Endo, a loyal citizen, was forcefully relocated because of her Japanese ancestry. The Court held she was entitled to a habeas corpus for release from detention because the Japanese relocation orders did not authorize continued and indefinite detention beyond an initial evaluation and loyalty determination.

It should be noted that these decisions are without precedent and have not been cited favorably since. Moreover, there is widespread consensus among commentators that these decisions are more of a warning about the implications of over-reacting to a crisis than a sound measure of legal authority.²⁰

2. USE OF THE MILITARY

During or after a terrorist event, military forces could be used to enforce a quarantine or curfew or provide logistical support to assure adequate supplies and housing. Americans have long resisted military involvement in civilian affairs. The Declaration of Independence specifically objects to the military's interference in citizens' lives.²¹ Yet, in the aftermath of a grave terrorist event, there may be a call for the military to respond. One reason for this call is that, at least at first, it is unclear whether the attack is a single event or the beginning of an onslaught. Second, the military has unparalleled resources – logistical, medical, equipment, and personnel. Third, the combination of destruction and panic raises concerns that police abilities for maintaining order could be overwhelmed.

The Defense Department has been apprehensive to being involved in domestic terrorism response that could drain resources from its core mission of defending the United States from external threat. Moreover, there is concern that domestic deployment could undercut public support for the military, especially if troops undertake actions that restrain Americans' liberty. More generally, the military is designed for the extremely deadly and destructive business of warfare; that undertaking is mismatched to the types of tasks it might have to perform as part of a domestic response to a terrorist event.

Two points deserve attention at the outset of a legal discussion of the military's domestic role. First, nothing in the Constitution prohibits such use.²² Congress has enacted prohibitions in this area, and Congress can (and has) created exceptions to those prohibitions. Second, the legal rules concerning domestic use of the military apply to the use of the military for *law enforcement purposes*. With regard to the subject of this volume -- consequence management -- there have never

¹⁸ *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (dissenting Justice Roberts suggested that the military acting under the President would be authorized to remove people from where pestilence has broken out).

¹⁹ *Ex Parte Endo* 323 U.S. 283 (1944).

²⁰ See Barry Kellman, *Judicial Abdication of Military Tort Accountability: But Who Is To Guard The Guards Themselves*, 1989 DUKE L. J. 1597 (1990).

²¹ *Laird v. Tatum*, 408 U.S. 1, 20 (1972).

²² Several constitutional provisions show the framers' intention that the armed forces be subject to tight civilian control. Congress is authorized to raise and support armies, to declare war, and to make rules for the government and regulation of land and naval forces. U.S. CONST. art. I, § 8. Additionally, the President is Commander in Chief of the military. *Id.* art. II.

been significant limitations on what the military may be ordered to do.

This section looks at the basis for ordering a military presence in our own country and distinguishes between the military and the National Guard. First is a discussion of the primary prohibition against the domestic use of the military -- the Posse Comitatus Act. Second, the discussion turns to the primary exceptions to that prohibition contained in the Insurrection Statutes. Third, the discussion describes the kinds of military assistance available to civilian authorities and the return of responsibilities to civilians.

2.1. Posse Comitatus Act

2.1.1. Background and Enactment

From 1789 through the Civil War, United States marshals called upon the military as a posse comitatus.²³ In 1867, the Reconstruction Act established military government rule in the southern states, dividing them into districts governed by military commanders. The Army was often called upon to suppress civil disturbances and enforce laws, even after the confederate states were rejoined to the union and civil authority restored. Enactment of the Ku Klux Klan Act in 1871 authorized the President to use the military to suppress insurrection and domestic violence.²⁴ In the Presidential election of 1876, President Grant ordered soldiers to the polls to guard canvassers and to deter harassment against newly freed slaves.²⁵ Acting in response to alleged abuses of military authority,²⁶ Congress precluded the Army from assisting local law enforcement officers in enforcing the nations' laws and carrying out their duties.²⁷

A compromise version of the Posse Comitatus Act (PCA)²⁸ was included in the Army Appropriations Act of 1878.²⁹ The PCA prohibits the use of "any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws" unless expressly authorized by the Constitution or act of Congress. A violation of the PCA is a felony punishable by a \$10,000 fine or two years imprisonment or both. Congress has expressly permitted various forms of military assistance to law

²³ Authority to do so derived from the Judiciary Act of 1789, Act of Sept. 24, 1789, ch. 20 §27, 1 Stat. 73. "Posse comitatus" is the power or force of the country. "A group of citizens who are called together to assist the sheriff in keeping the peace." BLACK'S LAW DICTIONARY 1183 (7th ed. 1999).

²⁴ The freed slaves were mistreated by the state military forces. Senator Trumbull stated, in debates over the Freedmen's Bureau Bill, that "nearly all the dissatisfaction that now exists among the freedmen is caused by the abusive conduct of [the Mississippi] militia" Cong. Globe, 39th Cong., 1st Sess. 941 (1866) (cited by Sayoko Blodgett-Ford, *The Changing Meaning of the Right to Bear Arms*, 6 SETON HALL CONST. L.J. 103, 145 n.201 (1995)).

²⁵ During Reconstruction, former slaves were subject to violence and intimidation when attempting to vote. See *United States v. Cruikshank*, 92 U.S. 542 (1875). In the 1876 election, Rutherford B. Hayes, the Republican candidate, won with the disputed electoral votes of South Carolina, Louisiana, and Florida, by only one electoral vote. See M.C. Hammond, *The Posse Comitatus Act: A Principle In Need of Renewal*, 75 WASH. U.L.Q. 953, 960 (1997).

²⁶ *Moon v. State*, 785 P.2d 45, 46 (Alaska Ct. App. 1990).

²⁷ *United States v. Allred*, 867 F.2d 856, 870 (5th Cir. 1989); *Gillars v. United States*, 182 F.2d 935, 972 (D.C. App. 1950); *United States v. Hartley*, 796 F.2d 112 (5th Cir. 1986); *State v. Sanders*, 281 S.E.2d 7 (N.C.)

²⁸ 18 U.S.C § 1385 (2000).

²⁹ See Maj. Clarence I. Meeks III, USMC, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 MIL. L. REV. 83, n.27 (1975). For congressional debates of the Army's role in civil matters, see 7 Cong. Rec. 3538, 3579-86, 3845-50, 4239-48, 4295-4304, 4684-86 (1878) (text of congressional debate).

enforcement, subject to regulatory restrictions that prohibit “direct participation” by members of the armed services in “a search, seizure, arrest, or other similar activity” unless “otherwise authorized by law.”³⁰

Since the PCA’s enactment, the military has occasionally been used for domestic purposes that do not conform to its traditional role. The PCA proscribes use of the army in civilian law enforcement, but it has not prevented military assistance in so-called national emergencies such as strike replacements and disaster relief. Presidents Nixon and Reagan used the military to replace striking federal employees. In 1970, President Nixon sent 30,000 federal troops to replace striking postal workers in New York; in 1981, President Reagan replaced striking air traffic controllers. Disaster relief, another common use of the military, does not violate the PCA because it is not a mission executing the laws. In the 1906 San Francisco earthquake, the Army led the effort to put out fires and restore order. Hurricane Hugo in Florida evoked a large military presence during the relief effort. The military also provided election facilities in Florida - a situation similar to what precipitated the passage of the PCA in 1876.³¹

Notably for a discussion of managing consequences of terrorism, no PCA exception exists for military activity in connection with the Stafford Act or Federal Response Plan -- the military may not perform any law enforcement functions in support of civilian authorities in an emergency. This raises an unresolved issue as to the military’s role if a disaster situation deteriorates into a civil disturbance.

2.1.2. Subsequent Enactments

2.1.2.1. 1981

In 1981, seeking to clarify legal principles regarding cooperation between the military and civilian law enforcers, Congress codified military-civilian cooperation practices that were already permissible and authorized more cooperation with civilian officials while adding specific prohibitions on the military’s own law enforcement powers.³² The enactment enables the military to provide intelligence and information,³³ facilities,³⁴ training and expert advice,³⁵ and assistance in operating and maintaining equipment.³⁶ Direct participation in interdiction, search, seizure, arrest, and similar activities is prohibited unless otherwise authorized by law.³⁷ Nor may assistance be provided to civilian law enforcement agencies if to do so would adversely affect military preparedness.³⁸ Also, assistance to civilian law enforcers may be conditioned on their reimbursing the federal government for the military’s incurred costs.³⁹

³⁰ Stevens, *supra* note 3, at 26.

³¹ See M.C. Hammond, *The Posse Comitatus Act: A Principle In Need of Renewal*, 75 WASH. U.L.Q. 953, 960 (1997).

³² H.R. REP. NO. 97-71, pt. 2, at 3 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1781, 1785 [hereinafter H.R. Report No. 71].

³³ 10 U.S.C. § 371 (1982).

³⁴ *Id.* § 372.

³⁵ *Id.* § 373.

³⁶ *Id.* § 374(b) (authorizing military personnel to operate equipment only to monitor movement of air and sea traffic).

³⁷ *Id.* § 375.

³⁸ *Id.* § 376.

³⁹ *Id.* § 377; The Secretary of Defense must issue regulations to make this effective.

Notably, Congress clarified that these prohibitions do not preempt military assistance to civilian law enforcement that other laws -- including the original PCA -- might authorize.⁴⁰ “The 1981 amendments to the PCA, therefore, apparently manifested Congress's attempt to confront the ‘American dilemma’ by balancing two competing interests: (1) promoting the efficacy of civilian law enforcement agencies by allowing the armed forces to lend them certain military resources; and (2) controlling military involvement in civilian affairs by placing specific prohibitions on military law enforcement activities.”⁴¹

2.1.2.2. 1988

Seven years later, Congress established an air and sea surveillance mission and designated the DoD as the agency responsible for orchestrating the operations necessary to assist in drug interdiction. Congress perceived the mission as “a major new military requirement” that would enhance the nation's drug interdiction efforts substantially. The 1988 enactment, which effectively re-enacted the 1981 amendments, revised the law governing military assistance to civilian law enforcement officials.⁴²

2.1.3. Judicial Tests and Exceptions

In its 125-year history, no one has been prosecuted for violating the PCA. Yet, courts have considered the Act’s application in private causes of actions against military officials participating in or authorizing particular actions.⁴³ Other cases have been based on arguments that the actions of the military improperly assisted in prosecuting defendants.⁴⁴ Also, the United States has used the PCA to shield itself from liability based on the Federal Tort Claims Act.⁴⁵

The courts have held that the PCA applies only where “there is direct, active use of military personnel that pervades the activities of civilian law enforcement, and subjects civilians to the exercise of military power that is regulatory, proscriptive, or compulsory in nature.”⁴⁶ Courts apply three tests to determine if a use of military personnel has violated the PCA. First, was their action “active” or “passive”?⁴⁷ Second, did the use of the military pervade the activities of civilian law enforcement officials or amount to active involvement in executing the laws?⁴⁸ Third, did military

⁴⁰ *Id.* § 378.

⁴¹ Major Leroy C. Bryant, *The Posse Comitatus Act, the Military, and Drug Interdiction: Just How Far Can We Go?* 1990 ARMY LAW. 3 (1990).

⁴² The 1988 Amendments reaffirmed and broadened the military's authority with respect to providing intelligence, equipment and facilities, and training to civilians; see 10 U.S.C. §§ 371-73 (1988). Congress also revised § 380 to emphasize that DOD had the lead role in advising civilian law enforcement officials of the types of military assistance available. See *id.* § 380.

⁴³ *Bissonette v. Haig*, 776 F.2d 1384 (8th Cir. 1985); *aff'd en banc*, 800 F.2d 812 (8th Cir.1986), *aff'd*, 485 U.S. 264, 108 S. Ct. 1253, 99 L. Ed. 2d 288 (1988).

⁴⁴ See, e.g., *United States v. Walden*, 490 F.2d 372, 375 (4th Cir. 1974), *cert. denied*, 416 U.S. 983 (1974); *United States v. Cotten*, 471 F.2d 744, 747-48 (9th Cir. 1973), *cert. denied*, 411 U.S. 936 (1973); *United States v. Casper*, 541 F.2d 1275, 1276 (8th Cir. 1976), *cert. denied*, 430 U.S. 970 (1977); *Gilbert v. United States*, 165 F.3d 470, 471-472 (6th Cir. 1999).

⁴⁵ *Wrynn v. United States*, 200 F. Supp. 457, 463-465 (E.D. N.Y. 1961).

⁴⁶ *Stevens*, *supra* note 3, at 26.

⁴⁷ *United States v. Red Feather*, 392 F. Supp. 916, 921 (W.D.S.D. 1975); *United States v. Yunis*, 681 F. Supp. 891, 892 (D.D.C. 1988); *United States v. Rasheed*, 802 F. Supp. 312, 319 (D. Hawaii 1992).

⁴⁸ *United States v. Hartley*, 678 F.2d 961, 978 (11th Cir. 1982); *United States v. Hartley*, 796 F.2d 112, 114 (5th Cir. 1986); *United States v. Bacon*, 851 F.2d 1312, 1313 (11th Cir. 1988); *Hayes v. Hawes*, 921 F.2d 100, 103 (7th Cir.

personnel regulate, prohibit, or coerce civilians?⁴⁹ The military is not restricted from providing equipment to civilian law enforcement: “the prevention of the use of military supplies and equipment was never mentioned in the debates, nor can it reasonably be read into the words of the Act.”⁵⁰

Courts have generally held that limited military involvement in law enforcement for an independent military purpose -- *e.g.*, preventing the flow of drugs -- will not violate the PCA: “In the majority of cases in which no violation has been found, the independent military purpose that justified the military conduct was the prevention of illicit drug transactions involving active duty military personnel regardless of whether such conduct took place on military installations.”⁵¹ Exceptions include:

1. The military, upon the request of the Secret Service, may assist in protecting governmental officials and major political candidates from physical harm.⁵² The military may also respond to crimes against foreign officials and other foreign guests,⁵³ members of Congress, the Cabinet, and Supreme Court,⁵⁴ and the Vice-President and President.⁵⁵ Also, the military has a role in enforcing neutrality laws,⁵⁶ customs laws,⁵⁷ and executing certain civil rights warrants.
2. Military forces may provide logistical and technical support to civilian law enforcement agencies by sharing information,⁵⁸ loaning equipment,⁵⁹ and providing expert advice and training.⁶⁰

1990).

⁴⁹ See *United States v. Kahn*, 35 F.3d 426, 431 (9th Cir. 1994); *United States v. Casper*, 541 F.2d 1275, 1278 (8th Cir. 1976); *United States v. Yunis*, 681 F. Supp. 891, 895-6 (D.D.C. 1988). “It is the nature of their primary mission that military personnel must be trained to operate under circumstances where the protection of constitutional freedoms cannot receive the consideration needed in order to assure their preservation. The posse comitatus statute is intended to meet that danger. The feared use [of military personnel] which is prohibited by the posse comitatus statute is that which is regulatory, proscriptive or compulsory in nature, and causes the citizens to be presently or prospectively subject to regulations, proscriptions, or compulsions imposed by military authority.” *United States v. McArthur*, 419 F. Supp. 186, 193-94 (D. N.D. 1975), *aff’d sub nom* *United States v. Casper*, 541 F.2d 1275, 1276 (8th Cir. 1976).

⁵⁰ *United States v. Red Feather*, 392 F. Supp. 916, 922 (1974). Applying these tests, the Eighth Circuit has held that the use of Air Force personnel to fly surveillance, the advice of military officers, and the furnishing of equipment and supplies did not constitute a violation of posse comitatus. *United States v. Casper* 541 F.2d 1275 (8th Cir. 1976); *Bissonette v. Haig*, 776 F.2d 1384 (8th Cir. 1985).

⁵¹ *Harker v. State*, 663 P.2d 932, 936 (Alaska 1983).

⁵² 32 C.F.R. § 215.4(c)(2)(i)(d); this exception is taken from House Joint Resolution 1292, June 6, 1968. Although this resolution has been placed in the Statutes at Large as Public Law 90-331, 82 Stat. 170, it has not been codified; it is set out in the notes to 18 U.S.C. § 3056; see also 18 U.S.C. § 3056 (stating the protective duties of the Secret Service).

⁵³ 18 U.S.C. § 112(f) (2000), (b)(3)(c).

⁵⁴ *Id.* § 351(g).

⁵⁵ *Id.* § 1751(i), 3056.

⁵⁶ 22 U.S.C. § 408, 461-62 (2000).

⁵⁷ 50 U.S.C. § 220 (2000).

⁵⁸ 10 U.S.C. § 371 (2000).

⁵⁹ *Id.* § 372.

⁶⁰ *Id.* § 373.

3. The military may respond to events involving chemical or biological weapons of mass destruction.⁶¹
4. Military forces are authorized for direct participation in arrest, search and seizure, and in intelligence collection when necessary to save human life and civilian authorities are unable to take the required action, as long as the action is otherwise authorized by law.⁶²
5. Two recognized exceptions derive from the President's inherent right to preserve public order and to carry out government operations. In an emergency situation that requires prompt and vigorous action to prevent loss of life, or warrants destruction of property when sudden and unexpected disasters disrupt normal governmental functions such that duly constituted local authorities are unable to control the situation, the President may use the military to prevent loss of life, to prevent wanton destruction of property, and to restore governmental functions and public order.⁶³ The Office of Legal Counsel of the Department of Justice has recognized the U.S. government's power to protect federal functions.⁶⁴ Second, the President may use the military "to protect Federal property and Federal governmental operations when . . . local authorities are unable or decline to provide adequate protection."⁶⁵
6. There are also two common law exceptions:
 - No violation occurs when a service member assists civil law enforcement on his own initiative as a private citizen.⁶⁶
 - According to the Military Purpose Doctrine, no violation occurs when military personnel, to achieve a military purpose, only incidentally benefit civilian law enforcement authorities.⁶⁷

Section 2.3. below, "Military Assistance in Civilian Emergencies," discusses other limitations.

⁶¹ See *Id.* § 382; 18 U.S.C. § 175a and § 2332e (2000).

⁶² Section 1416 of the 1997 National Defense Authorization Act (codified at 10 U.S.C. §382); National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, §1416, 110 Stat. 186 (1996).

⁶³ Employment of Military Resources in the Event of Civil Disturbances, 32 C.F.R. §215.4c(1) (2001). The Supreme Court in *In re Neagle*, 135 U.S. 1 (1890), held that the President had the authority to use the military in emergency situations.

⁶⁴ See M.C. Hammond, *The Posse Comitatus Act: A Principle In Need of Renewal*, 75 WASH. U.L.Q. 953, 968 (1997).

⁶⁵ 32 C.F.R. § 215.4(c)(1)(ii) (1986).

⁶⁶ See Brian L. Porto, Annotation, *Construction and Application of Posse Comitatus Act, and Similar Predecessor Provisions, Restricting Use of United States Army and Air Force to Execute Laws*, 141 A.L.R. FED. 271, 298-99 (1997) (listing cases where soldiers acted on their own initiative and in their private capacities to help civil authorities).

⁶⁷ See *id.* at 299-305 (listing cases where the Military Purpose Doctrine was applied).

2.2. Insurrection Statutes

The President can use military troops for law enforcement during a national emergency involving civil disturbances or insurrections. In contrast to martial law whereby an executive suspends normal operation of lawful authorities as well as of constitutional rights, the insurrection statutes authorize the President to use the military to enforce the laws in times of domestic emergency so as to better protect the nation and the government.⁶⁸ Typically, the President must first receive a request from a Governor and, second, issue a proclamation to disperse the wrongdoers.⁶⁹ If they do not stop their malfeasance, the President can use federal troops to restore civil order. The President is authorized to call into federal service the state militia at the State's request "whenever there is an insurrection in any state against its government."⁷⁰

Without the Governor's request, the militia and armed forces may be used to enforce federal authority and laws.⁷¹ To suppress an insurrection, the President may use the militia or armed forces to provide for the execution of state or federal laws.⁷² Thus, during an insurrection, the President may hold in custody persons for whom there is probable cause of criminal complicity.⁷³ The President can use this power if persons are deprived of a constitutional right or a right secured by U.S. law. Also, the right to interstate travel is within this section's protection.⁷⁴ Under 10 U.S.C. §2383, persons engaged in or inciting insurrection against the United States are punishable by death or imprisonment for at least five years, fined at least \$10,000, and may not hold public office.

⁶⁸ *In re Charge to Grand Jury*, 62 F. 828, 829-30 (1894).

⁶⁹ 32 C.F.R. § 215.4(c)(2)(i)(2002); 10 U.S.C.A. § 334 (2001).

⁷⁰ 10 U.S.C.A. § 331 (1998) (stating "[w]henver there is an insurrection 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 the State, and use such of the armed forces, as he considers necessary to suppress the insurrection." This section is described as implementing Article IV, Section 4, of the Constitution. 32 C.F.R. §215.4 (c)(2)(i)(a) (2002).

⁷¹ 10 U.S.C.A. § 332 (1998) (reading "[w]henver 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." This section implements Article II, Section 3, of the Constitution. 32 C.F.R. § 215.4 (c)(2)(i)(b) (2002). This law was used to federalize the Arkansas National Guard to enforce federal court orders relating to integration in 1957. Exec. Order No. 10730, 22 Fed. Reg. 7628 (1957). And to federalize the Mississippi National Guard in 1962 and Alabama National Guard in 1963 for similar purposes. *Id.* The Insurrection Statutes also helped to quell urban rioting after the 1992 jury verdict involving Rodney King. Proclamation No. 6427, 57 Fed. Reg. 19,359 (May 1, 1992); Exec. Order No. 12,804, 57 Fed. Reg. 19,361 (May 5, 1992).

⁷² 10 U.S.C.A. § 333 (1998) (providing "[t]he 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 the 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 impeded the course if justice under those laws.

This section is described as implementing Article II, Section 3, and the 14th Amendment of the Constitution." 32 C.F.R. § 215.4 (c)(2)(i)(c) (2002).

⁷³ 10 Op. Att'y. Gen.74 (1861).

⁷⁴ *Bergman v. United States*, 565 F. Supp. 1353, 1396 (W.D. Mich. 1983).

2.2.1. What is an insurrection?

An “insurrection” is a form of rebellion against an established government when there is an intent to overthrow a lawfully constituted regime.⁷⁵ For example, the County of Philadelphia declared a state of insurrection when a mob forcibly took possession of the Philadelphia railroad and destroyed private property during rioting.⁷⁶ Though an insurrection usually does not require armed opposition or resistance, it does involve persons acting in concert, rising against civil or political authority -- open and active opposition of a number of persons to the execution of law in a city or state.⁷⁷

The insurrection statutes empower the President to grant the armed forces a significant role in responding to situations, including terrorist attacks. Any acts of terrorism would likely fall under the umbrella terms “unlawful obstructions, combinations or rebellion against the authority of the United States” in Section 332. Additionally, the broad terms of Section 333, “insurrection, domestic violence, unlawful combination or conspiracy” could be applied against terrorist activity.

2.2.2. How can the President use the power of insurrection?

The President of the United States may formally proclaim that an insurrection exists; that proclamation continues until the President decides otherwise.⁷⁸ The President has exclusive discretion to use troops or militia in quelling a civil disorder or insurrection.⁷⁹ Thus, President Johnson’s decision to use the military to control the civil disturbances following the assassination of Dr. Martin Luther King was upheld on the grounds that the courts may not question the President’s exercise of this authority.⁸⁰ Nevertheless, this military power must be in strict subordination to civil authority.⁸¹

2.3. Military Assistance in Civilian Emergencies

The Department of Defense (DoD) has a series of policies directing the military to assist FEMA and local authorities in the event of a “civil emergency,” which DoD defines as “any natural or manmade disaster or emergency that causes or could cause substantial harm to the population or infrastructure [including] major disaster or emergency, as those terms are defined in the Stafford Act ... as well as consequences of an attack or a national security emergency.”⁸² The nature and urgency of the emergency determines which official must authorize the assistance and what the assistance may comprise. This section examines the DoD’s Immediate Response Authority, Military Support to Civil Authorities (MSCA), Military Assistance to Civil Authorities (MACA) and Military Assistance for Civil Disturbances (MACDIS).

⁷⁵ *Pan Am World Airways, Inc. v. Aetna Casualty & Surety Co.*, 505 F.2d 989, 1017 (1974).

⁷⁶ *Allegheny County v. Gibson*, 90 Pa. 397, 399 (1849).

⁷⁷ *In re Charge to Grand Jury*, 62 F. 828, 832 (N.D. Ill. 1894). State decisions are to similar effect; the State of Iowa declared an insurrection when the defendant was the principal leader in a prison riot causing damages to be done against both hostages and the Iowa penitentiary. *State v. Wagner*, 410 N.W.2d 207, 214 (1987).

⁷⁸ *Lapeyre v. United States*, 84 U.S. 191, 195 (1872); *see also* *United States v. One Hundred and Twenty Nine Packages*, 27 F. Cas. 284, 289 (1862).

⁷⁹ *Martin v. Mott*, 25 U.S. 19, 31 (1827).

⁸⁰ *Monarch Ins. Co. of Ohio v. District of Columbia*, 353 F. Supp. 1249, 1255 (D.C.D.C. 1973).

⁸¹ 9 Op. Att’y. Gen. 517 (1860).

⁸² U.S. Dept. of Defense Dir. 3025.12, Military Assistance for Civil Disturbances (MACDIS), para. E.2.1.5 (Feb. 4, 1994).

2.3.1. Immediate Response Authority

Department of Defense personnel may act in non-military settings under the “Immediate Response Authority”⁸³ which is set forth in two Department of Defense Directives to support civilian authorities during civil disturbances and disaster relief.⁸⁴ In a sudden emergency, a military commander or other DoD official can act, at the request of civilian authorities, before a declaration of emergency or major disaster.⁸⁵

Imminently serious conditions resulting from any civil emergency or attack may require immediate action by military commanders, or by responsible officials of other DoD Agencies, to save lives, prevent human suffering, or mitigate great property damage. When such conditions exist and time does not permit prior approval from higher headquarters, local military commanders and responsible officials of other DoD Components are authorized by this Directive, subject to any supplemental direction that may be provided by their DoD Component, to take necessary action to respond to requests of civil authorities.⁸⁶

The types of Immediate Response support by the DoD to civil bodies, include:

- rescue, evacuation, and emergency medical treatment of casualties, maintenance or restoration of emergency medical capabilities, and safeguarding the public health;
- emergency restoration of essential public services (including fire-fighting, water, communications, transportation, power, and fuel);
- emergency clearance of debris, rubble, and explosive ordnance [sic] from public facilities and other areas to permit rescue or movement of people and restoration of essential services;
- recovery, identification, registration, and disposal of the dead;
- decontaminating radiological, chemical, and biological effects; controlling contaminated areas; and reporting through national warning and hazard control systems;
- roadway movement control and planning;
- safeguarding, collecting, and distributing food, essential supplies, and materiel on the basis of critical priorities;

⁸³ The “most commonly cited rationale to support Immediate Response actions is the common law principle of necessity.” See Commander Jim Winthrop, *The Oklahoma City Bombing: Immediate Response Authority and Other Military Assistance to Civil Authority (MACA)*, 1997 ARMY LAW. 3, 9-11.

⁸⁴ U.S. Dept. of Defense Dir. 3025.1, Military Support to Civil Authorities (MSCA), para. D(5)(a), (Jan. 15, 1993) [hereinafter DoD Dir. 3025.1] (requires a request from civilian authorities before the military can provide emergency support); U.S. Dept. of Defense Directive 3025.12, para. D(2)(b), Military Assistance for Civil Disturbances (MACDIS) (4 Feb. 1994) [hereinafter DoD Dir. 3025.12] (does not requires a such a request before the military can provide assistance).

⁸⁵ Local commanders in the United States may “undertake immediate, unilateral, emergency response actions that involve measures to save lives, prevent human suffering, or mitigate great property damage, only when time does not permit approval by higher headquarters.” Memorandum from the Deputy Secretary of Defense, to The Secretaries of the Military Departments, *DOD Year 2000 (Y2K) Support to Civil Authorities (22 Feb. 1999)*, at http://www.army.mil/army-y2k/desecdef_dod_civil_support.htm.

⁸⁶ DoD Dir. 3025.1, *supra* note 87 at 4.5.1. Discussions of reimbursement for DoD’s expenses may be delayed. The DoD commander may not refuse to assist if the agency requesting assistance is unable to agree about reimbursement. DoD Dir. 3025.1, *supra* note 87 at 5.b.

- damage assessment;
- interim emergency communications; and
- facilitating the re-establishment of civil government functions.⁸⁷

The directives guide military commanders on acceptable actions, including limiting them to providing support, including emergency medical care, clearance of debris, and recovery and identification of the dead.⁸⁸ Congress has not limited or clarified a commander's authority to action.

After the bombing of the Murrah federal building in Oklahoma City, military personnel from Fort Sill and Tinker Air Force Base supported local responders under the Immediate Response Authority by supplying ambulances, bomb sniffing dogs, medivac aircraft, and military personnel.

2.3.2. Military Support to Civilian Authorities (MSCA)

MSCA is, in general, DoD's statement of how it will comply with applicable Stafford Act provisions and, with FEMA, prepare for and respond to emergencies through Regional Military Emergency Coordinating (RMEC) teams. DoD provides MSCA in an emergency upon FEMA's request and determination that the situation exceeds civilian capabilities. The support may include the activities listed as immediate responses, but may also go further, using all DoD resources except that:

- the military cannot provide assistance to civilian law enforcement;
- civil resources should be used before military resources; and
- the military's non-MSCA operations take priority, unless the Secretary of Defense determines otherwise.⁸⁹

According to the national policy section of DoD Directive 3025.1, Military Support to Civil Authorities (MSCA), "[p]lanning and preparedness by the Federal Government for civil emergencies and attacks are important due to the severity of the consequences of emergencies for the Nation and the population, and to the sophistication of means of attack on the United States and its territories."⁹⁰

MSCA Policy includes, *inter alia*, support in either civil emergencies or attacks, during any period of peace, war, or transition to war. It includes response to civil defense agencies but does not include military assistance for civil law enforcement operations.

MSCA provides "a mechanism to facilitate continuous and cooperative civil and military planning and preparedness to mobilize all appropriate resources and capabilities of the civil sector and the Department of Defense, whenever required for any form of national security emergency."⁹¹ MSCA planning focuses on "centralized direction of peacetime planning with civil authorities, with decentralized planning by DoD Components with civil agencies, where appropriate, and decentralized execution of approved plans in time of emergency."⁹² Also, DoD resources are provided only when response or recovery requirements are beyond the capabilities of civilian

⁸⁷ DoD Dir. 3025.1, *supra* note 87 at 4.5.4.1-10.

⁸⁸ *Id.*

⁸⁹ DoD Dir. 3025.1, *supra* note 87 at A.2.6.

⁹⁰ DoD Dir. 3025.1, *supra* note 87 at 4.1.1.

⁹¹ *Id.* at 4.4.5.

⁹² *Id.* at 4.4.3.

authorities (as determined by FEMA or another lead emergency response Agency).⁹³

2.3.3. DoD Military Assistance to Civilian Authorities (MACA)

MACA missions are but one category of the military's responsibilities for counter-terrorism and homeland defense which also include, *inter alia*, force protection, support to federal consequence management activities [discussed in Chapter I], and protection of critical assets. Assistance under MACA extends from the immediate response and MSCA activities for natural and manmade disasters, to DoD assistance for civil disturbances, law enforcement, and counter-drug and counter-terrorism actions.⁹⁴ The assistance may be loans of equipment, facilities or personnel to law enforcement agencies, aid in a civil emergency other than terrorism, and support for domestic civil disturbances or domestic counter-terrorism operations.⁹⁵ At least a flag officer or general officer must approve all requests for all types of MACA operations; their evaluation must consider six factors:

- legality (compliance with laws);
- lethality (potential use of lethal force by or against DoD forces);
- risk (safety of DoD forces);
- cost (who pays, and what is the impact on the DoD budget);
- appropriateness (whether conducting the requested mission is in DoD's interest); and
- readiness (impact on the DoD's ability to perform its primary mission).

In addition, DoD may provide support for domestic civil disturbances or domestic counter-terrorism operations only with Presidential authorization, as noted below in the MACDIS discussion.

2.3.4. Military Assistance for Civil Disturbances (MACDIS)

DoD maintains a separate policy, MACDIS, governing assistance to civilian agencies in the event of a civil disturbance or terrorist incident. A civil disturbance is a "group act of violence and disorder prejudicial to public law and order;"⁹⁶ a domestic terrorist incident is a "distinct criminal act ... by a group or ... individual ... to advance a political objective, and which endangers the safety of the people, property, or a Federal function."⁹⁷ Either event could also constitute a civil emergency addressed in the MACA and MSCA policies discussed above; if so, DoD coordinates provision of services among the applicable policies. MACDIS also applies to National Guard forces if the President orders them into Federal service. Otherwise, the National Guard, as discussed below, is under the command of the state's Governor.⁹⁸

MACDIS is based in the Insurrection Clause of the Constitution; the President must authorize deployment of forces for this purpose, based on the advice of the Attorney General, not

⁹³ *Id.* at 4.4.4.2.

⁹⁴ U.S. Dept. of Defense Directive 3025.15, Military Assistance to Civil Authorities (MACA) (Feb. 18, 1997) [hereinafter DoD Dir. 3025.15].

⁹⁵ *Id.* at 4.7.

⁹⁶ U.S. Dept. of Defense Directive 3025.12, Military Assistance for Civil Disturbances, E2.1.4. (Feb. 18, 1997) [hereinafter DoD Dir. 3025.12].

⁹⁷ *Id.* at E2.1.12.

⁹⁸ *Id.* at 4.5

from the Secretary of Defense.⁹⁹ Two exceptions to the requirement for Presidential authorization exist: when military forces are required “to prevent loss of life or wanton destruction of property, or to restore government functioning and public order,” and when civilian authorities cannot or will not protect federal property or functions.¹⁰⁰ In all circumstances, military troops must “maintain the primacy of civilian authority” and not take charge of the civilian government unless necessary in an “extreme emergency.”¹⁰¹

2.3.5. Phases Of Military Disaster Response Operations

Domestic disaster operations are normally conducted in stages: response, recovery, and restoration. Response operations focus on those life-sustaining functions required by the population in the disaster area. Recovery operations begin the process of returning the community infrastructure and services (both municipal and commercial) to a status that satisfies the needs of the population. Restoration is a long-term process that returns the community to pre-disaster normalcy.

The military has an important role in the relief and recovery stages, but restoration is primarily a civilian responsibility. Military forces will redeploy as operations transition from the response and recovery stages to the restoration stage. The role of the military is most intense in the response stage, decreasing steadily as the operation moves into the recovery and restoration stages. Military disaster response operations are conducted in five phases.

Phase 1: Pre-Disaster Activities - Preparations for life-saving missions begin on notice of the requirement for military support to include pre-positioning of resources near the disaster area.

Phase 2: Assessment - Assessment is a fundamental task for providing effective disaster assistance, requiring the integration and analysis of information from many different sources. DoD may deploy a disaster area survey team to the affected area to supplement the FEMA disaster assessment effort.

Phase 3: Initial Response Force - Response operations focus on the life-sustaining functions (*i.e.* food, water, shelter, medical, and power) required by the population in the disaster area. DoD may rapidly deploy an initial response force with capabilities to provide the life-sustaining functions.

Phase 4: Follow-on-Force - As the federal relief effort escalates, additional military forces may be rapidly deployed to the disaster area to assist in restoring essential public service.

Phase 5: Transition - The military's ultimate role in disaster response is to help a local community to return to a normal, pre-disaster status; that role must end as soon as practical. Consequently, the military does not compete with civilian commercial enterprises. As a commercial resource becomes more available, the military's provision of support and services can diminish. Disaster response operations require that end conditions be established to enable the affected population to know when military operations will cease and local support organizations are to continue the mission. Conditions must be definable and attainable.

⁹⁹ *Id.* at 4.22 and 4.8.1.1.

¹⁰⁰ *Id.* at 4.2.2.1. and 4.2.2.2.

¹⁰¹ *Id.* at 4.1.5. and 4.2.7.

2.3.6. Assistance To Civilian Law Enforcement Authorities

DoD Directive 5525.5, DoD Cooperation with Civilian Law Enforcement Officials,¹⁰² addresses DoD cooperation with civilian (state and local as well as federal) law enforcement. The Directive states that it is “DoD policy to cooperate with civilian law enforcement officials to the extent practical.”¹⁰³ Any cooperation “shall be consistent with the needs of national security and military preparedness, the historic tradition of limiting direct military involvement in civilian law enforcement activities, and the requirements of applicable law.”¹⁰⁴ Enclosure 4, Restrictions on Participation of DoD Personnel in Civilian Law Enforcement Activities, includes a list of permissible direct assistance that does not violate the Posse Comitatus Act. Allowed activities include:

- Actions to further a military or foreign affairs function of the United States. The Directive warns that “This provision must be used with caution, and does not include actions taken for the primary purpose of aiding civilian law enforcement officials or otherwise serving as a subterfuge to avoid restrictions.”¹⁰⁵ Allowed actions include investigations related to maintenance of law and order on a military installation or facility, including enforcement of the Uniform Code of Military Justice; and protection of classified military information, personnel, or equipment.¹⁰⁶
- Audits and investigations conducted by, under the direction of, or at the request of IG, DoD, subject to any applicable limits on direct participation in law enforcement activities.¹⁰⁷
- Actions that are taken to ensure preservation of public order and to carry out governmental operations. According to the Directive, “This authority is reserved for unusual circumstances”, and will be used only under DoD Directive 3025.12, “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” or to protect federal property if duly constituted local authorities are unable or decline to provide adequate protection.”¹⁰⁸
- Use of military forces during insurgency or domestic violence that hinders execution of state or federal law, based on DoD responsibilities under Title 10, Sections 331-334.¹⁰⁹
- Actions taken under express statutory authority allowing military participation in civilian law enforcement.¹¹⁰
- Except as elsewhere allowed, the PCA prohibits the following forms of direct assistance:
 - a. interdiction of a vehicle, vessel, aircraft, or other similar activity;

¹⁰² U.S. Dept. of Defense Directive 5525.5, DoD Cooperation With Civilian Law Enforcement Officials, (Jan. 15, 1985), Administrative Reissuance, [hereinafter DoD Dir. 5525.5]

¹⁰³ *Id.* at 4.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at E4.1.2.1.

¹⁰⁶ *Id.* at E4.1.2.1.1-6.

¹⁰⁷ 5 U.S.C. App § 3, 8(g) (2000); DoD Dir. 5525.5 *supra* note 106 at E4.1.2.2.

¹⁰⁸ *Id.* at E4.1.2.3.

¹⁰⁹ *Id.* at E4.1.2.4. Actions under this authority are governed by DoD Directive 3025.12, *supra* note 100.

¹¹⁰ DoD Dir. 5525.5, *supra* note 106 at E4.1.2.5.

- b. a search or seizure;
- c. an arrest, apprehension, stop and frisk, or similar activity; and
- d. Use of military personnel for surveillance or pursuit of individuals, or as undercover agents, informants, investigators, or interrogators.¹¹¹

2.4. Military Response Involving Weapons of Mass Destruction

The use of the military is specifically authorized in response to terrorist incidents involving chemical and biological weapons of mass destruction.¹¹² As discussed, the Defense Secretary may allow the use of military equipment (including supplies or spare parts), base facilities, or research facilities to any federal, state, or local civilian law enforcement official for law enforcement purposes.¹¹³ The statutes concerning WMD augment that authority, especially in connection with nuclear weapons. Also, reserves may be mobilized to support emergency preparedness programs and to respond to any emergency involving the use of a weapon of mass destruction.¹¹⁴

2.4.1. Nuclear Weapons

Title 18, Section 831 implements the Convention on the Physical Protection of Nuclear Material¹¹⁵ that obligates the United States to protect nuclear material during transport and in storage, and prohibits the illegal ownership or use of nuclear material, including use of nuclear materials that cause death. Punishment is a fine and up to twenty years imprisonment.¹¹⁶ The Attorney General may request assistance from the Secretary of Defense¹¹⁷ to enforce this section. Also, notwithstanding the PCA, the Secretary of Defense may provide assistance to the Attorney General to support law enforcement activities if an emergency situation exists and providing assistance will not adversely affect military preparedness. Here, an emergency situation is a circumstance that “poses a serious threat to the interests of the United States” and that “enforcement of the law would be seriously impaired if the assistance were not provided” and “civilian law enforcement personnel are not capable of enforcing the law.”¹¹⁸ Whether an emergency situation

¹¹¹ *Id.* at E4.1.3.1-4.

¹¹² The term “weapon of mass destruction” means any weapon or device that is intended, or has the capability, to cause death or serious bodily injury to a significant number of people through the release, dissemination, or impact of-- (A) toxic or poisonous chemicals or their precursors; (B) a disease organism; or (C) radiation or radioactivity. 50 U.S.C.S. § 2302 (Law. Co-op. 2001).

¹¹³ 10 U.S.C.S. § 372(a) (Law. Co-op. 2001). The Defense Secretary conducts a yearly briefing of each state’s law enforcement personnel, explaining how civilian officials can (a) obtain “information, equipment, training, expert advice, and other personnel support,” (b) obtain surplus military equipment, and (c) obtain “a description of the types of information, equipment and facilities, and training and advice available to civilian law enforcement officials from the Department of Defense,” including a “current, comprehensive list of military equipment which is suitable for law enforcement officials from the Department of Defense or available as surplus property from the Administrator of General Services.” 10 U.S.C.S. §§ 380(a)- (b) (Law. Co-op. 2001).

¹¹⁴ 10 U.S.C.S. §12304 (b) (Law. Co-op. 1998); 10 U.S.C.S. §12310 (c) (Law. Co-op. 1998). The term “weapon of mass destruction” means any weapon or device that is intended, or has the capability, to cause death or serious bodily injury to a significant number of people through the release, dissemination, or impact of-- (A) toxic or poisonous chemicals or their precursors; (B) a disease organism; or (C) radiation or radioactivity. 50 USCS § 2302 (Law. Co-op. 2001). 50 U.S.C.S. § 2302 (1)(1998)

¹¹⁵ 18 I.L.M. 1419, opened for signature Mar. 3, 1980, entered into force Feb. 8, 1987.

¹¹⁶ 18 U.S.C.S. § 831 (Law. Co-op. 2001).

¹¹⁷ 10 U.S.C.S. §§ 371 (Law. Co-op. 1998).

¹¹⁸ 18 U.S.C.S. § 831(e) (Law. Co-op. 2001).

exists is to be determined jointly by the Attorney General and the Secretary of Defense “in their discretion.”¹¹⁹

Assistance may include:

- “use of personnel of the Department of Defense to arrest persons and conduct searches and seizures with respect to violations of this section;” and
- “such other activity as is incidental to the enforcement of this section, or to the protection of persons or property from conduct that violates this section.”¹²⁰

2.4.2. Chemical or Biological Weapons

The Secretary of Defense may allow a federal, state, or local law enforcement or emergency response agency to use DoD materials to prepare for or respond to an emergency involving chemical or biological agents if the item is not reasonably available otherwise. These items include appropriate DoD materials or expertise, such as training facilities, sensors, protective clothing, and antidotes.¹²¹

Also, the Secretary of Defense may provide assistance to the Department of Justice in emergency situations involving a chemical or biological weapon of mass destruction. Assistance is allowed if “the Secretary of Defense and the Attorney General jointly determine that an emergency exists,” and that the Secretary of Defense determines that United States military preparedness would not be adversely affected.¹²² An emergency situation is defined as circumstances that involve a biological or chemical weapon of mass destruction that poses “a serious threat to the interests of the United States” and three factors exist: (1) civilian expertise and capabilities cannot immediately counter the threat; (2) the Defense Department’s “special capabilities and expertise . . . are necessary and critical to counter the threat posed by the weapon involved”; and (3) enforcement of laws against weapons of mass destruction¹²³ would be impaired if the Defense Department was not allowed to act.¹²⁴

Generally, military forces may “monitor, contain, disable, or dispose of the weapon involved or elements of the weapon.”¹²⁵ Though this statute prohibits the direct participation of military personnel in most cases, it allows direct participation in arrest, search and seizure, and intelligence collection when necessary to save human life and civilian authorities are unable to take the required action, as long as the action is otherwise authorized by law.¹²⁶ The Secretary of Defense and the Attorney General must prescribe regulations describing the actions that Department of Defense personnel may take in these circumstances. The regulations may not authorize arrest, direct

¹¹⁹ *Id.* § (e)(1)(a).

¹²⁰ *Id.* §§ (e)(3)(a)-(b).

¹²¹ 10 U.S.C.S. § 372 (b) (Law. Co-op. 1998). The requirement of a determination that an item is not reasonably available from another source does not apply to assistance provided under 10 U.S.C. §382, after a request for assistance by the Attorney General. *Id.*

¹²² 10 U.S.C. § 382 (a) (2000).

¹²³ *Id.* §175; *Id.* § 2332.

¹²⁴ *Id.* § 382(d).

¹²⁵ *Id.* § 382(c).

¹²⁶ *Id.* § 382(d); *see also* H.R. REP. NO. 104-724, at 819 (1996) (emphasizing that using the military in such circumstances “should be limited both in time and scope to dealing with the specific chemical or biological weapons-related incident”).

participation in conducting a search for or seizure of evidence, or direct participation in the collection of intelligence for law enforcement purposes.

Similarly, under Title 18 Sections 175(a) and 2332(e), the Attorney General (or other Justice Department officials) may request the Secretary of Defense to provide assistance in emergency situations involving a biological weapon.¹²⁷ Also, the Attorney General may request that the Secretary of Defense provide assistance¹²⁸ supporting Department of Justice activities¹²⁹ during an emergency situation involving a weapon of mass destruction. The Defense Secretary must “develop and maintain at least one domestic terrorism rapid response team composed of members of the Armed Forces and employees of the Department of Defense who are capable of aiding Federal, State, and local officials in the detection, neutralization, containment, dismantlement, and disposal of weapons of mass destruction containing chemical, biological, or related materials.”¹³⁰ Pursuant to this authority, DoD has formed the Response Task Force (RTF) and the Chem/Bio Quick Response Force (CBQRF).

According to Title 50 Section 2316(d), however, “The President shall take reasonable measures to reduce the reliance of civilian law enforcement officials on Department of Defense resources to counter the threat posed by the use or potential use of biological and chemical weapons of mass destruction within the United States. The measures include actions to increase civilian law enforcement expertise to counter such a threat and to improve coordination between civilian law enforcement officials and other sources of expertise, within and outside the Federal Government, to counter such a threat.”¹³¹ The President must report to Congress, including a description of the policy functions and operational roles of federal agencies in countering the threat of use or potential use of biological and chemical weapons of mass destruction within the United States and if the civilian law enforcement reliance on the federal government has been reduced.

3. THE NATIONAL GUARD

Use of the National Guard to respond to a terrorist event has been advocated in order to employ military capabilities without risking the problems of domestic involvement of the armed forces. The National Guard is designed to serve as states’ first line of defense against sudden, local disasters. It may enforce curfews, provide immediate logistical support for distributing needed supplies, or protect vulnerable areas. In addition, the President may order National Guard units to serve as full-time federal troops in the Army or Air Force. This section explains the complex connection between states’ National Guards and the National Guard of the United States, the duty status of Guardsmen and how the relationships are coordinated.

3.1. Legal Foundation

The National Guard is the modern militia reserved to the states by the ‘Militia Clauses’ of the Constitution.¹³² Article I, Section 8, Clause 15 authorizes Congress to provide for calling forth the

¹²⁷ 18 U.S.C.S. § 175(a) (Law. Co-op. 2001).

¹²⁸ 10 U.S.C. § 382 (2000).

¹²⁹ Relating to the enforcement of biological weapons criminal laws. *See* 18 U.S.C.S. § 2332a (Law. Co-op. 2001).

¹³⁰ 50 U.S.C.S. § 2314(a) (Law. Co-op. 2001).

¹³¹ *Id.* § 2316(d).

¹³² *Maryland for Use of Levin v. United States*, 381 U.S. 41, 46 (1965), *vacated on other grounds*, 382 U.S. 159, 159 (1965). The Virgin Islands National Guard was called into federal service for Hurricane Hugo, as was the California National Guard for the Los Angeles riots. Each Presidential order cited only chapter 15 of Title 10,

militia to execute the laws of the Union, suppress insurrections, and repel invasions. Clause 16 authorizes Congress to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states the appointment of the officers, and the authority for of training the militia as prescribed by Congress.

The Supreme Court described the two conflicting themes that motivated these clauses: the framers feared that a national standing Army would be an intolerable threat to individual liberty and to the sovereignty of the separate states, but they recognized the danger of relying on inadequately trained soldiers as the primary means of providing for the common defense. Thus, Congress has certain powers and responsibilities regarding the militia, but the selection of its officers and command and control remain with the states except during periods in the actual service of the United States.¹³³

3.2. The Dual-Component Status

In 1933, Congress created two overlapping, but distinct organizations--the National Guard of the various states (ARNG) and the National Guard of the United States (ARNGUS).¹³⁴ State ARNG members must simultaneously enroll in the ARNGUS.¹³⁵ Congress later limited the “National Guard of the United States” to the Army and created a separate Air National Guard of the United States.¹³⁶ Presently, the militia of the United States consists of two classes, organized and unorganized. The class consisting of the National Guard and the Naval Militia is the organized Militia.¹³⁷ The National Guard consists of the Army National Guard and the Air National Guard. The Army National Guard is the part of the organized militia that is a land force, is trained under the sixteenth Clause of Section 8, Article 1 of the Constitution, is organized, armed and equipped at least partially at federal expense, and is federally recognized.¹³⁸

A member of the National Guard belongs both to a state ARNG and the federal ARNGUS, and is a civilian when not in military status. A Governor may order a guardsman, as an ARNG member, to address an emergency within the state; the State pays all salary, benefits and other costs. Full-time members of the National Guard are not on “Active Duty”, which is limited to “full-time duty in the active military service of the United States.”¹³⁹ The President may order the same person to active duty as a federal ARNGUS member. In this situation, the federal government pays the salary, benefits and other costs, and the Federal Tort Claims Act protects the guardsman as a

without specifying any particular section. Lieutenant Colonel Steven B. Rich, *The National Guard, Drug Interdiction and Counterdrug Activities, and Posse Comitatus: The Meaning and Implications of "In Federal Service,"* 1994 ARMY LAW. 35, 39 n.36 (1994).

¹³³ United States *ex rel* v. Dern, 74 F.2d 485, 487 (D.C. Cir. 1934).

¹³⁴ National Defense Act Amendments of 1933, Pub. L. No. 73-64, 48 Stat. 153 (1933).

¹³⁵ 10 U.S.C. § 101(c)(3) (2000); 32 U.S.C. § 101(5) (2000); Johnson v. Powell, 414 F.2d 1060, 1063 (5th Cir. 1969).

¹³⁶ Armed Forces Reserve Act of 1952, Pub. L. No. 82-476, 66 Stat. 481, 498, 501 (1952). The definitions were further changed by the creation of the “Army National Guard of the United States.” Pub. L. No.1028, 70A Stat. 3 (1956).

¹³⁷ 10 U.S.C. § 311(b) (2000).

¹³⁸ *Id.* § 101(c).

¹³⁹ *Id.* § (d)(1).

federal employee. The National Guard, then, is only a potential part of the United States Armed Forces and does not become a part thereof until the requisite entry into active federal service.¹⁴⁰

Units or individual members of the National Guard may enter “active duty” (that is, federal service) in two ways. First, once ordered into Federal service, they serve as reserves of the Army.¹⁴¹

Duty performed as reserves of the Armed Forces is performed by the Army service, and the member has been temporarily disassociated from the State militia. Second, members of the ARNG (as such, and not as members of the ARNGUS) may be called into federal service under the President’s authority to federalize the militia¹⁴² -- while in federal service, the ARNG is a component of the Army.¹⁴³

While in active federal duty, guardsmen are relieved from service in the ARNG.¹⁴⁴ States’ authority to train the militia, reserved to them by the Militia Clause, does not apply to militia members who are on active duty in the ARNGUS.¹⁴⁵ “Although National Guard members receive federal pay and allowances, retirement points, certain medical benefits, and Federal Tort Claims Act protection while performing full-time National Guard Duty and IDT under Title 32,¹⁴⁶ this occurs in the status of the ARNG, not the ARNGUS.”¹⁴⁷ When not on active duty, “members of Army National Guard of the United States shall be administered, armed, equipped, and trained in their status as members of the Army National Guard.”¹⁴⁸

Thus, the Army includes, in addition to the Regular Army: the ARNGUS, a reserve component of the Army whose members must be members of the state ARNG;¹⁴⁹ the ARNG only

¹⁴⁰ *Id.* § 10103.

¹⁴¹ *Id.* § 12403. National Guard units were activated for Operation Desert Storm/Desert Shield. At first, it was under the Presidential “200 K” call-up authority of the appropriate code section. 10 U.S.C. § 12309 (2000). A subsequent partial mobilization occurred under the National Emergency provisions. 10 U.S.C. § 12309 (2000). Lieutenant Colonel Steven B. Rich, *The National Guard, Drug Interdiction and Counterdrug Activities, and Posse Comitatus: The Meaning and Implications of "In Federal Service,"* 1994 ARMY LAW. 35, 39 n.42. 10 U.S.C. § 673 was subsequently moved to 10 U.S.C.S. § 12302 in 1994. 10 U.S.C. § 673 (2000).

¹⁴² 10 U. S. C. §§ 331, 332, 333 (2001).

¹⁴³ *Id.* § 3062(c); *Id.* § 10106. An example of federalizing the militia occurred during the Los Angeles riots in 1992. 10 U.S.C. § 3062(c) (2000). Lieut. Colonel Steven B. Rich, *The National Guard, Drug Interdiction and Counterdrug Activities, and Posse Comitatus: The Meaning and Implications of "In Federal Service,"* 1994 ARMY LAW. 35, 39 n.41 (1994).

¹⁴⁴ 32 U.S.C. § 325 (1988).

¹⁴⁵ *Dukakis v. Department of Defense*, 686 F. Supp. 30, 36 (D. Mass 1988), *aff'd*, 859 F.2d 1066 (1st Cir. 1988).

¹⁴⁶ For purposes of laws providing benefits to members of the ARNGUS, their dependents and beneficiaries, full-time National Guard duty is deemed to be active duty in federal service. 10 U.S.C. § 12602 (2001). According to 28 U.S.C. § 2671 (2001), for purposes of the Federal Tort Claims Act, “employees of the government” includes members of the National Guard while in training or other duty under §§ 316, 502, 503, 504, or 505 of Title 32. The definition of “scope of employment” can include duty performed by a member of the state ARNG as defined by 32 U.S.C. § 101(3); *see* 28 U.S.C. § 2671 (2000); 32 U.S.C. § 715 (2001).

¹⁴⁷ Lieutenant Colonel Steven B. Rich, *The National Guard, Drug Interdiction and Counterdrug Activities, and Posse Comitatus: The Meaning and Implications of "In Federal Service,"* 1994 ARMY LAW. 35, 39 (1994).

¹⁴⁸ 10 U.S.C. § 10107 (2001).

¹⁴⁹ *Id.* §§ 101(c)(3), 10101, 10105, 3062 (c) (2001). We recognize that “the Guard is an essential reserve component of the Armed Forces of the United States.”). *Jorden v. National Guard Bureau*, 799 F.2d 101, 106 (3d Cir. 1986) (citing *Gilligan v. Morgan*, 93 S.Ct. 2440, 2444 (1973)). It is common knowledge that, in the event of a surprise attack, the Guard may be the first line of defense. *See* 32 U.S.C. § 102 (2000) (“It is essential that the strength and organization of the Army National Guard and the Air National Guard as an integral part of the first line defense of

while in service of the United States, and the Army Reserve.¹⁵⁰ Because the ARNGUS is the reserve component, Congress may order members into active service. An individual may be called without his/her consent but with the Governor's consent for up to fifteen days, an unspecified time with the consent of both the individual and the Governor, or in time of national emergency declared by the Congress or the President.¹⁵¹ The President, absent declaration of a national emergency, may order up to 200,000 members of the Selected Reserve to active duty. The President is required to report in writing to Congress within twenty-four hours the circumstances requiring the use of the Reserves and describing their anticipated use.¹⁵²

Authority over federalized members of the National Guard lies with the President, not the Governor; the Federal Uniform Code of Military Justice jurisdiction applies.¹⁵³ The Secretary of Defense has been delegated that authority.¹⁵⁴ Authority for law enforcement support to civilian officials has been delegated to the Secretary of the Army.¹⁵⁵ The Under Secretary of the Army may exercise the law enforcement support authority, and the Assistant Secretary of the Army (Installations, Logistics, and Environment) is the principal assistant, overseeing military support activities to civilian law enforcement and for disaster relief.¹⁵⁶

3.3. Application of the PCA to the National Guard

National Guard coverage under the PCA depends on its status. The ARNG -- the militia -- is a part of the Army only when in active federal service. The ARNG, unless called into federal service, are not "federal troops;" by definition, they are not within the PCA's coverage. Because command and control remains with the states, the perceived abuses of federal power that the PCA is designed to protect against could not occur.¹⁵⁷ A significant implication here is that the ARNG may engage in law enforcement activities; when called into federal service, however, the Posse Comitatus Act prohibits such activities.

the United States be maintained and assured at all times.") Indeed, Congress passed a resolution, Pub. L. No. 99-290, 100 Stat. 413 (1986), designed to "reaffirm Congressional recognition of the vital role played by members of the National Guard . . . in the nation's armed forces." H.R. REP. NO. 504, 99th Cong., 2d Sess. (1985), reprinted in 1986 U.S.C.C.A.N. 1294.

¹⁵⁰ 10 U.S.C. §§ 3062(c), 10104 (2001).

¹⁵¹ *Id.* § 12301(a), (b), (d).

¹⁵² *Id.* § 12304 (a)-(h).

¹⁵³ *Id.* § 802 (a)(3).

¹⁵⁴ 32 U.S.C. §§ 110, 940, 12103 (d) (2001).

¹⁵⁵ Dep't of Defense, Directive 3025.1, Military Support to Civil Authorities (MSCA), para. 3a (Jan. 15, 1993).

¹⁵⁶ 10 U.S.C. § 136 (2001).

¹⁵⁷ *United States v. Benish*, 5 F.3d 20 (3d Cir. 1993); *United States v. Kyllo*, 809 F. Supp. 787, 793 (D. Ore. 1992) (holding that PCA does not apply to National Guard).

3.4. State Authority and Responsibility

The Governor is in charge of the National Guard (NG) in each state except when called into active federal service where, of course, the President is the “Commander in Chief.” When the NG is in a non-federal status, the Governor, as each State's Chief Executive Officer as well as the state Commander of the Army and Air National Guard, may order the National Guard to take specific action in response to contingency operations. While serving in state status, the NG provides military support to civilian authorities, including law enforcement, in accordance with state law. Federal equipment assigned to the NG may be used for emergency support on an incremental cost reimbursement basis.

3.4.1. The State Adjutant General and Supporting Officials

The Governor administers the Guard through the State Adjutant General (AG) or Commanding General (CG) who administers the state's National Guard program. Although the Governor is in command, the AG is actually in charge of State National Guard forces called to State Active Duty. Each office may administer the requirements of both Army and Air National Guard elements located in the State.

The AG, working through the State Area Command (STARC) and the Plans, Operations, and Military Support Officer (POMSO), coordinates the response plans for state emergencies. The STARC is a mobilization entity in each state and territory, responsible for emergency planning and response using all National Guard resources. It organizes, trains, plans, and coordinates the mobilization of National Guard units and elements for state and federal missions. It directs the deployment and use of Army Reserve National Guard (ARNG) units and elements for domestic support operations, including military support to civilian authorities. Within each state, the Plans, Operations, and Military Support Officer (POMSO) plans for disaster response and recovery operations within the full spectrum of military support missions. S/he coordinates training, plans and exercises between the state NG and federal, state, and local emergency management agencies.

3.4.2. Liaison Officers

United States Property and Fiscal Officers (USPFOs) work for the Chief National Guard Bureau and are detailed for duty in each state. They are accountable for all federal resources provided to each state's National Guard. The USPFO staff provide supply, transportation, contracting and financial support. The USPFOs can be a support installation for active components or reserve forces on a reimbursable basis. The Executive Staff Support Officer (ESSO) is the Air National Guard point of contact with the DoD during a federally declared disaster. The ESSO acts as the chief executive officer for the AAG Air.

Representatives from the Services are Emergency Preparedness Liaison Officers (EPLOs) to each State NG. As service planning agents' representatives to TAGs and STARCs, they plan and coordinate the execution of national security emergency preparedness (NSEP) plans, performing duty with the STARC's. EPLOs are Army, Navy, and Air Force Reservists who have been trained in disaster preparedness and military support matters. They report to an active duty program manager or planning agent who provides (or seeks further approval of) military support to the state. EPLOs must know their respective service facilities and monitor relevant DoD resources. Upon appointment of the DCO, EPLOs may be ordered to active duty to serve as liaison representatives to the STARCs and their respective services.

3.5. Federal Administration and Coordination

3.5.1. National Guard Bureau (NGB)

The NGB is the federal coordination, administrative, policy, and logistical center for the Army and Air National Guard. It serves as the legal channel of communications among the United States Army and Air Force, and the National Guard. The laws pertaining to the federal role of the National Guard are contained in Title 10 of the code, while laws relating to state/territorial roles are contained in Title 32. The NGB is responsible for contracting for and managing supplies, providing meals and medical services, removing waste and debris, providing power generation and communications, and repairing vehicles and equipment. The Adjutant General must periodically report to the National Guard Bureau on the guard's reserve status.

3.5.2. WMD Civil Support Teams (WMD CST's), Formerly RAID Teams

The mission of the WMD CST's is to deploy to an area of operations to assess a suspected nuclear, biological, chemical or radiological event in support of the local incident commander; advise civilian responders as to appropriate action; and facilitate requests for assistance to expedite arrival of additional state and federal assets to help save lives, prevent human suffering, and mitigate great property damage.

4. LEGISLATED PRESIDENTIAL AUTHORITIES

As discussed earlier in this Chapter, Congress can, and has, specifically authorized the President to deal with interference with communications channels, energy sources, food and health supplies, public health necessities, or transportation capabilities, and has authorized surveillance of potential lawbreakers or initiation of emergency preparedness measures. In addition, the President has issued Executive Orders that specify authorities for emergencies. Notably, Executive Order No. 12656 catalogs the President's emergency powers, including the use of military personnel and civilian law enforcement, regulation of aliens, imposition of wage and price controls, control of civilian transportation, acquisition and lease of property, and control of civilian nuclear plants. This authority may be triggered by "any occurrence . . . or other emergency, that seriously degrades or seriously threatens the national security of the United States."¹⁵⁸

This section discusses some important authorizations. Two issues pertain to many of these enactments and orders: (1) Do the specified authorities apply to a terrorist event or are they more limited in application, *e.g.*, only to war (and, if so, does that mean only following a formal Declaration of War)? and (2) Is congressional approval or some positive action required before the authority may be exercised?

4.1. Communications

The importance of maintaining reliable channels of communications escalates during a national crisis. In recognition of this sentiment, the following statutes have been created.

47 U.S.C. §308 -- During time of war or national emergency declared by the President or Congress (or at the FCC's discretion, if necessary), the FCC may waive the requirement that all radio station licenses, renewals, modifications, and construction permits be obtained only upon written application. No Congressional notification is required. In addition, the FCC may issue a

¹⁵⁸ Exec. Order No. 12,656, 53 Fed. Reg. 47,491 (Nov. 18, 1988).

permit, in lieu of a license, for the operation of a communication station on a vessel of the United States at sea. This permit shall remain effective until the vessel returns to a port of the continental United States.

47 U.S.C. §606(a) -- During the continuance of war in which the United States is engaged, the President is authorized to direct and control the priority use of any communications carrier that the President decides is necessary for national defense and security of the U.S. The President, the FCC, or any Presidential designee may give directions and may modify, suspend or annul these directions for any authorized purpose. Carriers that comply with such directions shall be exempt from all liabilities or penalties contained in existing law. No congressional notification is required.

47 U.S.C. §606(b) -- It is unlawful for any person to knowingly obstruct, by physical force or by intimidation through threats of physical force, interstate or foreign communication during any war in which the United States is engaged. The President is authorized to employ the armed forces to prevent obstructions when the public interest so requires.

47 U.S.C. §606(c) -- Upon a Presidential proclamation that there exists a war or threat of war, a state of public peril, a disaster or other national emergency, or in order to maintain the neutrality of the United States, the President may suspend or amend rules for stations capable of transmitting electromagnetic radiation within the United States. The President may also close or control any station or equipment used for radio communication that is capable of emitting electromagnetic radiation between 10 kilocycles and 100,000 megacycles. Also, the President may authorize any federal department to use or control any station or device with just compensation to the owners.

47 U.S.C. §606(d) -- The President may suspend or amend rules applicable to all facilities used for wire communications, upon Presidential proclamation that there exists a state or threat of war. Additionally, the President may order closure of any such facility and removal of its equipment as well as authorize controlling such a facility through any designated federal department, provided there is just compensation to the owners. No congressional notification is required.

4.2. Energy

42 U.S.C. §2138 -- In a declared state of war or national emergency or when the NRC finds it necessary for defense and security, the NRC is authorized to suspend licenses and to order the recapture of special nuclear material; it may order entry into any plant to facilitate the recapture such material. The Commission may also order the operation of any licensed nuclear facility.

4.3. Resource Use

The Defense Priorities and Allocations System (DPAS) creates legal requirements for all persons who receive priority-rated contracts or orders under the terms of the Defense Production Act of 1950 or for FEMA-approved emergency preparedness activities under Section 602 of the Stafford Act.¹⁵⁹ FEMA and other designated federal agencies have authority to place priority ratings on “contracts or orders necessary or appropriate to promote the national defense”¹⁶⁰ or for a “disaster situation that is serious enough to require Federal intervention and assistance, and timely delivery of urgently required ...products, materials and/or services [that] cannot otherwise be obtained.”¹⁶¹

¹⁵⁹ 50 U.S.C. app. § 2061 *et seq.*; 15 C.F.R. § 700 (2002)

¹⁶⁰ 15 C.F.R. § 700.2(c) (2002).

¹⁶¹ Office of Strategic Industries and Economic Security, U.S. Dept. of Commerce, DPAS, Defense Priorities and

A DPAS priority rating requires that the supplier give the contract or order preferential treatment over other pending orders. In addition, rated orders must be subject to the same terms and conditions as unrated orders, to prevent price discrimination.¹⁶² Suppliers need not be existing government contractors to be subject to DPAS terms and conditions. In a national emergency, special supplemental rules may be adopted to allocate scarce materials and facilities.¹⁶³ The Secretary of Commerce also has authority to control general distribution of scarce goods in the civilian market that are required for the emergency.¹⁶⁴ If communications are severed during a national emergency, Regional Emergency Coordinators have the authority to represent the Secretary of Commerce in carrying out DPAS functions.¹⁶⁵

Various additional statutes authorize action to ensure that necessary resources are available to provide for the public interest.

10 U.S.C. §2538 (formerly 10 U.S.C. §4501, §9501) -- In a time of war or when war is imminent, the President, through the head of any department, may order necessary products or materials from any person or organized manufacturing industry, so long as the products or materials are usually produced or capable of being produced by that person or industry. Any person or industry so ordered must make the order its primary priority. Similarly, in a time of war or when war is imminent, the President, through the head of any department, may take immediate possession of any plant equipped, or capable of being readily equipped, for the manufacture of arms, ammunition, or parts if the owner refuses to comply with a Presidential order. An owner fails to comply if it refuses to give precedence to the Presidential order, to manufacture the kind, quantity, or quality of supplies needed, or fails to furnish the supplies at a reasonable price as determined by the head of such department. Failure to comply can result in imprisonment of up to three years.

50 U.S.C. §82 -- In times of war, the President is authorized to place an order for ships or war material which are usually produced by that person. Compliance with such orders is obligatory, and such orders must take precedence over all other existing contracts or requests placed with such a person. The President may take immediate possession of an entire or part of a facility, or of any person who refuses to give the United States order precedence, or fails to manufacture the kind of ships so ordered at a reasonable price. In addition, the President may require the output of such a factory to be placed at the disposal of the United States and to be delivered at a specified destination for a reasonable price. An existing contract between the United States and such a facility is not required.

Executive Order No. 12742 -- With respect to Title 10, Sections 4501 and 9501, now encompassed in Title 10, Section 2538 above, as well as Title 50, Section 82, former President George Bush Sr. enacted Executive Order No. 12742, delegating the President's authority under those statutes to:

- the Secretary of Agriculture for all food resources;
- the Secretary of Energy for all forms of energy;
- the Secretary of Transportation for all forms of civil transportation; and

Allocation System, at B-20 (Aug. 1998).

¹⁶² 15 C.F.R. § 700.3 (2002).

¹⁶³ *Id.* § 700.4.

¹⁶⁴ *Id.* § 700.30(a)(3).

¹⁶⁵ *Id.* § 700.30(b).

- the Secretary of Commerce for other products, and materials, including construction materials.

50 U.S.C. §98f(a)(2) -- In a time of declared war or during a national emergency, Presidentially designated officers may authorize the release of stockpile material for the purposes of the national defense. It is important to note that Title 50 Section 98h-3, defines the term “national emergency” as a general declaration of emergency announced by the President or by Congress concerning the national defense.

50 U.S.C. §1701 - §1706 -- To deal with an unusual or extraordinary threat to the national security, foreign policy, or national economy that substantially originates outside the United States, the President may declare a national emergency and, thereupon, may investigate, regulate, or prohibit:

- transactions in foreign exchange;
- transfers of credit involving any banking institution and any foreign country;
- the import/export of currency or securities; and
- any transaction involving any property subject to the jurisdiction of the United States in which a foreign country or national thereof has an interest.

In exercising this authority, the President may require a person to maintain a full record and report of any such transaction. Whenever possible, the President should consult with Congress prior to exercising such authority. Exercise of such authority should immediately be followed by a report to Congress specifying the circumstances that necessitate the exercise of such power, and the actions to be taken.

50 U.S.C. App. §2093(a) -- The President may execute a contract for the purchase of an industrial resource or critical technology item for government use. The President may also make provisions for to encourage exploration, development, and mining of critical and strategic materials. However, as a prerequisite to either authority, the President must determine that the resource or technology is essential to the national defense, the need for the item exceeds domestic industry’s output capability without Presidential action, and that such contracts are the most cost-effective and practical alternative.

4.4. Prevention of Hoarding

If, following an incident such as a terrorist attack, persons accumulate unreasonable amounts of necessary commodities either for their own use or for resale at excessive prices, the federal government may act to prevent such hoarding.

42 U.S.C. §5196(i) -- The FEMA Director may procure or maintain, by condemnation or otherwise, materials and facilities for emergency preparedness; possession thereof may be taken immediately and used before the Attorney General approves title. The Director can lease any real property acquired for emergency preparedness but shall not acquire fee title to the property unless specifically authorized. The Director can also procure and maintain radiological, chemical, bacteriological, and biological agent monitoring devices, which may be granted or loaned to a state for emergency preparedness.

50 U.S.C. App. §2072 - 2073 -- To prevent hoarding of scarce materials, the President may designate certain materials as scarce. Any person accumulating such scarce materials in excess of reasonable needs of business, personal, or home consumption, or to resell at prices exceeding the prevailing market prices may be fined up to \$10,000 and/or imprisoned for up to one year.

4.5. Electronic Surveillance

50 U.S.C. §1811 -- Following a declaration of war, the President, through the Attorney General, may authorize the use of electronic surveillance to obtain foreign intelligence without a court order. Such surveillance may not exceed a period of 15 days.

4.6. Public Health

42 U.S.C. §217 -- Upon declaration of war or national emergency, the President may utilize the Public Health Service as needed to promote the public interest. This authority includes the issuing of an executive order declaring the commissioned corps of the Service to be a military service.

42 U.S.C. §266 -- In order to protect the armed forces and war workers of the United States during a time of war, the Surgeon General, upon recommendation of the NAHC, may provide regulations to apprehend, examine, and detain any person reasonably believed to be infected with a communicable disease. If such a person is found to be infected, and may constitute a source of infection to members of the armed forces or suppliers thereof, that individual may be detained for as long as reasonably necessary.

42 U.S.C. §264 -- The Surgeon General, upon the approval of the HHS Secretary, may make and enforce necessary regulations to prevent the introduction, transmission, or spread of communicable diseases. This authority includes ordering inspections, fumigation, pest extermination, and destruction of infected animals or articles. However, this authority extends only to persons traveling interstate or from a foreign country. Neither this statute nor the regulatory program establishes a national quarantine system for citizens within a state.

42 U.S.C. §243 -- The HHS Secretary may accept assistance from state or local authorities regarding the enforcement of quarantine regulations. The Secretary shall also cooperate with and assist the states to suppress communicable diseases. The Secretary shall encourage the states to cooperate in developing plans for future health needs, including training personnel for state and local health work. In doing so, the Secretary is authorized to develop a plan under which personnel, equipment, medical supplies, and other resources of the Service and other agencies under the jurisdiction of the Secretary may be used to control epidemics of any disease and to meet other health emergencies or problems.

4.7. Transportation

10 U.S.C. §2644 -- In a time of war, the President, through the Secretary of Defense, may take possession and assume control of transportation systems to transport troops, war materials, and equipment, or for other emergency purposes. The President can exclude other traffic from the transportation system.

4.8. Emergency Preparation

The Stafford Act is the general authorization for emergency planning. There are several Executive Orders relevant to this authority, including the following:

E.O. 12656 -- As noted, this Order addresses “any occurrence . . . or other emergency, that seriously degrades or seriously threatens the national security of the United States.” It assigns responsibilities for national security emergency preparedness to the various federal departments and agencies. Under the direction of the President, the National Security Council develops and administers the policy. Preparedness functions and activities include, “as appropriate, policies, plans, procedures, and readiness measures that enhance the ability of the United States Government to mobilize for, respond to, and recover from a national security emergency.”¹⁶⁶

E.O. 13010 -- Certain infrastructures are so vital that their destruction would have a debilitating impact on national defense: telecommunications, electrical power systems, gas and oil storage and transportation, banking and finance, transportation, water supply systems, emergency services, and government continuity. To protect such systems, the Order established the President’s Commission on Critical Infrastructure Protection.

E.O. 13130 -- Under this Order, President Bill Clinton established the National Infrastructure Assurance Council (NIAC). The members of the NIAC shall be no more than 30 in number, and are selected from state and local government and the private sector. The goals of NIAC include the development of a partnership between the public and private sectors in protecting crucial infrastructures, encouraging private industry to conduct periodic risk assessments of critical processes, monitoring the development of Private Sector Information Sharing and Analysis Center, and advising lead agencies with critical infrastructure responsibilities.

¹⁶⁶ Exec. Order No. 12,656, 53 Fed. Reg. 47,491 (Nov. 18, 1988).

CHAPTER III -- STATE AND LOCAL EMERGENCY RESTRICTIONS

INTRODUCTION

The Tenth Amendment vests responsibility for coping with emergencies, including terrorist events, in the states which have primary jurisdiction to undertake consequence management. Preservation of public health is the most important duty incumbent upon the State.¹ This police power is not explicitly limited but is co-extensive with the threat to the public interest. “Thus on the state level, the power to provide for and protect the public health is a basic, inherent power of the government.”² “Inspection laws, quarantine laws, and health laws of every description are component parts of this mass.”³ Justice Holmes noted that:

[P]ublic danger warrants the substitution of executive for judicial process; and the ordinary rights of individuals must yield to what the executive honestly deems the necessities of a critical moment. When it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment.⁴

In the event of a terrorist attack and the ensuing mass chaos, state or local officials might need to restrict fundamental liberties, especially freedom of movement, for at least three reasons. First and perhaps of narrowest impact, movement of rescuers, equipment, and supplies could demand precedence over personal travel; officials might seek to disencumber highways or airports or to prevent crowding at a site. Second and perhaps of widest impact, in the event of a biological attack, officials might have to prevent personal movement to reduce the potential for spreading contagion. Third, a catastrophic terrorist attack could incite riots or vigilante attacks against ethnic groups perceived to be associated with the attackers; restrictions on liberty might be necessary to restore law and order.

Emergency restrictions bring into sharp contrast each American’s right to freedom of movement with the authority of state and local officials to protect the public. The “constitutional right to travel from one state to another” is firmly embedded in our jurisprudence.⁵ Yet even traffic

¹ *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905).

² FRANK GRAD, *PUBLIC HEALTH LAW MANUAL* 10 (2nd ed., American Public Health Association 1990). “[T]here are circumstances in which a public emergency, for instance, a fire, the spread of infectious or contagious diseases or other potential public calamity, presents an exigent circumstance before which all private rights must immediately give way under the government’s police power.” *Davis v. City of South Bay*, 433 So. 2d 1364, 1366 (Fla. Dist. Ct. App. 1983).

³ *Gibbons v. Ogden*, 22 U.S. 1, 87 (1824); *see also*, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475-7 (1996).

⁴ *Moyer v. Peabody*, 212 U.S. 78, 85 (1909). “By virtue of his duty to ‘cause the laws to be faithfully executed,’ the executive is appropriately vested with the discretion to determine whether an exigency requiring military aid for that purpose has arisen. His decision to that effect is conclusive.” *Sterling v. Constantin*, 287 U.S. 378, 399 (1936).

⁵ *Saenz v. Rue*, 526 U.S. 489, 498 (1999); *see also* *United States v. Guest*, 383 U.S. 745, 758 (1966) (the right to interstate travel originated in the Articles of Confederation and is a “necessary concomitant of the stronger Union the Constitution created); *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969). The Supreme Court has suggested that some more generalized right to movement may exist. *See, e.g., Kent v. Dulles*, 357 U.S. 116, 126 (1958) (“Freedom of movement is basic in our scheme of values.”); Justice Douglas noted that “wandering or strolling” from place to

restrictions (although they have been easily sustained) implicate a substantive right of free movement.⁶ The right to travel must be balanced against the state's police power to protect the compelling needs of the public health, safety, morals, and general welfare.⁷ To protect society, the police power may justify severe restraint of personal liberty such as preventing passage into or out of an infected district in order to limit contagion.⁸ More accurately, a citizen may not be deprived of the right to travel *without* due process of law; thus, this right may be restricted *with* due process of law.

The constitutional protection of freedom of travel “does not mean that areas ravaged by flood, fire or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the area would directly and materially interfere with the safety and welfare of the area.”⁹ Yet, even in emergencies, restrictions on personal movement must be imposed in good faith and with actual basis that the restrictions are necessary.¹⁰ Neither personal liberty nor official authority is absolute. The legality of a restriction depends on case-specific factors: who imposes it; how serious is the need for the restriction; how unbiased is it; and do restricted persons have means to sustain their health and well-being. Restrictions that violate legal standards may be struck down or even give rise to liability claims.

Thus, the issue here is not whether Americans have a right to travel (we do), nor is it whether the Governor has authority to restrict travel when necessary to protect the public (s/he does); the issue here is what travel restrictions cross the boundary of reasonableness and necessity such that a court will deny their enforcement. Part I of this chapter discusses statutory authorization for state or local emergency response efforts, including restrictions on movement. Part II of this chapter discusses judicial review of restrictive measures. [*Relevant liability issues are discussed in Chapter IV.*]

place was historically part of the “amenities of life.” *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972).

⁶ A The right to travel upon the public streets of a city is a part of every individual's liberty, protected by the Due Process Clause of the 14th Amendment to the United States Constitution. “[T]he familiar traffic light is, however, an every present reminder that this segment of liberty is not absolute. It may be regulated, as to the time and manner of its exercise, when reasonably deemed necessary to the public safety, by laws reasonably adapted to the attainment of that objective.” *State v. Dobbins*, 277 N.C. 484, 497 (N.C. Sup. Ct. 1971).

⁷ See *Lutz v. City of New York*, 899 F.2d 255, 268 (3d Cir. 1990) (ordinance outlawing “cruising,” *i.e.* driving repeatedly around loop of public roads, implicated substantive due process right to “move freely about one's neighborhood or town,” but was upheld under intermediate scrutiny test derived from First Amendment time, place, and manner doctrine); see also *Townes v. City of St. Louis*, 949 F. Supp. 731 (E.D. Mo. 1996) (heightened scrutiny applied when resident claimed that city's placement of large flower pots across the entrance to her block infringed her fundamental right to localized travel but holding the ordinance would survive intermediate scrutiny), *aff'd*, 112 F.3d 514 (8th Cir. 1997).

⁸ *Compagnie Francaise etc. v. Louisiana State Board of Health*, 186 U. S. 380, 385 (1902).

⁹ *Zemel v. Rusk*, 381 U.S. 1, 15 (1965).

¹⁰ *Smith v. Avino*, 91 F.3d. 105, 109 (11th Cir. 1996).

1. STATE EMERGENCY AUTHORITIES

A catastrophic terrorist attack will create an immediate emergency in every locality where it strikes. Before any disaster draws a national response, states and localities will have to use established emergency preparedness frameworks to address the occurrences. During the attack itself, responsible officials must be certain of who is legally authorized to perform which functions. This section looks at existing emergency planning requirements, authorities, funding and training, and at quarantines and travel restrictions, as the basis for local responses to terrorist acts.

1.1. Federal Support for State Emergency Planning

A primary purpose of the Stafford Disaster Relief and Emergency Assistance Act (Act) (discussed in Chapter I), is to promote federal and state programs for responding to emergencies and disasters. The Act establishes and maintains coordinated federal, state and regional actions to prepare for, respond to and resolve anticipated hazards.¹¹ The Act grants the FEMA Director authority to:

- prepare response plans and programs along with other federal departments and agencies;
- develop preparedness measures and develop and conduct training programs;
- encourage states to enter into interstate preparedness agreements and review them for uniformity with federal plans;
- obtain necessary materials and facilities and give matching contributions to states for obtaining materials and facilities and for constructing emergency preparedness centers; and
- obtain, for loan or grant to states, “radiological, chemical, bacteriological, and biological agent monitoring and decontamination devices.”¹²

The federal government provides a one-time grant not to exceed an aggregate \$250,000 for each State to assist in developing comprehensive emergency plans and programs. To receive this grant, the State must submit a comprehensive disaster preparedness program to the FEMA Director, setting forth provisions for both emergency preparedness and permanent assistance. The plan must:

- be mandatory and apply to all political subdivisions of the State;
- be administered by a single state agency, under a full-time director or deputy director;
- require development of state and local preparedness plans that meet FEMA standards;
- provide for reporting, as required, to FEMA;
- allow for audits; and
- be submitted to FEMA within sixty days after receiving notice of the State’s allocation.¹³

¹¹ 42 U.S.C. §§ 5195, 5195a (2000); Exec. Order No. 12,656, 53 Fed. Reg. 47,491 (Nov. 23, 1988) “Assignment of Emergency Preparedness Activities” extends the FEMA Director’s responsibilities to preparing for responses to national emergencies. A “national security emergency” is “any occurrence, including natural disaster, military attack, technological emergency, or other emergency, that seriously degrades or seriously threatens the national security of the United States.” *Id.* at Part I, § 101(a).

¹² 42 U.S.C. § 5196 (2000).

¹³ *Id.* § 5196b(a)-(f).

It must also provide for the appointment and training of appropriate staff and for the formulation of necessary regulations and procedures. Matching grants of 50% to the states (not in excess of \$50,000) are available for revision and updating of disaster assistance plans.¹⁴

In addition to the Stafford Act, the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) requires state and local planners to identify potential risks and notify the public of any releases of hazardous substances.¹⁵ EPCRA requires that each state establish an emergency response commission which in turn must appoint and supervise local emergency planning committees for addressing releases of hazardous substances.¹⁶ The State Emergency Response Commission must also establish procedures to receive and process public requests for information.¹⁷

Within nine months of the law's enactment, each commission must designate emergency planning districts to facilitate preparation and implementation of emergency plans. The State Commission appoints members of a local emergency planning committee for each district that must prepare an emergency response plan. Local planning committees must submit their plans to their State Emergency Response Commission which "shall review the plan and make recommendations to the committee on revisions of the plan that may be necessary to ensure coordination" with those of other planning districts.¹⁸

The response plans must designate responsible officials as well as identify relevant facilities, methods the facilities must follow, and "[p]rocedures providing reliable, effective, and timely notification by the facility emergency coordinators and the community emergency coordinator to persons designated in the emergency plan, and to the public, that a release has occurred..."¹⁹ In addition, plans must describe available emergency resources including equipment nearby and at facilities, measures to minimize risks to human health and the environment, evacuation plans, and training programs. There is no provision, however, allowing the federal government, state government or private citizen to challenge a nonexistent or incomplete state or local plan. Nor may citizens prevent locally elected government officials from implementing an emergency response plan.²⁰

1.2. The Governor's Authority

[The following sections are generalized, describing essential authorities common in all states. Particular examples are noted parenthetically.]

The Governor is the state's overall director of emergency management. The Governor's general powers include authority to appoint an Adjutant General and mobilize the national guard, transfer and direct state personnel for emergency management purposes, direct the evacuation of all or part of the population, commandeer or use private property, suspend state statutes as necessary (in Tennessee, for example, the Governor may authorize the emergency management agency to amend

¹⁴ *Id.* §5131.

¹⁵ Codified at 42 U.S.C. §§11001-11050 (1995).

¹⁶ *Id.* § 11001.

¹⁷ *Id.* § 11044

¹⁸ *Id.* § 11003.

¹⁹ *Id.* § 11003.

²⁰ *Vernet v. Town of Exeter*, 523 A.2d 48, 50 (1986).

or rescind laws as necessary during an emergency), authorize emergency funds, and enter into mutual aid agreements with other states. For states with an emergency management advisory commission, the Governor appoints its members and serves as chair.

Typically, the legislature creates a State Emergency Management Agency or Commission which is delegated the Governor's authority to allocate resources in an emergency. It may be located in the Governor's office, the Department of Military Affairs, the Department of Public Safety, the Department of Community Affairs, or under the State Police. Almost always, the Governor appoints that agency's Director (in Oregon, the State Police superintendent appoints the Director; in Arizona and Maryland, the Adjutant General does so).

The emergency agency has lead responsibility to appoint county and local directors of emergency planning organizations, establish local planning districts, and prepare a comprehensive emergency management plan for submission to the Governor. (In a few states, the Governor retains direct responsibility for these tasks: in Pennsylvania, Maryland to appoint local directors; in Alaska, Texas to establish local districts; in Alabama to prepare the plan.) It generally oversees implementation of state emergency management functions as required by federal law. In some states, the agency certifies state and local relief agencies, and registers and classifies relief workers for compensation, liability, and management purposes (California). A primary responsibility is to ensure a rapid and effective disaster communication systems to be used by disaster relief employees operating in different jurisdictions. The agency is also in charge of collecting and disseminating information regarding hazardous materials from facility owners and operators.

The State Adjutant General is responsible for organizing and training the National Guard which, at the Governor's discretion, provides staff and equipment for emergencies. The Adjutant General is also responsible for emergency management activities not expressly reserved to the Governor. S/he sits on the emergency management advisory commission in order to advise the Governor on military affairs (in Missouri, s/he heads the agency).

The Attorney General handles all state claims arising out of the implementation of emergency plans, including claims for reimbursement of state funds or for compensation by the State for use of private property. In some states, the Attorney General may restrict and control the flow of vehicular traffic (New Jersey), although this power is usually reserved for the Governor.

Local planning committees appointed by local officials prepare and maintain local plans, coordinate emergency management organizations, and arrange training exercises. They also execute mutual aid agreements with other planning districts and other states. Local districts that cannot establish their own planning committees (due to lack of resources and population) may combine to do so, or the locality may appoint a liaison officer to the State Emergency Management Agency. In some states, if the local committee cannot manage the disaster, the State Emergency Management Agency assumes direction of local disaster operations (New York).

In most states, firefighting response is handled by local fire officials. Search and rescue operations are the responsibility of sheriffs' departments although the State Emergency Management Agency usually appoints a coordinator for such operations. In some states, a local planning committee having jurisdiction within the zone of a commercial nuclear reactor is required to submit a radiological emergency response plan to the state director, providing for evacuation in the event of a dangerous release of radiation (Maryland).

Most states have adopted by legislation or executive order the Incident Command Structure

(ICS) that is designed to ensure effective procedures for the various agencies that must jointly plan and execute disaster response; it also facilitates integration of federal assistance into state and local response efforts. It consists of a modular organization, integrated communications, a unified command structure, consolidated action plans, pre-designed incident facilities, a manageable span of control, and comprehensive resource management.

1.2.1. Declarations and Orders

Most states authorize the Governor to issue executive orders in an emergency even without complying with procedural safeguards or defined process that other laws require. These orders, legally binding on all state political subdivisions, public agencies, officials and employees, typically have three parts. The first part establishes the purpose of the order, details the actions that the Governor plans to take, and cites the Governor's legal authority. The second part is a broad statement invoking the Governor's powers. The final section contains the substance of the order. In most states, however, a long-term solution to a problem cannot be addressed by executive orders unless the legislature declares a continuing emergency.

The Governor may declare a state of emergency by issuing an executive order. This declaration initiates the Governor's emergency powers for a statutory period (*i.e.* 30 days in Illinois) that can be lengthened at the Governor's request and legislative approval. If the Governor is inaccessible, authority to declare a state of emergency follows the statutory/constitutional line of succession. In some states, the emergency management agency has this authority if the Governor is inaccessible or absent (California, Arizona). Local jurisdictions may declare a local state of emergency. In general, the Governor by rescinding the initial order, or the legislature by joint resolution, has the power to terminate a state emergency. The Governor is responsible for notifying the public of rules and regulations issued during a state of emergency; local emergency management districts disseminate these orders to judicial and law enforcement authorities. Generally, the Governor's Chief of Staff is the principal contact in the Governor's office for emergency management.

1.2.2. Mitigation Measures

To support emergency management activities, states set requirements on individuals, companies and on state agencies to assure advance preparation that will mitigate the effects of a disaster. States require that facility owners/operators register hazardous materials; the state emergency management agency collects and maintains that information. Local fire fighting organizations are in charge of inspecting facilities reporting hazardous materials. Some states have hazmat response teams to be activated in a hazardous material emergency. When authorized to respond to a hazardous release, these teams may enter onto any private or public property where the release has occurred or where there is an imminent threat of such release; they may also enter an adjacent or surrounding property to monitor, control, or contain the release or perform any other mitigation activity.

Some states have set up committees that address specific types of disasters and propose mitigation measures. To cope with a disaster that may cause disease, some states authorize the State Board of Health to establish preventative programs. Most states require local planning districts to establish a voluntary register of persons needing assistance during an emergency (such as the handicapped, the infirm, and others with disability) and to file those registries with the State Emergency Management Agency. These registries are used to provide special services during an

evacuation. If the Governor orders evacuation of persons from an area, state and county departments of health, local police, militia, and/or National Guard would carry out those orders.

In most states, publicly funded schools would operate as mass care facilities. School buses and other forms of publicly funded transportation would be made available for an evacuation. In some states, the Governor may prescribe routes, modes of transportation, and destinations for an evacuation. Typically, the Department of Public Utilities is responsible for mapping underground infrastructures (gas lines, electrical lines, etc.) to plan for safe evacuation of areas and detonation of explosives. The emergency management agency must study structures to identify those that may be susceptible in a disaster and to recommend structural changes. Also, some Emergency Management Agencies establish standards for construction of fall-out shelters.

1.2.3. Training Programs

The Governor administers emergency management training programs. The emergency management agency is responsible for organizing statewide and multi-jurisdictional training exercises and programs. Most states require local districts to establish training programs and conduct exercises. Some states have created specialized training institutes and curriculum for disaster relief, and some states have designated special funds for such purposes.

1.2.4. Funding

The Emergency Management Agency is generally in charge of obtaining federal funding for planning programs and maintaining compliance with federal requirements. Statutorily designated persons manage and allocate those funds. A Board (usually a Disaster Emergency Funding Board) advises the Governor on allocation matters, but the Governor has decisional authority. Most states have a separate fund controlled by the Governor for use during an emergency. Usually, the Governor delegates his authority to allocate funds to an office of emergency management within his offices. Such funds are typically dispersed via grants to local districts to establish local planning committees or to assist in disaster relief and recovery efforts.

In general, disaster relief personnel are considered state employees and have immunity for activities undertaken in good faith. States can obtain insurance (not in excess of workers compensation) to cover injuries/deaths of emergency employees.

1.2.5. Quarantines and Travel Restrictions

The Governor has broad authority to restrict the movement of persons and may use this authority to issue orders of quarantine. Yet, most quarantines are issued at the local level or by the Department of Health which has authority to declare epidemics. The State Department of Health issues rules and regulations for quarantines and may obtain warrants to arrest persons violating an epidemic-based quarantine. Local counterparts to those departments enforce those rules or may issue their own if not more stringent than state rules. Most states direct counties and/or local boards of health to set up quarantine facilities within their jurisdiction.

Local physicians must notify the Department of Health of certain diseases. That information is used for general statistical purposes and to determine whether clusters or epidemics may be emerging. In most states, the initial step in issuing quarantines requires that an infected person stay home. Only if there is evidence that a person has a contagious disease may physical restraint be used. When necessary, quarantined persons may be relocated to hospitals. Quarantined persons may contest the necessity of quarantine or isolation, usually at a hearing within forty-eight hours of a

request, but those persons must remain in quarantine while awaiting that hearing. Persons that refuse medical treatment must comply with other quarantine measures.

Most state departments and localities are authorized to remove or destroy any property believed likely to communicate disease. Compensation may be provided to parties injured by such actions. But, following an historic volcanic eruption, the State of Washington successfully argued that continued restriction of access to a town near the volcano was a proper exercise of police power and as such did not require compensation.²¹

The State Department of Agriculture and local boards have authority to issue quarantine orders and to establish rules and regulations of plants and animals infected with communicable disease. This authority includes controlling the movement of animals into and out of state. When necessary, the State Wildlife Commission is in charge of measures to control the movement of wildlife in the event of a rapidly spreading infectious disease. In most states, the Department is authorized to destroy property that poses a threat of spreading the disease. Owners are not typically compensated for the quarantine or destruction of infected plants or animals. When owners fail to obey the Department's eradication orders, the Department may take necessary means to do so, with or without the owner's consent, and owners must pay costs associated with such actions.

2. JUDICIAL EVALUATION OF EMERGENCY RESTRICTIONS

That terrorism presents unforeseen challenges suggests that officials might not actually make the most appropriate responses in an emergency. This section discusses how courts examine whether a particular response is properly authorized under the circumstances. First are issues concerning the nature and extent of limitations placed upon personal liberties. Second is the matter of an official's skill, experience and judgment and how s/he applies those attributes in responding to a specific situation. When events are moving quickly amid uncertainty and fear, officials may take steps so extreme that the courts later question the legitimacy of the action. This section looks at the standards courts apply in evaluating official decisions, and considers circumstances requiring martial law, quarantines, curfews, restrictions on movement or seizures of goods and services.

In general, the courts defer to officials concerning the legality of emergency restrictions. There is a need to protect the public interest without fear that a judge might overrule decisions. If the emergency restrictions are legally wrong, there is typically a subsequent liability action that is a sufficient remedy.

[Issues as to whether that restriction was properly executed arise in connection with liability actions brought by adversely affected citizens and are discussed in Chapter IV.]

The rare situations where the courts strike down an emergency restriction for lack of authority typically are where those restrictions amount to punishment of the person. That is, when courts are faced with a challenge to a state-imposed restriction on the grounds that a citizen has been deprived of liberty without due process of law, the judicial inquiry is whether those conditions or restrictions are non-discriminatory and tailored to achieve a necessary non-punitive public purpose or, by contrast, show an express intent to punish.²² If a condition or restriction is arbitrary or purposeless, a court may permissibly infer that the governmental action may not constitutionally be

²¹ Cougar Business Owners Assn. v. State of Washington, 647 P.2d 481, 486 (Sup. Ct. Wash. 1982).

²² Bell v. Wolfish, 441 U.S. 520, 564 (1979).

inflicted.²³

2.1. Governors' Martial Law Authority

[For discussion of Presidential martial law authority, see Chapter II.]

If law and order within a state seriously break down, the Governor has authority to declare martial law and to use the National Guard to enforce the declaration. This authority, although distinct from the Presidential authority to declare martial law in a state of emergency [discussed in the previous chapter], is based on the same idea. The Supreme Court has held that a Governor has power to call out its military forces to suppress insurrection and disorder.²⁴

This principle was developed in *Duncan v. Kahanamoku*.²⁵ After the Japanese attacked Pearl Harbor, Hawaii Governor Poindexter declared martial law, suspended the writ of habeas corpus, and authorized the commanding general of the Military Department of Hawaii to use all powers normally exercised by judicial officers and employees of the territory. At issue in *Duncan* was whether Congress, under a declaration of martial law, had authorized the trial of civilians by military commission. Ultimately, the Court held that even though the Hawaii Organic Act authorized martial law, Congress had not intended to replace civilian courts with military jurisdiction. However, the Court explicitly explained that it was not addressing: the validity of suspending the writ of *habeas corpus* under martial rule; the military authority to arrest or detain persons or to enforce curfews; nor the military power to exercise court martial jurisdiction as well as to try civilians in foreign territory where civilian government cannot function.²⁶

Chief Justice Stone's concurrence in *Duncan* added that martial law “is a law of necessity to be prescribed and administered by the executive power. Its object, to preserve public safety and good order, defines its scope which will vary with the circumstances and necessities of the case.”²⁷ Additionally, the power of the “executive branch of the government to preserve order and insure the public safety in times of emergency [does] not extend beyond what is required by the exigency which calls it forth.”²⁸ Thus, the necessity to declare martial law limits the authority granted thereunder to the circumstances of the emergency. This notion renders military jurisdiction unnecessary if civilian courts are capable and accessible.

The Governor's authority to declare martial law arises from either the state constitution or from the legislature. Any such declaration, to be valid, must be within the terms of the power the legislature has granted the executive.²⁹ No specific process is required to validate the Governor's decision.³⁰ Martial law is a tool that may be wielded only by the Governor, not local or subordinate State officials. Local officials may proclaim an emergency, but only in “situations involving riots or

²³ *Egan v. Aurora*, 365 U.S. 514 (1961).

²⁴ *Moyer v. Peabody*, 212 U.S. 78, 81 (1909).

²⁵ *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

²⁶ *Id.* at 312-314.

²⁷ *Id.* at 335.

²⁸ *Id.*

²⁹ *Gayle v. Governor of Guam*, 414 F. Supp. 636, 638 (D. Guam App. Div. 1976) (holding that the Governor did not have authority to bar the population from all public places after a super typhoon, or set a curfew).

³⁰ *Bright v. Nunn*, 448 F.2d 245, 248 (6th Cir. 1971).

unlawful assemblies characterized by violence or an imminent threat of violence; extraordinary disasters; and instances where deliberate acts of destruction or personal injury pose a threat to the public at large.”³¹

A Governor’s declaration is not afforded absolute immunity, but courts grant Governors wide latitude in the use of the power to declare martial law: “It is not a tort for government to govern.”³² Only rarely have such declarations and the exercise of military authority following the declaration been overturned.³³ Governors have declared martial law in circumstances such as student demonstrations in state university campuses,³⁴ and labor unrest.³⁵ Courts are somewhat stricter in scrutinizing how the Governor, having declared martial law, exercises the authority.³⁶ Only the most arbitrary and capricious acts, however, will be found illegal.

The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for without such liberty to make immediate decision, the power itself would be useless. Such measures, conceived in good faith, in the face of the emergency, and directly related to the quelling of the disorder or to the prevention of its continuance, fall within the discretion of the executive in the exercise of his authority to maintain peace.³⁷

Under martial law, the National Guard has the power to imprison a person, deprive him of the right of a trial by jury, deny him the right of habeas corpus, or deprive him of other rights, in order to restore law and order. The arrests and detention are not considered punishment, but a means to halt the disorder that gave rise to the declaration of martial law. In this situation, then, the National Guard is not considered an adjunct to civil law enforcement personnel. The Guard is sent in when they can no longer maintain law and order, and military rules are substituted as necessary.³⁸

³¹ *ACLU v. Chandler*, 458 F. Supp. 456, 460 (W.D. Tenn. 1978).

³² *Scheuer v. Rhodes*, 416 U.S. 232, 241 (1973) (noting that qualified immunity is based on “existence of reasonable grounds for the belief formed at the time ... coupled with good-faith belief ... in light of all the circumstances”). “[T]he range of discretion must be comparably broad” when considering broad and subtle options when evaluating civil disorder. *Id.* at 247.

³³ *Gayle v. Governor of Guam*, 414 F. Supp. 636 (D. Guam App. Div. 1976); *Hearon v. Calus*, 178 S.C. 381 (1936) (striking down the Governor’s use of militia to seize control of State Highway Commission and removing the head of the commission from his office, as political in nature and beyond his constitutional authority).

³⁴ *Bright v. Nunn*, 448 F.2d 245, 248 (6th Cir. 1971) (holding use of National Guard on state university campus was justified because student-caused disorders and violence constituted a clear and present danger); *Gilligan v. Morgan*, 413 U.S. 1, 6-7 (1973) (holding that even after death of students during National Guard’s presence on state campus, court will not evaluate or oversee how the Guard operates; that is a legislative and executive function).

³⁵ *Cox v. McNutt*, 12 F. Supp. 355, 356 (S.D. Ind. 1935) (upholding martial law declared after 15,000 workers in one county took a “labor holiday”); *ACLU v. Chandler*, 458 F. Supp. 456, 460 (W.D. Tenn. 1978) (upholding declaration of curfew after strike by Memphis police union).

³⁶ “We hold it to be the established rule that the discretion of the Governor to determine the existence of an insurrection may not be interfered with by judicial authority. We hold it to be the established rule that the acts of the Governor after the declaration of a state of insurrection, which are in excess of his constitutional and legislative authority, are subject to review by the Courts.” *Hearon v. Calus*, 178 S.C. 381, 406 (1936).

³⁷ *Cox v. McNutt*, 12 F. Supp. 355, 359 (S.D. Ind. 1935), *quoting* *Sterling v. Constantin*, 53 S. Ct. 190, 196 (1936).

³⁸ *State ex rel Roberts v. Swope*, 28 P.2d 4, 6 (N.M. Sup. Ct. 1933).

2.2. Quarantines and Evacuations

Not surprisingly, the courts have been extremely tolerant of quarantines and related orders when health conditions may reasonably be said to be in jeopardy. City and state officials often have the authority to enact such regulations in emergency situations. The right to travel may be legitimately curtailed when a community has been ravaged by flood, fire or disease, and its safety and welfare are threatened.³⁹ Yet, most of the case law on quarantines is pre-WWII or earlier, reflecting the fact that the past five decades in the United States have been relatively free of health threats that call for quarantines or similar restrictions.

In order to restrict the movement of persons due to suspected infection, a credible and factual basis must exist supporting the suspicion that the person has been exposed to contagion. The police may hold persons arrested of an unrelated offense who are also suspected of being infected with disease without bail until the prisoners submit to an examination where the state law enables municipalities to segregate or treat persons suffering from communicable disease. Such quarantine laws are not within the criminal code but are based on the state's police power. Therefore, persons can be held without bail.⁴⁰

2.2.1. Geographic Quarantines

Where a quarantine is established due to conditions within a particular area, the courts have uniformly upheld the order. A leading recent decision is *Miller v. Campbell City*,⁴¹ involving an order to evacuate an area due to leaking methane and hydrogen gases. After residents of a subdivision contracted maladies, the County Commissioners declared the subdivision uninhabitable. Plaintiff was arrested when he traveled through a roadblock in attempting to return to his home. The court upheld a finding that the evacuation order was substantially related to the public health and safety, and there was no evidence that the action was taken in bad faith or maliciously. Because the defendants obviously needed to act quickly because of the potential danger, no liability could be found.

Similarly, in *People ex Rel. Barmore v. Robertson*,⁴² the plaintiff was ordered to stay at home without access by visitors because she carried typhoid bacilli. Even despite evidence that she had never been sick with typhoid fever nor caused anyone else to become sick, the court upheld the quarantine as properly authorized by the State Department of Health.

2.2.2. Ethnic or Oppressive Quarantines

Despite the general principle of judicial deference to health authorities, a few cases suggest that the courts will step in if they view a quarantine restriction as unreasonable or oppressive. In *Kirk v. Board of Health*,⁴³ the Aiken, South Carolina, Board of Health ordered Miss Kirk, a refined, elderly, white victim of leprosy, to be taken to a city hospital used mainly for "incarcerating negroes

³⁹ *Zemal v. Rusk*, 381 U.S. 1, 15-16 (1965).

⁴⁰ *People ex rel Baker v. Strautz*, 54 N.E. 2d 441, 445 (Ill. 1944) (Prostitutes held without bail subject to examination for venereal disease).

⁴¹ *Miller v. Campbell Co.*, 945 F.2d 348 (10th Cir. 1991).

⁴² *People ex rel Barmore v. Robertson*, 134 N.E. 815 (Ill. 1922).

⁴³ *Kirk v. Board of Health*, 65 S.E. 387 (S.C. 1909).

having smallpox and other dangerous and infectious diseases.”⁴⁴ Miss Kirk disputed that her leprosy was contagious, and she charged that the place she was to go was “coarse and comfortless,” and located a hundred yards from the town dump. After reviewing the constitutional principles supporting the board of health’s power over citizens, the court defined the issue as whether the required isolation exceeded what was necessary to protect the public. While emphasizing that courts should exercise caution in deciding against boards of health, the court held that this was an exceptional case, given the plaintiff’s age, health and the effectiveness of quarantining her home.

In *Wong Wai v. Williamson*⁴⁵ the San Francisco Board of Health required inoculation of all Chinese residents against bubonic plague and restricted their right to leave the city, following nine deaths allegedly from plague. The inoculation was poisonous, producing severe reactions and could be fatal. The court assumed that the regulations were properly authorized but struck them down as “not based on any established distinction in the conditions that are supposed to attend the plague, or the persons exposed to its contagions.”⁴⁶ Shortly after, in *Jew Ho v. Williamson*, the same court found that the quarantine requirements applied only to Chinese and questioned whether bubonic plague actually caused the reported deaths. It struck down the quarantine as “unreasonable, unjust and oppressive.”⁴⁷

2.3. Municipally-Imposed Restrictions: Curfews

A curfew forbids people (or certain classes of people) from being outdoors between certain hours. A usual curfew is directed at minors out at night. Less common are curfews before or during an emergency, either natural (hurricanes) or because of civil unrest. In either case, the purpose of the curfew is to prevent people from interfering with civilian authorities who are protecting the community and from taking advantage of the situation by committing crime. Especially if law and order has broken down, persons who are out may represent a threat to the quietude of the public. It is easier to maintain order when people are off the streets and in their homes.

Legal challenges to curfews have typically failed. Courts have generally ruled that the temporary restrictions of individual rights are worth the sacrifice for the return of peace to the area. In the contrast of rights, the public’s right to be safe during dangerous situations almost always trumps the individual’s right to travel. Courts do not tend to second-guess the official because it is the executive in charge who has the best understanding of the dangers and the needs of the community and because that person is statutorily empowered to make that decision.⁴⁸ In such circumstances, preventive action is far more desirable than actions remedial.⁴⁹

In general, the legal test of a curfew is whether it is reasonable in relation to the specified

⁴⁴ *Id.* at 374.

⁴⁵ *Wong Wai v. Williamson*, 103 F. 1 (N.D. Cal. 1900).

⁴⁶ *Id.* at 15.

⁴⁷ *Jew Ho v. Williamson*, 103 F. Rep. 1047 (1900).

⁴⁸ “Whether the conditions warrant the curfew is a difficult question not easily answered with a simple ‘yes’ or ‘no.’ A court’s role in the aftermath of an emergency . . . is to review, with deference, the decision of the executive; at all times, however, under such conditions, the executive must be permitted to make the decision in the first instance.” *Moorhead v. Farrelly*, 727 F. Supp. 193, 201 (D.C.V.I. 1989).

⁴⁹ *United States v. Chalk*, 441 F.2d 1277, 1280 (4th Cir. 1971)

ends.⁵⁰ The courts have often upheld a curfew because it is targeted at persons whose control is necessary to maintain order and who are clearly defined. “[A] municipality, under its inherent police power, may enact legislation which may interfere with the personal liberties of its citizens and impose penalties for the violation thereof where the general welfare, public health and safety demand such enactment; but this rule is always subject to the rule of reasonableness in relation to the objects to be attained.”⁵¹ The District of Columbia Court of Appeals recently upheld a curfew prohibiting juveniles 16 and under from being in a public place unaccompanied by an adult from 11:00 p.m. on Sunday through Thursday to 6:00 a.m. the next day, subject to enumerated exceptions.⁵²

Therefore, temporary restrictions on the right to travel are a reasonable means of reclaiming order from anarchy so that all may exercise their constitutional rights freely and safely. In the case of riots or looting, a threat to safety and the welfare of a community exists, providing a compelling reason to impose a curfew. Courts are deferential even to a curfew that affects First Amendment rights so long as those effects are incidental and non-discriminatory.⁵³ Where the courts have struck down a curfew, it has been because either: (1) the official who ordered it was not authorized to do so; (2) the curfew was vague and thereby encouraged discriminatory enforcement; or (3) the curfew was unreasonable for failing to permit exceptions.

2.3.1. Questionable Authority

A curfew must be issued by someone with proper authority. The Governor’s unquestionable authority derives from the power to declare a state of emergency. Some courts have held that mayors, by contrast, must have clear statutory authority, usually from a municipal ordinance, to declare states of emergency and issue curfew orders.⁵⁴ The reasoning is that an absence of statutory authority suggests a preference for coordinated state-wide direction; although the mayor has implicit powers to respond immediately to an emergency, a curfew is of greater duration. These cases turn on legislative intent as to who has the authority to impose a curfew. The curfew is a protection of the community’s rights at the sacrifice of some individual rights, and the only source to whom the public has deemed authorized to strike that balance is the legislature.

That said, statutory authority to enable local officials to order a curfew need not be very specific. A broad grant to make and enforce reasonable police regulations during periods of emergency has been upheld as sufficient to protect a curfew order during riot conditions when speedy response was essential.⁵⁵ Nor need the emergency actually have materialized; a mayor’s authority to order curfews during a “civil emergency” was sufficient when, during a strike of police and firefighters, the mayor thought it necessary to maintain order.⁵⁶

⁵⁰ *Thistlewood v. Ocean City Magistrate*, 204 A.2d 688, 693 (Md. 1964).

⁵¹ *Alves v. Justice Court*, 306 P.2d 601, 603 (Cal. App. 3d Dist. 1957).

⁵² *Hutchins v. District of Columbia*, 188 F.3d 531 (1999).

⁵³ *In re Juan C*, 28 Cal. App. 4th Supp. 1093 (1994) (curfew stated that persons cannot be out in public areas or unimproved private properties from 7pm-6am. Violators of curfew are subject to arrest. Curfew imposed in response to civil disorder. Arrest only applies to those who refuse to obey curfew even after oral or written notice).

⁵⁴ *Walsh v. City of River Rouge*, 189 N.W.2d 318, 635-36 (1971).

⁵⁵ *Glover v. District of Columbia*, 250 A.2d 556, 560 (D.C. Cir. 1969)

⁵⁶ *ACLU v. Chandler*, 458 F. Supp. 456, 459-60 (W.D. Tenn. 1978).

2.3.2. Vagueness

In some cases, curfews have been struck down where the persons to whom they apply are vaguely defined. The problem with vagueness is that police officers might indiscriminately or unfairly decide whether a person on the street is covered by the curfew. Carte blanche discretion without guidelines impermissibly transfers the judicial task of determining what conduct violates the law to the police. Especially during emergencies and periods of chaos, there should be as little guessing as possible.

To avoid unconstitutional vagueness, an ordinance must: (1) define the offense with sufficient precision that ordinary people can understand what conduct is prohibited; and (2) establish standards to permit police to enforce the law in a non-arbitrary, non-discriminatory manner. Thus, the Ninth Circuit struck down a curfew that prohibited juveniles to “loiter, idle, wander, stroll or play” on the grounds that the prohibition was vague.⁵⁷ Similarly, a court struck down a curfew that prohibited being on the street “without satisfactory explanation.”⁵⁸ And a statute that penalized “anyone who prevented, hindered or delayed the protection of the city” could not be used to justify a municipal order that anyone on the street after curfew hours was guilty of that crime because there was insufficient reason to believe that curfew-breakers were endangering any lives or property.⁵⁹

2.3.3. Impermissibility of Exceptions

A judicial concern throughout the cases involving emergency restrictions is that, without exceptions or sensitive application, their imposition will cause unnecessary harm to innocent persons. Thus, an ordinance that fails to provide for any exceptions may be unconstitutional. If there are not any delineated exceptions, the police must decide who will or will not be restricted, leading to the risk of arbitrary enforcement.⁶⁰ That said, some courts disagree, ruling that desperate measures may be necessary in desperate times,⁶¹ or that the lack of exceptions deprives police of discretion and is, therefore, less arbitrary than an ordinance with exceptions.⁶²

2.4. Restrictions on Interstate Movement

The opposite of a quarantine is establishment of a barrier to movement that keeps people or goods out. A unique situation arises when the barrier is a state border, *i.e.*, when a Governor closes a border with a neighboring state. Legal issues arise both as to right to travel and to the risk that the restriction might overstep congressional prerogatives under the commerce clause. The power of the federal government to regulate interstate commerce does not prevent states from adopting reasonable measures intended to secure the public health.⁶³ However, a state may neither impose a burden that

⁵⁷ *Nunez v. San Diego*, 114 F.3d 935, 943-44 (1997); *see also* *Stoutenburgh v. Frazier*, 16 App. D.C. 229, 239-41 (1900) (congressional legislation declaring that “suspicious persons” within the District of Columbia can be arrested and prosecuted as criminals was struck down unconstitutionally vague).

⁵⁸ *City of Shreveport v. Brewer*, 72 So. 2d 308, 98 (La. Ct. App. 1954); *see also* *City of Portland v. Goodwin*, 210 P.2d 577, 428-29 (1949) (ordinance struck down that prohibited any person to be out at night without having and disclosing a lawful purpose).

⁵⁹ *People v. Continola*, 15 Cal. App. 4th Supp. 20, 27 (1993).

⁶⁰ *People v. Kearse*, 295 N.Y.S.2d 1921 (1968).

⁶¹ *Smith v. Avino*, 91 F.3d 105, 109 (11th Cir. 1996).

⁶² *State v. Boles*, 240 A.2d 920, 928-29 (Conn. Cir. Ct. 1967).

⁶³ *Clason v. Indiana*, 306 U.S. 439, 444 (1939) (where statute prohibited the transfer of dead animals not slaughtered

materially affects interstate commerce in an area where uniformity of regulation is necessary, nor impose laws that discriminatorily restrict interstate commerce in order that its citizens gain a competitive advantage.⁶⁴ When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, it will be declared unconstitutional as violative of implied substantive restrictions on permissible state regulation of interstate commerce, under the dormant commerce clause, unless it advances a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives.⁶⁵

2.4.1. Products and Goods

Courts have upheld that prohibiting import of livestock into a state unless the state of origin's chief sanitary official has certified such livestock as being disease-free; this does not unduly burden interstate transportation so as to contravene the commerce clause.⁶⁶ However, some states have attempted to prohibit transportation of livestock into the state completely during certain times of the year.⁶⁷ Such laws are not quarantine laws nor inspection laws (because the states are not concerned about the health of livestock). These statutes impose liabilities and criminal penalties on persons attempting to transport cattle without any other stated purpose. Such statutes go outside the scope of the police powers of the State and are not allowed under the commerce clause. States cannot, beyond what is absolutely necessary for self-protection, interfere with transportation into or through its territory.⁶⁸

2.4.2. Hazardous Materials

The 1990 the Hazardous Materials Transportation Uniform Safety Act (HMTUSA)⁶⁹ empowers the Secretary of the Department of Transportation (DoT) to protect the nation adequately against the risks to life and property that are inherent in the transportation of hazardous materials in commerce.⁷⁰ The Secretary is authorized to promulgate regulations governing any safety aspect of the transportation of hazardous materials which the Secretary deems necessary or appropriate.⁷¹ The HMTUSA regulations preempt "inconsistent" state or local regulations, *i.e.* when it is not possible to

for food on state highways. This did not unduly burden interstate commerce); *see also* *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 445 (1960) (city's smoke abatement code not pre-empted by federal statutes under which steam vessels and their equipment, including their broilers, are inspected, approved, and licensed to operate in interstate commerce in accordance with a comprehensive scheme of federal regulation. Federal purpose is to ensure seagoing safety of vessels subject to inspection. State purpose is to eliminate air pollution for the health of the local community).

⁶⁴ *Louisiana v. Texas*, 176 U.S. 1, 21 (1900); *Chemical Waste Management v. Hunt*, 504 U.S. 334, 347 (1992); *Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978).

⁶⁵ *Bainbridge v. Bush*, 148 F. Supp 2d. 1306, 1310-11 (M.D. Fla. 2001) (upheld state statute prohibiting shipments of alcohol, from out-of-state vendors to recipients within state not holding manufacturer's or wholesaler's license).

⁶⁶ *Mintz v. Baldwin*, 289 U.S. 346, 350 (1933).

⁶⁷ *Railroad Co. v. Husen*, 95 U.S. 465, 468 (1877).

⁶⁸ *Id.*

⁶⁹ 49 U.S.C.S. app. §§ 1801-1819 (Law. Co-op. 1998)

⁷⁰ *Id.* § 1801.

⁷¹ *Id.* § 1804(a).

comply with both or where state requirements are an obstacle to federal law.⁷² The HMTUSA established that the DoT is the single federal authority with the responsibility to oversee transportation of hazardous materials, that there is not any requirement that safety in such transport be maximized, and that even state action that increases such safety, is precluded.⁷³

2.5. States' Authority To Commandeer Resources

[The following discussion is related to, but distinct from, a state's liability for a taking of private property, discussed in Chapter IV, section I]

Inherent in government's sovereignty and its police power is the right to commandeer or seize private property for public service, "in cases of extreme necessity in time of war or of immediate and impending public danger."⁷⁴ The Fifth Amendment of the Constitution provides the underpinning for such seizure over a property owner's objection by requiring "just compensation" for any such acquisition,⁷⁵ and the Fourteenth Amendment extends this to state government action. The rationale for this is that the State must use its power to control violence and disorder and protect public health and welfare,⁷⁶ even to the point of taking extraordinary action.⁷⁷

Courts have regularly upheld commandeering or requisitioning in emergencies without requiring the normal judicial exercise of eminent domain.⁷⁸ The test for the validity of the government action is whether it has "some actual and reasonable relation to the maintenance and promotion of the public health and welfare, and whether such is in fact the end sought to be attained."⁷⁹

The basic objective of government is to protect and promote the health, safety and general welfare of the people. When a condition of affairs appears in the state which presents a threat to the accomplishment of that objective, the government has the right, and obligation, to cope with such

⁷² *Jersey Central Power v. Lacey*, 772 F.2d 1103, 1113 (3d Cir. 1985).

⁷³ *New York v. United States Dep't of Transp.*, 715 F.2d 732, 741 (2d Cir. 1983); *New York State Energy Research and Development Authority vs. Nuclear Fuel Services*, 102 F.R.D. 18, 22 (W.D. N.Y. 1983).

⁷⁴ *U.S. v. Russell*, 80 U.S. 623, 627 (1871) (upholding compensation to the owner of three steamboats used by the U.S. government for military transport during the Civil War).

⁷⁵ "Nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V.

⁷⁶ See generally Richard A. Epstein, *Symposium on Richard Epstein's Takings: Private Property and the Power of Eminent Domain*, 41 U. MIAMI L. REV. 3, 5 (1986); David G. Tucker and Alfred O. Bragg, III, *Florida's Law of Storms: Emergency Management, Local Government, and the Police Power*, 30 STETSON L. REV. 837, 839-40 (2001).

⁷⁷ David G. Tucker and Alfred O. Bragg, III, *Florida's Law of Storms: Emergency Management, Local Government, and the Police Power*, 30 STETSON L. REV. 837, 850 (2001).

⁷⁸ "Such a [T]aking of private property by the government, when the emergency is too urgent to admit of delay, is everywhere regarded as justified..." *United States v. Russell*, 80 U.S. 623, 629 (1871). "In times of natural catastrophe or civil disorder, immediate and decisive action by some component of state government is essential." *Cougar Business Owners Assn. v. State of Washington*, 647 P.2d 481, 486 (Sup. Ct. Wash. 1982) (internal quotations and citation omitted). Gregory R. Kirsch, *Hurricanes and Windfalls: Takings and Price Controls in Emergencies*, 79 VA. L. REV. 1235, 1242 (1993).

⁷⁹ David G. Tucker and Alfred O. Bragg, III, *Florida's Law of Storms: Emergency Management, Local Government, and the Police Power*, 30 STETSON L. REV. 837, 843 (2001). (citing *Varholý v. Sweat*, 15 S.2d 267, 270 (Fla. 1943)).

threat by whatever measures, within constitutional limits, that are necessary and appropriate.⁸⁰

At the federal level, emergency expropriation has generally occurred in time of war, to offset shortages of means of production (such as steel⁸¹ or power generation⁸²), services (such as transportation⁸³), space,⁸⁴ or supplies (such as oil⁸⁵). At the state level, seizures more frequently involve the accidental destruction of private property in emergency circumstances (such as a police vehicle colliding with an automobile during a chase) or the intentional destruction of property that poses a hazard, during or after an emergency. That curfews, quarantines, destruction of diseased animals and mandatory confinement of persons with contagious diseases have survived state court scrutiny suggests that courts would also be deferential to commandeering at the state level in order to assure that citizens have basic necessities and ease their hardships.⁸⁶

In most states, the Governor as well as local governments may enter into purchase, lease, or other arrangements for temporary housing units to be occupied by disaster victims. The Governor has authority to commandeer private property with or without the owner's permission, but the owner must be compensated. If dissatisfied by the offered compensation, the owner may file a request for additional compensation, but denial of that request may result in a reduction of the original offer. Depending on the state's statutory requirements, the seizure of property may require a formal declaration of an emergency;⁸⁷ the declaration may have to specifically authorize authorities to seize or destroy property in dealing with the emergency.⁸⁸ Courts typically do not review seizures for necessity unless the actions are arbitrary and capricious, a difficult standard of review for a plaintiff to meet. Moreover, courts have found that state government is not liable for damages to seized or destroyed property,⁸⁹ on the basis that "police power controls the use of property by the owner, for the public good."⁹⁰

⁸⁰ *Suber v. Alaska State Bond Comm.*, 414 P.2d 546, 551-52 (Sup. Ct. Alaska, 1966).

⁸¹ *Omnia Commercial Co. v. United States*, 261 U.S. 502, 511 (1923).

⁸² *Southern Calif. Edison Co. v. United States*, 91 F. Supp 757, 520 (Cl. Ct. 1950).

⁸³ *United States v. Russell*, 80 U.S. 623, 627 (1871) (upholding compensation to the owner of three steamboats used by the U.S. government for military transport during the Civil War); *Northern Pac. R. Co. v. N. Dak. Ex rel. Langer*, 250 U.S. 135, 144-45 (1919) (upholding the power of the Congress and President to take possession and control of railroads for troop transport during World War I); *Louisville Flying Service v. United States*, 64 F. Supp. 938, 942 (W.D. Ky., 1945) (providing just compensation for government's seizure of two private airplanes required for the war effort).

⁸⁴ *United States v. General Motors Corp.*, 323 U.S. 373, 374 (1945) (government has power to take possession of leased space from the lessee).

⁸⁵ *Gulf Refining Co. v. United States*, 58 Cl. Ct. 559 (Cl. Ct. 1923).

⁸⁶ David G. Tucker and Alfred O. Bragg, III, *Florida's Law of Storms: Emergency Management, Local Government, and the Police Power*, 30 STETSON L. REV. 837, 843 (2001).

⁸⁷ *Cougar Business Owners Assn. v. State of Washington*, 647 P.2d 481, 472-73 (Wash. 1982).

⁸⁸ *Marty v. State of Idaho*, 786 P.2d 524, 142 (Idaho 1989).

⁸⁹ *Cougar Business Owners Assn. v. State of Washington*, 647 P.2d 481, 476 (Wash. 1982); *Suber v. Alaska State Bond Comm.*, 414 P.2d 546, 552 (Alaska 1966); *Balent v. City of Wilkes-Barre*, 492 A.2d 1196, 581 (Comm. Ct. of Penn. 1985).

⁹⁰ *Balent v. City of Wilkes-Barre*, 492 A.2d 1196, 1197 (Pa. Commw. Ct. 1985).

If an emergency both interferes with supply and increases demand for services or products, federal or state government may use its police powers to remedy an economic and supply system that is not working. For example, when a hurricane left 250,000 people homeless and in need of food, water and shelter, the State of Florida enacted price controls to limit price gouging for necessities. Legal experts have argued that the State could also have engaged in a “take and distribute” strategy, requisitioning supplies from manufacturers and distributing them directly to citizens in the affected area, to reduce their waiting time and assure that price gouging did not occur.⁹¹

⁹¹ Gregory R. Kirsch, *Hurricanes and Windfalls: Takings and Price Controls in Emergencies*, 79 VA. L. REV. 1235, 1239 and 1262 (1993).

CHAPTER IV -- LIABILITIES OF EMERGENCY RESPONDERS

INTRODUCTION

Previous chapters have discussed proper authority for consequence management activities. Yet, even properly authorized activity can be performed in a manner that inflicts damages. Lawsuits seeking redress for that damage generate legal rules of behavior. Thus, officials who manage the consequences of terrorism should appreciate that the issue of *how* relevant activities are executed has important legal answers; these answers set the contours of their responses. Accordingly, the cases and principles discussed in this chapter should be understood as generating rules that shape the process of planning and preparation.

For example, consider the legality of quarantines. The material in Chapter III makes clear that a Governor has ample authority to order a quarantine when conditions warrant. Only if that order is palpably discriminatory or unjustified will the courts interfere. But many questions remain as to how to treat persons subject to the quarantine order; additional questions arise concerning property losses. Courts confront these questions in liability suits where complaining citizens allege that the quarantine or restriction, even if properly authorized, caused an injury for which government or an official should be liable. The overwhelming majority of relevant cases, and accordingly of relevant rules, are generated by such suits.

There is another important implication here: both federal and state law immunize official responses to an emergency. However, there is no immunity that is wholly absolute; all grants of immunity are limited by *reasonableness* in view of the policy objective for the grant. What is meant by *reasonableness* is a question that courts decide in liability suits.

1. IMPLICATIONS OF POTENTIAL LIABILITY

Emergency responders coping with catastrophic terrorism may view the risk of potential liability as counter-productive to the community's needs, inducing excessive caution precisely when decisive action is critical. Immediate decisions must be made under extraordinary pressures. Compounding that crisis will be the threat of a breakdown in law and order. Response authorities will be pressed into service in the most dire crisis conditions in order to attend to people who need help and to control those who disobey the law. At that moment, whatever level of official inexperience or lack of preparedness will rise to the surface.

Citizens seek redress for alleged injuries by filing liability actions only after relatively normal conditions are restored. Liability suits are always retrospective, asking judges to decide what should have been reasonable conduct in unprecedented situations. There is a risk of Monday-morning quarterbacking -- that a judge will, in calm hindsight, point an accusatory finger at officials who did their best under exceptional duress. Significantly, the case law does not demonstrate this risk. Courts accord officials and responders wide latitude to cope with extraordinary situations, concerned that inducing inaction could cost lives or property unnecessarily. The primary judicial concern is to prod officials to perform their responsibilities. Officials who prepare and, when necessary, carry out their preparations to the best of their ability should not fear liability. But the courts may impose liability on officials who ignore threats and fail to prepare or, when an

emergency strikes, manifest carelessness for the public they are supposed to serve.

In this context, the underlying inquiry of most liability actions is to separate the vast majority of responders who will rise to the crisis from the minority who will not, because that minority is dangerous. A recurrent focus of judicial attention throughout this legal inquiry is on advance training and preparedness. The courts will be broadly deferential to officials who are reasonably aware of the terrorism threat, have organized to address it, and have trained personnel who can carry out complex tasks under pressure. The courts' key focus is to distinguish "discretionary" activity that does not give rise to liability from "deliberate indifference." The point of this distinction is to inquire: has a responder reasonably acted in view of the responder's mission and the circumstances even if those actions have unfortunate results, or are the choices patently unreasonable causing harm that could have been avoided by the exercise of reason. Thus, officials who have done nothing to prepare for a terrorist event and whose personnel are untrained for the emergency may find that the courts, while respectful of the dire situation, will be inclined to impose liability.

2. THE LAW'S COMPLEXITY

Broadly viewed, liability actions are pursued in three broad categories: (1) tort actions, claiming that officials breached a duty; (2) actions under Title 42 Section 1983, claiming that official action violated a citizen's constitutional rights; and (3) actions under various state statutes, claiming that official conduct violated prescribed rules. These categories substantially overlap, and claims arising from similar factual circumstances could be litigated under different legal constructions. Moreover, claims may be brought against the government or against an official in his/her individual capacity, further complicating the issue.

Two sections comprise this Chapter. Section one discusses tort actions seeking redress for failure to prepare or warn of an emergency and for destruction of property. Section two discusses predominantly (but not exclusively) actions under Section 1983 seeking redress for creating a dangerous situation, for detaining people and not attending to their needs, for mistreatment, and for failure to protect from criminal violence. Each section's brief introduction describes the legal principles that underlie these respective sets of claims.

3. TORT LIABILITY

3.1. Introduction To Principles Of Government Liability in Tort

3.1.1. Federal Tort Claims

The United States government has sovereign immunity from liability for its negligence or other wrongful behavior, *i.e.* "the king can do no wrong." Because the government creates the right to bring a claim, the government must itself agree to be sued. The Supreme Court embraced this principle in 1824, in *Osborn v. Bank of United States*.¹ Over time, however, the federal government began consenting to liability for contract claims; later, Congress legislated consent to tort claims on a case-by-case basis.

¹ *Osborn v. Bank of United States*, 1824 U. S. Lexis 409, at *77 (1824) (noting "a sovereign State is entirely exempt from jurisdiction"). *Id.* at 707. "But for the law, the case would never have existed. But for the continued existence of the law, it could not continue to exist. If, by any conceivable means, the law were to be determined, the case must be at an end. There is, therefore, an inseparable, indissoluble connection between the law and the case, as cause and effect. The case owes its being to the law, and only to the law"). *Id.* at 806.

Facing escalating inefficiency of private legislation, Congress enacted a general waiver of immunity to tort suits through the Federal Tort Claims Act (FTCA) of 1946.² The FTCA waives the government's sovereign immunity from tort liability for acts or omissions of its employees "under circumstances where the United States, if a private person, would be liable to the claimant."³ The FTCA grants exclusive jurisdiction to federal district courts to hear FTCA claims.⁴ It provides only for bench, not jury trials.⁵ A plaintiff must exhaust all administrative or statutory remedies before making an FTCA claim.⁶ Finally, the FTCA waives immunity only for suits against the federal government, not against its employees. The Federal Employees Liability Reform and Tort Compensation Act of 1988 (FELRTCA) immunizes federal employees acting within the scope of their employment but does not bar actions brought for the violation of a statute or the Constitution.⁷ For any plaintiff injured in tort by a federal employee, the FTCA is the only available remedy.

The FTCA's waiver of immunity is subject to thirteen exceptions; a complaint within any of these exceptions may not proceed. Thus, a plaintiff who has suffered a loss from federal government activity must show that the wrongful conduct falls outside those exceptions. The two most relevant exceptions here involve quarantines and discretionary functions. Section 2680(f) of the FTCA excludes "Any claim for damages caused by the imposition or establishment of a quarantine by the United States."⁸ There is no relevant case under this provision, however, leaving open issues as to what constitutes a valid declaration of a quarantine, how long a quarantine may reasonably last, and how large an area may be quarantined.

The "discretionary function" exception (DFE) of the FTCA as well as the Stafford Act⁹ immunizes the United States against any claim of "an act or omission of an employee of the Government ... based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."¹⁰ Its purpose is to insulate government actions and decisions based on "social, economic, and political policy" so as to "prevent judicial 'second-guessing' of legislative and administrative decisions through the medium of an action in tort."¹¹ The DFE "marks the boundary between Congress's willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private

² 28 U.S.C.A. §§ 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671, 2672, 2674-80 (West 1991).

³ *Id.* § 2674. The U.S. government cannot be held strictly liable for a wrongful act even if an individual defendant could have been so held.

⁴ *Id.* §§ 1346(b), 2679(d).

⁵ *Id.* § 2402.

⁶ *Id.* §§ 2401(b), 2675.

⁷ *Id.* § 2679(b).

⁸ *Id.* § 2680(f).

⁹ 42 U.S.C. § 5148 (2000).

¹⁰ 28 U.S.C. § 2680(a) (2000).

¹¹ *United States v. Gaubert*, 499 U.S. 315, 322 (1991) (quoting *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984)).

individuals.”¹² To be “discretionary”, therefore, the decision must be susceptible to a policy analysis.¹³ Whether the discretionary function applies in a particular case does not turn on the actor’s office nor how much power s/he possesses but whether the nature of the actor’s conduct amounts to policymaking authority as to the particular question.¹⁴

*Berkovitz v. United States*¹⁵ illustrates the subtle distinction between a discretionary and non-discretionary activity. After an oral dose of polio vaccine, two-month-old Kevan Berkovitz became almost completely paralyzed and could not breathe without a respirator. His parents sued the United States, alleging that the National Institutes of Health (NIH) had wrongfully licensed vaccine production and that the Food and Drug Administration (FDA) had wrongfully approved release of the vaccine that Kevan received. Noting that, “The discretionary function exception applies only to conduct that involves the permissible exercise of policy judgment,”¹⁶ the court used a two-part test for immunizing conduct from a tort challenge. First, under applicable statutes or regulations, is the conduct a matter of choice; if not, then the function is not discretionary, and the DFE does not apply. Second, if the conduct involves an element of judgment, does that judgment involve policy considerations? Because the NIH lacked discretion to issue a license without determining that the vaccine complied with all regulatory requirements, plaintiffs could proceed with their claim that the NIH had wrongfully licensed the vaccine’s production. But, because the regulations for release of vaccine allowed the FDA to determine how to regulate those releases, “the discretionary function exception bars any claims that challenge the [FDA’s] formulation of policy as to the appropriate way in which to regulate the release of vaccine lots.”¹⁷

In many respects, emergency response functions fulfill the requirement of “discretionary function.” Emergency response always entails judgments made under pressure, typically involving allocation of scarce resources. Responders might have to choose among different options with imperfect information. For a court to rule in hindsight that such choice was negligent would not serve the public’s interests. The courts have denied immunity, however, when the question is not which action responders should undertake or whether any particular action is preferable but is merely how to perform an already-chosen task.

*Downs v. United States*¹⁸ demonstrates how the “discretionary function” exception might apply in a terrorism response case. A small plane was hijacked with four hostages aboard. Nearly out of fuel, it landed on an airstrip where FBI agent O’Connor engaged the hijacker in a stand-off. After the hijacker released two hostages to bargain for fuel, O’Connor, fearing that the hijacker

¹² *Berkovitz v. United States*, 486 U.S. 531, 536 (1988) (quoting *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984)).

¹³ *Gaubert*, 499 U.S. at 325; *Federal Deposit Ins. Corp. v. Craft*, 157 F.3d 697, 707 (9th Cir. 1998).

¹⁴ *Pembauer v. City of Cincinnati*, 475 U.S. 469, 483-84 (1986); *Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985).

¹⁵ *Berkovitz v. United States*, 486 U.S. 531 (1988).

¹⁶ *Id.* at 539.

¹⁷ *Id.* at 546. The court rejected the government’s argument that the decision not to install carpet or a handrail in a Post Office fell under the DFE: “The discretionary policy exception protects only activities which, because they further policy goals, are uniquely governmental.” *Raymond v. United States*, 923 F. Supp. 1419, 1423 (D.C. Kan. 1996).

¹⁸ *Downs v. United States*, 522 F.2d 990 (6th Cir. 1975).

would compel the pilot to fly off, ordered the tires and engine to be shot out. The hijacker responded by killing himself and the two remaining hostages. The victims' heirs alleged that O'Connor's conduct was legally responsible for their loss. The court agreed, refusing to apply the discretionary function exception because O'Connor's choices did not entail the formulation of governmental policy. O'Connor was handling a hijacking situation, policy for which was set forth in the FBI Handbook emphasizing hostage safety. Because O'Connor was familiar with the Handbook, liability would ensue for his failure to comply with FBI procedures. A reasonable FBI agent with his training and experience would have been patient and tried to reason with the hijacker.

Besides *Downs*' obvious relevance to terrorism situations, it informs this discussion in two respects. First, it limits the discretionary function exception to situations that involve formulation of policy rather than its execution. This is a difficult line to draw; policy can be formulated even by low-level or operational officials. But the mere fact that the official makes a choice is insufficient to place that official's actions within the scope of the exception. Second, *Downs* suggests that where the government has a policy and the officer has constructive knowledge of that policy yet fails to abide by it, liability is more likely to be found.

3.1.2. State Tort Claims

State governments also have sovereign immunity under the Eleventh Amendment from suits by citizens of other states or foreign plaintiffs.¹⁹ In *Florida Department of State v. Treasure Salvors, Inc.*, the Supreme Court extended this protection to suits from citizens against their own State if the officials involved acted within the scope of their statutory authority.²⁰ Thus, as with the federal government, a State must consent before a tort action can proceed against it.²¹ Without consent, state governments have substantive and jurisdictional immunity; even with consent, States retain discretionary immunity for official or policy acts.

Case law and statutes set forth exceptions to the principle of state immunity. First, the Supreme Court held in *Edelman v. Jordan* that citizens may enjoin state officers to compel action (but not retroactive disbursement of funds) if federal or state law requires.²² Second, Congress may provide that certain complaints against state officials be heard in federal court, most specifically

¹⁹ "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." U. S. CONST. amend. XI.

²⁰ A suit generally may not proceed directly against the State itself, or against its agency or department, unless the State has waived its sovereign immunity; If the complaint directly makes a state that has not consented to the suit, it must be dismissed from the action. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 684 (1982), *citing* *Alabama v. Pugh*, 438 U.S. 781, 782 (1978).

²¹ "In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (citations and internal quotations omitted); *see generally*, W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, *PROSSER & KEETON ON TORTS*, 1043-51 (5th ed. 1984).

²² "[A] federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, *Ex parte Young*, *supra*, and may not include a retroactive award which requires the payment of funds from the state treasury." *Edelman v. Jordan*, 415 U.S. 651, 677 (1974) (citations and internal quotations omitted).

Section 1983 civil rights claims, discussed below. Third, most states, like the federal government, have enacted tort claims acts (TCAs) waiving immunity from tort suits, albeit with similar exceptions. For example, California's waiver of immunity provides that "[a] public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative."²³ Some states, *e.g.* Georgia, have established administrative bodies to hear claims against it and make awards if a private party would have been liable for the same action.²⁴ Some states waive immunity only under limited conditions, *e.g.* when insurance will pay for the State's wrongdoing or for cases involving motor vehicles or tangible personal property.²⁵

Even within general statutory waivers, states, like the federal government, limit liability in certain areas. Some states' constitutions preserve all sovereign immunity. Alabama, for example, provides, "That the State of Alabama shall never be made a defendant in any court of law or equity."²⁶ According to *Gill v. Sewell*, involving a police officer who was shot by an escaped felon, sovereign immunity specifically bars suits against Alabama officials when acting in their official capacity.²⁷ It also extends to executive bodies and overrides statutory language allowing those bodies to sue and be sued.²⁸ Other states, such as Tennessee, preserve immunity both constitutionally and statutorily.²⁹ Yet other states, like Maine, allow tort liability only up to the amount of insurance held by the relevant government body. In *Blier v. Inhabitants of Town of Fort Kent*, a plaintiff injured in an auto accident with a city employee could recover only \$50,000 of an \$84,757 jury award, because that was the maximum amount of insurance the town carried.³⁰

According to the Restatement of Torts (Second), local governments are immune for discretionary functions arising from court decisions and from state statutory language waiving tort immunity.³¹ Significantly, if the challenged conduct fails to satisfy standards of applicable federal or state regulations, the discretionary function exception will not apply. Thus, in *Maresh v. State of Nebraska*,³² plaintiff died in an auto accident -- the highway under construction lacked markings

²³ CAL. GOV'T CODE § 815.2(a) (West 2001).

²⁴ R. Perry Sentell, Jr., *Tort Claims Against the State: Georgia's Compensation System*, 32 GA. L. REV. 1103, 1120 (1998).

²⁵ *Id.* at 1044-45.

²⁶ ALA. CONST. art. I, § 14.

²⁷ *Gill v. Sewell*, 356 So. 2d 1196, 1198 (Ala. 1978).

²⁸ *The Armory Commission of Ala. v. Wanda T. Staudt*, 388 So. 2d 991 (Ala. 1980) (reversing a claim brought by a woman who slipped and fell in a State National Guard armory).

²⁹ "The rule of sovereign immunity in Tennessee is both constitutional and statutory. It is not within the power of the courts to amend it." *Jones v. L & N Railroad*, 617 S.W.2d 164, 170 (Tenn. App. 1981), *quoted in* *City of Laverne v. Southern Silver, Inc.*, 872 S.W.2d 687, 689 (Tenn. App. 1993).

³⁰ *Blier v. Inhabitants of Town of Fort Kent*, 272 A.2d 732 (Maine 1971).

³¹ "It will be assumed here that the sovereign immunity against action in tort was waived by both fire districts when the State yielded its general immunity by section 8 of the Court of Claims Act." *Tillson v. Kuhner*, 283 A.D. 604, 607 (N.Y. App. Div. 1954).

³² *Maresh v. State of Neb.*, 489 N.W.2d 298 (Neb. 1992).

showing where the shoulder of the road bordered a five inch drop-off. The court deemed the discretionary function exception inapplicable and held the State liable for creating the hazard; the State Department of Roads had adopted United States Department of Transportation regulations that prescribed the course of action required. Similarly, in *Bellman v. The City of Cedar Falls*,³³ the court found the discretionary function exception did not shield a school district from liability in a suit involving a kindergarten student who was crushed by a golf cart on a school field trip. The principal's failure to determine appropriate supervision for field trips, specifically required by the school district's policy manual, was "not a matter of choice;" the discretionary function exception could not apply.

Finally, most states in their comprehensive emergency services statute immunize responders acting in response to an emergency but only when a Governor or a local official proclaims a state of emergency.³⁴ For example, the Alabama Code provides that:

Neither the state nor any political subdivision thereof nor other agencies of the state or political subdivisions thereof, nor, except in cases of willful misconduct, gross negligence or bad faith, any emergency management worker, individual, partnership, association or corporation complying with or reasonably attempting to comply with this chapter [entitled "emergency management"] or any order, rule or regulation promulgated pursuant to the provisions of this chapter . . . shall be liable for the death of or injury to persons, or for damage to property, as a result of any such activity.³⁵

3.2. Failure To Prepare or Warn

A municipal corporation is generally not liable for injuries caused by its negligence in the exercise of "governmental" functions.³⁶ The following material considers case law where a plaintiff's injury or loss is allegedly attributable to the government's inaction in a situation where harm could be foreseeable. In these cases, the plaintiff argues that, if the government had responsibly prepared for that situation or warned of it, the plaintiff would have been spared the harm.

3.2.1. Absence or Inadequacy of a Plan

As discussed in Chapter III, states, and through them localities, must develop a plan to respond to emergencies. Governments have discretion in determining the contents of the plan. There is no statutorily-provided cause of action to challenge the nonexistence or inadequacy of a plan. Nor may citizens sue to prevent local officials from implementing an emergency response

³³ *Bellman v. The City of Cedar Falls*, 617 N.W.2d 11 (Iowa, 2000).

³⁴ Swanson, *The Delicate Art of Practicing Municipal Law under Conditions of Hell and High Water*, 76 N. DAK. L. REV. 487 (2000).

³⁵ ALA. CODE § 31-9-16(b) (1989).

³⁶ 57 AM JUR. 2d, *Municipal, School, and State Tort Liability*, §27 (2001); *see also* Jay M. Zitter, *Annotation: Liability for Failure of Police Response to Emergency Call*, 39 A.L.R. 4th 691 (2001) (includes cases of liability caused by actions of police officers and emergency systems dispatchers); *see also* *Hendon v. DeKalb County*, 417 S.E.2d 705 (Georgia 1992).

plan.³⁷

*Bradley v. Board of County Commissioners of Butler County*³⁸ is a rare case discussing the absence of a mandatory emergency preparedness plan. Butler County was the only county in Kansas without a state-approved disaster plan. Plaintiff suffered serious injuries when a tornado struck her home. She claimed that the county negligently failed to warn her of the impending danger, and that, under the Kansas Tort Claims Act (KTCA), the lack of the required plan erased the county's immunity for emergency preparedness activities. The court found the Board immune from suit: "nowhere in all of the statutes of this state is there any mention that having an approved emergency plan on file is a prerequisite to immunity for emergency preparedness activities. Nor has [plaintiff] cited us to any case law to support her position."³⁹

Similarly, in *Autery v. United States*,⁴⁰ a federal court found that the lack of a written tree hazard management plan in a national park did not subject the National Park Service to liability after plaintiff was killed by a diseased tree that fell on him. Park personnel had received "critical safety information" about the trees in question and were advised to remove them when possible; the Park Service had a written policy that "the saving and safeguarding of human life takes precedence over all other park management activities."⁴¹ Citing *Berkovitz*, the court held that the language of the administrative policy determines whether conduct is mandatory. In this instance, the directive to safeguard human life was "written in broad language [and] does not mention tree inspections, nor how the agency should implement the goal of safety."⁴² Thus, the guideline was too general to eliminate the discretionary function exemption.

By contrast, a state that used an inadequate traffic plan while resurfacing 15 miles of public highway, which caused cars to drive 55 miles an hour on a largely gravel road, was liable for an accident that left a motorist paralyzed. The court in *McCorvey v. Utah State Department of Transportation* found that the traffic plan "failed to provide drivers with sufficient warning of the hazards presented by the loose gravel."⁴³

3.2.2. Failure to Warn of Potential Danger

Another potential area for liability for state and local governments involves failure to warn the public about a potential danger such as diseases or natural disasters. In general, a government may be liable if, under a statute or regulation, it must provide a warning and fails to comply with that obligation. Yet, if the government has complied but a specific plaintiff did not receive that warning, there is no basis for liability.

In *Jasa v. Douglas County*, plaintiff claimed that the county health department negligently failed to warn that there was a case of contagious bacterial meningitis at a day care center. The

³⁷ *Vernet v. Town of Exeter*, 523 A.2d 48, 49 (1986).

³⁸ *Bradley v. Bd. of Co. Com'rs of Butler Co.*, 890 P.2d 1228 (Kan. Ct. App. 1995).

³⁹ *Id.* at 1231.

⁴⁰ *Autery v. United States*, 992 F.2d 1523 (11th Cir. 1993).

⁴¹ *Id.* at 1524-25.

⁴² *Id.* at 1523, 1528 (11th Cir. 1993).

⁴³ *McCorvey v. Utah State Dept. of Transp.*, 868 P.2d 41, 44 (Utah 1993).

county board of health was statutorily authorized to designate bacterial meningitis a reportable disease and to promulgate regulations to prevent its spread. The board had a program of educating day-care operators and offering assistance to day-care facilities, but not of notifying parents. How the board gave notice and who it notified were discretionary functions, held the court. “[T]he duty to make and enforce regulations is painted in broad strokes and does not specify the manner in which investigations are to be conducted.”⁴⁴ The county department’s approach was based on public policy considerations of how to allocate resources and therefore was within the discretionary function exemption. The court found the county not liable: “[H]ow the disease was to be contained was a matter of judgment. . . . However one may view the efficacy of the county department’s policy and reaction to the onset of bacterial meningitis, the courts are not at liberty to second-guess the county department’s policy decisions.”⁴⁵

Similarly, in *Roberson v. State of Louisiana*,⁴⁶ plaintiff died when his car skidded on a patch of ice on a bridge. The court found that the Department of Transportation and Development had no good reason to expect icing conditions “so as to trigger a duty to begin constant monitoring” of the weather tracking equipment, as was required by the emergency plan. Accordingly, courts should not “impose upon that department a burden of anticipating atypical weather conditions, i.e., of expecting the unexpected, and then acting upon the basis of that anticipation.”⁴⁷ By contrast, the court in *Lemke v. Metropolitan Utilities District*⁴⁸ asserted that when “(1) a governmental entity has actual or constructive notice of a dangerous condition or hazard caused by or under the control of the governmental entity, and (2) the dangerous condition or hazard is not readily apparent to persons who are likely to be injured by the dangerous condition or hazard, the governmental entity has a non-discretionary duty to warn of the danger or take other protective measures that may prevent injury as the result of the dangerous condition or hazard.”⁴⁹

A few cases address a government agency’s liability for failure to monitor emergency weather services such that the public is not notified of dangerous conditions.⁵⁰ The cases hold that no liability can be imposed, even where a customary practice of notification had developed, including having an emergency plan.⁵¹ Government bodies have no duty to adequately warn each citizen of approaching severe weather. The court in *Litchhult v. County of Orange*⁵² did not find the

⁴⁴ *Jasa v. Douglas County*, 510 N.W.2d 281, 291 (Neb. 1994).

⁴⁵ *Id.* at 292.

⁴⁶ 550 So. 2d 891, 896-97 (1989).

⁴⁷ *Id.* at 897. See also *Linda Lee Corp. v. Covington Co. and City of Bedford*, 36 Va. Cir. 590 (Va. Cir. Ct. 1993).

⁴⁸ *Lemke v. Metropolitan Utilities Dist.*, 502 N.W.2d 80 (Neb. 1993).

⁴⁹ *Id.* at, 89. See also *Hellmers v. Dept. of Transp. & Development*, 503 So.2d, 174 La. App. 4 Cir. (1987). *But see McCormick v. City of Norfolk*, 263 Neb. 693 (2002).

⁵⁰ *Roberson v. State of Louisiana*, 550 So. 2d 891 (La. 1989) (ice on bridge); *Bradley v. Bd. of County Commissioners*, 890 P. 2d 1228, 1231-32 (Kansas 1995) (tornado). See also *Griffin v. Rogers*, 653 P.2d 463, 479 (1982) (high winds on water causing several deaths; however, cause of action was based on contract, not duty to public, individuals or as a whole).

⁵¹ *Griffin v. Rogers*, 653 P.2d 463, 479 (1982); *Roberson v. State of Louisiana*, 550 So. 2d 891 (1989).

⁵² *Litchhult v. County of Orange*, 583 N.Y.S. 2d 671, (1992); *see also Bergquist v. United States* 849 F. Supp. 1221 (N.D. Il. 1994).

county liable for failing to disseminate tornado watch information before it struck a school, killing or injuring thirty children. The county's duty ran to the public "as intended beneficiaries of the emergency preparedness plan," not to the school or the students. The county could choose whether to warn the public about a tornado and was thus subject to the discretionary immunity exception (although the court did not address whether the county's public information officer's failure to distribute the notice was a deliberate choice or an oversight).

3.2.3. Failure to Keep Emergency Systems (911) Working

Local governments are typically not found liable for personal injury or property damage that results from a breakdown of emergency systems, including 911 emergency services. For example, in *Chiczewski v. Emergency Telephone System Board of DuPage County*,⁵³ plaintiff called 911 but was routed to the wrong system, and the 911 operator told plaintiff she could not send emergency services to outside areas. The court held that defendant would only be liable for willful or wanton conduct.⁵⁴ There was no evidence that defendant should have been aware that plaintiff's call would be mis-routed, nor was there a record of any previous mis-routing; an earlier 911 call from plaintiffs' home had been routed correctly. Courts are even more deferential of systems that are only used during emergencies: "the very fact that these are emergency procedures suggests a design that they not be maintained constantly in operation. Few, if any, emergencies so persist or endure."⁵⁵

3.2.4. Failure to enter into a mutual aid agreement

Mutual aid agreements are made, pursuant to statutory language either at the state or local level, among government entities (states, counties, or municipalities) to assist each other in the event of a fire or police emergency.⁵⁶ Most statutes permit mutual aid agreements; provision of aid under them is generally voluntary, conditional on the donor's ability to spare the resources.⁵⁷ Informal agreements may not be legally recognized.⁵⁸ Similarly, who may enter into the mutual aid agreement (Governor, mayor, fire or police official) depends upon the statutory wording. Who may request or invoke aid under the agreement is also specific to the statute and to the agreement itself. In New York, for example, only the Governor may activate the fire mobilization plan, following a request

⁵³ *Chiczewski v. Emergency Telephone System Board of Du Page County*, 692 N.E.2d 691 (Ill. 1997).

⁵⁴ *E.g.*, a "course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property." 745 ILCS 10/1C210 (West 1994).

⁵⁵ *Roberson v. Louisiana*, 550 So. 2d 891, 896 (La. 1989).

⁵⁶ *Advance Food Service Equipment v. County of Nassau*, 128 A.D.2d 658, 659-60 (NY App. Div. 1987) (citing state law requiring state fire administration to prepare a mutual aid plan); *Pennsylvania v. Novick*, 438 A.2d 974, 976 (1981) (citing state law permitting municipalities to enter into mutual aid agreements).

⁵⁷ In New York, the state fire administration was required to prepare a plan "which *may* provide for mutual aid zones." *Advance Food Service Equipment v. County of Nassau*, 128 A.D.2d 658, 659 (N. Y. App. Div. 1987) *emphasis added*. *But see* *Lima v. County of Rockland*, 133 A.D.2d 740, 741 (N.Y. App. Div. 1987) (the Rockland County (NY) mutual aid plan for fire districts was voluntary); *see also* *Tillson v. Kuhner*, 283 A.D. 604, 609 (N.Y. App. Div. 1954) (the defendant fire districts "instructed" their firemen to cooperate with each other. Pennsylvania permits its municipalities to enter into joint agreements).

⁵⁸ *Pennsylvania v. Novick*, 293 PA Super. 241, 245 (Pa. Super Ct. 1981) (finding "only municipalities may enter into such agreements, and that tacit agreements between police departments of adjoining municipalities purporting to authorize mutual aid are without legal effect").

for assistance from a local official.⁵⁹

Case law involving mutual aid agreements is limited for several reasons. First, they are infrequently invoked: one case found that less than five percent of a fire department's calls were to provide mutual aid to another district.⁶⁰ Second, failure to create or to invoke an agreement, without mandatory language in the statute or the agreement, does not give rise to a cause of action. Finally, even if a mutual aid agreement is mandated, courts favor the government in assessing any failure to act. A few cases use a mutual aid agreement as an element of proof in addressing other issues, such as whether a government entity is liable for property damage or personal injury that occurred when assistance was provided under that agreement,⁶¹ or whether a policeman's arrest outside of his municipality was lawful as "mutual aid" to the community where the arrest occurred.⁶²

In planning for a terrorist attack, state and local governments are well-advised to review existing mutual aid agreements to determine whether they are in compliance with any state law mandating them, whether they have been properly executed with neighboring communities, what steps are required to invoke them, what the penalty is for failure to respond to a request for mutual aid and to assure that any response plan for a terrorism attack properly references the mutual aid agreements.

3.3. Tort Liability for Damage to Private Property

In contrast to the previous section's discussion of potential tort liability for officials who do remain idle in advance of a situation, this section discusses liability for officials who act during a situation and cause harm to property by their actions.

3.3.1. Federal Liability

Previously-discussed principles of federal tort liability might suggest that courts would be deferential and rarely hold the government liable for responses to a crisis. In fact, when federal responders' actions cause damage to private property, courts often reject application of the discretionary function exception and hold them to a high duty of care. The leading cases involving the United States Forest Service (USFS) distinguish between discretionary choices involving allocation of resources and non-discretionary execution of fire-fighting tasks.

In *Rayonier Inc. v. United States*,⁶³ the Supreme Court held that USFS firefighters could be

⁵⁹ *Advance Food Service Equipment*, 128 A.D.2d 658, 659-60 (N.Y. App. Div. 1987).

⁶⁰ *Lima v. County of Rockland*, 133 A.D.2d 740, (N.Y. App. Div. 1987).

⁶¹ *Advance Food Service Equipment v. County of Nassau*, 128 A.D.2d 658, 741 (N.Y. App. Div. 1987) (defendant was not providing assistance under the mutual aid agreement, and therefore was not entitled to immunity under the statute mandating the plan); *Tillson v. Kuhner*, 283 A.D. 604, 607-08 (N.Y. App. Div. 1954) (fire department that requested mutual aid had no liability for fatal accident caused by fireman from another department who was responding to the request).

⁶² *Pennsylvania v. Novick*, 293 Pa. Super. 241, 245 (Pa. Super Ct. 1981) ("tacit agreements of police departments of adjoining municipalities purporting to authorize such mutual aid are without legal effect to empower the police of one municipality to arrest someone in the other municipality").

⁶³ *Rayonier, Inc. v. United States*, 352 U.S. 315, 321, (1957), *on remand*, *Arnhold v. United States*, 284 F.2d 326, 329-30 (9th Cir. 1960) (holding USFS firefighters liable under Washington law for negligently failing to control a fire started on federal land).

liable for negligent firefighting if state law would hold a private individual liable for similar conduct.⁶⁴ More recently, in *Anderson v. United States*,⁶⁵ the USFS initiated controlled burns in the Cleveland National Forest pursuant to a program to prevent major forest fires. When the fire got out of control, it destroyed part of a residential neighborhood. The court said that liability could ensue for the alleged negligence in setting, controlling, and suppressing the fire because California law imposes liability for damages caused when one sets fires that escape one's property. The same conclusion was reached in *Bennett v. United States*,⁶⁶ where the fire service negligently lost control of naturally-started fires, in contrast to fires it had set.

But in *Miller v. United States*,⁶⁷ the court dismissed a complaint against the fire service because the discretionary function exception is designed to prevent the judiciary from policing executive branch decisions. The damage resulted from a choice as to how best to cope with multiple fires in Bald Butte, considering fire suppression costs, minimizing resource damage and environmental impacts, and protecting private property. Although guidance sources for forest service operations were allegedly not satisfied, the court stated that "when there is more than one fire to fight, ... the inevitable competition for resources dictates discretion." Regardless of whether the Forest Service made correct resource allocation decisions, if officials are forced to balance competing concerns, immunity shields the decision.⁶⁸

Case law concerning the liability of FEMA, the Army Corps of Engineers, and other disaster-response agencies closely parallels the forest service cases. FEMA has been held immune from liability for deciding which property should be cleared or whether federal agencies should lead the effort or make grants to state or local governments. "The Government's decisions on when, where, and how to remove debris after a major disaster are exactly the sort of policy-imbuend decisions that fall within the second prong of the discretionary function exception."⁶⁹ But if federal law or policy prescribes a specific course of action, and the official violates that prescription, the discretionary function exception will not apply. Federal agents have no discretion to violate mandatory federal regulations. If their behavior does not comply with applicable regulations and where that non-compliance is the proximate cause of the damage, the government is negligent *per se*.⁷⁰

Moreover, the discretionary function exception will not apply if the choices do not involve high policy judgments that should be immune from judicial second-guessing or if the injury-causing

⁶⁴ *Rayonier* did not address the discretionary function exception which did not receive its current meaning until decades later. The government did not argue for, nor did the Court consider, the discretionary function exception. Moreover, when *Rayonier* was decided, discretionary immunity did not connote what it does under current law. It was not until 1984 that the Court formed the two-step analysis approach. *Varig Airlines*, 467 U.S. 797, 813-14 (1984); see William P. Kratzke, *The Supreme Court's Recent Overhaul of the Discretionary Function Exception to the Federal Tort Claims Act*, 7 ADMIN. L.J. AM. U. 1, 12 (1993).

⁶⁵ 55 F.3d 1379 (9th Cir. 1995).

⁶⁶ 53 F.3d 1080 (9th Cir. 1995).

⁶⁷ 163 F.3d 591 (9th Cir. 1998).

⁶⁸ See also *Defrees v. United States, Through U.S. Forest Service*, 738 F. Supp. 380, 384 (Or. 1990).

⁶⁹ *Sunrise Village Mobile Home Park v. United States*, 42 Fed. Cl. 392, 398 (1998).

⁷⁰ See *Smalls v. U.S.E.P.A.*, 861 F.2d 60 (3d Cir. 1988); *Starrett v. United States*, 847 F.2d 539 (9th Cir. 1988); and *Clark v. United States*, 660 F. Supp. 1164 (9th Cir. 1988).

negligence is unnecessary to execute policy choices.⁷¹ Thus, in *Ward v. United States*,⁷² plaintiff could recover damages resulting from a sonic boom induced by Air Force aircraft. Ordering military aircraft to undertake training flights was within the discretionary function exception, negligently operating aircraft during maneuvers was not.⁷³ Similarly, in *Miller v. United States*,⁷⁴ decisions to keep lake levels within a specific range were discretionary, but immunity did not extend to mistakes in judging how much water goes through the gates.⁷⁵

These cases, viewed together, clarify understanding of liability under the FTCA. No liability will follow from choices made involving policy considerations, even if a choice harms someone. However, if a policy, once chosen, can be carried out without causing harm, but a careless official selects a way to proceed that causes unnecessary harm, then immunity does not apply and liability may follow.

3.3.2. State Liability

Under the public necessity doctrine, state/local governments may make emergency response decisions that damage property without incurring liability: “[O]ne is privileged to enter land in possession of another if it is . . . necessary for the purpose of averting an imminent public disaster.”⁷⁶

Thus, no liability attaches if: (1) there a valid emergency; (2) the destruction of private property was necessary to alleviate a public danger; (3) if the destruction was not under exigent circumstances, the property owner received due process before the loss occurred; and (4) there was no intentional misrepresentation. A minority position, however, is that a taking occurs even if the damage results from necessary actions.⁷⁷

There is no liability if the property loss is inflicted to prevent further damage to other persons or property. “The basic objective of government is to protect and promote the health, safety and general welfare of the people. When a condition of affairs appears in the state which presents a threat to the accomplishment of that objective, the government has the right, and obligation, to cope with such threat by whatever measures, within constitutional limits, that are necessary and appropriate.”⁷⁸

⁷¹ *Melton v. U.S.*, 488 F. Supp. 1066 (D.D.C. 1980).

⁷² 471 F.2d 667, (3d Cir. 1973).

⁷³ *See also* *United States v. Hunsucker*, 314 F.2d 98 (9th Cir. 1962).

⁷⁴ 583 F. 2d 857, (6th Cir. 1978), *on remand*, 480 F. Supp. 612 (E.D. Mich. 1979)

⁷⁵ *See also* *Hayes v. United States*, 585 F.2d 701 (4th Cir. 1978).

⁷⁶ Restatement (Second) of Torts § 196, *quoted in* *Marty v. State of Idaho*, 786 P.2d 524, 142 (Idaho 1989) (whether flooding of farm land by flood control district was a taking or exercise of necessity was a question of fact to be determined at trial). “In times of natural catastrophe or civil disorder, immediate and decisive action by some component of state government is essential.” *Cougar Bus. Owners Assn. v. State of Wash.*, 647 P.2d 481, 486 (Wash. 1982).

⁷⁷ *See* *Wegner v. Milwaukee Mutual Ins. Co.*, 479 N.W. 2d 38 (Minn. 1991). The Minnesota Supreme Court said “We believe the better rule, in situations where an innocent third party’s property is taken, damaged or destroyed by the police. . . is for the municipality to compensate the innocent party for the resulting damages.” *Id.* at 42.

⁷⁸ *Suber*, 414 P.2d 546, 551-52 (1966); *see also* *Balent v. City of Wilkes-Barre*, 492 A.2d 1196 (Pa. Commw. Ct. 1985).

Depending on a state's statutory requirements, seizure of property may require a formal emergency declaration that specifically authorizes officials to seize or destroy property in dealing with the emergency.⁷⁹ The state of emergency may last for as long as necessary to resolve the public peril, even if longer than scheduled and without additional notice to the public. The emergency need not be declared until long after it occurred in order to be official and immune, so long as the declaration substantially complies with the applicable disaster preparedness statute. Immunity may extend to losses caused by damage to property that was not directly involved in the emergency situation such as nearby structures or automobiles.⁸⁰

There are exceptions to immunity for emergency response actions. Officials must substantially comply with disaster preparedness laws and with laws that specify activities to protect the public, such as cleanup of hazardous waste. If the government waits too long to destroy property after a disaster, then neither a necessity nor a nuisance exists, and the property owner must receive due process prior to destruction. Thus, the destruction must be timely, although the declaration of emergency may not have to be.⁸¹ In addition, intentional misrepresentation of harm that could arise from emergency actions is not a discretionary act.⁸² Officials must give complete and accurate information without deliberately concealing what harms could arise from their planned emergency measures. But inadvertently giving misinformation does not give rise to liability. Finally, the action must not violate state and federal constitutional rights or it could be a "taking" of property for public use, rather than an emergency action required as a police power.

*Teresi v. California*⁸³ demonstrates the meaning of "discretionary action." In the early 1980s, the Mediterranean fruit fly, Medfly, infested California's commercial agricultural land, prompting a state-declared emergency quarantine and pesticide program lasting almost two years. Quarantining the shipment of peppers and then spraying caused plaintiff's entire pepper crop to rot. Plaintiff alleged that his losses resulted from the negligent failure to adopt a safer pest eradication program and negligence in not realizing that it would damage crops. Plaintiff could not recover despite a California constitutional provision for compensation for a taking of private property; the actions were reasonably necessary to avoid further infestation. Similarly, in *Farmers Insurance Exchange v. California*,⁸⁴ an auto insurance company could not recover from the State for the claims it had paid to repaint cars damaged by the pesticide spraying. Moreover, a decision to continue spraying beyond its originally scheduled period without giving the public further notice was also a discretionary decision.

⁷⁹ *Cougar Bus. Owners Assn. v. State of Wash.*, 647 P.2d 481, 486 (Wash. 1982).

⁸⁰ *LaBadie v. California*, 256 Cal. Rptr. 604 (Cal. Ct. App. 1989); *see also* *S. Griffin Construction, Inc. v. City of Lewiston*, 135 Idaho 181 (Idaho 2000) (declaring a fire a state of emergency three years after it occurred substantially complied with the Idaho Disaster Preparedness Act, and only substantial compliance was required).

⁸¹ *Rapid City v. Boland*, 271 N.W.2d 60 (1978) (holding that waiting 21 days to demolish a house damaged by a flood was too long to show a necessity existed, and the owner was entitled to due process or compensation). *But see* *S. Griffin Construction, Inc. v. City of Lewiston*, 135 Idaho 181 (Idaho 2000) (declaring a fire a state of emergency three years after it occurred substantially complied with the Idaho Disaster Preparedness Act).

⁸² *Adkins v. California*, 50 Cal.App. 4th 1802, (Cal. App. 1996) (the state was liable to plaintiffs who suffered harm from pesticides because their supervisors knowingly misrepresented that the chemicals in the pesticides were safe).

⁸³ *Teresi v. California*, 180 Cal.App. 3d 239 (Cal. Ct. App. 1986).

⁸⁴ *Farmers Insurance Exchange v. California*, 175 Cal.App. 3d 494 (Cal. Ct. App. 1985).

Damages inflicted during a proper exercise of the state's police power are non-compensable. The constitutional guarantee of just compensation attaching to an exercise of the power of eminent domain does not extend to the State's exercise of its police power. In cases calling for immediate action, the emergency justifies the measures taken to control the menacing condition, and private interests must be held wholly subservient to the State's right to proceed howsoever it deems appropriate to protect the public health or safety.⁸⁵ Thus, the Illinois Supreme Court held in *In re Chicago Flood Litigation* that city officials were not liable for a public injury caused by city workers who allegedly failed to supervise contractors who damaged an underwater tunnel system leading to flooding in downtown buildings. The court considered the officials' alleged failure to repair the tunnel and decisions made immediately after the accident as within the exercise of discretionary decisions.⁸⁶

4. LIABILITY UNDER SECTION 1983 FOR RIGHTS VIOLATIONS

Section 1983 of Title 42 of the United States Code arises from the Ku Klux Klan Act of 1871, one of the Civil Rights Acts passed between 1866 and 1875 to enforce the 13th, 14th, and 15th Amendments to the Constitution.⁸⁷ It provides that state and local officials or their governments for may be liable for actions that deprive persons of rights secured by the Constitution or laws of the United States.⁸⁸ For the locality to be liable, the wrongful action must implement or execute a promulgated policy or law or it must manifest customary government actions. If the locality was not responsible for the plaintiff's constitutional injury, then the Section 1983 action may proceed only against the offending officer.⁸⁹ Delegating authority to a subordinate to exercise discretion does not render the locality liable; the delegated subordinate's discretionary decisions must be unconstrained by official policies and not subject to review.⁹⁰ A constitutional violation by a non-policy-making official not pursuant to an unconstitutional policy is insufficient to impose liability,⁹¹ but municipal liability may attach to the actions of the decisive policymaker as to that subject matter.⁹²

Persons making Section 1983 claims typically allege that the harm they sustained was due to

⁸⁵ *Id.* at 501, 502.

⁸⁶ *In re Chicago Flood Litigation*, 680 N.E.2d 265 (Ill. 1997).

⁸⁷ Section 1983 of 28 U.S.C.S. is derived from the first provision (usually referred to as § 1, although not designated as such in the Act) of the Act of Congress of April 20, 1871 (17 Stat 13), which, in relevant part, reads "Any person who, under color of any state law, statute, ordinance, regulation, custom or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress." Observers consider § 1983 the only one of the Civil Rights Acts that has had successful effect over time. *Zwickler v Koota*, 389 U.S. 241 n.9 (1967).

⁸⁸ *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978) (the Supreme Court approved the recovery of damages directly from a municipality that ultimately was found responsible for the plaintiff's deprivation).

⁸⁹ *Collins v. City of Harker Heights*, 503 U.S. 115 (1992).

⁹⁰ *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1998).

⁹¹ *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985).

⁹² *Mandel v. Doe*, 888 F.2d 783 (11th Cir. 1989).

a violation of their privacy rights or of their substantive due process rights.⁹³ In connection with catastrophic terrorism, four categories of Section 1983 claims may arise. First, liability may ensue if responders create or increase a person's danger or harm. Second, liability may result from detaining persons, thereby preventing them from taking care of themselves, and failing to attend to their needs or manifesting deliberate indifference to them. Third, liability may be imposed for using excessive force in carrying out official functions. Fourth, liability may be imposed for not protecting persons from private violence. As to this last claim, this discussion also considers state "mob-action" statutes that may provide a cause of action for similar problems.

4.1. State and Local Responders' Liability for Creating or Increasing Danger

This section explores whether a municipality and/or its officers could be liable for a citizen's injuries if the officials' actions in stressful conditions contributed to plaintiff's peril by increasing the potential danger.

No liability will be imposed simply because responders did not succeed in protecting persons from harm. There is no right to competent rescue services.⁹⁴ Mere failure to rescue does not give rise to liability, nor does a poorly executed rescue. Officials are not obliged to prevent harm nor rescue persons in danger. The Due Process Clause does not guarantee certain minimal levels of safety and security for citizens; it is designed to control abuses of governmental power and thus does not reach negligence. Nor is it a source of mandatory rescue services, though it does proscribe intentional deprivations.⁹⁵

Liability can be established, however, if officials leave a person in more danger than when they found him, or when they deny self-help or the help of others. This basis for a claim must involve conduct that endangers a person.⁹⁶ If the government creates or increases the danger that leads to a person's injury and fails to protect the person, then the government is liable under Section 1983.⁹⁷ The logic here is traditional tort doctrine; no one must rescue someone in distress, but a person who begins a rescue must not be negligent.⁹⁸ This doctrine respects the autonomy of bystanders and reduces the risk of conscription into hazardous rescue. At the same time, liability for incompetent rescue reflects the view that a rescue in process may lead superior rescuers to pass by, endangering the victim more than if the first rescue had not been initiated. Therefore, by application of this rule to governmental rescue services such as police, fire departments, "hot line" phone numbers, etc., the government need not offer such services but must provide them competently if it does.

Contrast two recent decisions from the Seventh Circuit Court of Appeals. In *Archie v. City of Racine*,⁹⁹ Les Hiles repeatedly called the Racine Fire Department, seeking a rescue squad for his

⁹³ Brogsdale v. Barry, 926 F.2d 1184, 1187-88 (D.C. Cir. 1991).

⁹⁴ Jackson v. City of Joliet, 715 F.2d 1200, 1205 (7th Cir. 1983).

⁹⁵ DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989).

⁹⁶ L.W. v. Grubbs, 974 F.2d 119, 121 (9th Cir. 1992).

⁹⁷ Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982).

⁹⁸ RESTATEMENT 2D OF TORTS §§ 314, 323 (1965); PROSSER & KEETON, THE LAW OF TORTS 378-82 (5th ed. 1984).

⁹⁹ 847 F.2d 1211 (7th Cir. 1988).

friend Rena DeLacy who was hyperventilating heavily. George Giese, the dispatcher, advised Hiles to have DeLacy breathe into a paper bag. DeLacy died a few hours later; appropriate emergency care could have saved DeLacy's life. In the suit against the City of Racine as well as Giese, the appellate court ruled that, although Giese may have negligently violated state tort law, neither he nor the government had a constitutional obligation to DeLacy. To treat a violation of state law as a constitutional violation would make the federal government the enforcer of state law, impermissibly intruding upon state determinations of how to allocate resources and responsibilities.

In *Ross v. United States*,¹⁰⁰ twelve year-old William Ross fell off a pier into Lake Michigan and drowned. Two lifeguards, two firefighters, a policemen and two civilian scuba divers sought to attempt a rescue but were stopped by county deputy sheriff Johnson, citing a policy forbidding civilian rescue attempts; only official agents could perform rescues. Deputy Johnson ordered everyone to cease their rescue efforts. When the civilian divers offered to attempt a rescue at their own risk, Johnson threatened to arrest them and positioned his boat to prevent their dive. Thirty minutes later, official divers retrieved William's body. Plaintiff successfully alleged liability under Section 1983 for the "official policy" that led Deputy Johnson to forbid rescue efforts, even though this was the first challenge to the policy. The wrong was not the failure to provide assistance; it was the official's cutting off private sources of rescue without providing an alternative, depriving William of his right to life. "Where a particular course of action is authorized by a municipality's authorized decision-makers, it represents a policy rightly attributed to the governmental entity, and in such a case, there is no need to resort to proof of the policy's multiple applications to attribute its existence to the municipality."¹⁰¹

The line that separates *Archie* from *Ross* is captured in two sentences from the opinion in *Archie*:

Having put the citizen on the defensive, or having stripped away avenues of self-help, the state must afford a procedure reasonably likely to reach an accurate conclusion even if that means the implication of positive rights from negative ones. When the government does not monopolize the avenues of relief, or when it has already afforded process sufficient to yield accurate decisions, it has no further obligation to give aid.¹⁰²

Other cases illustrate when police may be liable for increasing a risk of injury. In *Kneipp v. Fedder*,¹⁰³ police stopped plaintiff's daughter and her husband while walking visibly intoxicated. The police sent the husband home; he believed that the police would take his seriously impaired wife to the hospital. Instead, they sent her home alone. She fell down an embankment, suffering hypothermia and brain damage. The court ruled that by assuming responsibility for her safety when they told the husband to leave, the police cut off her private source of safety and increased risk that she might be injured when they later abandoned her. The officers could be liable under a four-part test of the state-created danger theory: (1) the harm ultimately caused was foreseeable and fairly

¹⁰⁰ 910 F.2d 1422 (7th Cir. 1990).

¹⁰¹ *Id.*, citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-81 (1986); see also *Sinhasomphone v. City of Milwaukee*, 785 F. Supp. 1343 (E.D. Wis. 1992).

¹⁰² *Archie v. City of Racine*, 847 F.2d 1211, 1222 (7th Cir. 1988).

¹⁰³ 95 F.3d 1199 (3^d Cir. 1996).

direct; (2) the official acted in willful disregard for the plaintiff's safety; (3) a relationship existed between the official and the plaintiff; and (4) the officials used their authority to create a risk of harm that would not have otherwise existed. As to the city's liability, the facts would have to show that its training program for handling such situations was inadequate and that inadequacy was caused by deliberate indifference.¹⁰⁴

Closely related is a claim that, due to the claimant's ethnicity, officers selectively ignored the risk. In *Amos v. The City of Page, Arizona*,¹⁰⁵ decedent's estate could pursue a claim against police for having called off a rescue effort, allegedly because they believed that the decedent was Native American. Moreover, as the refusal to rescue was allegedly pursuant to an unstated municipal policy, the municipality itself could be a culpable party, and not merely the officers who declined to conduct the rescue.

These cases suggest that the courts will hold municipalities liable if police or officials manifest an extraordinary or unjustifiable disregard of a danger or interfere with private sources of rescue. If the disregard or interference is linked to a municipal "policy," then the municipality is likely to be held responsible itself, not just the official. The basis of liability here is not the reasonable exercise of discretion that leads to an unfortunate result, it is the obstinate refusal to be helpful or to allow others to help someone in need. In a catastrophe, police and other responders must not stand in the way of private rescue efforts nor disregard victims in danger.

¹⁰⁴ See also *Hansberry v. City of Philadelphia*, No. 01-CU-1670 #2002 U.S. Dist. LEXIS 20493, at *9 (Oct. 24, 2002).

¹⁰⁵ No. #99-16214, 2001 U.S. App. Lexis 16792 (July 26, 2001).

4.2. Liability for Failure To Properly Attend To Detainees' Needs

During and after a terrorism emergency, authorities might impose a quarantine or might order persons confined to their homes or detained for medical testing and vaccination. Individuals may lose personal liberty as well as the normal ability to tend to their own needs. This section explores whether a municipality and/or its officers could face liability for depriving or failing to attend to detainees' medical needs. That is, could a municipality be liable if police or other officials detain someone yet do not provide that person with necessary medical attention or medication? As stated, Section 1983 does not generally obligate officials to provide for citizens' safety or well-being. However, if officials detain or have custody of a person, preventing access to avenues of assistance such that the detainee is dependent upon those officials, a "special relationship" exists. "Deliberate indifference" to the detainee's needs in that context can lead to liability. When officials restrain an individual's freedom to act on his own behalf -- through incarceration, institutionalization, or other detention -- the protections of the Due Process Clause are triggered.¹⁰⁶

"'Deliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.... A plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision."¹⁰⁷ "Deliberate indifference" cannot be inferred merely from a negligent or even a grossly negligent response to a substantial risk of harm. Nor will liability be found for failure to provide medical care for detainees whose injuries appear to be slight but later turn out to be serious.¹⁰⁸

The term "deliberate indifference" serves to distinguish actions giving rise to liability from actions that are shielded by the doctrine of qualified immunity for performance of discretionary functions that are objectively reasonable.¹⁰⁹ If a Section 1983 defendant is an official whose position involves exercising discretion, plaintiff must rebut the defense of qualified immunity by showing that a clearly established right was violated such that a reasonable official would understand that what he is doing violates that right.¹¹⁰ The defendant's acts are held to be objectively reasonable unless officials in the defendant's circumstances would have known that the defendant's conduct violated established rights. Decisions of how to manage programs and even concerning a particular response to a situation involve many policy choices that local officials must make without fear that federal judges will hold them liable in hindsight for a mistake.¹¹¹ However, qualified immunity turns only upon the *objective* reasonableness of the defendant's actions; a particular defendant's subjective state of mind has no bearing on whether qualified immunity should

¹⁰⁶ Farmer v. Brennan, 511 U.S. 825 (1994).

¹⁰⁷ Board of County Comm'rs. v. Brown, 520 U.S. 397, 411 (1997).

¹⁰⁸ Davis v. Jones, 936 F.2d 971 (7th Cir. 1991).

¹⁰⁹ Harlow v. Fitzgerald, 457 U.S. 800 (1982).

¹¹⁰ Anderson v. Creighton, 483 U.S. 635 (1987).

¹¹¹ See Johnson v. Hardin County, 908 F.2d 1280 (6th Cir. 1990) (county jailer not liable despite being in complete charge of the jail with unreviewable authority to decide on prisoners' medical care; the legislature was responsible for enacting laws regarding medical care at the jail, even though relevant ordinances had not been adopted).

apply.¹¹²

Detainees have a constitutional right to have confining officials not meet their serious medical needs with deliberate indifference. “Deliberate indifference” in this context means that: (1) the official knew facts and could draw an inference of substantial risk of harm; (2) the official actually drew that inference; and (3) the official’s response indicates a subjective intent that harm occur. If the need for treatment is obvious, intentionally refusing to provide it or providing care that is so cursory as to amount to no treatment at all may amount to deliberate indifference. In *Fielder v Bosshard*,¹¹³ liability could be found where both the detainee and his mother had asked the jailer for medical attention for delirium tremens but the jailer ignored those requests; the jailer thought the prisoner was “faking.” In *Mandel v. Doe*,¹¹⁴ the defendant’s persistent refusal to order an x-ray despite the plaintiff’s complaints or to refer plaintiff to a hospital for more experienced treatment, coupled with his utter lack of concern for the well-being of a detainee with whose care he had been entrusted, was held to constitute constitutionally intolerable deliberate indifference.¹¹⁵

If the official’s liability can be established, then a question arises as to whether the municipality itself may be liable. In *Canton v. Harris*, the Supreme Court held that to support a claim of “failure to train,” the plaintiff must show that: “in light of the duties assigned to specific officers or employees, the need for more or different training is obvious, and the inadequacy so likely to result in violations of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.”¹¹⁶ The municipality could be held liable under Section 1983 for violating a plaintiff’s Due Process rights to receive necessary medical attention while in police custody because of the municipality’s failure to train its employees. The plaintiff arrestee twice slumped to the ground and was incoherent when asked if she needed medical attention. The police left her on the floor until after she was released from custody when she was admitted to the hospital for treatment of emotional illness. The municipality’s policy was to provide necessary medical treatment to arrestees. In this case, the municipal policymakers responsible for establishing training regimens deliberately chose inadequate training.

Theories of vicarious liability or *respondeat superior* will not support supervisory liability. Absent a policy or custom evincing deliberate indifference, there is no liability for claims of failure to train officers that derive from a municipality’s discretionary allocation of strained resources, even if officials were negligent.¹¹⁷ In order to pursue such liability, the plaintiff must establish that: (1) the wrongful conduct was due to a failure to train or supervise the officers involved; (2) that failure is causally connected to the alleged violation of plaintiff’s rights; and (3) the failure to train manifested deliberate indifference to plaintiff’s rights.¹¹⁸ Thus, in *S.P. v. City of Takoma Park*,¹¹⁹

¹¹² Thompson v. Upshur County, 245 F.3d 447 (5th Cir. 2001).

¹¹³ 590 F.2d 105 (5th Cir. 1979).

¹¹⁴ 888 F.2d 783 (11th Cir. 1989).

¹¹⁵ See also, Gibson v. County of Washoe, 290 F.3d 1175 (2002).

¹¹⁶ Canton v. Harris, 489 U.S. 378, 390 (1989).

¹¹⁷ Ringuette v. City of Fall River, 888 F. Supp. 258 (D. Mass. 1995).

¹¹⁸ Thompson v. Upshur County, 245 F.3d 447 (5th Cir. 2001).

¹¹⁹ 134 F.3d 260 (4th Cir. 1998).

the Fourth Circuit held that a municipality's failure to instruct employees as to the proper constitutional standard to detain a person for mental health reasons suffices to constitute inadequate training for purposes of a Section 1983 claim. In *Colle v. Brazos County*,¹²⁰ the sheriff was held liable for staffing the jail with persons lacking authority to transfer a detainee needing medical care to a hospital, and having a policy of not monitoring detainees' serious health needs.

4.3. Liability for Use of Excessive Force

In responding to a terrorist event, an important liability issue concerns law enforcement officers' use of force. Persons who interfere with responders must be forcibly moved or controlled; persons who panic must be restrained. If a quarantine or other emergency restriction is ordered, force may be necessary to enforce it against disobedient citizens. Moreover, the general stress on social conditions might encourage people to commit crime: either traditional crimes such as looting or robbery; or crimes of violence directed at purported associates of the terrorist event (*i.e.*, persons of the same ethnicity as the alleged culprit). The courts review allegations of excessive use of force case by case; there are no absolute rules, although the cases establish some guidelines. To control emergency situations, law enforcement officers may not use objectively unreasonable force "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."¹²¹ Police acting in their community care taking function, *i.e.*, protecting community safety, rather than conducting investigations, may use force that would be excessive in other situations if they reasonably believe that their action is required to avert a life-threatening emergency.¹²²

In contrast to previously discussed liability issues where the courts' inquiry focused on "deliberate indifference," cases involving claims of excessive force turn on whether force was applied "maliciously and sadistically for the very purpose of causing harm,"¹²³ or with "a purpose to cause harm."¹²⁴ The Supreme Court has held that use of force where circumstances require police officers to make split-second judgments may not be a basis for Section 1983 culpability under either the Eighth Amendment (in prison riots) or the Fourteenth Amendment (in high-speed automobile chases) if the officers were merely indifferent to the risk posed by that force. Determining if the force used was unnecessary requires evaluation of the need to apply force, the relationship between that need and the amount of force used, the threat "reasonably perceived by the responsible officials," and "any efforts made to temper the severity of a forceful response."¹²⁵

Police, in situations requiring fast action, might have conflicting obligations. Their duty is to restore and maintain lawful order decisively and to show restraint at the same time, and their decisions must be made "in haste, under pressure, and frequently without the luxury of a second chance."¹²⁶ An officer's use of some degree of force is justified against a person who resists arrest

¹²⁰ 981 F.2d 237 (5th Cir. 1993).

¹²¹ *Graham v. Connor*, 490 U.S. 386, 396 (1989).

¹²² *Russoli v. Salisbury*, 126 F. Supp. 2d 821 (E.D. Pa. 2000).

¹²³ *Whitley v. Albers* 475 U.S. 312, 320-21 (1986).

¹²⁴ *County of Sacramento v. Lewis*, 523 U.S. 833, 835 (1998).

¹²⁵ *Hudson v. McMillian* 503 U.S. 1 (1992).

¹²⁶ *County of Sacramento v. Lewis*, 523 U.S. 833, 852 (1998).

or threatens to assault the officer, but the officer has no license to use force without limit. The force used must be reasonably related to the nature of the resistance.¹²⁷ While not “every push or shove an officer makes during an arrest will subject the officer to Section 1983 liability,” the force used need not “‘shock the conscience’ or cause ‘severe injuries’” to rise to the level of excessive force.¹²⁸ A key issue is whether the officer’s actions comported with a department’s routine practice and in light of their training such that the officer’s conduct was objectively reasonable.¹²⁹

Terrorism creates new problems for police; line officers’ ability to rapidly follow their training and the law in dangerous situations involving politically motivate sociopaths is critical.¹³⁰ In a case where a criminal escorted by DEA agents during a flight became unruly, the court found that the agents had not used excessive force. Some force was necessary to restrain him and protect the other passengers under the circumstances: where the alleged excessive force occurred for a very brief period; the passenger was clearly disturbed and dangerous; and crew members faced potential criminal liability if they did interfere.¹³¹

4.4. Liability for Failure To Protect Against Private Violence and Mob Actions

A terrorist act can (and has) provoked violence by creating an environment of mass panic that spawns violence by non-terrorists. For example, rioting may erupt if there is a widespread sense that law and order have broken down. In another respect, persons unrelated to the terrorist might, out of misplaced anger, behave violently to innocent members of the terrorists’ ethnic group. This section explores the legal rules governing the liability of officials with respect to harm caused by private violence.

Persons injured by criminal violence face a steep burden of proof in seeking to hold officials liable for failing to provide protection. In general, state and local governments are not responsible for damages caused by private citizens’ wrongful conduct. As earlier stated, officials are not obligated to protect people, least of all from conduct outside their control. Even if officials are negligent in their responsibilities, that does not lead to liability because of statutory protections from tort liability for performing government functions. Yet, despite their broad immunity, officials can be held liable under either: (1) Section 1983 for violation of a right protected by the constitution or federal law; or (2) state statutes that provide a cause of action against a municipality for damages to property or injuries to persons resulting from mob actions or riots.

¹²⁷ *Sullivan v. Town of Dewitt* New York, 225 F.3d 161 (2000).

¹²⁸ *Lester v. City of Chicago*, 830 F.2d 706, 712 (7th Cir. 1987); *see also* *Warren v. Humphrey*, 875 F. Supp 378 (E.D. Texas 1995); *Johnson v. Glick*, 481 F.2d 1028, 1033 (2nd Cir.).

¹²⁹ *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

¹³⁰ *O’Brien v. City of Grand Rapids*, 23 F.3d 990 (6th Cir. 1994).

¹³¹ *Levy v. American Airlines*, No. 90 Civ. 7005, 1993 U.S. Dist. LEXIS 7842, at (S.D.N.Y. June 9, 1993), *aff’d*, 22 F.3d 1092, (3d Cir. 1994).

4.4.1. Liability under Section 1983 for Injuries from Private Violence

In general, Section 1983 does not provide relief for persons injured by private violence. When a civil disturbance injures individuals, even an official's precipitate recklessness will not necessarily shock the conscience if the official did not act with malice or intend to cause the harm.¹³²

According to the Supreme Court, "[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty and property of its citizens against invasion by private actors.... It forbids the State itself to deprive individuals of life, liberty, or property ... but its language cannot be fairly extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means."¹³³

Yet, if plaintiff can show that the official actions were based on discriminatory intent, increased the victim's vulnerability to private attacks, or were made without due care, plaintiff can raise a Section 1983 claim. In *Dwares v. City of New York*,¹³⁴ plaintiff observed a flag-burning rally and was severely beaten by skinheads. He alleged that police officers looked on and did nothing to stop the beating, although the defendants knew that one attacker had a history of violence against free speech activists and had told a local newspaper that police officers had agreed to not interfere with the skinheads. The Second Circuit found that the victim could claim a Section 1983 violation where the State "assisted in creating or increasing the danger to the victim." This complaint "asserted that the defendant officers indeed had made the demonstrators more vulnerable to assaults," which "violated the victim's rights under the Due Process Clause."

In *Rosenbaum v. City of New York*,¹³⁵ plaintiffs sued the Mayor of New York and the City Police Commissioner, claiming an inappropriate policy of restraint. After an African-American child was killed by a car driven by a Hasidic Jew, civil disturbances led to personal injury, another death, and property damage. The court refused to dismiss the §1983 complaint against the City "because plaintiffs have adequately pleaded the violation of their equal protection rights." But the Mayor and Police Commissioner were entitled to qualified immunity because plaintiffs had not made a particularized showing that the officials made policy decisions with improper discriminatory intent. "[I]t was objectively reasonable for [them] to conclude that they were not behaving in a manner that either created or increased danger to plaintiffs" by deciding not to make arrests for unlawful assembly during the first two and a half days of violence.

4.4.2. Mob Action Statutes

Some states have enacted statutes specifying municipal liability for harm to persons and property caused by mob action or riots. These laws both encourage prevention of losses and deter local residents from rioting by imposing a dollar liability upon them. They also reflect a policy that the community rather than the individual victim should absorb the losses. Thus, the municipality is the surety in these situations. Even in states having no fault liability statutes, the plaintiff must establish that the damages were caused by the riot,¹³⁶ not merely from a municipality's discretionary

¹³² *Radecki v. Barela*, 146 F.3d 1227 (10th Cir. 1998).

¹³³ *DeShaney v. Winnebago County Social Services Dept.*, 489 U.S. 189, 195 (1988).

¹³⁴ *Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993).

¹³⁵ *Rosenbaum v. City of New York*, 975 F. Supp. 206 (E.D. N.Y. 1997).

¹³⁶ *Wigler v. City of Newark*, 309 A.2d 897 (1973).

administrative or legislative decisions.¹³⁷

Some of the statutes imposing liability for mob action provide for liability only if the municipality has not exercised reasonable care or diligence in suppressing the mob.¹³⁸ Other statutes provide for strict liability in cases where the victim is assaulted or lynched.¹³⁹ Other statutes provide for liability unless the victim did not exercise due diligence in protecting its property.¹⁴⁰ Indeed, a municipality may use the claim of contributory negligence as a defense even in states with no fault liability statutes. Some states that had such statutes have repealed them or replaced them with victim compensation statutes.¹⁴¹

Various issues arise concerning claims under these statutes, including whether the perpetrators were a mob; whether the municipality had notice or knowledge; and what damages does liability extend to?

4.4.2.1. What Constitutes a Mob?

Generally, a mob must share a common purpose for the victim to recover for its violence.¹⁴² Thus, a mob is not merely a group of persons who commit individual illegal acts. In *Barbour Package Store v. City of Hartford*,¹⁴³ recovery was not allowed for losses from acts of looters who did not act in concert. The court could not determine how many persons were involved in the looting nor whether they acted in concert or alone. Other courts, however, have assumed that criminal acts were committed in concert, especially if there is a history of roving gangs,¹⁴⁴ or where the persons assembled to carry out what they believed was a community or collective interest.¹⁴⁵ In some cases, persons have constituted a mob for purposes of finding liability even though they had assembled with no common purpose but became unlawful thereafter.¹⁴⁶ Nor has the criminality of

¹³⁷ *A&B Auto Stores of Jones St. v. City of Newark*, 279 A.2d 693 (1971).

¹³⁸ See e.g. CONN. GEN. STAT. § 7-108 (1999); Idaho Code § 6-903 (Michie 1996); KY REV. STAT. ANN. § 411.100 (Banks-Baldwin 1991) (liability only if authorities could have prevented the damage; Maryland Ann. Code art. 82 "1-3 (liability only if authorities had reason to believe that riot was likely, and could have prevented injury but did not exercise proper care); MASS ANN. LAWS Ch. 269 § 3 (Law. Co-op. 1992); N.Y. Gen. Mun. § 71 (McKinney 1999) (liability of official for neglecting or refusing to provide protection).

¹³⁹ See e.g. OHIO REV. CODE ANN. § 3761.03 (Anderson 2002) (damages up to \$5,000 for persons assaulted or lynched by a mob); S. C. CODE ANN. § 16-5-60 (Law. Co-op. 2001) (county is liable at least \$2,000 for lurching regardless of officers' conduct); W. VA. CODE § 61-6-12 (2000) (municipal liability for \$5,000 when person lunched was taken from municipal officer).

¹⁴⁰ See e.g. N.J. STAT. ANN. § 2A:48-1 (West 2000) (plaintiff can recover only if it used all reasonable diligence to prevent injury/destruction); WIS. STAT. ANN. § 893.81 (West 1997) (claimant must have tried to prevent loss and immediately notified authorities).

¹⁴¹ See e.g. CAL. GOV. CODE § 13960 (West 1984).

¹⁴² *Meadows v. City of Logan*, 1 S.E.2d 394 (W.Va. 1939) (persons assembled to force plaintiffs to sign an agreement regulating their business who destroyed and carried off all plaintiff's property had assembled for a common unlawful purpose and constituted a mob).

¹⁴³ 300 A.2d 254 (Conn. C.P. 1972).

¹⁴⁴ *Abraham v. City of Woburn*, 421 N.E. 2d 1206 (Mass. 1981).

¹⁴⁵ *Slaton v. City of Chicago*, 130 N.E. 2d 205 (Ill. 1955).

¹⁴⁶ *Yalenezian v. City of Boston*, 131 N.E. 220 (Mass. 1921).

the common purpose been determinative. In *City of Madisonville v. Bishop*,¹⁴⁷ the court disregarded the aim or purpose of the assembly (to celebrate Christmas by setting off fireworks) if in fact the assembly was riotous.

4.4.2.2. Municipality's Knowledge or Notice

Most statutes require that a person seeking recovery for damages/injury notify the authorities of any threat or act of rioting. However, if such notice would have been useless to secure protection from the mob, the plaintiff will not be precluded from recovery for failure to give notice.¹⁴⁸ Some courts have focused not on a municipality's knowledge that riots were occurring but whether it knew that specific property was in danger.¹⁴⁹

4.4.2.3. Liability for What Damages?

Almost all mob action statutes allow recovery for damage to property, but only a few allow recovery for personal injury. Even where personal injuries may be recovered, the courts generally require that such injury be the mob's specific or common purpose.¹⁵⁰ With regard to recovery for property damages, property owners can typically recover from losses resulting from theft and looting.¹⁵¹ However, plaintiffs may not recover for loss of profits, losses from business interruption, or intangible losses.¹⁵²

¹⁴⁷113 Ky 106 (1902). *But see* *A & B v. Newark*, 59 N.J. 5 (1971) (a mob or riot is different than a joint violation of law).

¹⁴⁸*Roy v. Hampton*, 108 N.H. 51 (1967).

¹⁴⁹*City of Louisville v. Habeeb*, 556 S.W.2d 665 (Ky. 1977) (city did not have notice of imminent danger to plaintiff's store even though it knew of mob riots in the area).

¹⁵⁰*Landesman v. Board of County Commissioners*, 224 N.E.2d 532 (Ohio 1967).

¹⁵¹*But see Yalenezian v. City of Boston*, 238 Mass. 538 (1921) (theft of property does not signify that the thing stolen has been destroyed or injured, only that the plaintiff's possessory right has been injured).

¹⁵²*Mulliken v. City of Englewood*, 59 N.J. 1 (1971).

CHAPTER V -- LEGAL CHALLENGES FOR THE PUBLIC HEALTH SECTOR¹

INTRODUCTION: PUBLIC HEALTH AND CATASTROPHIC TERRORISM

Acts of catastrophic terrorism would cause widespread human and property damage in a society. The terrorist aim of attacking large populations with weapons of mass destruction (WMD) brings the public health sector of government into the forefront of efforts to deal with catastrophic terrorism. “Public health” focuses on population health as opposed to the health of the individual, which is the province of health care and medicine. The Institute of Medicine defined the substance of public health as “organized community efforts aimed at the prevention of disease and promotion of health.”² Acts of catastrophic terrorism would threaten the essence of the public health mission.

Public health is also important in connection with catastrophic terrorism because the public health sector bears significant burdens of planning for and would bear critical responsibilities in responses to acts of catastrophic terrorism. Public health officials and services will be among the first to respond to uses of WMD because of the adverse population health consequences these weapons could achieve. Catastrophic terrorism’s challenge to public health is complicated because biological, chemical, and nuclear/radiological weapons affect human health differently and require distinct public health planning and responses. The public health sector’s importance is magnified if biological weapons are used because public health personnel and resources represent the main lines of defense against the spread of disease (see Table 1). The anthrax attacks in the United States in October 2001 demonstrated the critical importance of the public health sector to responses to acts of bioterrorism.

Table 1: Unique Public Health Challenges of Biological Weapons

“Bioterrorism presents unique challenges since it differs dramatically from other forms of terrorism and national emergencies. While explosions or chemical attacks cause immediate and visible casualties, an intentional release of a biological weapon would unfold over the course of days or weeks, culminating potentially in a major epidemic. Until sufficient numbers of people arrive in emergency rooms, doctors’ offices and health clinics with similar illnesses, there may be no sign that a bioterrorist attack has taken place.”

Source: Testimony of Tommy G. Thompson, Secretary of the Department of Health and Human Services, before the Subcommittee on Commerce, Justice, State, and Judiciary, Committee on Appropriations, U.S. Senate, May 9, 2001.

While public health is achieved through public and private activities, the government’s role in protecting and promoting public health is paramount. For purposes of this chapter, references to the “public health sector” are confined primarily to governmental entities and efforts on behalf of the public’s health. The threat of catastrophic terrorism only reinforces the government’s dominant public health role as private citizens and companies cannot be expected to lead the effort to plan for and respond to acts of catastrophic terrorism.

¹ Sections 5.1-5.5 prepared by Prof. David Fidler; section 5.6 prepared by Edward Tanzman.

² INSTITUTE OF MEDICINE, THE FUTURE OF PUBLIC HEALTH 41 (1988).

Governmental efforts on public health at the local, state, and national levels in the United States have not historically focused on the threat posed by possible terrorist use of WMD. Fears of biological weapons use by Cold War adversaries, especially the Soviet Union, affected public health in the United States,³ but this effect did not penetrate the public health sector deeply or address the possible terrorist use of biological weapons. The public health sector faces the daunting challenge of addressing this threat without, generally speaking, legal authorities specifically tailored to catastrophic terrorism or practical experience in dealing with the kinds of public health emergencies WMD could produce. In addition, public health services in the United States have historically been inadequately staffed and funded for their day-to-day responsibilities. Acts of catastrophic terrorism, especially bioterrorism, could exhaust public health capabilities at local, state, and federal levels. The October 2001 anthrax incidents seriously challenged, for example, federal and state public health capabilities. Further, some public health experts believe that the WMD planning that has occurred at the federal level has not properly addressed the important role that the public health sector would play, especially in the context of the use of biological weapons.

This chapter breaks down public health responsibilities in the context of catastrophic terrorism into three functions:

- **Deterrence.** Public health agencies play a role in deterring the development and use of WMD through regulatory mechanisms and criminal sanctions. While law enforcement and national security entities play the dominant role in deterring catastrophic terrorism, state and federal legislation on WMD give public health agencies a deterrence function.
- **Preparedness.** Public health agencies are responsible for preparing for the public health and medical consequences catastrophic terrorism might create. Preparedness includes such traditional public health responsibilities as epidemiological surveillance and non-traditional tasks such as planning for the consequences use of WMD might produce.
- **Response.** Public health services and personnel will be on the front lines of responses to acts of catastrophic terrorism and may, in some cases, take the lead role in containing and mitigating threats to population health from WMD.

1. PUBLIC HEALTH, CATASTROPHIC TERRORISM, AND FEDERALISM⁴

1.1. Public Health and Federalism Generally

Under the United States Constitution, state governments not the federal government possess primary legal responsibility for public health. Under the 10th Amendment of the Constitution, the states of the Union retain the “police power” -- a sovereign government’s authority to protect the health, safety, morals, and general welfare of the citizenry. State governments delegate their sovereign public health authority in many instances to county and local governments, but it is the state government that ultimately retains legal responsibility for promoting and protecting public health.

³ Elizabeth Fee & Theodore M. Brown, *Preemptive Biopreparedness: Can We Learn Anything from History?* 91 AM. J.L. PUB. HEALTH 721 (2001).

⁴ See *infra* Chapter 3: *State and Local Emergency Restrictions* for more general discussion of federalism in connection with catastrophic terrorism.

This allocation of public health power in the federal system means that state governments create, manage, and fund most of the public health sector in the United States. From a public health perspective, how state governments plan for and respond to acts of catastrophic terrorism is equally or more important than federal government activities. Unlike dealing with national security threats from foreign nations, which is a federal responsibility under the Constitution, preparing for catastrophic terrorism elevates the importance of state sovereignty and law, especially in the area of public health. Recent legislative and regulatory activity at the state level on preparedness for catastrophic terrorism reflects the assignment of public health powers under the United States constitution.

While state governments retain primary responsibility for public health under the Constitution, the federal government exercises constitutional powers to protect and promote public health. Through its authority to tax and spend, for example, the federal government influences how state governments exercise their public health powers and support state efforts to prepare for catastrophic terrorism. For example, pursuant to federal law,⁵ the United States Department of Health and Human Services (DHHS) leads the effort to provide “coordinated Federal assistance to supplement State and local resources in response to public health and medical care needs following a major disaster or emergency.”⁶ Congress has also directed DHHS to support state and local efforts to improve public health systems to respond to public health emergencies caused by terrorist attacks.⁷

1.2. Federalism’s Effect on the Public Health Functions in the Context of Catastrophic Terrorism

The allocation of public health powers under federalism affects the structure of legal responsibility for the deterrence, preparedness, and response functions that the public health sector has in connection with catastrophic terrorism.

Deterrence. Deterring the development and use of WMD involves, among other things, regulating access to weapons materiel and sanctioning efforts to develop and use WMD. Effectively deterring the development and use of WMD requires federal government leadership because terrorist activities likely span many jurisdictions inside and beyond the borders of the United States. United States ratification of treaties such as the Biological Weapons Convention (1972) and Chemical Weapons Convention (1993) provide examples of federal government leadership in deterring and preventing the development and use of biological and chemical weapons. Individual states of the Union do not have the interstate law enforcement or international legal powers possessed by the federal government to deter and prevent acts of catastrophic terrorism. State activities in the deterrence area supplement federal government efforts.

Preparedness. Federalism affects government preparations for the public health consequences of catastrophic terrorism by placing the primary legal responsibility for such preparedness at the state government level. Literature on preparing for catastrophic terrorism

⁵ 42 U.S.C.A. § 5121 (Law. Co-op. 1995).

⁶ FEDERAL RESPONSE PLAN EMERGENCY SUPPORT FUNCTION #8 -- HEALTH AND MEDICAL SERVICES ANNEX, APRIL 1999; See also *Chapter 1: Federal Disaster and Emergency Assistance* for more discussion of the federal role in catastrophic terrorism planning and response.

⁷ 42 U.S.C.A. § 247d (Law. Co-op. 2002).

makes clear that state and local governments are primarily responsible for management of emergencies within their jurisdictions. In addition, as noted earlier, states retain the bulk of public health powers in the United States constitutional system. The chief legal responsibility for preparedness falls, thus, within the “police power” retained by the states under the Tenth Amendment to the Constitution. The federal government’s legal responsibility in public health preparedness is to support state efforts. The federal government has, however, a leadership role in the preparedness area because, in the words of the Gilmore Commission, the federal government “must provide national leadership, guidance, and assistance to response entities at all levels.”⁸

Response. Federalism’s impact on public health responses to catastrophic terrorism are similar to its effects on public health preparedness: states of the Union have the primary legal responsibility for responding to the public health consequences of emergencies and disasters in their jurisdictions. In connection with terrorism, the Federal Response Plan notes that “[s]tate and local governments exercise primary authority to respond to the consequences of terrorism; the Federal Government provides assistance as required.”⁹ The Gilmore Commission similarly noted that “the Federal role in a response to an actual attack should be to assist when requested and to meet response requirements that exceed local and State capabilities.”¹⁰ The federal government is responsible for supporting state public health efforts should state governments need such support.

These descriptions of federalism’s effects on the public health functions in the catastrophic terrorism context do not present jurisdictional complications that would arise in public health responses to catastrophic terrorism. Most analysis of catastrophic terrorism assumes that any use of a WMD would overwhelm state and local public health resources, requiring early and strong federal government intervention. Despite assignment of primary legal authority for emergency management and public health to the state level in the federal system, the need for significant federal involvement may “federalize” public health responses to acts of catastrophic terrorism involving WMD.

2. PUBLIC HEALTH AND DETERRENCE OF CATASTROPHIC TERRORISM

The public health responsibilities in deterring acts of catastrophic terrorism are twofold: (1) assisting law enforcement agencies in the application of criminal law on development and use of WMD; and (2) regulating the use and transfer of materiel that may be used in WMD terrorism.

2.1. Assistance to Law Enforcement

Federal law and the law of some states criminalize the development, possession, and use of WMD. Law enforcement agencies may call upon public health officials in applying criminal sanctions in the context of chemical and biological weapons. Federal law’s criminal prohibitions on the development, possession, transfer, or use of chemical or biological weapons involve the

⁸ SECOND ANN. REP. OF THE ADVISORY PANEL TO ASSESS DOMESTIC RESPONSE CAPABILITIES FOR TERRORISM INVOLVING WEAPONS OF MASS DESTRUCTION, 23 (2000).

⁹ FEDERAL RESPONSE PLAN, TERRORISM INCIDENT ANNEX (April 1999), at TI-1.

¹⁰ SECOND ANN. REP. OF THE ADVISORY PANEL TO ASSESS DOMESTIC RESPONSE CAPABILITIES FOR TERRORISM INVOLVING WEAPONS OF MASS DESTRUCTION, 23 (2000).

determination that a chemical or biological agent is being used for illegitimate purposes.¹¹ Federal law enforcement agencies may consult or rely on federal public health personnel on whether development or possession of: (1) a biological agent involves “prophylactic, protective, other peaceful purposes;”¹² or (2) a chemical relates to a “medical or pharmaceutical activity.”¹³ The USA PATRIOT Act of 2001, which Congress passed in the wake of the terrorist violence of September 11, 2001, tightens the Federal criminal law on biological agents,¹⁴ making public health input to federal law enforcement on biological weapons even more important. Federal law prohibits illegitimate possession and threats to use nuclear material or nuclear byproduct material,¹⁵ but federal law enforcement agencies are less likely to call upon public health expertise in applying these criminal sanctions. In addition, federal and state public health resources, such as public health laboratories, will be important for law enforcement agencies to investigate and perhaps prosecute persons alleged to violate federal criminal law on WMD, especially biological weapons.

Public health agencies may have a similar assistance function in connection with state laws that criminalize development and use of WMD. For example, California criminalized the development, possession, use, or threat of use of WMD.¹⁶ In addition to providing advice to California law enforcement about whether a person or persons violated this law in developing or using a WMD, other provisions in the law may require public health input. The California statute criminally sanctions “[a]ny person who uses recombinant technology or any other biological advance to create new pathogens or more virulent forms of existing pathogens for the purposes specified in this section.”¹⁷ Whether a person has created a new pathogen or a more virulent one could require public health expertise to assist the criminal investigation and prosecution.

2.2. Regulating the Use and Transfer of Weapons Materiel

Federal public health officials contribute to deterrence of catastrophic terrorism in connection with biological weapons by regulating facilities receiving and transferring select agents identified as potential biological or toxin weapons. The Anti-Terrorism and Effective Death Penalty Act of 1996 required the Secretary of DHHS to: (1) establish a list of biological and toxin agents that have the potential to pose a severe threat to public health and safety; and (2) regulate facilities handling and transferring biological and toxin agents placed on such list.¹⁸ The Secretary of DHHS assigned the task of compiling the list and promulgating the regulations to

¹¹ 18 U.S.C.A. § 175 (Law. Co-op. 2002) (on biological weapons); 18 U.S.C.A. §§ 229, 229F (Law. Co-op. 2002) (on chemical weapons); 18 U.S.C.A. § 2332a (Law. Co-op. 2000) (on use of WMD).

¹² 18 U.S.C.A. § 175(b) (Law. Co-op. 2002).

¹³ 18 U.S.C.A. § 229F(7)(A) (Law. Co-op. 1991).

¹⁴ United and Strengthening America by Providing Appropriate Tools Required to Interrupt and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, § 801(Oct. 12, 2001).

¹⁵ 18 U.S.C.A. § 831 (Law. Co-op. 2000).

¹⁶ CAL. PENAL CODE § 11418-11418.5 (West 2000).

¹⁷ *Id.* § 11418(d).

¹⁸ 42 U.S.C.A. § 262 (Law. Co-op. 2002).

the Centers for Disease Control and Prevention (CDC). CDC issued the list and regulations in 1996.¹⁹

Federal law also regulates the interstate handling and transfer of nuclear materials²⁰ and the use of chemicals that could be used as weapons,²¹ but federal public health agencies are not assigned formal regulatory roles in these regimes.

3. PUBLIC HEALTH AND PREPAREDNESS FOR CATASTROPHIC TERRORISM

The second public health function in connection with catastrophic terrorism is preparedness. Given the potential threat to population health posed by WMD, public health preparedness constitutes one of the most important responsibilities of the public health sector at the federal, state, and local levels. State and federal public health agencies have familiarity with planning for chemical and nuclear accidents;²² but, until the latter half of the 1990s, they had little or no experience in planning for the use of biological weapons against the civilian population in the United States.²³ The October 2001 anthrax attacks reinforced the importance of public health preparedness in connection with bioterrorism.

For public health, the preparedness function involves many tasks, including epidemiological surveillance, scientific research and development, consequence management planning and training, stockpiling pharmaceuticals and antidotes, and developing effective lines of communication. The effectiveness of a public health response to catastrophic terrorism depends on the quality of the planning and preparations made by public health authorities prior to the use of a WMD. The chief objectives of public health preparedness for catastrophic terrorism are to field, organize, and train public health capabilities to: (1) detect health threats posed by use of WMD; and (2) contain and mitigate the adverse effects of WMD use on the health of the population.

The different health threats posed by biological, chemical, and nuclear weapons complicate public health preparedness efforts for catastrophic terrorism because each of these WMD poses particular detection, containment, and mitigation challenges for the public health sector. This reality means that public health preparedness for catastrophic terrorism has to plan to respond to three kinds of threats to population health. Experts have warned against lumping WMD together in connection with public health preparedness activities. Consensus also has emerged that biological weapons pose the greatest challenges for public health in the context of catastrophic terrorism (see Table 1 above).

As noted above, state governments bear the primary legal responsibility for public health preparedness for catastrophic terrorism under their general “police power” authority to protect

¹⁹ 42 C.F.R. § 72.6 (2002). Federal law previously regulated interstate shipment of etiologic agents. See 42 CFR §§ 72.1-72.5 (2002).

²⁰ 18 U.S.C.A. § 831 (Law. Co-op. 2000).

²¹ 22 U.S.C.A. § 6701 (Law. Co-op. 2002).

²² For example, the Federal Emergency Management Agency (FEMA) has developed the: (1) Chemical Stockpile Emergency Preparedness Program to plan for accidents involving U.S. chemical weapons munitions; and (2) the Federal Radiological Emergency Response Plan and the Radiological Emergency Preparedness Program for peacetime radiological emergencies.

²³ DEPT. OF HEALTH & HUMAN SERVS., FACT SHEET, May 21, 2001, at 1.

public health and safety. The federal government has the legal duty to assist and support state efforts to prepare for acts of catastrophic terrorism. Federal law on emergency preparedness recognizes the joint duty of the state and federal governments because it vests “responsibility for emergency preparedness jointly in the Federal Government and the States and their political subdivisions.”²⁴

To date, most legislative and regulatory activity on public health preparedness has occurred at the federal rather than the state level. This fact illustrates the important leadership role the federal government has in the public health sector’s approach to catastrophic terrorism and reflects federal law’s mandate that the federal government “shall provide necessary direction, coordination, and guidance, and shall provide necessary assistance . . . so that a comprehensive emergency preparedness system exists for all hazards.”²⁵

3.1. PREPAREDNESS AND DETECTION OF WMD EVENTS

Whether in the context of catastrophic terrorism or natural occurrence of disease, public health surveillance of the population to detect disease trends and unusual events is very important. Given that any use of a WMD will likely be covert, the quality of surveillance will determine the speed that the public health sector identifies the WMD attack. Surveillance involves identifying possible unusual disease trends in a population and then analyzing the trend through clinical and laboratory examinations to determine precisely the nature of the disease occurrence. The earlier a WMD attack is identified and confirmed, the faster state and federal government consequence management plans and resources can be mobilized to contain and mitigate the damage to society. Public health surveillance constitutes a critical component of preparedness for catastrophic terrorism.

State governments have the primary legal and fiscal responsibility to ensure that their public health surveillance systems contribute to preparedness for catastrophic terrorism. State governments determine what disease events must be legally reported to state public health authorities. Historically, reporting duties under state public health law have not included diseases or clinical syndromes that WMD may cause because preparedness for WMD terrorism has not been a function of state public health departments. But, as experts emphasize (see Table 2), local and state surveillance capabilities are crucial to the successful handling of acts of catastrophic terrorism.

Some states are, however, revising their public health laws to bring WMD threats directly within the scope of public health surveillance. Indiana passed, for example, a statute that requires the state public health department to “adopt procedures to gather, monitor, and tabulate case reports of incidents involving dangerous communicable diseases or unnatural outbreaks or diseases known or suspected to be used as weapons.”²⁶ The statute imposes on the state public health department the duty to notify emergency management, law enforcement, and public health officials within twenty-four hours if surveillance detects a possible WMD case.²⁷ The Indiana

²⁴ 42 U.S.C.A. § 5195 (Law. Co-op. 2002).

²⁵ *Id.* § 5195.

²⁶ IND. CODE § 16-41-3-1(b) (2001).

²⁷ *Id.* § 16-41-3-1(c).

statute further requires the state department of health to “develop capabilities and procedures to perform preliminary analysis and identification in as close to a real time basis as is scientifically possible of unknown bacterial substances that have been or may be employed as a weapon.”²⁸

Table 2: The Importance of State and Local Public Health Surveillance in Responding to Use of Biological or Chemical Weapons

- “● Because the initial detection of a covert biological or chemical attack will probably occur at the local level, disease surveillance systems at state and local health agencies must be capable of detecting unusual patterns of disease or injury, including those caused by unusual or unknown threat agents.
- Because the initial response to a covert biological or chemical attack will probably be made at the local level, epidemiologists at state and local health agencies must have expertise and resources for responding to reports of clusters of rare, unusual, or unexplained illnesses.”

Source: U.S. Centers for Disease Control and Prevention, *Biological and Chemical Terrorism: Strategic Plan for Preparedness and Response—Recommendations of the CDC Strategic Planning Workgroup*, 49 MORBIDITY AND MORTALITY WEEKLY, April 21, 2000, p. 3.

The federal government has also been stressing the importance of public health surveillance at the local and state levels in preparedness strategies for catastrophic terrorism (see Table 2 above), and it is using its constitutional appropriations authority to assist state governments with training and resources to improve local and state public health. Under the Public Health Threats and Emergencies Act of 2000, for example, the Secretary of DHHS shall award grants to state and local public health agencies in order “to address core public health capacity needs . . . with a particular focus on building capacity to identify, detect, monitor, and respond to threats to the public health.”²⁹

DHHS and CDC have been working to improve the nation’s public health surveillance capacities generally and in connection with catastrophic terrorism specifically. CDC efforts include strengthening “the capacity to detect outbreaks of illness that might have been caused by terrorists, improved laboratory identification and characterization of causal agents for disease outbreaks, and improved electronic communications among public health and other officials regarding outbreaks and responses to them.”³⁰ CDC initiatives in the surveillance area relevant to preparedness for catastrophic terrorism include the Foodborne Diseases Active Surveillance Network (FoodNet), the National Electronic Disease Surveillance Systems (NEDSS), and Epidemic Information Exchange (EPI-X). Table 3 below provides brief descriptions of these federal disease surveillance efforts.

²⁸ *Id.* § 16-41-3-2(d)

²⁹ 42 U.S.C.A. § 247d-3 (Law. Co-op. 2002).

³⁰ DEPT. OF HEALTH & HUMAN SERVS., FACT SHEET, May 21, 2001, at 3.

Table 3: CDC-Sponsored Disease Surveillance Initiatives

FoodNet	Provides a network to respond to new and emerging foodborne diseases of national importance, monitoring the burden of foodborne diseases, and identifying sources of specific foodborne diseases. FoodNet is a collaborative project among CDC, nine state health departments, the Food Safety and Inspection Service (FSIS) of the United States Department of Agriculture (USDA), and the Food and Drug Administration (FDA).
NEDSS	Facilitates the handling of surveillance data primarily through creating standards for data collection, management, access, analysis, and transmission. NEDSS will improve how public health surveillance is conducted at the federal, state, and local level. It seeks complementary electronic information systems that automatically gather data from a variety of sources on a real-time basis; facilitate the monitoring of community health; assist in analysis of trends and detection of emerging public health problems; and provide information for setting public health policy.
EPI-X	Is a secure, Web-based communications network for public health officials that will both simplify and expedite the exchange of routine and emergency public health information between CDC and state health departments. This information will prompt investigative and prevention efforts, and help bioterrorism preparedness efforts by helping officials share preliminary information about outbreaks and other health events across jurisdictions, and gain every day experience in the use of a secure communication system. <i>Source: CDC</i>

DHHS is also increasing funding for scientific research and development in connection with biological organisms likely to be used in acts of terrorism. Such research may strengthen public health surveillance by producing new diagnostic methods that can help clinicians and laboratory technicians identify more rapidly possible bioterrorist events. Federally sponsored research and development activities are also underway to improve sensors and detection technologies that could assist in identifying the use of a chemical or nuclear device.

3.2. Preparedness for Containment and Mitigation

Public health officials at the state and federal levels are also involved in consequence management planning, organizing, and training to improve the prospects of successful containment and mitigation of any act of catastrophic terrorism.

The federal government has taken the lead in shaping consequence management planning in the public health sector for catastrophic terrorism. FEMA has developed a Federal Response Plan (FRP) to establish the process and structure for delivery of federal assistance to state and local governments to address the consequences of any major emergency or disaster declared under the Robert T. Stafford Disaster Relief and Emergencies Assistance Act.³¹ FEMA has also developed a State and Local Guide (101) for All-Hazard Emergency Operations Planning (1996) to assist state and local governments in planning for emergency management.

Presidential Decision Directive 62 on Combating Terrorism (May 22, 1998) designates the DHHS as the lead federal agency to plan and prepare for a national response to medical

³¹ 42 U.S.C.A. § 5121 (Law. Co-op. 2002).

emergencies in the event of a WMD event. The FRP includes Emergency Support Function #8 -- Health and Medical Services, for which DHHS is the primary federal agency.³² Emergency Support Function #8 plans for the provision of federal assistance to state and local governments in identifying and addressing the health and medical needs of victims of a major disaster, emergency, or terrorist attack.³³ Table 4 below describes the functional areas of federal support contained in Emergency Support Function #8 along with the DHHS agency with primary responsibility. The State and Local Guide (101) for All-Hazard Emergency Operations Planning also includes guidance in Attachment G on developing a health and medical services annex for state and local emergency management plans.

Table 4: Emergency Support Function #8 Support Areas and Responsible Agencies

Functional Support	Lead DHHS Agency
Assessment of health and medical needs	Office of Public Health and Science/Office of Emergency Preparedness/National Disaster Medical System (OPHS/OEP/NDMS)
Health surveillance	CDC
Medical care personnel	OPHS/OEP/NDMS
Health and medical equipment and supplies	OPHS/OEP/NDMS
Patient evacuation	OPHS/OEP/NDMS
In-hospital care	OPHS/OEP/NDMS
Food, drug, and medical device safety	Food and Drug Administration
Worker health and safety	CDC
Radiological, chemical, and biological hazards consultation	CDC
Mental health care	Substance Abuse and Mental Health Services Administration
Public health information	CDC
Vector control	CDC
Potable water and disposal of wastewater and solid waste	Indian Health Service
Victim identification and mortuary services	OPHS/OEP/NDMS
Veterinary services	OPHS/OEP/NDMS
<i>Source:</i> Emergency Support Function #8 -- Health and Medical Services Annex (April 1999), at ESF #8-8 – ESF #8-11.	

The FRP also contains a Terrorist Incident Annex to ensure appropriate responses to the consequences of terrorism, including the use of WMD, in the United States. Under the Terrorism Incident Annex, DHHS is responsible for technical operations and support in the health and

³² Federal Response Plan -- Basic Plan (April 1999), at 1, *available at* www.fema.gov/rrr/frpbpln.shtm.

³³ Emergency Support Function #8 -- Health and Medical Services Annex (April 1999), at ESF #8-1, *available at* www.fema.gov/pdf/rrr/frp/frpesf8.pdf.

medical services area. Pursuant to this responsibility, DHHS developed a Health and Medical Services Support Plan for the Federal Response to Acts of Chemical/Biological Terrorism.³⁴ The State and Local Guide (101) for All-Hazard Emergency Operations Planning also contains an attachment on terrorism to aid state and local emergency planners in developing and maintaining a terrorist incident appendix to their emergency operations plan for incidents involving WMD.³⁵ In addition, CDC prepared recommendations for preparedness in connection with biological and chemical terrorism.³⁶

Presidential Decision Directive 39 on United States Policy on Counterterrorism (June 21, 1995) mandated that FEMA “ensure that States’ response plans are adequate and their capabilities are tested.” According to the United States General Accounting Office, the emergency preparedness plans of: (1) forty-six states mirrored the FRP; and (2) forty-one states incorporated terrorism preparedness plans.³⁷ These statistics suggest that state emergency management and public health agencies have exercised their primary legal responsibilities in this area by following the federal lead in strengthening consequence management preparedness both generally and in connection to acts of terrorism specifically.

In addition to planning, DHHS efforts include improving local response capabilities through the development of Metropolitan Medical Response Systems (MMRS) in cities around the United States. A MMRS coordinates local public health, public safety, and health services capabilities to respond to a WMD terrorist incident. Current MMRS efforts and goals are summarized in Table 5 below.

Table 5: Current MMRS Efforts and Enhancement Goals

Current MMRS Efforts	Current Goals for MMRS Enhancement
<ul style="list-style-type: none"> • Focusing on immediate site-specific response capability. • Enhancing existing capabilities. • Developing overall systems plans. • Raising awareness of WMD agents. • Developing enhanced capability to operate in contaminated environments. • Developing specialized treatment protocols for WMD victims. 	<ul style="list-style-type: none"> • Integrate biological preparedness into the overall planning process. • Develop plans for mass prophylaxis of exposed and potentially exposed populations. • Develop plans for mass patient care. • Develop plans for mass fatality management. • Develop plans for environment surety.
<p><i>Source:</i> DHHS, Metropolitan Medical Response System—Program Description, at http://www.mmrs.hhs.gov/About/ProDesc.cfm</p>	

³⁴ TERRORISM INCIDENT ANNEX (April 1999), at TI-2, *available at* www.fema.gov/r-n-r/frp/frplet.htm.

³⁵ FED. EMERG. MGMT. ADMIN., STATE AND LOCAL GUIDE (101) FOR ALL-HAZARD EMERGENCY OPERATIONS PLANNING, Chapter 6, Attachment G - Terrorism (April 2001), *available at* www.fema.gov/rrr/gaheop.shtm.

³⁶ *Biological and Chemical Terrorism: Strategic Plan for Preparedness and Response—Recommendations of the CDC Strategic Planning Workgroup*, 49 MORBIDITY AND MORTALITY WEEKLY REPORT, April 21, 2000.

³⁷ U.S. GENERAL ACCOUNTING OFFICE, COMBATING TERRORISM: FEMA CONTINUES TO MAKE PROGRESS IN COORDINATING PREPAREDNESS AND RESPONSE (March 2001), at 9, *available at* www.gao.gov/terrorism.html.

DHHS achieves coordination through the MMRS program through contracts with local municipalities. By the end of 2002, DHHS hopes to have 122 MMRS in various stages of development around the United States.³⁸

DHHS also coordinates the National Disaster Medical System (NDMS), which constitutes a cooperative, asset-sharing program among federal, state, and local governments, private businesses, and civilian volunteers. The purpose of NDMS includes establishing a “single, integrated national medical response capability for assisting state and local authorities in dealing with the medical and health effects of major peacetime disasters.”³⁹ As indicated in Table 4 above, Emergency Support Function #8 on health and medical services calls the NDMS into service in connection with multiple support functions to respond to disasters or emergencies, including those involving catastrophic terrorism. The NDMS capabilities are found in various teams -- the Disaster Medical Assistance Teams (DMATs), Disaster Mortuary Operational Response Teams (DMORTs), and Veterinary Medical Assistance Teams (VMATs). The NDMS also includes specialized National Medical Response Teams (NMRTs) that are equipped and trained to provide medical care for victims of WMD.⁴⁰ Each NMRT has its own pharmaceutical stockpile designed to provide it with the necessary drugs and antidotes to respond to acts of biological and chemical terrorism.

An increasingly important element of the federal efforts at consequence management preparedness is the development of the national pharmaceutical stockpile (NPS). Presidential Decision Directive 62 on Combating Terrorism (May 22, 1998) charged DHHS with establishing a national stockpile of antibiotics, vaccines, antidotes, and other medical supplies to assist consequence management of biological and chemical terrorism. In 1999, DHHS delegated responsibility for establishing the NPS to CDC.

According to CDC, the NPS “is designed to supplement and re-supply state and local public health agencies in the event of a biological or chemical terrorism incident anywhere, at anytime within the United States or its territories.”⁴¹ The NPS consists of life saving pharmaceuticals, antibiotics, chemical interventions, as well as medical, surgical and patient support supplies, and equipment. The medical equipment includes what would be essential for treatment, including airway supplies, bandages and dressings, and other emergency medications. These are items that local clinicians may find in short supply in the event of a terrorism incident. Various national security agencies and expert panels convened by the CDC provide updates and analyses of threat agents to ensure that the NPS reflects current needs. CDC lists the following biological agents as its current NPS priorities: smallpox, anthrax, pneumonic plague, tularemia, botulinum toxin, and viral hemorrhagic fevers.⁴²

³⁸ DEPT. OF HEALTH & HUMAN SERVS. METROPOLITAN MEDICAL RESPONSE SYSTEM—PROGRAM DESCRIPTION, *at* <http://www.mmrs.hhs.gov/About/ProDesc.cfm>.

³⁹ OFFICE OF EMERGENCY PREPAREDNESS, DEPT. OF HEALTH & HUMAN SERVS., NDMS: CATASTROPHIC CARE FOR THE NATION, *at* <http://ndms.dhhs.gov/NDMS/ndms.html>.

⁴⁰ OFFICE OF EMERGENCY PREPAREDNESS, DEPT. OF HEALTH & HUMAN SERVS., NDMS: CATASTROPHIC CARE FOR THE NATION -- ABOUT TEAMS, *at* http://ndms.dhhs.gov/NDMS/About_Teams/about_teams.html#dmat.

⁴¹ CENTERS FOR DISEASE CONTROL, NPS SYNOPSIS, *at* <http://www.cdc.gov/nceh/nps/synopses.htm>.

⁴² National Pharmaceutical Stockpile, http://www.bt.cdc.gov/DocumentsAPP/national_pharmaceutical_stockpile.pdf.

The NPS is not a first response tool. State and local officials can use the NPS to bolster their initial response to a biological or chemical terrorism attack -- thereby increasing their capacity to mitigate more rapidly the results of this type of terrorism.⁴³ The NPS can support local first response efforts with a Push Package followed by quantities of materiel specific to the terrorist agent used, utilizing Vendor Managed Inventory (see below). Deployment of the NPS stockpile is based on the best epidemiologic, laboratory, and public health information regarding the nature of the threat.

The NPS has two basic components. The first consists of eight 12-hour Push Packages for immediate response. These Push Packages are fully stocked, kept in environmentally controlled and secured warehouses, and ready for immediate deployment to reach any affected area within twelve hours of the federal decision to release the assets. Each Push Package consists of fifty tons of material intended to address a mass casualty incident. These packages will permit emergency medical staff to treat a variety of different agents, since the actual threat may not have been identified at the time of the stockpile deployment. The second NPS component is Vendor Managed Inventory (VMI). If an incident requires a larger or multi-phased response, follow-on VMI Packages can be shipped to arrive within twenty-four to thirty-six hours. VMI packages are comprised of pharmaceuticals and supplies that can be “tailored” specifically for the suspected or confirmed agent or combination of agents.

CDC transfers authority for the NPS materiel to the state and/or local authorities once it arrives at the airfield near the disaster site. State and/or local authorities will then repackage and label the bulk medicines and other NPS materiel according to their state terrorism contingency plan. CDC’s technical advisors will accompany the NPS in order to assist and advise state/local officials in putting the NPS assets to prompt, effective use.

While the federal government has taken the lead role in public health preparedness for acts of catastrophic terrorism, many state governments have also been exercising their “police power” authority by, as indicated above, incorporating federal guidelines and advice (e.g., the FRP, Emergency Support Function #8, and the Terrorism Incident Annex) into state preparedness planning, organizing, and training. Some state governments have gone beyond such incorporation of federal guidance to strengthen further their public health preparedness for acts of catastrophic terrorism. For example, Colorado passed a statute in 2000 that created an expert emergency epidemic response committee to advise the governor in declaring and handling an emergency epidemic, whether caused naturally or from an act of bioterrorism.⁴⁴

The Colorado statute also empowered the State Board of Health to promulgate regulations to “assure that hospitals, other acute care facilities, local public health departments, trauma centers, area trauma advisory councils, and managed care organizations are prepared for an emergency epidemic.”⁴⁵ Legislation in Indiana requires the Indiana Emergency Medical Services Commission to provide training and certification standards for the administration of antidotes, vaccines, and antibiotics in situations related to a terrorist attack.⁴⁶ These are examples

⁴³ *See id.*

⁴⁴ COL. REV. STAT. § 24-32-2103 (2000).

⁴⁵ COL. REV. STAT. § 25-1-108 (2000).

⁴⁶ IND. CODE § 16-31-2-9(9)(3) (1993).

of state governments exercising their public health powers to prepare for acts of catastrophic terrorism.

Both the Colorado and Indiana statutes strengthen preparedness for WMD events by providing certain persons who participate in health and medical consequence management with immunity from civil liability for acts undertaken during a response to a terrorist event. The Colorado statute provides in part that “persons and entities that in good faith comply completely with Board of Health rules regarding the emergency epidemic and with executive orders regarding the disaster emergency shall be immune from civil or criminal liability for any action taken to comply with the executive order or rule.”⁴⁷ The Indiana legislation protects paramedics or emergency technicians (including persons from other states with equivalent certifications) who provide basic or advanced life support in good faith in connection with a disaster emergency declared by the governor in response to an act of terrorism.⁴⁸

State government public health preparedness for catastrophic terrorism can also be aided by interstate mutual aid agreements that provide a mechanism for state governments to assist one another in response to disasters or emergencies. The Gilmore Commission recommended that states use either the: (1) Emergency Management Assistance Compact administered by the National Emergency Management Association (NEMA); or (2) the Interstate Civil Defense and Disaster Compact first promulgated in the Civil Defense Act of 1950.⁴⁹ The States’ Terrorism Policy Summit in February 1999 also included the following recommendation: “[s]tates should develop mutual aid agreements across multiple jurisdictions and consider developing a regional WMD response capability.”⁵⁰ Congress has instructed FEMA to assist and encourage state governments to negotiate and enter into interstate emergency preparedness compacts.⁵¹ In addition to interstate preparedness compacts, state governments that share borders with foreign countries can enter arrangements, with the assistance of the Department of State, on rendering mutual emergency and disaster aid.⁵²

4. PUBLIC HEALTH AND RESPONSES TO CATASTROPHIC TERRORISM

The third public health function in connection with catastrophic terrorism is responding to the threat to population health posed by use of a WMD. In the event catastrophic terrorism occurs, the public health response will seek to contain and mitigate the damage terrorism causes to human health. The consequence management plans discussed above would, of course, be activated if terrorists used a WMD within the United States. Achieving containment and

⁴⁷ COLO.REV.STAT. § 24-32-2111.5(2) (2000).

⁴⁸ IND. CODE § 16-31-6-4(4)(b) (1993); *see also infra* Annex, MODEL STATE EMERGENCY HEALTH POWERS ACT § 804 (Draft of Oct. 23, 2001), reprinted as the Annex to this monograph, regarding state and private liability. *See infra* Section 6 for more on liability issues.

⁴⁹ SECOND ANN. REP. OF THE ADVISORY PANEL TO ASSESS DOMESTIC RESPONSE CAPABILITIES FOR TERRORISM INVOLVING WEAPONS OF MASS DESTRUCTION, 25-26 (2000).

⁵⁰ *Cited in* SECOND ANN. REP. OF THE ADVISORY PANEL TO ASSESS DOMESTIC RESPONSE CAPABILITIES FOR TERRORISM INVOLVING WEAPONS OF MASS DESTRUCTION, Appendix J-2 (2000).

⁵¹ 42 U.S.C.A. § 5196(h) (West 1995).

⁵² *Id.* § 5196a.

mitigation in the face of the use of a WMD may, however, involve the exercise of extraordinary powers by public health and other government officials. Use of a communicable disease organism as a weapon would exacerbate the public health sector's need to exercise powers not utilized in its everyday work because of the potential for the agent to spread disease through an unprotected population.

As noted earlier (see Section 5.2.2), state governments have the primary legal responsibility for responding to the public health consequences of acts of catastrophic terrorism. In the words of the Gilmore Commission, “[s]tate public health entities have the primary role in the control of disease outbreaks, including those intentionally inflicted. The Federal role is almost exclusively one of support to States upon request.”⁵³

Containment and mitigation of public health threats from WMD falls, thus, most heavily upon state governments and their exercise of public health powers. Except in limited circumstances (e.g., the exercise of federal foreign and interstate quarantine authority⁵⁴), federal officials cannot exercise public health powers directly in state jurisdictions because public health is a state not a federal constitutional function. For example, CDC transfers control over pharmaceuticals from the NPS (discussed above in Section 4.2) to state government officials when the pharmaceuticals are delivered.⁵⁵ While CDC officials may provide advice on the state government's use of the NPS pharmaceuticals, the power to determine how they are used remains with the state government.

4.1. Accessing Federal Public Health Assistance

Most experts acknowledge that acts of catastrophic terrorism will quickly overwhelm or exhaust the public health resources and capabilities of state and local governments. Accessing federal support for public health responses to WMD events becomes an important factor. To access federal public health support under the FRP and its related Emergency Support Function #8, the governor of the affected state must request that the President of the United States declare that an emergency exists.⁵⁶ The President can unilaterally declare an emergency and release federal support if “he determines that an emergency exists for which the primary responsibility for response rests with the United States because the emergency involves a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority.”⁵⁷ Because the federal government exercises preeminent responsibility for anti-terrorism policy, terrorism involving a WMD perpetrated in the United States would provide the President with cause to declare an emergency requiring federal assistance without the request from the affected state's governor.

State access to the NPS can be achieved through: (1) the emergency declaration authority provided the federal government in the Stafford Act and the subsequent activation of the FRP; or (2) a state request directly to the CDC Director, who has the authority, in consultation with the

⁵³ SECOND ANN. REP. OF THE ADVISORY PANEL TO ASSESS DOMESTIC RESPONSE CAPABILITIES FOR TERRORISM INVOLVING WEAPONS OF MASS DESTRUCTION, 34 (2000).

⁵⁴ 42 U.S.C.A. § 264 (West 1991); 42 CFR § 70 (2002).

⁵⁵ CENTERS FOR DISEASE CONTROL, NPS SYNOPSIS, at <http://www.cdc.gov/nceh/nps/synopses.htm>.

⁵⁶ 42 U.S.C.A. § 5191(a)

⁵⁷ *Id.* § 5191(b).

Surgeon General and the DHHS Secretary, to order the deployment of the NPS.⁵⁸ The ability to request access to the NPS directly through the CDC Director creates public health flexibility for responding to disease events that have not developed into full-scale public health emergencies requiring a presidential emergency declaration. The importance of access to the NPS was emphasized at the February 1999 States' Terrorism Policy Summit, at which the participants recommended that "[s]tates need to develop procedures to access [the] National Pharmaceutical Stockpile including how to formally request resources and how local governments will receive it."⁵⁹

4.2. Public Health Powers Needed in Responses to Catastrophic Terrorism

[This section refers to The Model State Emergency Health Powers Act, which appears in an Annex to this volume.]

As part of its Bioterrorism Preparedness and Response Program, CDC compiled a list of public health powers that a public health officer would need in responding to a bioterrorist event (Report on Cantigny Conference on State Emergency Health Powers & the Bioterrorism Threat, April 26-27, 2001, at Appendix A). Although put together with bioterrorism in mind, the list of public health powers is also relevant for public health responses to uses of chemical and nuclear WMD. Annex 1 to this chapter reprints CDC's list. This section divides public health response powers into those relating to management of property, persons, and information.

Description of the public health powers needed to respond to WMD events is important for two reasons. First, discourse about public health responses to catastrophic terrorism has raised questions about whether state and local public health officials possess sufficient legal authority to undertake the kinds of acts necessary to contain and mitigate the public health effects of catastrophic terrorism.⁶⁰ As the Gilmore Commission noted, "[v]irtually all States have some statutory basis for undertaking extraordinary measures, such as quarantine, in the event of a major attack. In several cases, however, the statutes are ambiguous, because of the broad authority given to state public health officials to take whatever steps necessary to respond to such an incident."⁶¹ These questions and ambiguities can only be answered and clarified by detailed review of state public health and emergency response laws in each jurisdiction.⁶² Second, the

⁵⁸ CENTERS FOR DISEASE CONTROL, NPS SYNOPSIS, at <http://www.cdc.gov/nceh/nps/synopses.htm>.

⁵⁹ SECOND ANN. REP. OF THE ADVISORY PANEL TO ASSESS DOMESTIC RESPONSE CAPABILITIES FOR TERRORISM INVOLVING WEAPONS OF MASS DESTRUCTION, J-3 (2000).

⁶⁰ REP. ON CATIGNY CONF. ON STATE EMERGENCY HEALTH POWERS & THE BIOTERRORISM THREAT, April 26-27, 2001, available at www.nationalsecurity.com/april%20conference.htm.

⁶¹ SECOND ANN. REP. OF THE ADVISORY PANEL TO ASSESS DOMESTIC RESPONSE CAPABILITIES FOR TERRORISM INVOLVING WEAPONS OF MASS DESTRUCTION (Dec. 15, 2000), at 34).

⁶² The Gilmore Commission recommended the following: "The [proposed] National Office for Combating Terrorism should review existing Federal and State authorities for mandatory or prescriptive activities, such as vaccinations, quarantine, containment, and observation. As a result of that review, "model" legislation and regulations should be promulgated for consideration of the States. The [proposed] National Office for Combating Terrorism should also provide, as part of its information "clearinghouse" function, reports that will ensure that Federal, State, and local response entities have a mutual understanding of the authorities and procedures at all levels of government." SECOND ANN. REP. OF THE ADVISORY PANEL TO ASSESS DOMESTIC RESPONSE CAPABILITIES FOR TERRORISM INVOLVING WEAPONS OF MASS DESTRUCTION, 35(Dec. 15, 2000). A similar recommendation was made by the National Commission on Terrorism. NATIONAL COMMISSION ON TERRORISM, COUNTERING THE CHANGING THREAT OF INTERNATIONAL TERRORISM, 38 (2000) available at www.w3access.gpo.gov/net/.

extraordinary nature of many of the powers needed by public health raises issues concerning respect for and protection of civil liberties during a WMD emergency (see Section 5.5.3 below).

4.2.1. Management of Property

Containment and mitigation of the public health threats posed by the use of WMD may require public health officials to manage private property. Containment of public health threats from WMD may require seizing, closing, decontaminating, or destroying privately owned buildings, facilities, land, or other forms of property contaminated or suspected of contamination by biological, chemical, or nuclear/radiological devices.⁶³ Public health authorities may also need to commandeer private hospitals, health care facilities, and hotels to provide space for treatment of casualties.⁶⁴ Public health agencies may have to confiscate private stocks of pharmaceuticals and other medical supplies to support supplies available from the public sector.⁶⁵ Colorado legislation on emergency epidemics illustrates that state public health departments understand the potential necessity for exercising extraordinary powers to manage private property to contain and mitigate the consequences of WMD use (see Table 6).

Table 6: Management of Property in Colorado Emergency Epidemic Legislation

“In the event of an emergency epidemic that has been declared a disaster emergency, the Committee shall convene as rapidly as possible and as often as necessary to advise the Governor, who shall act by executive order, regarding reasonable and appropriate measures to reduce or prevent spread of the disease, agent, or toxin and to protect the public health. Such measures may include, but are not limited to:

- (I) Procuring or taking supplies of medicines and vaccines; . . .
- (III) Isolating . . . property;
- (IV) Determining whether to seize, destroy, or decontaminate property or objects that may threaten the public health; . . . “

Source: Colorado Revised Statutes § 24-32-2104.

State governments participating in a February 1999 States’ Terrorism Policy Summit also recommended that “[e]very state should examine state laws and authorities that relate to search and seizure, invasion of privacy, quarantine, evacuation, relocation or restricting access. State should develop comprehensive preparedness strategies that utilize all legally available assets.” *cited in* SECOND ANN. REP. OF THE ADVISORY PANEL TO ASSESS DOMESTIC RESPONSE CAPABILITIES FOR TERRORISM INVOLVING WEAPONS OF MASS DESTRUCTION, Appendix J-3 (2000). State public health officials reflecting on the TOPOFF bioterrorism exercise in Denver recommended “that state public health agencies review their statutory authority and evaluate whether these laws would be adequate to deal with the threat[] of bioterrorism” (Richard E. Hoffman and Jane E. Norton, *Lessons Learned from a Full-Scale Bioterrorism Exercise*, 6 *Emerging Infectious Diseases*, 652 (Nov. Dec. 2000). After the terrorist attacks of September 11, 2001, CDC asked the Center for Law and the Public’s Health (CLPH), based at Georgetown University Law Center and the Johns Hopkins School of Public Health, to accelerate its work on preparing a model statute on public health emergency powers. CLPH released a draft of The Model State Health Emergency Health Powers Act on October 23, 2001. This model statute is reprinted as an annex to this monograph. *Infra* Annex 1, MODEL STATE EMERGENCY HEALTH POWERS ACT

⁶³ See, e.g. *infra* Annex 1, MODEL STATE EMERGENCY HEALTH POWERS ACT, § 401 (Oct. 23, 2001 Draft) (emergency measures concerning dangerous facilities and materials; *id.* at § 407 (destruction of property).

⁶⁴ See *id.* at § 402 (access to and control of facilities and properties generally).

⁶⁵ See *id.* at § 405 (control of health care supplies).

State public health officials have experience with managing private property to protect public health, as illustrated by the exercise of licensing, inspection, and nuisance abatement powers.⁶⁶ The scale and emergency nature of potential public health management of private property in the context of WMD terrorism is beyond the experience of most state public health authorities and is not the kind of property regulation typically found in state public health law statutes and regulations. While the state government's inherent sovereign "police power" supports emergency management of private property (as illustrated by the Colorado statute excerpted in Table 6), the legal and administrative procedures for doing so need clarifying in most state jurisdictions. In addition, drastic interference with private property for public health responses to WMD terrorism raises issues involving civil liberties (see Section 5.5.3 below).

Property management questions have also arisen concerning whether government authorities can compel pharmaceutical companies to produce drugs, vaccines, or other medicines in the wake of a WMD terrorist event exhausting or threatening to exhaust existing supplies. The legal authority to compel emergency pharmaceutical production would clearly be a federal power given that such compulsion would affect interstate commerce. Under federal law, the President can declare a national emergency and exercise emergency powers granted to him by statutes of Congress.⁶⁷ Whether Congress has expressly authorized the President to compel production of pharmaceuticals or other related goods in the context of a national emergency is not clear. One possible source of authority is the Defense Production Act of 1950, which permits the President to require that the performance of government orders for goods and services he deems necessary to promote the national defense take priority over performance under any other contract or order.⁶⁸

This presidential power may, however, require the existence of a national emergency *and* a state of war because the Defense Production Act was passed pursuant to Congress' war powers.⁶⁹ One commentator noted that the Defense Production Act "was never contemplated, or used, to provide presidential authority during a domestic crisis."⁷⁰ Based on the United States government's reaction to the September 11, 2001 terrorist attacks on the World Trade Center and Pentagon, the federal government may, however, consider the use by a terrorist organization of a WMD in the United States to be an act of war falling within the scope of the Defense Production Act.

The cooperation between the federal government and the pharmaceutical industry that developed in connection with the production of a vaccine for swine influenza in 1976 offers insight into federal government efforts to encourage drug or vaccine production in response to a perceived national public health emergency. In order to ensure that pharmaceutical companies would produce adequate quantities of swine influenza vaccine, Congress enacted a special regulatory regime: (1) that gave pharmaceutical companies temporary immunity from anti-trust

⁶⁶ LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW 252-261 (2000).

⁶⁷ 50 U.S.C.A. § 1621 (West 2003).

⁶⁸ 50 App. U.S.C.A. § 2071(a) (West 2002).

⁶⁹ U.S. v. Excel Packing Co., 210 F. 2d 596 (10th Cir. 1954).

⁷⁰ Juliette Kayyem, *U.S. Preparations for Biological Terrorism: Legal Implications and the Need for Planning*, ESDP-2001-02 and BCSIA-2001-4, 13 (2001) (noting that "FEMA's Federal Response Plan does not mention federal authority to marshal resources like that in the Defense Production Act").

laws to promote inter-company collaboration;⁷¹ (2) under which the federal government accepted responsibility for any liability (except for bad vaccine production) for harm incurred from administration of the swine influenza vaccine; and (3) that prohibited the export of swine influenza vaccine produced in the United States for the national vaccination program.⁷² Federal efforts to encourage vaccine manufacturers to produce drugs or vaccines as part of a response to a public health emergency triggered by catastrophic terrorism would probably entail legal protections for pharmaceutical companies similar to those found in the legislation issued for the 1976 swine influenza vaccination program.⁷³

Federal government seizure of privately owned pharmaceutical facilities in order to produce drugs or vaccines needed in a response to an act of terrorism involving WMD would have to be approved in advance by an act of Congress because the constitutional authority of the executive branch cannot by itself support such an act.⁷⁴ Any local, state, or federal government seizure, confiscation, or property-related compulsion in response to catastrophic terrorism would, under state and federal constitutional law, be a “taking” for which appropriate compensation would have to be paid to the property owner.⁷⁵

Federal government attempts to encourage or compel the production of needed drugs or vaccines in the wake of WMD terrorism would face not only the legal disciplines outlined above but also the practical difficulties of gearing up pharmaceutical production in an emergency context. Pharmaceutical company manufacturing capacities do not generally contain “surge” capabilities because the capacities are designed to meet most efficiently estimated normal market demand. Quickly ramping up pharmaceutical production to meet the public health emergency triggered by WMD terrorism may, thus, face very serious practical as well as legal constraints.

4.2.2. Management of People

Containment and mitigation of the public health threats posed by the use of WMD may require public health officials to manage people in extraordinary ways. Persons exposed to biological, chemical, or nuclear/radiological material may need to be compelled to undergo medical examinations and tests, treatment, decontamination, surveillance, or isolation by public health authorities.⁷⁶ Public health officials may need to move patients in hospitals and health care facilities to accommodate triage and treatment needs caused by WMD events. People in areas

⁷¹ The Defense Production Act of 1950 gives persons and companies engaging in voluntary agreements for preparedness programs and expansion of production capacity and supply a defense against civil or criminal action brought for violation of federal or state anti-trust laws with respect to any act or omission to act to develop or carry out any voluntary agreement. 50 U.S.C.A. 2158(j) (West 1991).

⁷² Maurice R. Hilleman, *Cooperation Between Government and Industry in Combating a Perceived Emerging Pandemic: The 1976 Swine Influenza Vaccination Program*, 275 J. AM. MED. ASSOC. 241 (1996).

⁷³ The issue of legal protections for pharmaceutical companies has arisen in discussions about the production of smallpox vaccine in the wake of the October 2001 anthrax attacks in the United States.

⁷⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁷⁵ U.S. CONST. amend. V; *see also* COL. REV. STAT. § 24-32-2104 (2000) (for state statutes on compensation for the taking of property); *infra* Annex 1, MODEL STATE EMERGENCY HEALTH POWERS ACT § 406 (compensation).

⁷⁶ *See infra* Annex 1, MODEL STATE EMERGENCY HEALTH POWERS ACT § 502 (mandatory medical examinations); *Id.* § 503 (isolation and quarantine); *Id.* § 504 (vaccination and treatment); *Id.* § 505 (collection of laboratory specimens; performance of tests); *Id.* § 506 (access to and disclosure of patient records).

affected by a communicable biological agent may have to be quarantined by public health authorities to prevent the potential spread of disease. People in the vicinity of chemical or nuclear/radiological releases may have to be evacuated to mitigate the threat to public health.

As with the management of private property, state public health officials have legal authority and experience in managing people to protect public health. Historically, state public health authorities used quarantine against groups of people and isolation of individual patients to prevent the spread of infectious diseases (see Table 7). In the past, public health authorities also utilized compulsory vaccination of populations in efforts to control disease outbreaks, as evidenced by the use of compulsory smallpox vaccinations in the smallpox outbreaks in Muncie, Indiana (1893) and Boston, Massachusetts (1901). The use of compulsory smallpox vaccination in Boston was challenged in federal court as a violation of the United States Constitution, and the case was ultimately decided in favor of the State of Massachusetts in *Jacobson v. Massachusetts*.⁷⁷ *Jacobson* provides constitutional precedent for the government's ability to use compulsory vaccination (and perhaps other compulsory public health measures) in its efforts to deal with public health emergencies.

Table 7: Some Historical Examples of Quarantine to Control Suspected Infectious Disease Outbreaks⁷⁸

Year	Quarantine Description
1892	New York City Port Authority imposed quarantine on ships arriving from Europe to prevent importation of cholera.
1893	City of Muncie, Indiana imposed quarantine on neighborhoods and isolation of individual persons in an attempt to deal with a smallpox outbreak.
1900	San Francisco imposed quarantine on a Chinese area of the city in an attempt to contain a plague outbreak.
1901	Massachusetts used quarantine and isolation of individuals in its efforts to stem a smallpox outbreak in Boston.
1924	California used quarantine as part of its attempt to control an outbreak of pneumonic plague in Los Angeles.

Quarantine and compulsory vaccination of populations to deal with public health emergencies faded, however, from public health practice after the first quarter of the 20th century as governments brought infectious diseases under better control. Today, public health experience with compulsory public health measures involves almost exclusively isolated, individual cases. For example, individuals with highly communicable diseases, such as multi-drug resistance tuberculosis, can be compulsorily isolated and treated because of the risk the individual poses to

⁷⁷ *Jacobson v. Mass.*, 197 U.S. 11 (1905).

⁷⁸ H. Markel, *Knocking Out Cholera: Cholera, Class, and Quarantines in New York City, 1892*, 69 BULL. HIST. MED. 420, (1995); W. Eidson, *Confusion, Controversy, and Quarantine: The Muncie Smallpox Epidemic of 1893*, 86 IND. MAG. HIST. 374 (1990); G. Risse, *A Long Pull, a Strong Pull, and All Together: San Francisco and Bubonic Plague, 1907-1908*, 66 BULL. HIST. MED. 260, (1992); M. R. Albert, K. G. Ostheimer, J. G. Breman, *The Last Small Epidemic in Boston and the Vaccination Controversy, 1901-1903*, 344 NEW ENG. J. MED. 375 (2001); A. J. Viseltear, *The Pneumonic Plague Epidemic of 1924 in Los Angeles*, 1 YALE J. BIO. & MED. 40 (1974).

the general populace.⁷⁹ Again, the scale and emergency nature of potential public health management of populations in the context of WMD terrorism is beyond the experience of most state public health authorities and is not the kind of action currently undertaken pursuant to state public health law statutes and regulations. Further, protections for civil liberties in this area complicate the public health exercise of extraordinary powers for management of people in the wake of WMD terrorism (see Section 5.3 below).

In addition to contemporary public health inexperience with quarantine powers, confusion exists concerning federal quarantine authority. The federal government has the power to quarantine to protect the public health in two contexts: in connection with: (1) infectious diseases imported from foreign nations; and (2) stopping interstate transmission of infectious diseases.⁸⁰ The growing concern about bioterrorism has led experts to raise questions about the scope and potential implementation of federal quarantine authority. CDC is currently reviewing federal quarantine authority with a view to revising the existing statutory and regulatory powers.

4.2.3. Management of Information

Public health officials may also need to engage in extraordinary management of personal and public information in responding to WMD terrorism. In investigating suspicious outbreaks or injuries, public health officials may require access to patient and health care information to assess whether a threat to public health is imminent or underway.⁸¹ Such personal health information may need to be shared with emergency management and law enforcement personnel as part of the larger effort at crisis and consequence management. The right to privacy and state and federal rules protecting the privacy of individual health care information present obstacles to such public health management of information in the context of WMD terrorism.

The most recent federal protection for individual health care information, the Standards for Privacy of Individually Identifiable Health Information (Privacy Standards),⁸² were authorized by the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Compliance is required by April 14, 2003.⁸³ Because of the limits the Privacy Standards place on release of patient medical information, the Privacy Standards attracted considerable attention and comment from health care providers before and after their introduction. Health care providers may refuse to release patient information to state public health or law enforcement officials relevant to a bioterrorist attack because of the federal requirements in the Privacy Standards. The Privacy Standards do, however, set out exceptions for consequence management purposes in emergency contexts; and public officials and health care providers should be aware of these exceptions as they apply to acts of catastrophic terrorism.⁸⁴

⁷⁹ See generally LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW, 203-224 (2000)

⁸⁰ 42 U.S.C.A. § 264 (West 1991); 42 C.F.R. § 70 (2002).

⁸¹ See, *infra* Annex 1, MODEL STATE EMERGENCY HEALTH POWERS ACT § 506 (access to and disclosure of patient records).

⁸² 45 C.F.R. § 160 (2000).

⁸³ American Health Lawyers Association, *Bush Puts Privacy Rules into Effect, but Promises 'Modifications*, HEALTH LAWYERS NEWS, 9-10, (May 2001).

⁸⁴ See 45 C.F.R. § 164.506 (2002) (consent for uses or disclosures to carry out treatment, payment, and health care operations); 45 C.F.R. § 164.510 (2002) (uses and disclosures requiring patient agreement); 45 C.F.R. § 164.512 (2002) (uses and disclosures for which consent, an authorization, or opportunity to agree or object is not required).

Experts have also raised the possibility that public health officials may want to regulate the content of information being released to the public through various media outlets in order to: (1) prevent panic fueled by bad information and rumors; and (2) ensure dissemination of accurate public health information and guidance to reassure citizens and to enlist their cooperation with public health orders and activities taken to contain and mitigate the consequences of WMD terrorism.⁸⁵ Such interference with the media would clash with the strong constitutional protection of free speech in the United States, and Supreme Court jurisprudence might require a specific federal law authorizing prior restraints on the media before such restraints can pass constitutional muster.⁸⁶

4.2.4. Implementation of Public Health Response Powers

Most state public health departments would have serious problems implementing the extraordinary powers outlined above. State public health officials may have the statutory power to quarantine populations in large geographical areas, but state public health departments do not have the personnel to implement and enforce quarantine orders. Reflecting on the TOPOFF bioterrorism exercise in Denver, Colorado, public health officials noted that:

an executive order was issued quarantining all persons in metropolitan Denver in their homes. . . . However, quarantining two million persons is not simple. Essential workers must be identified, be given prophylaxis and protective barriers, and be permitted to do their jobs. Other members of the community can stay in their homes only a few days before they need fresh supplies of food.⁸⁷

Therefore, a one-time, blanket quarantine order is unlikely to be successful and cannot be enforced unless these and many other issues are addressed.

Similar implementation problems would arise with exercising other extraordinary powers to manage property and people, especially in the face of opposition from individuals and property owners.⁸⁸ If such response powers are exercised, public health officials have to be supported by personnel resources from emergency management, law enforcement, the National Guard, or federal troops⁸⁹ in effectively implementing and enforcing them.

Implementation challenges will include more than questions about the adequacy of the number of personnel needed to implement extraordinary public health actions. In a public health

⁸⁵ Juliette Kayyem, *U.S. Preparations for Biological Terrorism: Legal Implications and the Need for Planning*, ESDP-2001-02 and BCSIA-2001-4, 17-18 (March 2001).

⁸⁶ *New York Times v. United States*, 403 U.S. 713 (1971); Juliette Kayyem, *U.S. Preparations for Biological Terrorism: Legal Implications and the Need for Planning*, ESDP-2001-02 and BCSIA-2001-4, 17 (March 2001).

⁸⁷ Richard E. Hoffman & Jane E. Norton, *Lessons Learned from a Full-Scale Bioterrorism Exercise*, 6 EMERGING INFECTIOUS DISEASES 652, 653 (2000).

⁸⁸ Episodes of civil resistance and violence against the exercise of emergency public health powers have historically occurred. See D. HOPKINS, PRINCES AND PEASANTS: SMALLPOX IN HISTORY, 285-286 (1983) (describing riots in Montreal following imposition of quarantine to contain smallpox); W. Eidson, *Confusion, Controversy, and Quarantine: The Muncie Smallpox Epidemic of 1893*, 86 IND. MAG. HIST. 374 (1990) (describing violence between townspeople of Muncie and public officials trying to enforce quarantine and compulsory vaccinations as governmental responses to a smallpox epidemic).

⁸⁹ See *infra* Chapter 2-- *Extraordinary Presidential Authority*, on the role of federal armed forces for more on the role of the military.

emergency requiring large quantities of vaccines, drugs, antidotes, or other medicines, public health officials may have to ration pharmaceuticals. Principles and procedures for rationing scarce pharmaceuticals will have to be determined by statute or regulation prior to a crisis in order to maximize the effectiveness of the public health response and to minimize legal challenges to rationing decisions in the aftermath of the emergency. Experts have, for example, discussed the importance of giving priority to health care workers and their families in the distribution of limited pharmaceutical supplies in order to ensure the functioning of the health care system in an emergency.⁹⁰ Such principles and procedures will be necessary to guard against prejudice and discrimination in how rationing decisions are made in the context of the volatile political and social consequences of WMD terrorism.

4.3. Disciplines to Protect Civil Liberties

4.3.1. The Threat to Individual Rights

As indicated in Section 5.2, public health responses to WMD terrorism involving the management of property, people, and information could impose serious infringements on individual civil rights. Table 8 below provides a non-exhaustive list of the individual civil rights potentially affected by public health actions that might need to be taken in a response to WMD terrorism.

Table 8 contains more than enough to worry those concerned about protecting civil liberties from governmental power. Historical applications of extraordinary public health powers also suggest that governmental violation of civil liberties is not illusionary. The 1892 quarantine applied by the New York Port Authority discriminated without cause between rich and poor passengers.⁹¹ A federal court struck down the quarantine imposed on a Chinese neighborhood in San Francisco in 1900 because the public health authorities acted with an “evil eye and unequal hand” by discriminating against the Chinese community.⁹² In 1905, the United States Supreme Court recognized the potential for unnecessary violations of civil liberties in efforts to protect the public health by requiring that liberty-restricting public health measures be necessary to protect the public from a demonstrable health threat.⁹³

Another factor also helps focus attention on respecting civil rights in the context of public health actions. Protecting civil rights in the application of public health law in the ordinary course of government has become an important issue in the last two decades, particularly in the wake of the HIV/AIDS crisis. Most public health statutes at the state level were written in the first half of this century or before; and they have not, for the most part, been updated to reflect contemporary protections for civil rights. As leading public health law scholars have argued, most public health law at the state level was not promulgated during a time when the protection of civil rights generally and in public health specifically were burning issues.

⁹⁰ REP.ON CANTINGY CONF.ON STATE EMERGENCY POWERS & THE BIOTERRORISM THREAT, April 26-27, 2001, at 4, 8, *available at* www.nationalsecurity.com/april%20conference.htm

⁹¹ H. Markel, “*Knocking Out Cholera*”: *Cholera, Class, and Quarantines in New York City, 1892*, 69 BULL. HIST. MED. 420 (1995).

⁹² *Jew Ho v. Williamson*, 103 F. 10, 24 (N.D. Cal. 1900).

⁹³ *Jacobson v. Mass.*, 197 U.S. 11 (1905); LAWRENCE O. GOSTIN, PUB. HEALTH L. 68 (2000).

Table 8: Non-Exhaustive List of Civil Rights Threatened by Public Health Actions in Response to WMD Terrorism

Civil Right	Public Health Action
Freedom of Movement and Travel	<ul style="list-style-type: none"> -Isolation of infected individuals and individuals suspected of being infected with biological agents -Compulsory hospitalization, treatment, or decontamination -Quarantine of populations in geographical areas -Preventing people from entering quarantine or contaminated areas -Evacuation of people
Freedom of Association	<ul style="list-style-type: none"> -Isolation of infected individuals and individuals suspected of being infected with biological agents -Quarantine of populations in geographical areas -Prohibitions on public meetings or social gatherings
Personal Integrity and Security of Person	<ul style="list-style-type: none"> -Compulsory vaccination -Compulsory administration of antidotes and antibiotics -Compulsory decontamination -Compulsory medical examinations -Compulsory collection of biological specimens -Handling of diseased or contaminated corpses
Privacy	<ul style="list-style-type: none"> -Reporting of cases of illnesses and injuries -Access to health-care provider records -Data sharing with law enforcement and emergency management authorities -Identification of infected or injured persons -Tracing of contacts of infected or injured persons
Freedom of Speech	<ul style="list-style-type: none"> -Restrictions on the publication or broadcasting of information in order to preserve civil order and the effectiveness of public health responses
Private Property	<ul style="list-style-type: none"> -Seizure and use of vaccines and drugs -Access to suspicious buildings -Closure of buildings -Temporary use of health care and other privately owned facilities -Decontamination of property -Seizure and destruction of contaminated property
Due Process of Law	<ul style="list-style-type: none"> -Emergency context prevents citizens from having challenging public health action in court <i>before</i> the government infringes on civil rights

These older statutes have to be read today against the backdrop of heightened sensitivities about respecting civil rights. The content of Table 8, the historical examples of discriminatory application of public health powers, and the on-going melding of public health law and modern

civil rights law mean that public health and other government officials must be concerned with disciplining governmental responses to WMD events to ensure as much respect for civil rights as possible. Some of the strongest criticisms of the Model State Emergency Health Powers Act involve concerns that the model statute, if enacted, would unnecessarily threaten important civil liberties and rights.⁹⁴

4.3.2. A Framework for Public Health Responses to WMD Terrorism and Respect for Individual Rights

Balancing Public Health and Civil Rights in General. Understanding how experts believe that public health powers and the protection of civil rights should be balanced in non-crisis contexts is helpful in thinking about respecting civil rights in the emergency circumstances a WMD attack would create. Generally speaking, both United States constitutional law and international human rights law recognize that governments may need to restrict civil liberties for public health purposes (usually infectious disease control) but impose five requirements on governments if they wish to so restrict:

1. The measure to be applied must be prescribed by law (i.e., public health officials have been authorized by law to take the measure in question).
2. The measure must be applied in a non-discriminatory manner.
3. The measure must relate to a compelling public health interest in the form of a significant risk to the public's health.
4. The measure must be necessary to achieve the protection of the public's health, meaning that the measure must be: (a) based on scientific and public health information and principles; (b) proportional in its impact on individual rights to the public health threat posed; and (c) the least restrictive measure possible to achieve protection against the significant health risk.
5. Individuals who have their civil rights affected by public health measures have the right to due process of law to challenge the measures before a court of law.

The significance of a risk to public health is determined by looking at multiple factors, including: (1) the nature of the health risk (e.g., is the risk posed by an organism that is highly contagious among humans?); (2) the duration of the health risk (e.g., how long is the chemical agent active in the environment or the incubation period of an infectious agent?); (3) the probability that the health risk is transmissible in the population (e.g., how is an infectious disease transmitted; how often are such transmissions likely to occur; can victims of chemical or nuclear/radiological devices contaminate other people?); and (4) the severity of the consequences if the health risk is transmitted to other individuals or the population.

United States constitutional law and international human rights law recognize that public health authorities may need to restrict civil rights in emergency situations -- situations that do not allow for due process of law prior to the application of the measure in question. When there is not a bona fide emergency, public health officials in the United States must, generally speaking, obtain a court order for actions that infringe on civil rights and provide the individual(s) affected with the opportunity to challenge the actions in a court of law prior to the implementation of the

⁹⁴ See Letter, from the Health Privacy Project at Georgetown University, to Lawrence O. Gostin (Nov. 7, 2001) (on file with author); Letter from the New England Coalition for Law & Public Health, to Tommy Thompson, Secretary of Health and Human Services (Nov. 13, 2001) (on file with author).

order.⁹⁵ In emergency situations, granting the individuals affected by the exercise of public health powers a prior hearing may not be in the interest of the public's health. Nevertheless, due process of law for the individuals affected should take place as soon as possible.⁹⁶

United States federal and state courts have, generally speaking, upheld public health actions infringing on civil rights when such actions are administered fairly and are necessary to protect the public against a significant health risk. This is true even when the courts apply strict scrutiny analysis to infringements of fundamental constitutional rights, such as the rights to travel and to bodily integrity.

Balancing Public Health and Civil Rights in the Context of WMD Terrorism. To discipline the exercise of public health power with respect to civil rights in response to WMD terrorism, the general five-point framework presented above can guide governmental decision-makers in balancing the need to protect the public's health and respect individual rights. Some people might think that a framework developed for the ordinary operation of government's public health powers does not, and should not, apply to the crisis situation a use of a WMD would produce. Emergencies, this line of reasoning goes, allow the government to exercise extraordinary powers without having to worry about civil rights law. Such a stance invites governments to take societies beyond the rule of law. The five-point framework above does not prevent the government from exercising extraordinary powers in emergency situations. It simply requires that such exercises satisfy procedural and substantive criteria to ensure that the infringement of individual rights is necessary.

In addition, the five-point framework can be seen as a positive rather than negative element of the decision-making process in the event of WMD terrorism because it requires policy-making discipline and rigor that might otherwise be lost in the panic of a WMD attack. For example, the five-point framework produces a decision-making approach to exercising public health measures in the context of responding to WMD terrorism:

STEP 1: DEMONSTRATE THE EXISTENCE OF A SIGNIFICANT THREAT TO THE PUBLIC'S HEALTH. This step responds to the requirement imposed by United States constitutional law and international human rights law that any measure taken that restricts civil rights relate to a compelling public interest in the form of a significant threat to the public's health. This step also places scientific and public health information and evidence, rather than panic or politics, at the forefront of responding to WMD terrorism. This emphasis on scientific and public information and evidence is necessary because the immediate policy objective is to control and mitigate the health damage the WMD might cause.

STEP 2: IDENTIFY THE PUBLIC HEALTH INTERVENTIONS THAT ARE NECESSARY TO CONTAIN THE SIGNIFICANT HEALTH RISK. The nature of the WMD used will drive what public health interventions are necessary to contain and mitigate the damage to population health. While population quarantine may be necessary to contain the spread of a pathogen that is highly contagious in human-to-human contact, it would not be necessary to contain an outbreak of a pathogen that does not transmit from person to person (e.g., anthrax). Precise identification of the

⁹⁵ See *infra* Annex 1, MODEL STATE EMERGENCY HEALTH POWERS ACT § 503(e)(1) (requiring public health authority to obtain a court order before isolating and quarantining a person and providing person with notification of a right to a hearing).

⁹⁶ See *id.* § 503(e)(2) (containing exception to obtaining prior court order to isolate or quarantine a person).

needed public health interventions for specific pathogens, chemical agents, and nuclear/radiological devices can be determined in advance of an event and can provide a efficient and effective template for political leaders and public health officials making decisions in a consequence management situation.

STEP 3: DEMONSTRATE THAT THE NEEDED PUBLIC HEALTH INTERVENTIONS ARE PRESCRIBED BY LAW. If an intervention is needed to contain and mitigate a significant health threat, then the power to intervene in that way should be found in existing law and regulations. Implementation and enforcement procedures and protocols should be developed in advance. Public health officials and government lawyers should cooperate before an actual WMD event to outline the legal authority for each and every possible public health intervention that may be needed and all the necessary steps and actors that would have to be involved in implementing such authority. Such cooperation should deal not only with the existence of legal authority but also the procedural and substantive requirements the legal authority for the interventions prescribes. Demonstrating that the needed interventions are prescribed by law also reinforces public health's function of empowering governments to respond in effective ways to WMD terrorism.

STEP 4: DEMONSTRATE THAT THE INTERVENTION'S INFRINGEMENTS ON INDIVIDUAL RIGHTS ARE REASONABLE COMPARED TO THE INTERVENTION'S BENEFITS IN CONTAINING THE SIGNIFICANT HEALTH THREAT. United States constitutional and international legal criteria require that the government establish that the intervention to be taken is reasonably likely to achieve the public health objective. While courts historically have been deferential to the judgments of public health officials, it is important in balancing public health and civil rights for the perceived benefits of the intervention to outweigh the burdens placed on individual rights. Scientific and public health evidence and information can be organized in advance that would allow decision-makers in a WMD crisis to demonstrate the necessity and reasonableness of burdening individual rights in such an emergency.

STEP 5: DEMONSTRATE THAT THE INTERVENTION IS THE LEAST RESTRICTIVE ALTERNATIVE. Wherever possible, public health authorities should use the intervention that will achieve the public health goal with the minimal possible infringement on civil rights. For example, if isolating a small number of individuals can contain an epidemic, such isolation is a less restrictive intervention than quarantining a large population. This requirement ensures that decision-makers consider their full range of options and do not, in a panic, revert to the most draconic interventions.

STEP 6: PROVIDE FOR TIMELY JUDICIAL REVIEW OF ALL INTERVENTIONS TAKEN TO RESPOND TO WMD TERRORISM. In responding to a WMD event, decision-makers will probably not have time to provide individuals with due process of law prior to the implementation of right-infringing interventions. The emergency context should not, however, mean that judicial review of public health interventions is entirely removed from the scene. Timely judicial review might, in some contexts, be hampered by state and federal courts themselves being affected by public health interventions, such as quarantine or evacuation. Part of the public health strategy for WMD terrorism should be sorting out how to make judicial review of public health interventions subject to timely judicial review to maximize protection of civil rights and the rule of law.

The six-step approach to ensuring the maximum protection of and respect for individual rights outlined above does not, by itself, eliminate all political, economic, scientific, and legal

uncertainties that would confront decision-makers facing the aftermath of WMD terrorism. The six-step approach is ultimately a balancing test, but panic and the pressure of an emergency situation could cause the balancing of public health and individual rights to be done poorly so that neither the public health objective nor respect for individual rights is achieved. The intention behind the six-step approach is to discipline government authorities to think systematically about public health interventions that might have to be made and apply rigorous standards when making policy so that individual rights and liberties can be protected to the maximum extent possible.

5. LIABILITY OF MEDICAL CARE PROVIDERS AND PUBLIC HEALTH OFFICIALS

Acts of catastrophic terrorism would be expected to activate a full panoply of medical care and public health services, ranging from emergency care to preventive measures, such as quarantines and vaccinations. This section considers the extent to which medical care providers and public health officials may be liable for their acts or omissions during responses to acts of catastrophic terrorism.

5.1. Liability for Refusal to Treat

Many forms of terrorism could produce large numbers of injuries, or widespread illness or fears of illness, all of which could prompt the public to seek medical treatment. Often, the first place of treatment, especially for urgent care, is the hospital emergency room. Even with careful preparation and disaster planning, hospitals could find themselves swamped with individuals seeking treatment. Traditionally, hospitals have had no duty to provide care to all patients who presented themselves for emergency treatment.⁹⁷ Indeed, courts have held that private hospitals need not even explain their reasons for refusal.⁹⁸ Under this traditional approach, no liability would be imposed on a hospital that turned away victims of catastrophic terrorist attacks because of, for example, fear of contamination, or even concern that the victim would be unable to pay the bill.

Enactment by Congress of the Emergency Medical Treatment and Active Labor Act of 1986 (EMTALA)⁹⁹ dramatically changed this traditional approach. Congress enacted EMTALA to respond to the specific problem of hospital emergency rooms refusing to treat patients who were uninsured or who could otherwise not pay for treatment. In such situations, emergency rooms would either decline to provide treatment, or transfer patients in an unstable condition to other hospitals, thereby jeopardizing the patient's health.¹⁰⁰

EMTALA imposes two duties upon hospitals and their on-call physicians. First, the hospital must provide a medical screening exam to any individual who comes to the emergency department and requests an examination or treatment for a medical condition.¹⁰¹ This requirement does not mandate accurate diagnosis of a patient's illness but rather requires that the

⁹⁷ *Brooks v. Maryland Gen. Hosp., Inc.*, 996 F.2d 708, 710 (4th Cir. 1993).

⁹⁸ *Birmingham Baptist Hosp. v. Crews*, 229 Ala. 398, 399, 157 So. 224, 225 (1934).

⁹⁹ 42 U.S.C. § 1395dd (2002).

¹⁰⁰ *Baker v. Adventist Health, Inc.*, 260 F.3d 987 (9th Cir. 2001) (This practice is often called "patient dumping," and EMTALA is frequently referred to as the "Patient Anti-Dumping Act").

¹⁰¹ OFC.OF INSP.GEN., DEPT. OF HEALTH & HUMAN SERVS., THE EMERGENCY MEDICAL TREATMENT AND LABOR ACT: THE ENFORCEMENT PROCESS REPORT (Jan 2001) [*hereinafter* Enforcement Process].

screening be performed equitably in comparison to other patients with similar symptoms.¹⁰² EMTALA explicitly recognizes the differences among the capabilities of hospital emergency rooms and limits the screening required to one that is within the capability of a given emergency department. The second EMTALA duty arises if the hospital determines an individual has a medical emergency. The hospital must then stabilize the condition or provide for appropriate transfer.¹⁰³

A hospital's duty to stabilize under EMTALA does not arise until the hospital first detects an emergency medical condition, and the Act's transfer restrictions apply only when an individual comes to the emergency room; and, after an appropriate medical screening examination, the hospital determines that the individual has an emergency medical condition. The hospital is obligated to provide these services regardless of the individual's ability to pay. It cannot delay the services to inquire about the individual's method of payment or insurance status.¹⁰⁴ Patients need not be Medicare recipients to benefit from EMTALA protections,¹⁰⁵ and refusal to treat is wrongful even if it is not based on inability to pay or some other improper motive.¹⁰⁶ In sum, EMTALA protects patients from all refusals to treat, not just those that are economically motivated.

Enforcement of EMTALA occurs within DHHS. The Centers for Medicare and Medicaid Services (CMS, formerly the Health Care Financing Administration) authorize investigations of dumping complaints by state survey agencies, determine if a violation has occurred, and, if appropriate, terminate a hospital's provider agreement. The DHHS Office of Inspector General (OIG) assesses civil monetary penalties against hospitals and physicians and may exclude physicians from the Medicare program for repeated or gross and flagrant behavior.¹⁰⁷ Large hospitals and doctors who negligently violate any legal requirements are subject to a civil penalty of up to \$50,000 for each offense. The penalty for hospitals with fewer than 100 beds is \$25,000 per violation.¹⁰⁸

Since enactment of EMTALA, the only hospital that might still be free (depending on state laws)¹⁰⁹ to turn away emergency patients is one that does not have emergency rooms or does not accept Medicare patients. Thus, most hospital emergency rooms in the United States to

¹⁰² Marshall v. E. Carroll Parish Hosp. Serv., 134 F.3d 116 (5th Cir. 1998).

¹⁰³ Baker, 260 F.3d at 987.

¹⁰⁴ Jackson v. E. Bay Hosp., 246 F.3d 1248 (9th Cir. 2001).

¹⁰⁵ D. Mackey, *The Emergency Medical Treatment and Active Labor Act: An Act Undergoing Judicial Development*, 19 U. ARK. LITTLE ROCK L. REV. 465, 471 (1997) (footnote omitted).

¹⁰⁶ M. Frank, *Tailoring EMTALA to Better Protect the Indigent: The Supreme Court Precludes One Method of Salvaging a Statute Gone Awry*, 3 DEPAUL J. HEALTH CARE L. 195, 230-31, (2000) (citing Roberts v. Galen of Virginia, Inc., 119 S. Ct. 685 (1999). 525 U. S. 249 (1999).

¹⁰⁷ Enforcement Process, *supra* note 102 at 1.

¹⁰⁸ Press Release, Office of Inspector General, Department of Health and Human Services, *Special Advisory Bulletin Outlines Hospitals' Obligations to Provide Emergency Services to Managed Care Enrollees*, (Nov. 9, 1999) (on file with author).

¹⁰⁹ "At the time of [EMTALA's] enactment, twenty-two states had issued regulations or enacted statutes requiring hospitals to provide emergency services to some extent." D. Mackey, *The Emergency Medical Treatment and Active Labor Act: An Act Undergoing Judicial Development*, 19 U. ARK. LITTLE ROCK L. REV. 465-466 (1997).

which victims of a catastrophic terrorist attack might be brought would be required to screen and stabilize them.

The OIG and CMS chiefs have suggested the following practices to minimize the likelihood that a hospital will violate EMTALA:

- Staff should not seek prior authorization of coverage from health plans before screening or stabilizing patients.
- Hospitals should not ask a patient to complete a financial responsibility form or an advanced beneficiary notification form before screening.
- A physician or other qualified medical personnel must screen all individuals.
- Hospitals must have knowledgeable staff to answer patients' inquiries about potential financial liability. They must clearly inform the patient about the hospital's obligation to provide screening and stabilizing treatment regardless of ability to pay, and encourage any patient who believes his/her condition is an emergency to defer discussion of financial responsibility until after the screening.
- If the individual voluntarily withdraws the request for examination or treatment, the hospital still must offer an examination and treatment, inform the person of the risks and benefits of being examined or refusing to be examined, and "take all reasonable steps" to get the individual's refusal in writing.

[As this monograph is being prepared, CMS is preparing a guidance memo as to how EMTALA would apply in the event of a bio-terrorist incident. The draft memo provides that a potentially exposed patient who appears at a hospital that is not designated in a community response plan can be referred to a designated response facility. The referral can be made after interviewing the patient and determining that s/he might be a category that is included in the response plan. Without this provision, transferring patients to a designated facility before conducting a screening examination could be considered an EMTALA violation.]

5.2. Liability for Improper Disclosure of Private Health Care Information

Part of the response by medical care providers to catastrophic terrorist incidents might include disclosure of health care information about patients to other organizations or persons. For example, providers might be requested to identify victims and their medical conditions by:

- other medical caregivers in the ordinary course of treatment, such as by victims' primary care physicians;
- law enforcement investigators seeking to identify terrorist suspects from among the victims;
- public health agencies attempting to determine the cause of a disease outbreak to prevent further spread; or
- reporters trying to inform the public about the incident.¹¹⁰

¹¹⁰ See Charity Scott, *Is Too Much Privacy Bad for Your Health? An Introduction to the Law, Ethics, and HIPAA Rule on Medical Privacy*, 17 GA. ST. U. L. REV. 481, 483-44 (2000).

Because much medical information is legally protected, such disclosure could create liability if carried out unlawfully.

Opportunities for error involving private health care information would certainly exist under the pressure of responding to catastrophic terrorism incidents. Medical records of emergency care provided to victims could be released to the wrong primary care physicians. Public health agencies could mix up victim records and, in the course of contact tracing, incorrectly notify relatives and neighbors that persons who were not exposed to contagious diseases might have such dreaded afflictions. Well-meaning public officials might identify victims to the media without prior permission. Consequently, it is worthwhile exploring the laws that protect private health information.

Regulation of private health information exists at four levels: ethical restrictions on licensed medical care providers,¹¹¹ state statutes,¹¹² state personal injury common law,¹¹³ and federal regulations¹¹⁴ issued under the Health Insurance Portability and Accountability Act of 1996 (HIPAA).¹¹⁵ Depending on the nature and seriousness of violations, consequences can include loss of licenses, civil fines, criminal punishment, or liability for monetary damages. Because the laws are extremely complex and vary greatly between states,¹¹⁶ it is essential for those who must comply to consult their local counsel about the answers to particular questions.

Nevertheless, it is possible to point out some features of applicable law that would be relevant during responses to catastrophic terrorist incidents. First, ethical duties imposed on licensed practitioners to protect privileged medical information (e.g., the doctor-patient privilege) are, strictly speaking, rules of evidence that apply only to legal and quasi-legal proceedings. Second, while states generally treat medical information as confidential and statutorily penalize its disclosure absent patient authorization, these laws also *require* reporting to law enforcement and public health agencies of diagnoses such as gunshot wounds or certain contagious diseases.¹¹⁷ Third, tort actions for personal injuries caused by wrongful medical

¹¹¹ Health Privacy Project, *THE STATE OF HEALTH PRIVACY: AN UNEVEN TERRAIN*, Institute for Health Care Research and Policy, Georgetown University, 12 (July 1999) at <http://www.healthprivacy.org> [hereinafter Georgetown Study].

¹¹² *Id.* at 11-12.

¹¹³ See Note, *Do Doctors Have a Constitutional Right to Violate Their Patients' Privacy?: Ohio's Physician Disclosure Tort and the First Amendment*, 46 VILL. L. REV. 141, 148-53 (2001).

¹¹⁴ Standards for Privacy of Individually Identifiable Health Information, Final Rule, 65 Fed. Reg. 82,462 (Dec. 28, 2000) (codified at 45 C.F.R. pt. 160, 164, *as corrected*, Technical Corrections to Final Rule, 65 Fed. Reg. 82,944 (Dec. 29, 2000)) available at <http://aspe.hhs.gov/admsimp/index.htm>.

¹¹⁵ Pub. L. No. 104-191, 110 Stat. 2021 (1996) (codified at 42 U.S.C. §§ 1320d et seq. (2001)).

¹¹⁶ Georgetown Study, *supra* note 12 at p.3, the author explained in the Preface “Eighteen months ago, the Health Privacy Project launched an initiative to compile and publish a comprehensive survey of state health privacy statutes. As word spread that we had undertaken this effort, we heard two distinct messages, often delivered by the same people in the same breath: First, ‘Nothing like this exists.’ Second, ‘Are you crazy? Do you have any idea what you are getting into?’ Over the past year and a half, we have come to appreciate both the importance of this effort, and the near impossibility of the task.” *Id.*

¹¹⁷ Georgetown Study, *supra* note 112, at 25.

records disclosure can be brought under a number of legal theories, but have often proven to be very difficult to win.¹¹⁸

Perhaps most important, the HIPAA regulations, while intended to create a set of national minimum health records privacy standards,¹¹⁹ specifically address many conditions that would be encountered during catastrophic terrorism incident responses. For example, these regulations provide explicitly that “[a] covered health care provider may, without prior consent, use or disclose protected health information . . . to carry out treatment, payment, or health care operations . . . [i]n emergency treatment situations, if the covered health care provider attempts to obtain such consent as soon as reasonably practicable after the delivery of such treatment”¹²⁰

Another HIPAA provision permits medical care providers to disclose protected health information to the extent required by other laws,¹²¹ to public health authorities responsible for preventing contagious disease spread,¹²² to other persons who may be at risk of contracting a contagious disease,¹²³ in the course of judicial or administrative proceedings,¹²⁴ to law enforcement personnel for law enforcement purposes,¹²⁵ or in good faith efforts to “prevent or lessen a serious and imminent threat to the health or safety of a person or the public.”¹²⁶ Thus,

¹¹⁸ “Patients sufficiently distressed by a disclosure of their private medical information and seeking justice through a common law cause of action encounter a number of difficulties. Legal theories upon which patients traditionally have brought suit include invasion of privacy, negligence/malpractice, implied breach of contract, breach of fiduciary trust, and intentional or negligent infliction of emotional distress. Assuming no legal justification immunizes a physician from liability, a patient must successfully establish a prima facie case and win a judgment that fits the injury incurred. Traditional legal actions typically frustrate patients in one or both of these areas.” Note, *Do Doctors Have a Constitutional Right to Violate Their Patients' Privacy?: Ohio's Physician Disclosure Tort and the First Amendment*, 46 VILL. L. REV. 141, (2001) (footnotes omitted).

¹¹⁹ “This final rule establishes, for the first time, a set of basic national privacy standards and fair information practices that provides all Americans with a basic level of protection and peace of mind that is essential to their full participation in their care. The rule sets a floor of ground rules for health care providers, health plans, and health care clearinghouses to follow, in order to protect patients and encourage them to seek needed care. The rule seeks to balance the needs of the individual with the needs of the society. It creates a framework of protection that can be strengthened by both the federal government and by states as health information systems continue to evolve.” Standards for Privacy of Individually Identifiable Health Info., 65 Fed. Reg. 82,464 (Dec. 28, 2000).

¹²⁰ 45 C.F.R. § 164.506(a)(3)(1)(A) (2001). “In these situations, covered providers must attempt to obtain the consent as soon as reasonably practicable after the delivery of the emergency treatment.” Standards for Privacy of Individually Identifiable Health Info., 65 Fed. Reg. 82,510 (Dec. 28, 2000); *see also* 45 C.F.R. § 164.510(a)(3) (2003).

¹²¹ 45 C.F.R. § 164.512(a)(1) (2003).

¹²² *Id.* at § 164.512(b)(1)(i).

¹²³ *Id.* at § 164.512(b)(1)(iv). The organization that notifies such persons must also be authorized by law to do so.

¹²⁴ *Id.* at § 164.512(e)(1).

¹²⁵ *Id.* at § 164.512(f). This section of the regulations contains many intricate provisions that must be consulted in their entirety to fully understand the specific requirements. *Id.*

¹²⁶ *Id.* § 164.512(j)(1)(i)(A).

considerable legal protection exists for careful, common-sense disclosures of private health information during emergency responses.¹²⁷

5.3. Liability for Failure to Protect Staff

Terrorist acts that expose the public to biological, chemical, or radiological contaminants might create a secondary risk for health care workers who treat victims at hospitals. The Occupational Safety and Health Act of 1970 (OSHA)¹²⁸ requires minimum safety standards for places of work, including hospitals, in order to protect such workers. State worker compensation statutes provide monetary damages to workers who become injured or ill as a result of workplace exposure. In addition, while not discussed here, most hospitals obtain accreditation through the Joint Commission on Accreditation for Healthcare Organizations (JCAHO), which includes standards for worker protection.

5.3.1. Occupational Health and Safety Act of 1970

OSHA is a preventive statute,¹²⁹ with OSHA rules protecting workers from today's hazards and tomorrow's threats.¹³⁰ Through extensive regulations, it provides for an enormous variety of specific protections that employers must implement. For example, hospitals are required to prevent workers from exposure to contagious disease by providing protection against bloodborne pathogens (BBPs),¹³¹ by implementing "various engineering controls, work practice controls, personal protective equipment requirements, and information-related mandates."¹³² OSHA's bloodborne pathogens standard requires the employer to prepare a written exposure control program. The standard mandates that the program evaluate routine workplace tasks and

¹²⁷ However, the provisions of 45 C.F.R. § 164.512 are not intended to preempt "any state or other restrictions" or the right to enforce any disclosure consent requirements under other laws. Standards for Privacy of Individually Identifiable Health Info., 65 Fed. Reg. 82,524 (Dec. 28, 2000).

¹²⁸ 29 U.S.C. §§ 651-78 (2000)

¹²⁹ One of the statute's purposes is "to assure so far as possible every workingman and woman in the Nation safe and healthful working conditions and to preserve our human resources. . . ." 29 U.S.C. § 651(b) (2000).

¹³⁰ OCCUPATIONAL HEALTH AND SAFETY ADMINISTRATION, *OSHA Facts* (2001) at <http://www.osha.gov/as/opa/oshafacts.html>.

¹³¹ See generally 29 C.F.R. § 1910.1030 (2002). BBPs "means pathogenic microorganisms that are present in human blood and can cause disease in humans. These pathogens include, but are not limited to, hepatitis B virus (HBV) and human immunodeficiency virus (HIV)." *Id.* at § 1910.1030(b).

¹³² P. Berg, *When the Hazard Is Human: Irrationality, Inequity, and Unintended Consequences in Federal Regulation of Contagion*, 75 WASH. U. L.Q. 1367, 1380 (1997). In particular, "[e]mployers must develop and implement an Exposure and Control Plan that identifies all employees at risk and describes the risk-producing functions they perform and the safety measures that have been implemented. Employers must institute work practice controls, including the use of universal precautions ("UPs"), handwashing, use and disposal of needles and sharp instruments, and laundry handling techniques. Employers must offer employees (but may not require that they avail themselves of) the vaccination for hepatitis. All occupational exposures to any bloodborne pathogen must be documented and evaluated, and exposed employees must be informed of the infection status of any person with whom they had contact. Finally, workers must receive education on preventing occupational exposure to BBPs." *Id.* at 1380-81 (footnotes omitted).

procedures that involve exposure to blood or other potentially infectious materials, identify workers performing such tasks, and use a variety of methods to reduce the risks.¹³³

Hospitals that become part of emergency responses involving hazardous substances must comply with the OSHA-based Hazardous Waste Operations and Emergency Response (HAZWOPER) Standard.¹³⁴ HAZWOPER requires employers, including hospitals, to plan for emergencies if they expect to use their employees to handle an emergency involving hazardous substances, including biological agents. Where hospitals are pre-designated to handle emergency victims from hazardous substance releases, they “must have an Emergency Response Plan (ERP), decontamination equipment, personnel protective equipment (PPE), and trained personnel.”¹³⁵

HAZWOPER requires various levels of training for personnel in hazardous material releases or clean up; however, it is not OSHA’s intent that every member of a community’s emergency response services receives the highest levels of specialized hazardous materials training.¹³⁶ The Occupational Safety and Health Administration, however, does suggest that every member of the emergency room clinical staff, plus any employee who might be exposed to hazardous substances during an emergency response incident, should be:

1. familiar with how the hospital intends to respond to hazardous substance incidents;
2. trained in the appropriate use of personnel protective equipment (PPE); and,
3. required to participate in scheduled drills.¹³⁷

Failure to comply with OSHA can lead to civil fines or criminal penalties.¹³⁸ However, OSHA does not give rise to employer tort liability.¹³⁹

¹³³ OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *Occupational Exposure to Bloodborne Pathogens--Precautions for Emergency Responders*, OSHA 3106 (1998), available at www.osha.gov/Publications/osha3130.pdf.

¹³⁴ 29 C.F.R. § 1910.120 (2002). This regulation includes within its scope “[e]mergency response operations for releases of, or substantial threat of releases of, hazardous substances without regard to the location of the hazard.” *Id.* § 1910.120(a)(1)(v); see generally OCCUPATIONAL HEALTH AND SAFETY ADMINISTRATION, *Hazardous Waste Operations and Emergency Response*, OSHA 3114 (Revised 1997) at <http://www.osha-slc.gov/Publications/OSHA3114/osha3114.html>.

¹³⁵ OCCUPATIONAL HEALTH AND SAFETY ADMINISTRATION, *Hospitals and Community Emergency Response -- What You Need to Know*, OSHA 3152 (1997) at <http://www.osha-slc.gov/Publications/OSHA3152/osha3152.html>.

¹³⁶ “The community may determine that it is appropriate for the fire department to develop a small group of highly trained hazardous materials technicians and specialists called a “HAZMAT” team,” or may find that the community does not require a HAZMAT team and that less intensive training is adequate.” *Id.* at 6.

¹³⁷ *Id.*

¹³⁸ N. Stillman and J. Wheeler, *Symposium: Health in the Workplace: Article: The Expansion of Occupational Safety and Health Law*, 62 NOTRE DAME L. REV. 969, 976 (1987). Criminal penalties could be imposed where willful violations cause death; for giving unauthorized advance notice of inspections; for providing false information to OSHA; killing, or for assaulting or hampering the work of an OSHA compliance officer. See *id.* n. 37 (citation omitted).

¹³⁹ “The consistent holdings of courts that there is no private right of action permitted under the Act by employees who claim they have been injured due to an employer’s violation of the OSH Act or a standard promulgated thereunder are further proof that the statute is preventive in nature.” *Id.* at 976 (footnote omitted).

5.3.2. Worker Compensation Statutes

Hospital workers who become injured or ill because of workplace exposure to contaminants from catastrophic terrorist weapons will be compensated through state worker compensation statutes. Worker compensation statutes were enacted specifically to avoid tort litigation and are supposed to be the exclusive remedy available to employees against employers for workplace injury and illness.¹⁴⁰ Statutory requirements vary from state to state, and in some instances there may be a question as to coverage for extraordinary events such as terrorism. In general, some the following elements are included:

- compulsory application of the worker's compensation principle to certain specific employments;
- liability based solely on the work connection and not on fault;
- benefits according to a prescribed schedule for injury or death;
- rate of compensation keyed to the earning power of the employee;
- provision for exclusive employer liability under the program;
- compulsory insurance for or proof of financial responsibility by the employer; and
- administration of the program outside the court system through agency or commission proceedings.¹⁴¹

Nonetheless, employees have occasionally been able to recover damages from employers in addition to this compensation by: (1) proving unusually egregious employer conduct, such as where an employer knowingly meant to harm an employee; or (2) bringing tort actions against third parties who bear responsibility under tort law for the injury or illness, which can then trigger contribution or indemnification actions by the third parties against the employers.¹⁴²

5.4. Liability Concerns for Public Health Officials

Response to catastrophic terrorist incidents is likely to involve public health officials in key roles. In addition to providing expertise and advice to emergency management and law enforcement officials, public health officials may find themselves in the position of exercising special statutory powers and authorities. For example, administration of correct dosages of potassium iodide before exposure can protect against thyroid cancer in cases of radiation emergencies by blocking thyroid uptake by ingestion or inhalation of radioiodines.¹⁴³ An outbreak of anthrax may be contained by use of antibiotics or prevented by use of a vaccine.¹⁴⁴ Even a chemical weapons attack with nerve agent could be mitigated by timely advance

¹⁴⁰ *Id.* at 971-72.

¹⁴¹ *Id.* at 971.

¹⁴² "Generally, recklessness or gross negligence by an employer does not establish the exception." *Id.* at 1004.

¹⁴³ See *Draft Guidance on Potassium Iodide as a Thyroid Blocking Agent in Radiation Emergencies*, 5 (2001) at <http://www.fda.gov/cder/guidance/3698dft.pdf>.

¹⁴⁴ *Anthrax Vaccine: What You Need to Know*, at <http://www.cdc.gov/nip/publications/VIS/vis-anthrax.pdf>.

distribution of masks.¹⁴⁵ Such measures might be taken before, during, or after an incident. They might be offered on a voluntary basis, or, under extreme circumstances, might have to be imposed under government authority.

Unfortunately, each of these measures also carries its own costs and risks. Potassium iodide can cause reactions among those who are allergic to iodine.¹⁴⁶ Improper use of respirators by the public led to several deaths in Israel during the Gulf War.¹⁴⁷ On rare occasions, anthrax vaccine can cause severe allergic reactions.¹⁴⁸ Lastly, any public health measure incorporating an element of compulsion, such as quarantine or mandatory vaccinations, will likely be opposed by some individuals on grounds of religious or personal freedom. For all these reasons, the risk of liability for public health officials should be evaluated.

5.4.1. Liability for Voluntary Administration of Preventive Measures

Where preventive measures such as vaccines or use of potassium iodide are offered on a voluntary basis, the most likely source of liability claims by recipients will be through tort suits against manufacturers for damages resulting from adverse side effects.¹⁴⁹ Liability claims may also be made by those who are not offered such preventive measures but who allege that such offers should have been made.

Liability for Side Effects. Liability by a manufacturer for the side effects of voluntarily-administered measures to prevent harm from catastrophic terrorism incidents is determined by state law generally applicable to medical product liability. Among possible causes of action, depending on the state with jurisdiction, would be negligence, strict liability, and breach of warranty.¹⁵⁰ A key issue would be whether patients were provided “informed consent” about the potential side effects that could occur in the course of receiving treatment.¹⁵¹

¹⁴⁵ See NATIONAL RESEARCH COUNCIL, *Chemical and Biological Terrorism Research and Development to Improve Civilian Medical Response*, (1999) at <http://www.nap.edu/html/terrorism/ch3.html>.

¹⁴⁶ See *Draft Guidance on Potassium Iodide as a Thyroid Blocking Agent in Radiation Emergencies*, 5 (2001) at <http://www.fda.gov/cder/guidance/3698dft.pdf>.

¹⁴⁷ NATIONAL RESEARCH COUNCIL, *Chemical and Biological Terrorism Research and Development to Improve Civilian Medical Response*, (1999) at <http://www.nap.edu/html/terrorism/ch3.html>.

¹⁴⁸ *Anthrax Vaccine: What You Need to Know* (Nov. 6, 2000) at <http://www.cdc.gov/nip/publications/VIS/vis-anthrax.pdf>.

¹⁴⁹ See P. Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277, 285-90 (1985).

¹⁵⁰ See Note, *Expansion of the Government Contractor Defense: Applying Boyle to Vaccine Manufacturers*, 70 TEX. L. REV. 1261, 1267 (1992) (discussing theories of liability for harm resulting from the diphtheria-tetanus-pertussis, or DTP, vaccine).

¹⁵¹ “Informed consent appears to be much the same in all U.S. states. The Ohio Revised Code specifically delineates the components of valid written informed consent for surgical or medical procedures. Despite past successes in patients suing physicians for battery based on the physicians’ failure to inform them of appropriate risks, Ohio legal precedent currently favors physicians. To prevail against a physician in Ohio and other states for lack of informed consent a patient must show the following: (1) An undisclosed risk must materialize; (2) The undisclosed risk must harm the patient; and (3) If the risk had been disclosed, the patient would have refused treatment. . . . [M]edical expert testimony must also be presented “to establish the significant risks which should have been disclosed to support the plaintiff’s claim.” Requiring expert medical testimony essentially reduces medical informed consent in Ohio to the practices of other physicians in that locale, i.e., standard medical practice,

Precedent for liability protection to benefit vaccine manufacturers exists. The National Childhood Vaccine Injury Act of 1986¹⁵² created the National Vaccine Injury Compensation Program (VICP) to provide no-fault compensation for the unavoidable side effects of childhood vaccines. Compensation is currently available for injury or death resulting from vaccines for polio, diphtheria, pertussis, tetanus, measles, mumps, rubella, hepatitis B, *haemophilus influenza* type b, varicella (chicken pox), rotavirus, and pneumococcal 7-valent conjugate.¹⁵³ Additional vaccines may be added in the future.¹⁵⁴ While none of the vaccines currently included in the VICP relate to biological weapons, future additions to the program could in theory encompass them, making a brief description of the VICP appropriate.

The VICP is administered jointly by the United States Court of Federal Claims, DHHS, and the Department of Justice (DoJ). If injury or death results from a vaccine covered in the VICP, then a claim may be filed by the injured individual. A parent, legal guardian, or a trustee may file on behalf of a child or an incapacitated person.¹⁵⁵ The VICP provides for a presumption of vaccine causation if a listed condition occurred within a prescribed time frame,¹⁵⁶ assuming certain legal requirements were met and another cause of the illness was not present.¹⁵⁷ In the case of an injury, a claim must be filed within thirty-six months after the first symptoms appeared. In the case of a death, the claim must be filed within twenty-four months of the death and within forty-eight months after the onset of the vaccine-related injury from which the death occurred.¹⁵⁸ At the time of this writing, legislation was pending in Congress to revise the filing deadlines for certain claims under the VICP¹⁵⁹ and to lower the burden of proof claimants must satisfy.¹⁶⁰

In order to qualify for compensation, a petitioner must show either that the injury was a result of a vaccine covered by the VICP, that the vaccine caused the condition, or that the

some would feel, to the detriment of patient autonomy.” K. Severyn, *Jacobson v. Massachusetts: Impact on Informed Consent and Vaccine Policy*, 5 J. PHARMACY & L. 249, 253-54 (1995) (footnotes omitted).

¹⁵² 42 U.S.C. § 300aa (1991).

¹⁵³ CENTERS FOR DISEASE CONTROL, *Overview of the National Vaccine Injury Compensation Program*, (2001) at http://www.cdc.gov/od/nvpo/fs_tableIV_doc1.htm.

¹⁵⁴ See 42 C.F.R. § 100.3(c)(4) (2000).

¹⁵⁵ <http://bhpr.hrsa.gov/vicp/qanda.htm#1>.

¹⁵⁶ http://www.turtletrack.org/ManyVoices/Issue_17/Vaccine_915.htm.

¹⁵⁷ <http://www.virtualpaper.com/whistler/coastviews.nsf>.

¹⁵⁸ <http://bhpr.hrsa.gov/vicp/qanda.htm#1>.

¹⁵⁹ On January 3, 2001, HR 195 was introduced in the House; this bill would amend the vaccine injury compensation portion of the Public Health Service Act to permit a petition for compensation to be submitted within 48 months of the first symptoms of injury. On June 5, 2001, HR 2056, Vaccine Injury Compensation Reform Act, was introduced in the House; this would amend the Public Health Service Act to revise the filing deadlines for certain claims under the VICP, to prevent the unfair denial of compensation under the VICP to individuals who are diagnosed as having vaccine-related injuries more than 36 months after the first symptom, manifestation of onset, or significant aggravation of such injuries.

¹⁶⁰ On March 29, 2001, HR 1287, was introduced in the House to amend the Vaccine Injury Compensation Program. It is cited as the Vaccine Injured Children’s Compensation Act of 2001; The bill would modify the burden of proof required from a preponderance of the evidence to “submitting evidence sufficient to justify a belief by a fair and impartial individual that petitioner’s claims are well grounded.”

vaccine significantly aggravated a pre-existing condition. If a case is found eligible for compensation, a hearing is scheduled to determine the amount of compensation.¹⁶¹ Awards in a vaccine-related death are limited to \$250,000 plus attorney's fees and costs. Awards to individuals with a vaccine-related injury have averaged \$824,463. Injuries from vaccines administered prior to October 1, 1988, are compensated from federal tax dollars allocated by Congress. For vaccines administered on or after October 1, 1988, claims are paid from the Vaccine Injury Compensation Trust Fund, funded from an excise tax on every dose of covered vaccine that is purchased.¹⁶²

The VICP's "no fault" compensation has reduced liability for manufacturers of vaccines and protected them from strict design defect liability.¹⁶³ The manufacturer fulfills its duty to warn by merely transmitting information to the treating physician which is called the learned intermediary doctrine.¹⁶⁴ The VICP creates the presumption that manufacturers' warnings that comply with the Food and Drug Administration (FDA) standards are adequate, thereby preventing state courts from performing an independent assessment of these warnings' sufficiency.¹⁶⁵ Vaccine manufacturers are not liable for unavoidable side effects caused by vaccines that are properly prepared and accompanied by adequate warnings.¹⁶⁶

The VICP protects administrators and manufacturers because it requires that vaccine injury claims involving covered vaccines given on or after October 1, 1988, must first be filed with the VICP before civil litigation through the tort system can be pursued. If a petitioner accepts an award under the VICP, the claim cannot be brought subsequently to the tort system.¹⁶⁷ Also, for vaccine manufacturers, the legislation sets new, more restrictive standards for actions alleging injury from these covered vaccines in cases that are brought to the tort system.¹⁶⁸

Manufacturers and vaccine administrators may still be sued if a petition has been judged non-compensable or dismissed under the VICP, if the award granted by the VICP is otherwise rejected by the petitioner, or if the vaccine is not covered under the VICP.¹⁶⁹ Although an individual who is dissatisfied with the Court's final judgment can reject it and file a lawsuit in state or federal court, a positive result of the program is that costly litigation against drug manufacturers and health care professionals who administer vaccines has virtually ceased.¹⁷⁰ For further discussion of congressional efforts to assure adequate supplies of vaccines through the National Pharmaceutical Stockpile, see Section 4.2 of this chapter. At the time of this writing, Congress was considering additional legislation to expand the supply of smallpox vaccine.

¹⁶¹ <http://bhpr.hrsa.gov/vicp/qanda.htm#1>.

¹⁶² <http://bhpr.hrsa.gov/vicp/qanda.htm#1>.

¹⁶³ RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965).

¹⁶⁴ 42 U.S.C. § 300aa-22(c) (1991).

¹⁶⁵ *Id.* § 300aa-22(b)(2).

¹⁶⁶ *Id.* § 300aa-22(b)(1).

¹⁶⁷ <http://bhpr.hrsa.gov/vicp/qanda.htm>.

¹⁶⁸ <http://bhpr.hrsa.gov/vicp/qanda.htm>.

¹⁶⁹ <http://bhpr.hrsa.gov/vicp/qanda.htm>.

¹⁷⁰ <http://www.usdoj.gov/opa/pr/1998/September/453civ.htm>.

Public health and legal professionals should be aware that any time such proposals protect private entities from tort liability, even in the interest of public health, lively debate will occur.

Liability for Discrimination. A greater risk to emergency planners and responders than liability for side effects would be liability for discriminatory distribution of pre-incident preventive measures. In addition to the obvious liability that would result from, for example, racially discriminatory policies, the Americans with Disabilities Act of 1990 (ADA)¹⁷¹ requires government services to include “reasonable accommodations” for those with recognized disabilities. As one expert explained:

After flat refusals to provide care and pretextual referrals based on disability, the next most obvious violation of the ADA in the health care context is the failure of a provider covered by the ADA to provide auxiliary aids or services necessary to ensure that an individual with a disability is not “excluded, denied services, segregated or otherwise treated differently than other individuals.” For example, the ADA has the effect of requiring health care providers to procure the services of sign language interpreters to communicate with the hearing impaired.¹⁷²

The prudent course is to take reasonable steps to assure that the plans for distributing pre-incident preventive measures take into account the special needs of the disabled. For example, it may be necessary to provide written information in Braille as well as in print,¹⁷³ or to deliver medicines to those who are unable to drive to a facility. Such steps can also have the effect of building community confidence that the government is behaving thoughtfully and fairly in a crisis, rather than panicking.

5.4.2. Liability for Compulsory Measures: Preventive or Therapeutic Treatment

In every state, public health officials have at their disposal certain powers to compel measures to prevent the spread of disease. While this authority was not originally delegated in contemplation of terrorism, in an emergency these powers would be available. The choice to invoke them, whether before, during, or after an incident, would presumably include medical and political considerations that are outside the scope of this manual. However it is important to understand the contours of the legal authority and the potential consequences of its use.¹⁷⁴

¹⁷¹ 42 U.S.C. §§ 12101 – 12132 (2000).

¹⁷² M. Crossley, *Symposium: The Americans with Disabilities Act: A Ten-Year Retrospective: Becoming Visible: The ADA's Impact on Health Care for Persons with Disabilities*, 52 ALA. L. REV. 51, 60 (2000), citing 42 U.S.C. § 12182(b)(2)(A)(iii). It should be noted that the remedy for ADA violations of this requirement include injunctive relief, but not damages. The fact that similar emergency services are unlikely to be repeated in the future may defeat a plaintiff's standing. On the other hand if the health care provider receives federal funds, compensatory damages may be available under section 504 of the Rehabilitation Act of 1973, which provides that: An otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. See *Id.* at n. 55.

¹⁷³ See *infra* Annex 1, MODEL STATE EMERGENCY HEALTH POWERS ACT the Model State Emergency Health Powers Act § 601(i) (accessibility to public information for persons with disabilities).

¹⁷⁴ For example, a traditional rationale for government-required vaccinations is to prevent the spread of communicable disease. A credible threat that a biological weapon disseminating an infectious disease is about to

States have broad power to enact statutes compelling their residents to undergo preventive medical treatment designed to protect the public from the spread of disease. In the 1905 case of *Jacobson v. Commonwealth of Massachusetts*, the United States Supreme Court held that a state statute enabling municipal boards of health to penalize those who refused to undergo mandatory smallpox vaccinations did not violate the United States Constitution.¹⁷⁵ Key to the Court's reasoning was the view that:

According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety. . . . The liberty secured by the 14th Amendment, this court has said, consists in part in the right of a person "to live and work where he will;" and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country, and risk the chance of being shot down in its defense. It is not, therefore, true that the power of the public to guard itself against imminent danger depends in every case involving the control of one's body upon his willingness to submit to reasonable regulations established by the constituted authorities, under the sanction of the state, for the purpose of protecting the public collectively against such danger.¹⁷⁶

In *Prince v. Massachusetts*, the Supreme Court stated that a Jehovah's Witness could not shield her child on religious grounds from receiving a compulsory vaccination, observing that "[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."¹⁷⁷ Presumably, the principles announced in *Jacobson* and *Prince* would also apply to pre-incident measures other than vaccinations, such as the compulsory use of antibiotics and victim rescue masks.

The *Jacobson* decision "is cited as legal precedent for compulsory vaccination laws in all fifty United States states and the District of Columbia."¹⁷⁸ However, there are significant variations from state to state; it is essential to consult individual state laws to determine what powers and authorities are available. A recent survey of state public health laws concluded that "state public health laws vary significantly in definitions, methods, age, and scope" so significantly, in fact, that the data defy useful tabulation or categorization."¹⁷⁹ In particular,

occur could justify compulsory vaccinations to reduce the resulting impacts. See SECOND ANN. REP. TO THE PRESIDENT AND THE CONGRESS OF THE ADVISORY PANEL TO ASSESS DOMESTIC RESPONSE CAPABILITIES FOR TERRORISM INVOLVING WEAPONS OF MASS DESTRUCTION 35 (Dec. 2000) (recommending review of existing federal and state authority to prescribe a variety of mandatory measures, including vaccines).

¹⁷⁵ *Jacobson v. Comm. of Mass.*, 197 U.S. 11 (1905).

¹⁷⁶ *Id.* at 25, 29-30 (citations omitted). However, if a vaccination scheme is racially discriminatory, it could be invalidated. W. Parmet, *Law, Social Policy, and Contagious Disease: A Symposium on Acquired Immune Deficiency Syndrome (AIDS): AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 HOFSTRA L. REV. 53, 69-71 (1985).

¹⁷⁷ *Prince v. Massachusetts*, 321 U.S. 156, 166-67 (1944) (citation omitted).

¹⁷⁸ K. Severyn, *Jacobson v. Massachusetts: Impact on Informed Consent and Vaccine Policy*, 5 J. PHARMACY & L. 249 (1995) (footnotes omitted).

¹⁷⁹ L. Gostin, S. Burris, and Z. Lazzarini, *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59, 101 (1999).

many state public health statutes were enacted in response to specific disease epidemics and, consequently, may provide for different compulsory authority to prevent different types of illness or injury.¹⁸⁰

Commentators have identified three types of state law exemptions from compulsory vaccinations. First, medical exemptions are available in all states. Religious exemptions are available in forty-seven states. So-called “philosophical” exemptions exemptions based on individual beliefs were available in nineteen states.¹⁸¹ Where illness or injury is alleged from a compulsory vaccination, tort liability is much more likely to be imposed on the manufacturer¹⁸² than on the unit of government that imposed its use, because the latter will probably be protected by sovereign immunity.¹⁸³ The fact that administration was pursuant to government compulsion, rather than on a voluntary basis, might make recovery easier.¹⁸⁴

5.4.3. Liability for Compulsory Measures: Isolation and Quarantines

Quarantining victims could be an effective response to protect public health and safety following an act of catastrophic terrorism.¹⁸⁵ For example, it might be necessary to isolate those who may have been infected with disease agents dispersed from a biological weapon, until it can be determined that they do not pose an infection hazard to others. Similarly, it might be necessary to isolate victims of a chemical or radiological incident until they can be decontaminated or otherwise confirmed as not posing a hazard of spreading contamination. Although many would undoubtedly assent to such confinement, it is reasonable to expect that some would not.

Both state and federal laws broadly authorize public health authorities to implement quarantines. In California, for example, the health department is authorized to quarantine, isolate, inspect and disinfect persons, animals, houses, rooms, other property, places, cities or localities, whenever in its judgment such action is necessary to protect or preserve the public health.¹⁸⁶ At the federal level, the Director of the Centers for Disease Control and Prevention may take measures to prevent the spread of diseases as he/she deems reasonably necessary, whenever he or she determines the measures taken by a State are insufficient to prevent the spread of a communicable disease.¹⁸⁷

¹⁸⁰ See *id.* at n.164.

¹⁸¹ *Id.* at 260-61.

¹⁸² See generally J. Wilson, *The Resolution of Legal Impediments to the Manufacture and Administration of an AIDS Vaccine*, 34 SANTA CLARA L. REV. 495, 534-45 (1994).

¹⁸³ See *supra* Section 1.1.2.

¹⁸⁴ As one commentator explained “Obviously, if one may not refuse vaccinations, a basic component of informed consent is absent, thus nullifying the consent.” K. Severyn, *Jacobson v. Massachusetts: Impact on Informed Consent and Vaccine Policy*, 5 J. PHARMACY & L. 249, 255 (1995).

¹⁸⁵ See CONPLAN: United States Government Interagency Domestic Terrorism Concept of Operations Plan 10, (January 2001) at <http://www.fbi.gov/publications/conplan/conplan.pdf>; FEDERAL EMERGENCY MANAGEMENT AGENCY, *Guide for All-Hazard Emergency Operations Planning: Chapter 6, Attachment G B Terrorism* 6-G-15 (State and Local Guide-101) (April 2001).

¹⁸⁶ CAL. HEALTH & SAFETY CODE § 120145 (West 1996), cited in L. Gostin, S. Burris, and Z. Lazzarini, *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 113-14 (1999).

¹⁸⁷ 42 C.F.R. § 70.2 (2000).

It is unlikely that plaintiffs can recover damages as a result of government quarantine decisions during an emergency response to an act of catastrophic terrorism. The case law and commentary involving damages caused by improper quarantine decisions (both imposing and failing to impose quarantines) is sparse, perhaps because federal and state tort claims acts typically do not permit claims for damages caused by the imposition of a quarantine.¹⁸⁸ While claims have been upheld occasionally by courts,¹⁸⁹ the successful plaintiffs are those that can fit their claims into some other legal cause of action.¹⁹⁰ In addition, as mentioned in Section 5.4.2 above, state statutes on catastrophic terrorism sometimes contain provisions that render persons who respond in good faith to public health emergencies immune from civil and criminal prosecution.¹⁹¹ The proposed Model State Emergency Health Powers Act also contains provisions that grant immunity from liability to state government entities and officials and to private persons involved in various ways with responding to a public health emergency.¹⁹²

6. CONCLUSION

The public health sector represents one of the most important governmental sectors in the management of the consequences of catastrophic terrorism. Public health fulfills deterrence, preparedness, and response functions in connection with catastrophic terrorism. The federal structure of government in the United States affects each of these functions, but an important consequence of federalism in this context is that state governments have primary legal authority and responsibility for preparedness and response to catastrophic terrorism. This situation contrasts with terrorism deterrence, where the federal government and federal law dominate. The federal government plays a vital role in providing public health leadership in the areas of preparedness and response given the demands these objectives place on state and local resources not designed to deal with terrorism involving WMD.

As this chapter indicates, many activities and initiatives are currently underway at federal and state levels to improve the public health sector's ability to deter, prepare, and respond to catastrophic terrorism. This represents not only increasing recognition of the public health sector's pivotal role in national defense against catastrophic terrorism but also the realization that the status quo is far from sufficient to protect the public's health from acts of catastrophic terrorism involving WMD. Monitoring and advancing developments in the public health sector as deterrence, preparedness, and response efforts evolve should be a top priority for federal and state governments.

¹⁸⁸ 28 U.S.C. § 2680(f).

¹⁸⁹ See generally J. Fraiser, *A Review of the Substantive Provisions of the Mississippi Governmental Immunity Act: Employees' Individual Liability, Exemptions to Waiver of Immunity, Non-Jury Trial, and Limitation of Liability*, 68 Miss. L.J. 703, 801-02 (1999). Fraiser observes that Athis exemption's cloak of immunity spreads wider to cover decisions imposing a quarantine than it does to cover decisions not to impose a quarantine. *Id.*

¹⁹⁰ For example, one plaintiff succeeded by arguing that a state veterinary doctor was liable for malpractice for misdiagnosis. See *id.*

¹⁹¹ See, e.g., COLO. REV. STAT. § 24-32-211.5(2) (2000); IND. CODE § 16-31-6-4(4)(b) (1998).

¹⁹² See *infra* Annex 1, MODEL STATE EMERGENCY HEALTH POWERS ACT the Model State Emergency Health Powers Act § 804(a) (state immunity); *Id.* § 804(b) (private liability).

ANNEX 1-- CDC LIST OF PUBLIC HEALTH POWERS NEEDED BY A HEALTH OFFICER IN A BIOTERRORISM EVENT

Collection of Records and Data

- Reporting of diseases, unusual clusters, and suspicious events.
- Access to hospital and provider records.
- Data sharing with law enforcement agencies.
- Veterinary reporting.
- Reporting of workplace absenteeism.
- Reporting from pharmacies.

Control of Property

- Right of access to suspicious premises.
- Emergency closure of facilities.
- Temporary use of hospitals and ability to transfer patients.
- Temporary use of hotel rooms and drive-through facilities.
- Procurement or confiscation of medicines and vaccines.
- Seizure of cellphones and other “walkie-talkie” type equipment.
- Decontamination of buildings.
- Seizure and destruction of contaminated articles.

Management of Persons

- Identification of exposed persons.
- Mandatory medical examinations.
- Collect lab specimens and perform tests.
- Rationing of medicines.
- Tracking and follow-up of persons.
- Isolation and quarantine.
- Logistical authority for patient management.
- Enforcement authority through police or National Guard.
- Suspension of licensing authority for medical personnel from outside jurisdictions.
- Authorization of doctors to perform functions of medical examiner.

- Safe disposal of corpses.

Access to Communications and Public Relations

- Identification of public health officers, e.g., badges.
- Dissemination of accurate information, rumor control, 1-800 number.
- Establishment of a command center.
- Access to elected officials.
- Access to experts in human relations and post-traumatic stress syndrome.
- Diversity training, cultural differences, dissemination of information in multiple languages.

ANNEX 2-- THE MODEL STATE EMERGENCY HEALTH POWERS ACT

**The Model State Emergency Health Powers Act¹
As of December 21, 2001**

A Draft for Discussion Prepared by:

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To Assist:

**National Governors Association [NGA],
National Conference of State Legislatures [NCSL],
Association of State and Territorial Health Officials
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¹ Members of the National Association of Attorneys General (NAAG) also provided input and suggestions to the drafters of the Model Act. The language and content of this draft Model State Emergency Health Powers Act do not represent the official policy, endorsement, or views of the *Center for Law and the Public's Health*, the CDC, NGA, NCSL, ASTHO, NACCHO, or NAAG, or other governmental or private agencies, departments, institutions, or organizations which have provided funding or guidance to the Center for Law and the Public's Health. This draft is prepared to facilitate and encourage communication among the various interested parties and stakeholders about the complex issues pertaining to the use of state emergency health powers.

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PREAMBLE

In the wake of the tragic events of September 11, 2001, our nation realizes that the government's foremost responsibility is to protect the health, safety, and well being of its citizens. New and emerging dangers—including emergent and resurgent infectious diseases and incidents of civilian mass casualties—pose serious and immediate threats to the population. A renewed focus on the prevention, detection, management, and containment of public health emergencies is thus called for.

Emergency health threats, including those caused by bioterrorism and epidemics, require the exercise of essential government functions. Because each state is responsible for safeguarding the health, security, and well being of its people, state and local governments must be able to respond, rapidly and effectively, to public health emergencies. The Model State Emergency Health Powers Act (the "Act") therefore grants specific emergency powers to state governors and public health authorities.

The Act requires the development of a comprehensive plan to provide a coordinated, appropriate response in the event of a public health emergency. It facilitates the early detection of a health emergency by authorizing the reporting and collection of data and records, and allows for immediate investigation by granting access to individuals' health information under specified circumstances. During a public health emergency, state and local officials are authorized to use and appropriate property as necessary for the care, treatment, and housing of patients, and to destroy contaminated facilities or materials. They are also empowered to provide care, testing and treatment, and vaccination to persons who are ill or who have been exposed to a contagious disease, and to separate affected individuals from the population at large to interrupt disease transmission.

At the same time, the Act recognizes that a state's ability to respond to a public health emergency must respect the dignity and rights of persons. The exercise of emergency health powers is designed to promote the common good. Emergency powers must be grounded in a thorough scientific understanding of public health threats and disease transmission. Guided by principles of justice, state and local governments have a duty to act with fairness and tolerance towards individuals and groups. The Act thus provides that, in the event of the exercise of emergency powers, the civil rights, liberties, and needs of infected or exposed persons will be protected to the fullest extent possible consistent with the primary goal of controlling serious health threats.

Public health laws and our courts have traditionally balanced the common good with individual civil liberties. As Justice Harlan wrote in the seminal United States Supreme Court case of *Jacobson v. Massachusetts*, "the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the 'common good.'" The Act strikes such a balance. It provides state and local officials with the ability to prevent, detect, manage, and contain emergency health threats without unduly interfering with civil rights and liberties. The Act seeks to ensure a strong, effective, and timely response to public health emergencies, while fostering respect for individuals from all groups and backgrounds.

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Although modernizing public health law is an important part of protecting the population during public health emergencies, the public health system itself needs improvement. Preparing for a public health emergency requires a well trained public health workforce, efficient data systems, and sufficient laboratory capacity.

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ARTICLE I TITLE, FINDINGS, PURPOSES, AND DEFINITIONS

Section I01 **Short title.** This Act may be cited as the “Model State Emergency Health Powers Act.”

Section I02 **Legislative findings.** The [state legislature] finds that—

- (a) The government must do more to protect the health, safety, and general well being of its citizens.
- (b) New and emerging dangers—including emergent and resurgent infectious diseases and incidents of civilian mass casualties—pose serious and immediate threats.
- (c) A renewed focus on the prevention, detection, management, and containment of public health emergencies is needed.
- (d) Emergency health threats, including those caused by bioterrorism may require the exercise of extraordinary government powers and functions.
- (e) This State must have the ability to respond, rapidly and effectively, to potential or actual public health emergencies.
- (f) The exercise of emergency health powers must promote the common good.
- (g) Emergency health powers must be grounded in a thorough scientific understanding of public health threats and disease transmission.
- (h) Guided by principles of justice and antidiscrimination, it is the duty of this State to act with fairness and tolerance towards individuals and groups.
- (i) The rights of people to liberty, bodily integrity, and privacy must be respected to the fullest extent possible consistent with maintaining and preserving the public’s health and security.
- (j) This Act is necessary to protect the health and safety of the citizens of this State.

Section I03 **Purposes.** The purposes of this Act are—

- (a) To require the development of a comprehensive plan to provide for a coordinated, appropriate response in the event of a public health emergency.
- (b) To authorize the reporting and collection of data and records, the management of property, the protection of persons, and access to communications.
- (c) To facilitate the early detection of a health emergency, and allow for immediate investigation of such an emergency by granting access to individuals’ health information under specified circumstances.
- (d) To grant State and local officials the authority to use and appropriate property as necessary for the care, treatment, vaccination, and housing of patients, and to destroy contaminated facilities or materials.

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- (e) To grant State and local officials the authority to provide care, treatment, and vaccination to persons who are ill or who have been exposed to contagious diseases, and to separate affected individuals from the population at large to interrupt disease transmission.
- (f) To ensure that the needs of infected or exposed persons are properly addressed to the fullest extent possible, given the primary goal of controlling serious health threats.
- (g) To provide State and local officials with the ability to prevent, detect, manage, and contain emergency health threats without unduly interfering with civil rights and liberties.

Section 104 **Definitions.**

- (a) “**Bi terrorism**” is the intentional use of any microorganism, virus, infectious substance, or biological product that may be engineered as a result of biotechnology, or any naturally occurring or bioengineered component of any such microorganism, virus, infectious substance, or biological product, to cause death, disease, or other biological malfunction in a human, an animal, a plant, or another living organism in order to influence the conduct of government or to intimidate or coerce a civilian population.
- (b) “**Chain of custody**” is the methodology of tracking specimens for the purpose of maintaining control and accountability from initial collection to final disposition of the specimens and providing for accountability at each stage of collecting, handling, testing, storing, and transporting the specimens and reporting test results.
- (c) “**Contagious disease**” is an infectious disease that can be transmitted from person to person.
- (d) “**Health care facility**” means any non-federal institution, building, or agency or portion thereof, whether public or private (for-profit or nonprofit) that is used, operated, or designed to provide health services, medical treatment, or nursing, rehabilitative, or preventive care to any person or persons. This includes, but is not limited to: ambulatory surgical facilities, home health agencies, hospices, hospitals, infirmaries, intermediate care facilities, kidney treatment centers, long term care facilities, medical assistance facilities, mental health centers, outpatient facilities, public health centers, rehabilitation facilities, residential treatments facilities, skilled nursing facilities, and adult day-care centers. This also includes, but is not limited to, the following related property when used for or in connection with the foregoing: laboratories; research facilities; pharmacies; laundry facilities; health personnel training and lodging facilities; patient, guest, and health personnel food service facilities; and offices and office buildings for persons engaged in health care professions or services.
- (e) “**Health care provider**” is any person or entity who provides health care services including, but not limited to, hospitals, medical clinics and offices, special care facilities, medical laboratories, physicians, pharmacists, dentists, physician assistants, nurse practitioners, registered and other nurses, paramedics, emergency medical or laboratory technicians, and ambulance and emergency medical workers.

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- (f) “**Infectious disease**” is a disease caused by a living organism or other pathogen, including a fungus, bacillus, parasite, protozoan, or virus. An infectious disease may, or may not, be transmissible from person to person, animal to person, or insect to person.
- (g) “**Infectious waste**” is—
 - (i) “**biological waste**,” which includes blood and blood products, excretions, exudates, secretions, suctioning and other body fluids, and waste materials saturated with blood or body fluids;
 - (ii) “**cultures and stocks**,” which includes etiologic agents and associated biologicals, including specimen cultures and dishes and devices used to transfer, inoculate, and mix cultures, wastes from production of biologicals and serums, and discarded live and attenuated vaccines;
 - (iii) “**pathological waste**,” which includes biopsy materials and all human tissues, anatomical parts that emanate from surgery, obstetrical procedures, necropsy or autopsy and laboratory procedures, and animal carcasses exposed to pathogens in research and the bedding and other waste from such animals, but does not include teeth or formaldehyde or other preservative agents; and
 - (iv) “**sharps**,” which includes needles, I.V. tubing with needles attached, scalpel blades, lancets, breakable glass tubes, and syringes that have been removed from their original sterile containers.
- (h) “**Isolation**” is the physical separation and confinement of an individual or groups of individuals who are infected or reasonably believed to be infected with a contagious or possibly contagious disease from non-isolated individuals, to prevent or limit the transmission of the disease to non-isolated individuals.
- (i) “**Mental health support personnel**” includes, but is not limited to, psychiatrists, psychologists, social workers, and volunteer crisis counseling groups.
- (j) “**Organized militia**” includes the State National Guard, the army national guard, the air national guard, or any other military force organized under the laws of this state.
- (k) “**Protected health information**” is any information, whether oral, written, electronic, visual, or any other form, that relates to an individual’s past, present, or future physical or mental health status, condition, treatment, service, products purchased, or provision of care, and that reveals the identity of the individual whose health care is the subject of the information, or where there is a reasonable basis to believe such information could be utilized (either alone or with other information that is, or should reasonably be known to be, available to predictable recipients of such information) to reveal the identity of that individual.
- (l) “**Public health authority**” is the [*insert the title of the state’s primary public health agency, department, division, or bureau*]; or any local government agency that acts principally to protect or preserve the public’s health; or any person directly authorized to act on behalf of the [*insert the title of the state’s primary public health agency, department, division, or bureau*] or local public health agency.

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- (m) A “**public health emergency**” is an occurrence of imminent threat of an illness or health condition that:
- (1) is believed to be caused by any of the following:
 - (i) bioterrorism;
 - (ii) the appearance of a novel or previously controlled or eradicated infectious agent or biological toxin;
 - (iii) *[a natural disaster;]*
 - (iv) *[a chemical attack or accidental release; or]*
 - (v) *[a nuclear attack or accident]*; and
 - (2) poses a high probability of any of the following harms:
 - (i) a large number of deaths in the affected population;
 - (ii) a large number of serious or long-term disabilities in the affected population;
or
 - (iii) widespread exposure to an infectious or toxic agent that poses a significant risk of substantial future harm to a large number of people in the affected population.
- (n) “**Public safety authority**” means the *[insert the title of the state’s primary public safety agency, department, division, or bureau]*; or any local government agency that acts principally to protect or preserve the public safety; or any person directly authorized to act on behalf of the *[insert the title of the state’s primary public safety agency, department, division, or bureau]* or local agency.
- (o) “**Quarantine**” is the physical separation and confinement of an individual or groups of individuals, who are or may have been exposed to a contagious or possibly contagious disease and who do not show signs or symptoms of a contagious disease, from non-quarantined individuals, to prevent or limit the transmission of the disease to non-quarantined individuals.
- (p) “**Specimens**” include, but are not limited to, blood, sputum, urine, stool, other bodily fluids, wastes, tissues, and cultures necessary to perform required tests.
- (q) “**Tests**” include, but are not limited to, any diagnostic or investigative analyses necessary to prevent the spread of disease or protect the public’s health, safety, and welfare.
- (r) “**Trial court**” is the trial court for the district in which isolation or quarantine is to occur, a court designated by the Public Health Emergency Plan under Article II of this Act, or to the trial court for the district in which a public health emergency has been declared.

Legislative History. The definition for “bioterrorism” was adapted from its definition in 18 U.S.C.A. § 178 (West 2000) and from definitions used by the General Accounting Office. The definitions of “chain of custody,” “specimens,” and “tests” were adapted from ALA. CODE § 25-5-331 (2000). The definition of “health care facility” was adapted from ARK. CODE ANN. § 20-13-901 (Michie 2000); CAL. BUS. & PROF. CODE § 4027 (West 2001); FLA. STAT. ANN. § 159.27 (West 2000). The definition of “health care provider” was adapted from OKLA. STAT. ANN. tit. 74, § 1304 (West 2001). The definition of “infectious waste” was adapted from OR. REV. STAT. § 459.386 (1999). The

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definition for “organized militia” was adapted from **NY CLS MILITARY § 1 (2001)**, **MISS CODE ANN § 33-1-1 (2001)**, **O.C.G.A. § 38-2-2 (2000)**, and **CONN. GEN. STAT. § 27-141 (2001)**. The definitions of “public health authority” and “protected health information” were adapted from LAWRENCE O. GOSTIN AND JAMES G. HODGE, JR., *THE MODEL STATE PUBLIC HEALTH PRIVACY ACT OF 1999*. The definition of a “public health emergency” was adapted from **COLO. REV. STAT. ANN. § 24-32-2103(1.5) (West 2001)**.

ARTICLE II PLANNING FOR A PUBLIC HEALTH EMERGENCY

Section II01 **Public Health Emergency Planning Commission.** The Governor shall appoint a Public Health Emergency Planning Commission (“the Commission”), consisting of the State directors, or their designees, of agencies the Governor deems relevant to public health emergency preparedness, a representative group of state legislators, members of the judiciary, and any other persons chosen by the Governor. The Governor shall also designate the chair of the Commission.

Legislative History. Section 201 is adapted from **COLO. REV. STAT. ANN. § 24-32-2104 (West 2001)**; **2001 ILL. LAWS 73(5)**.

Section II02 **Public Health Emergency Plan.**

- (a) **Content.** The Commission shall, within six months of its appointment, deliver to the Governor a plan for responding to a public health emergency, that includes provisions or guidelines on the following:
- (1) Notifying and communicating with the population during a state of public health emergency in compliance with this Act;
 - (2) Central coordination of resources, manpower, and services, including coordination of responses by State, local, tribal, and federal agencies;
 - (3) The location, procurement, storage, transportation, maintenance, and distribution of essential materials, including but not limited to medical supplies, drugs, vaccines, food, shelter, clothing and beds;
 - (4) Compliance with the reporting requirements in Section 301;
 - (5) The continued, effective operation of the judicial system including, if deemed necessary, the identification and training of personnel to serve as emergency judges regarding matters of isolation and quarantine as described in this Act;
 - (6) The method of evacuating populations, and housing and feeding the evacuated populations;
 - (7) The identification and training of health care providers to diagnose and treat persons with infectious diseases;
 - (8) The vaccination of persons, in compliance with the provisions of this Act;

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- (9) The treatment of persons who have been exposed to or who are infected with diseases or health conditions that may be the cause of a public health emergency.
 - (10) The safe disposal of infectious wastes and human remains in compliance with the provisions of this Act;
 - (11) The safe and effective control of persons isolated, quarantined, vaccinated, tested, or treated during a state of public health emergency;
 - (12) Tracking the source and outcomes of infected persons;
 - (13) Ensuring that each city and county within the State identifies the following—
 - (i) sites where persons can be isolated or quarantined in compliance with the conditions and principles for isolation or quarantine of this Act;
 - (ii) sites where medical supplies, food, and other essentials can be distributed to the population;
 - (iii) sites where public health and emergency workers can be housed and fed; and
 - (iv) routes and means of transportation of people and materials;
 - (14) Cultural norms, values, religious principles, and traditions that may be relevant; and
 - (15) Other measures necessary to carry out the purposes of this Act.
- (b) **Distribution.** The Commission shall distribute this plan to those who will be responsible for its implementation, other interested persons, and the public, and seek their review and comments.
- (c) **Review.** The Commission shall annually review its plan for responding to a public health emergency.

Legislative History. Section 202 is adapted from **COLO. REV. STAT. ANN. § 24-32-2104 (West 2001); 2001 ILL. LAWS 73(5).**

ARTICLE III MEASURES TO DETECT AND TRACK PUBLIC HEALTH EMERGENCIES

Section III01 **Reporting.**

- (a) **Illness or health condition.** A health care provider, coroner, or medical examiner shall report all cases of persons who harbor any illness or health condition that may be potential causes of a public health emergency. Reportable illnesses and health conditions include, but are not limited to, the diseases caused by the biological agents listed in 42 C.F.R. § 72, app. A (2000) and any illnesses or health conditions identified by the public health authority.

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- (b) **Pharmacists.** In addition to the foregoing requirements for health care providers, a pharmacist shall report any unusual or increased prescription rates, unusual types of prescriptions, or unusual trends in pharmacy visits that may be potential causes of a public health emergency. Prescription-related events that require a report include, but are not limited to—
 - (1) an unusual increase in the number of prescriptions or over-the-counter pharmaceuticals to treat conditions that the public health authority identifies through regulations;
 - (2) an unusual increase in the number of prescriptions for antibiotics; and
 - (3) any prescription that treats a disease that is relatively uncommon or may be associated with bioterrorism.
- (c) **Manner of reporting.** The report shall be made electronically or in writing within *[twenty-four (24) hours]* to the public health authority. The report shall include as much of the following information as is available: the specific illness or health condition that is the subject of the report; the patient's name, date of birth, sex, race, occupation, and current home and work addresses (including city and county); the name and address of the health care provider, coroner, or medical examiner and of the reporting individual, if different; and any other information needed to locate the patient for follow-up. For cases related to animal or insect bites, the suspected locating information of the biting animal or insect, and the name and address of any known owner, shall be reported.
- (d) **Animal diseases.** Every veterinarian, livestock owner, veterinary diagnostic laboratory director, or other person having the care of animals shall report animals having or suspected of having any diseases that may be potential causes of a public health emergency. The report shall be made electronically or in writing within *[twenty-four (24) hours]* to the public health authority and shall include as much of the following information as is available: the specific illness or health condition that is the subject of the report; the suspected locating information of the animal, the name and address of any known owner, and the name and address of the reporting individual.
- (e) **Laboratories.** For the purposes of this Section, the definition of "health care provider" shall include out-of-state medical laboratories, provided that such laboratories have agreed to the reporting requirements of this State. Results must be reported by the laboratory that performs the test, but an in-state laboratory that sends specimens to an out-of-state laboratory is also responsible for reporting results.
- (f) **Enforcement.** The public health authority may enforce the provisions of this Section in accordance with existing enforcement rules and regulations.

Legislative History. In Section 301, the language used in Subsections (a) - (d) were adapted from 6 COLO. CODE REGS. § 1009-1, reg. 1 (WESTLAW through 2001), except that the lists of events in (b) was adapted from the *Bioterrorism Readiness Plan: A Template for Healthcare Facilities* (Prepared by APIC Bioterrorism Task Force & CDC Hospital Infections Program Bioterrorism

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Working Group). Subsection (e) was adapted from 6 COLO. CODE REGS. § 1009-1, reg. 3 (WESTLAW through 2001).

Section III02 **Tracking.** The public health authority shall ascertain the existence of cases of an illness or health condition that may be potential causes of a public health emergency; investigate all such cases for sources of infection and to ensure that they are subject to proper control measures; and define the distribution of the illness or health condition. To fulfill these duties, the public health authority shall identify exposed individuals as follows—

- (a) **Identification of individuals.** Acting on information developed in accordance with Section 301 of this Act, or other reliable information, the public health authority shall identify all individuals thought to have been exposed to an illness or health condition that may be a potential cause of a public health emergency.
- (b) **Interviewing of individuals.** The public health authority shall counsel and interview such individuals where needed to assist in the positive identification of exposed individuals and develop information relating to the source and spread of the illness or health condition. Such information includes the name and address (including city and county) of any person from whom the illness or health condition may have been contracted and to whom the illness or health condition may have spread.
- (c) **Examination of facilities or materials.** The public health authority shall, for examination purposes, close, evacuate, or decontaminate any facility or decontaminate or destroy any material when the authority reasonably suspects that such facility or material may endanger the public health.
- (d) **Enforcement.** The public health authority may enforce the provisions of this Section in accordance with existing enforcement rules and regulations. An order of the public health authority given to effectuate the purposes of this Section shall be enforceable immediately by the public safety authority.

Legislative History. In Section 302, the main text under “Tracking” was adapted from **CAL. HEALTH & SAFETY CODE § 120575 (West 1996)**. Subsections (a) and (b) were adapted from **FLA. STAT. ANN. § 392.54 (West 1998)**; **CAL. HEALTH & SAFETY CODE § 120555 (West 1996)**; **N.Y. COMP. CODES R. & REGS. tit. 10, § 2.6 (LEXIS through Oct. 12, 2001)**.

Section III03 Information sharing.

- (a) Whenever the public safety authority or other state or local government agency learns of a case of a reportable illness or health condition, an unusual cluster, or a suspicious event that may be the cause of a public health emergency, it shall immediately notify the public health authority.
- (b) Whenever the public health authority learns of a case of a reportable illness or health condition, an unusual cluster, or a suspicious event that it reasonably believes has the

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potential to be caused by bioterrorism, it shall immediately notify the public safety authority, tribal authorities, and federal health and public safety authorities.

- (c) Sharing of information on reportable illnesses, health conditions, unusual clusters, or suspicious events between public health and safety authorities shall be restricted to the information necessary for the treatment, control, investigation, and prevention of a public health emergency.

Legislative History. Section 303 was adapted from **6 COLO. CODE REGS. § 1009-1, reg. 6 (WESTLAW through 2001)**.

ARTICLE IV DECLARING A STATE OF PUBLIC HEALTH EMERGENCY

Section IV01 **Declaration.** A state of public health emergency may be declared by the Governor upon the occurrence of a "public health emergency" as defined in Section 1-103(m). Prior to such a declaration, the Governor shall consult with the public health authority and may consult with any additional public health or other experts as needed. The Governor may act to declare a public health emergency without consulting with the public health authority or other experts when the situation calls for prompt and timely action.

Legislative History. Section 401 is adapted from language contained in **COLO. REV. STAT. ANN. §§ 24-32-2104(3)(a), 4 (West 2001); 42 U.S.C.A. § 247d (West 1991 & Supp. 2001)**.

Section IV02 **Content of declaration.** A state of public health emergency shall be declared by an executive order that specifies:

- (a) the nature of the public health emergency,
- (b) the political subdivision(s) or geographic area(s) subject to the declaration,
- (c) the conditions that have brought about the public health emergency,
- (d) the duration of the state of the public health emergency, if less than thirty (30) days, and
- (e) the primary public health authority responding to the emergency.

Legislative History. Section 402 is adapted from **COLO. REV. STAT. ANN. § 24-32-2104(4) (West 2001); 2001 LA. ACTS 1148**.

Section IV03 **Effect of declaration.** The declaration of a state of public health emergency shall activate the disaster response and recovery aspects of the State, local, and inter-jurisdictional disaster emergency plans in the affected political subdivision(s) or geographic area(s). Such declaration authorizes the deployment and use of any forces to which the plans apply and the use or distribution

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of any supplies, equipment, and materials and facilities assembled, stockpiled, or available pursuant to this Act.

- (a) **Emergency powers.** During a state of public health emergency, the Governor may:
 - (1) Suspend the provisions of any regulatory statute prescribing procedures for conducting State business, or the orders, rules and regulations of any State agency, to the extent that strict compliance with the same would prevent, hinder, or delay necessary action (including emergency purchases) by the public health authority to respond to the public health emergency, or increase the health threat to the population.
 - (2) Utilize all available resources of the State government and its political subdivisions, as reasonably necessary to respond to the public health emergency.
 - (3) Transfer the direction, personnel, or functions of State departments and agencies in order to perform or facilitate response and recovery programs regarding the public health emergency.
 - (4) Mobilize all or any part of the organized militia into service of the State. An order directing the organized militia to report for active duty shall state the purpose for which it is mobilized and the objectives to be accomplished.
 - (5) Provide aid to and seek aid from other states in accordance with any interstate emergency compact made with this State.
 - (6) Seek aid from the federal government in accordance with federal programs or requirements.
- (b) **Coordination.** The public health authority shall coordinate all matters pertaining to the public health emergency response of the State. The public health authority shall have primary jurisdiction, responsibility, and authority for:
 - (1) Planning and executing public health emergency assessment, mitigation, preparedness response, and recovery for the State;
 - (2) Coordinating public health emergency response between State and local authorities;
 - (3) Collaborating with relevant federal government authorities, elected officials of other states, private organizations or companies;
 - (4) Coordinating recovery operations and mitigation initiatives subsequent to public health emergencies; and
 - (5) Organizing public information activities regarding public health emergency response operations.
- (c) **Identification.** After the declaration of a state of public health emergency, special identification for all public health personnel working during the emergency shall be issued as soon as possible. The identification shall indicate the authority of the bearer to exercise public health functions and emergency powers during the state of public health emergency. Public health personnel shall wear the identification in plain view.

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Legislative History. The main text of Section 403 was adapted from **COLO. REV. STAT. ANN. § 24-32-2104(5) (West 2001)**; **2001 ILL. LAWS 73(11)**. Section 403, Subsection (a) was adapted from **2001 ILL. LAWS 73(7)**; except that paragraph (4) was adapted from **ARIZ. REV. STAT. ANN. § 26-172 (West 2000)**. Subsection (b) was drafted in consideration of the Emergency Management Assistance Compact and Alaska's Interstate Civil Defense and Disaster Compact, As. § 26.23.130. Subsection (c) was adapted from **KY. REV. STAT. ANN. § 39A.050(2)(d) (LEXIS through 2001 Sess.)**.

Section IV04 **Enforcement.** During a state of public health emergency, the public health authority may request assistance in enforcing orders pursuant to this Act from the public safety authority. The public safety authority may request assistance from the organized militia in enforcing the orders of the public health authority.

Legislative History. Section 404 was adapted from **ARIZ. REV. STAT. ANN. § 26-172 (West 2000)**.

Section IV05 **Termination of declaration.**

- (a) **Executive order.** The Governor shall terminate the declaration of a state of public health emergency by executive order upon finding that the occurrence of an illness or health condition that caused the emergency no longer poses a high probability of a large number of deaths in the affected population, a large number of incidents of serious permanent or long-term disability in the affected population, or a significant risk of substantial future harm to a large number of people in the affected population.
- (b) **Automatic termination.** Notwithstanding any other provision of this Act, the declaration of a state of public health emergency shall be terminated automatically after thirty (30) days unless renewed by the Governor under the same standards and procedures set forth in this Article. Any such renewal shall also be terminated automatically after thirty (30) days unless renewed by the Governor under the same standards and procedures set forth in this Article.
- (c) **State legislature.** By a majority vote in both chambers, the State legislature may terminate the declaration of a state of public health emergency after sixty (60) days at any time from the date of original declaration upon finding that the occurrence of an illness or health condition that caused the emergency does not or no longer poses a high probability of a large number of deaths in the affected population, a large number of incidents of serious permanent or long-term disability in the affected population, or a significant risk of substantial future harm to a large number of people in the affected population. Such a termination by the State legislature shall override any renewal by the Governor.
- (d) **Content of termination order.** All orders or legislative actions terminating the declaration of a state of public health emergency shall indicate the nature of the

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emergency, the area(s) that was threatened, and the conditions that make possible the termination of the declaration.

Legislative History. Section 405 was adapted from **COLO. REV. STAT. ANN. §§ 24-32-2104(3)(a), 4 (West 2001); 42 U.S.C.A. § 247d (West 1991 & Supp. 2001); 2001 LA. ACTS 1148.**

ARTICLE V SPECIAL POWERS DURING A STATE OF PUBLIC HEALTH EMERGENCY:
MANAGEMENT OF PROPERTY

Section V01 Emergency measures concerning facilities and materials. The public health authority may exercise, for such period as the state of public health emergency exists, the following powers over facilities or materials—

- (a) **Facilities.** To close, direct and compel the evacuation of, or to decontaminate or cause to be decontaminated any facility of which there is reasonable cause to believe that it may endanger the public health.
- (b) **Materials.** To decontaminate or cause to be decontaminated, or destroy any material of which there is reasonable cause to believe that it may endanger the public health.

Legislative History. In Section 501, Subsection (a) was adapted from **GA. CODE ANN. § 38-3-51 (1995)**; Subsection (b) was adapted from **COLO. REV. STAT. ANN. § 24-32-2104 (West 2001).**

Section V02 Access to and control of facilities and property - generally. The public health authority may exercise, for such period as the state of public health emergency exists, the following powers concerning facilities, materials, roads, or public areas —

- (a) **Use of materials and facilities.** To procure, by condemnation or otherwise, construct, lease, transport, store, maintain, renovate, or distribute materials and facilities as may be reasonable and necessary to respond to the public health emergency, with the right to take immediate possession thereof. Such materials and facilities include, but are not limited to, communication devices, carriers, real estate, fuels, food, and clothing.
- (b) **Use of health care facilities.** To require a health care facility to provide services or the use of its facility if such services or use are reasonable and necessary to respond to the public health emergency as a condition of licensure, authorization or the ability to continue doing business in the state as a health care facility. The use of the health care facility may include transferring the management and supervision of the health care facility to the public health authority for a limited or unlimited period of time, but shall not exceed the termination of the declaration of a state of public health emergency.

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- (c) **Control of materials.** To inspect, control, restrict, and regulate by rationing and using quotas, prohibitions on shipments, allocation, or other means, the use, sale, dispensing, distribution, or transportation of food, fuel, clothing and other commodities, as may be reasonable and necessary to respond to the public health emergency.
- (d) **Control of roads and public areas.**
 - (1) To prescribe routes, modes of transportation, and destinations in connection with evacuation of persons or the provision of emergency services.
 - (2) To control or limit ingress and egress to and from any stricken or threatened public area, the movement of persons within the area, and the occupancy of premises therein, if such action is reasonable and necessary to respond to the public health emergency.

Legislative History. In Section 502, Subsections (a) and (b) were adapted from **GA. CODE ANN. § 38-3-51 (1995)**. Subsections (c) and (d) were adapted from **2001 LA. ACTS 1148; 2001 ILL. LAWS 73**; except that (d)(2) also had **GA. CODE ANN. § 38-3-51 (1995)** as a source.

Section V03 **Safe disposal of infectious waste.** The public health authority may exercise, for such period as the state of public health emergency exists, the following powers regarding the safe disposal of infectious waste—

- (a) **Adopt measures.** To adopt and enforce measures to provide for the safe disposal of infectious waste as may be reasonable and necessary to respond to the public health emergency. Such measures may include, but are not limited to, the collection, storage, handling, destruction, treatment, transportation, and disposal of infectious waste.
- (b) **Control of facilities.** To require any business or facility authorized to collect, store, handle, destroy, treat, transport, and dispose of infectious waste under the laws of this State, and any landfill business or other such property, to accept infectious waste, or provide services or the use of the business, facility, or property if such action is reasonable and necessary to respond to the public health emergency as a condition of licensure, authorization, or the ability to continue doing business in the state as such a business or facility. The use of the business, facility, or property may include transferring the management and supervision of such business, facility, or property to the public health authority for a limited or unlimited period of time, but shall not exceed the termination of the declaration of a state of public health emergency.
- (c) **Use of facilities.** To procure, by condemnation or otherwise, any business or facility authorized to collect, store, handle, destroy, treat, transport, and dispose of infectious waste under the laws of this State and any landfill business or other such property as may be reasonable and necessary to respond to the public health emergency, with the right to take immediate possession thereof.
- (d) **Identification.** All bags, boxes, or other containers for infectious waste shall be clearly identified as containing infectious waste, and if known, the type of infectious waste.

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Legislative History. In Section 503, Subsection (d) was adapted from **OR. REV. STAT. § 459.390 (1999)**; **MINN. STAT. ANN. § 116.78(2) (West 1997 & Supp. 2001)**; **MONT. CODE ANN. § 75-10-1005 (2001)**.

Section V04 **Safe disposal of human remains.** The public health authority may exercise, for such period as the state of public health emergency exists, the following powers regarding the safe disposal of human remains—

- (a) **Adopt measures.** To adopt and enforce measures to provide for the safe disposal of human remains as may be reasonable and necessary to respond to the public health emergency. Such measures may include, but are not limited to, the embalming, burial, cremation, interment, disinterment, transportation, and disposal of human remains.
- (b) **Possession.** To take possession or control of any human remains.
- (c) **Disposal.** To order the disposal of any human remains of a person who has died of a contagious disease through burial or cremation within twenty-four (24) hours after death. To the extent possible, religious, cultural, family, and individual beliefs of the deceased person or his or her family shall be considered when disposing of any human remains.
- (d) **Control of facilities.** To require any business or facility authorized to embalm, bury, cremate, inter, disinter, transport, and dispose of human remains under the laws of this State to accept any human remains or provide the use of its business or facility if such actions are reasonable and necessary to respond to the public health emergency as a condition of licensure, authorization, or the ability to continue doing business in the state as such a business or facility.. The use of the business or facility may include transferring the management and supervision of such business or facility to the public health authority for a limited or unlimited period of time, but shall not exceed the termination of the declaration of a state of public health emergency.
- (e) **Use of facilities.** To procure, by condemnation or otherwise, any business or facility authorized to embalm, bury, cremate, inter, disinter, transport, and dispose of human remains under the laws of this State as may be reasonable and necessary to respond to the public health emergency, with the right to take immediate possession thereof.
- (f) **Labeling.** Every human remains prior to disposal shall be clearly labeled with all available information to identify the decedent and the circumstances of death. Any human remains of a deceased person with a contagious disease shall have an external, clearly visible tag indicating that the human remains is infected and, if known, the contagious disease.
- (g) **Identification.** Every person in charge of disposing of any human remains shall maintain a written or electronic record of each human remains and all available information to identify the decedent and the circumstances of death and disposal. If human remains cannot be identified prior to disposal, a qualified person shall, to the extent possible, take fingerprints and photographs of the human remains, obtain identifying dental information,

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and collect a DNA specimen. All information gathered under this paragraph shall be promptly forwarded to the public health authority.

Legislative History. In Section 504, Subsection (a) is adapted from **CAL. HEALTH & SAFETY CODE § 102115 (West 1996)**; **GA. CODE ANN. § 43-18-72(b) (1999)**. Subsection (b) is adapted from **CAL. HEALTH & SAFETY CODE § 120140 (West 1996)**. Subsection (c) is adapted from **OHIO REV. CODE ANN. § 3707.19 (Anderson 1999)**. Subsection (d) is adapted from **KY. REV. STAT. ANN. § 39F.020(4) (LEXIS through 2001 Sess.)**. Subsection (f) is adapted from **LA. REV. STAT. ANN. § 40:1099.1 (West 2001)**. Subsection (g) was adapted from **OHIO REV. CODE ANN. § 313.08 (Anderson 1998 & Supp. 2000)**.

Section V05 Control of health care supplies.

- (a) **Procurement.** The public health authority may purchase and distribute anti-toxins, serums, vaccines, immunizing agents, antibiotics, and other pharmaceutical agents or medical supplies that it deems advisable in the interest of preparing for or controlling a public health emergency, without any additional legislative authorization.
- (b) **Rationing.** If a state of public health emergency results in a state-wide or regional shortage or threatened shortage of any product under (a), whether or not such product has been purchased by the public health authority, the public health authority may control, restrict, and regulate by rationing and using quotas, prohibitions on shipments, allocation, or other means, the use, sale, dispensing, distribution, or transportation of the relevant product necessary to protect the public health, safety, and welfare of the people of the State.
- (c) **Priority.** In making rationing or other supply and distribution decisions, the public health authority may give preference to health care providers, disaster response personnel, and mortuary staff.
- (d) **Distribution.** During a state of public health emergency, the public health authority may procure, store, or distribute any anti-toxins, serums, vaccines, immunizing agents, antibiotics, and other pharmaceutical agents or medical supplies located within the State as may be reasonable and necessary **to respond to the public health emergency**, with the right to take immediate possession thereof. If a public health emergency simultaneously affects more than one state, nothing in this Section shall be construed to allow the public health authority to obtain anti-toxins, serums, vaccines, immunizing agents, antibiotics, and other pharmaceutical agents or medical supplies for the primary purpose of hoarding such items or preventing their fair and equitable distribution among affected states.

Legislative History. In Section 505, Subsection (a) was adapted from **N.H. REV. STAT. ANN. § 141-C-17 (1996)**. Subsection (b) was adapted from **CONN. GEN. STAT. ANN. § 42-231 (West 1958)**.

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Section V06 **Compensation.** The State shall pay just compensation to the owner of any facilities or materials that are lawfully taken or appropriated by a public health authority for its temporary or permanent use under this Article according to the procedures and standards set forth in Section 805 of this Act. Compensation shall not be provided for facilities or materials that are closed, evacuated, decontaminated, or destroyed when there is reasonable cause to believe that they may endanger the public health pursuant to Section 501.

Section V07 **Destruction of property.** To the extent practicable consistent with the protection of public health, prior to the destruction of any property under this Article, the public health authority shall institute appropriate civil proceedings against the property to be destroyed in accordance with the existing laws and rules of the courts of this State or any such rules that may be developed by the courts for use during a state of public health emergency. Any property acquired by the public health authority through such proceedings shall, after entry of the decree, be disposed of by destruction as the court may direct.

ARTICLE VI **SPECIAL POWERS DURING A STATE OF PUBLIC HEALTH
EMERGENCY: PROTECTION OF PERSONS**

Section VI01 **Protection of persons.** During a state of public health emergency, the public health authority shall use every available means to prevent the transmission of infectious disease and to ensure that all cases of contagious disease are subject to proper control and treatment.

Legislative History. In Section 601, the text immediately following the heading “Protection of individuals” was adapted from **CAL. HEALTH & SAFETY CODE § 120575 (West 1996)**.

Section VI02 **Medical examination and testing.** During a state of public health emergency the public health authority may perform physical examinations and/or tests as necessary for the diagnosis or treatment of individuals.

- (a) Medical examinations or tests may be performed by any qualified person authorized to do so by the public health authority.
- (b) Medical examinations or tests must not be such as are reasonably likely to lead to serious harm to the affected individual.
- (c) The public health authority may isolate or quarantine, pursuant to Section 604, any person whose refusal of medical examination or testing results in uncertainty regarding whether he or she has been exposed to or is infected with a contagious or possibly contagious disease or otherwise poses a danger to public health.

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Legislative History. Section 602 was adapted from **CAL. HEALTH & SAFETY CODE § 120580 (West 1996 & Supp. 2001)**; **CAL. HEALTH & SAFETY CODE § 120540 (West 1996)**; **N.Y. COMP. CODES R. & REGS. tit. 10, § 2.5 (LEXIS through Oct. 12, 2001)**.

Section VI03 **Vaccination and treatment.** During a state of public health emergency the public health authority may exercise the following emergency powers over persons as necessary to address the public health emergency—

- (a) **Vaccination.** To vaccinate persons as protection against infectious disease and to prevent the spread of contagious or possibly contagious disease.
 - (1) Vaccination may be performed by any qualified person authorized to do so by the public health authority.
 - (2) A vaccine to be administered must not be such as is reasonably likely to lead to serious harm to the affected individual.
 - (3) To prevent the spread of contagious or possibly contagious disease the public health authority may isolate or quarantine, pursuant to Section 604, persons who are unable or unwilling for reasons of health, religion, or conscience to undergo vaccination pursuant to this Section.
- (b) **Treatment.** To treat persons exposed to or infected with disease.
 - (1) Treatment may be administered by any qualified person authorized to do so by the public health authority.
 - (2) Treatment must not be such as is reasonably likely to lead to serious harm to the affected individual.
 - (3) To prevent the spread of contagious or possibly contagious disease the public health authority may isolate or quarantine, pursuant to Section 604, persons who are unable or unwilling for reasons of health, religion, or conscience to undergo treatment pursuant to this Section.

Legislative History. Section 603 was adapted from **CAL. HEALTH & SAFETY CODE §§ 120175, 120575, 120605 (West 1996)**; **CAL. HEALTH & SAFETY CODE § 120580 (West 1996 & Supp. 2001)**.

Section VI04 **Isolation and quarantine.**

- (a) **Authorization.** During the public health emergency, the public health authority may isolate (consistent with the definition of “isolation” in Section 103(h)) or quarantine (consistent with the definition of quarantine in Section 103(o)) an individual or groups of individuals. This includes individuals or groups who have not been vaccinated, treated, tested, or examined pursuant to Sections 602 and 603. The public health authority may also establish and maintain places of isolation and quarantine, and set rules and make orders. Failure to obey these rules, orders, or provisions shall constitute a misdemeanor.

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- (b) **Conditions and principles.** The public health authority shall adhere to the following conditions and principles when isolating or quarantining individuals or groups of individuals:
- (1) Isolation and quarantine must be by the least restrictive means necessary to prevent the spread of a contagious or possibly contagious disease to others and may include, but are not limited to, confinement to private homes or other private and public premises.
 - (2) Isolated individuals must be confined separately from quarantined individuals.
 - (3) The health status of isolated and quarantined individuals must be monitored regularly to determine if they require isolation or quarantine.
 - (4) If a quarantined individual subsequently becomes infected or is reasonably believed to have become infected with a contagious or possibly contagious disease he or she must promptly be removed to isolation.
 - (5) Isolated and quarantined individuals must be immediately released when they pose no substantial risk of transmitting a contagious or possibly contagious disease to others.
 - (6) The needs of persons isolated and quarantined shall be addressed in a systematic and competent fashion, including, but not limited to, providing adequate food, clothing, shelter, means of communication with those in isolation or quarantine and outside these settings, medication, and competent medical care.
 - (7) Premises used for isolation and quarantine shall be maintained in a safe and hygienic manner and be designed to minimize the likelihood of further transmission of infection or other harms to persons isolated and quarantined.
 - (8) To the extent possible, cultural and religious beliefs should be considered in addressing the needs of individuals, and establishing and maintaining isolation and quarantine premises.
- (c) **Cooperation.** Persons subject to isolation or quarantine shall obey the public health authority's rules and orders; and shall not go beyond the isolation or quarantine premises. Failure to obey these provisions shall constitute a misdemeanor.
- (d) **Entry into isolation or quarantine premises.**
- (1) **Authorized entry.** The public health authority may authorize physicians, health care workers, or others access to individuals in isolation or quarantine as necessary to meet the needs of isolated or quarantined individuals.
 - (2) **Unauthorized entry.** No person, other than a person authorized by the public health authority, shall enter isolation or quarantine premises. Failure to obey this provision shall constitute a misdemeanor.
 - (3) **Potential isolation or quarantine.** Any person entering an isolation or quarantine premises with or without authorization of the public health authority may be isolated or quarantined pursuant to Section 604(a)(b).

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Section VI05 **Procedures for isolation and quarantine.** During a public health emergency, the isolation and quarantine of an individual or groups of individuals shall be undertaken in accordance with the following procedures.

(a) **Temporary isolation and quarantine without notice.**

- (1) **Authorization.** The public health authority may temporarily isolate or quarantine an individual or groups of individuals through a written directive if delay in imposing the isolation or quarantine would significantly jeopardize the public health authority's ability to prevent or limit the transmission of a contagious or possibly contagious disease to others.
- (2) **Content of directive.** The written directive shall specify the following: (i) the identity of the individual(s) or groups of individuals subject to isolation or quarantine; (ii) the premises subject to isolation or quarantine; (iii) the date and time at which isolation or quarantine commences; (iv) the suspected contagious disease if known.; and (v) a copy of Article 6 and relevant definitions of this Act.
- (3) **Copies.** A copy of the written directive shall be given to the individual to be isolated or quarantined or, if the order applies to a group of individuals and it is impractical to provide individual copies, it may be posted in a conspicuous place in the isolation or quarantine premises.
- (4) **Petition for continued isolation or quarantine.** Within ten (10) days after issuing the written directive, the public health authority shall file a petition pursuant to Section 605(b) for a court order authorizing the continued isolation or quarantine of the isolated or quarantined individual or groups of individuals.

(b) **Isolation or quarantine with notice.**

- (1) **Authorization.** The public health authority may make a written petition to the trial court for an order authorizing the isolation or quarantine of an individual or groups of individuals.
- (2) **Content of petition.** A petition under subsection (b)(1) shall specify the following: (i) the identity of the individual(s) or groups of individuals subject to isolation or quarantine; (ii) the premises subject to isolation or quarantine; (iii) the date and time at which isolation or quarantine commences; (iv) the suspected contagious disease if known; (v) a statement of compliance with the conditions and principles for isolation and quarantine of Section 604(b); and (vi) a statement of the basis upon which isolation or quarantine is justified in compliance with this Article. The petition shall be accompanied by the sworn affidavit of the public health authority attesting to the facts asserted in the petition, together with any further information that may be relevant and material to the court's consideration.
- (3) **Notice.** Notice to the individuals or groups of individuals identified in the petition shall be accomplished within twenty-four (24) hours in accordance with the rules of civil procedure.

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- (4) **Hearing.** A hearing must be held on any petition filed pursuant to this subsection within five (5) days of filing of the petition. In extraordinary circumstances and for good cause shown the public health authority may apply to continue the hearing date on a petition filed pursuant to this Section for up to ten (10) days, which continuance the court may grant in its discretion giving due regard to the rights of the affected individuals, the protection of the public's health, the severity of the emergency and the availability of necessary witnesses and evidence.
 - (5) **Order.** The court shall grant the petition if, by a preponderance of the evidence, isolation or quarantine is shown to be reasonably necessary to prevent or limit the transmission of a contagious or possibly contagious disease to others.
 - (i) An order authorizing isolation or quarantine may do so for a period not to exceed thirty (30) days.
 - (ii) The order shall (a) identify the isolated or quarantined individuals or groups of individuals by name or shared or similar characteristics or circumstances; (b) specify factual findings warranting isolation or quarantine pursuant to this Act; (c) include any conditions necessary to ensure that isolation or quarantine is carried out within the stated purposes and restrictions of this Act; and (d) served on affected individuals or groups of individuals in accordance with the rules of civil procedure.
 - (6) **Continuances.** Prior to the expiration of an order issued pursuant to Section 605(b)(5), the public health authority may move to continue isolation or quarantine for additional periods not to exceed thirty (30) days each. The court shall consider the motion in accordance with standards set forth in Section 605(b)(5).
- (c) **Relief from isolation and quarantine.**
- (1) **Release.** An individual or group of individuals isolated or quarantined pursuant to this Act may apply to the trial court for an order to show cause why the individual or group of individuals should not be released. The court shall rule on the application to show cause within forty-eight (48) hours of its filing. If the court grants the application, the court shall schedule a hearing on the order to show cause within twenty-four (24) hours from issuance of the order to show cause. The issuance of an order to show cause shall not stay or enjoin an isolation or quarantine order.
 - (2) **Remedies for breach of conditions.** An individual or groups of individuals isolated or quarantined pursuant to this Act may request a hearing in the trial court for remedies regarding breaches to the conditions of isolation or quarantine. A request for a hearing shall not stay or enjoin an isolation or quarantine order.
 - (i) Upon receipt of a request under this subsection alleging extraordinary circumstances justifying the immediate granting of relief, the court shall fix a date for hearing on the matters alleged not more than twenty-four (24) hours from receipt of the request.

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- (ii) Otherwise, upon receipt of a request under this subsection the court shall fix a date for hearing on the matters alleged within five (5) days from receipt of the request.
- (3) **Extensions.** In any proceedings brought for relief under this subsection, in extraordinary circumstances and for good cause shown the public health authority may move the court to extend the time for a hearing, which extension the court in its discretion may grant giving due regard to the rights of the affected individuals, the protection of the public's health, the severity of the emergency and the availability of necessary witnesses and evidence.
- (d) **Proceedings.** A record of the proceedings pursuant to this Section shall be made and retained. In the event that, given a state of public health emergency, parties can not personally appear before the court, proceedings may be conducted by their authorized representatives and be held via any means that allows all parties to fully participate.
- (e) **Court to appoint counsel and consolidate claims.**
 - (1) **Appointment.** The court shall appoint counsel at state expense to represent individuals or groups of individuals who are or who are about to be isolated or quarantined pursuant to the provisions of this Act and who are not otherwise represented by counsel. Appointments shall be made in accordance with the procedures to be specified in the Public Health Emergency Plan and shall last throughout the duration of the isolation or quarantine of the individual or groups of individuals. The public health authority must provide adequate means of communication between such individuals or groups and their counsel.
 - (2) **Consolidation.** In any proceedings brought pursuant to this Section, to promote the fair and efficient operation of justice and having given due regard to the rights of the affected individuals, the protection of the public's health, the severity of the emergency and the availability of necessary witnesses and evidence, the court may order the consolidation of individual claims into group or claims where:
 - (i) the number of individuals involved or to be affected is so large as to render individual participation impractical;
 - (ii) there are questions of law or fact common to the individual claims or rights to be determined;
 - (iii) the group claims or rights to be determined are typical of the affected individuals' claims or rights; and
 - (iv) the entire group will be adequately represented in the consolidation.

Legislative History. Sections 604 and 605 were adapted from **CAL. HEALTH & SAFETY CODE §§ 120130, 120225 (West 1996); N.H. REV. STAT. ANN. § 141-C:11 -14; CONN. GEN. STAT. ANN. § 19a-221 (West 1958).**

Section VI06 Collection of laboratory specimens; performance of tests. The public health authority may, for such period as the state of public health emergency exists, collect specimens and

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perform tests on living persons as provided in Section 602 and also upon deceased persons and any animal (living or deceased), and acquire any previously collected specimens or test results that are reasonable and necessary to respond to the public health emergency.

- (a) **Marking.** All specimens shall be clearly marked.
- (b) **Contamination.** Specimen collection, handling, storage, and transport to the testing site shall be performed in a manner that will reasonably preclude specimen contamination or adulteration and provide for the safe collection, storage, handling, and transport of such specimen.
- (c) **Chain of custody.** Any person authorized to collect specimens or perform tests shall use chain of custody procedures to ensure proper record keeping, handling, labeling, and identification of specimens to be tested. This requirement applies to all specimens, including specimens collected using on-site testing kits.
- (d) **Criminal investigation.** Recognizing that, during a state of public health emergency, any specimen collected or test performed may be evidence in a criminal investigation, any business, facility, or agency authorized to collect specimens or perform tests shall provide such support as is reasonable and necessary to aid in a relevant criminal investigation.

Legislative History. Section 606 was adapted from **CAL. BUS. & PROF. CODE § 681 (LEXIS through Aug. 12, 2001)**; **MISS. CODE ANN. § 71-7-9 (2000)**; **GA. CODE ANN. § 34-9-415 (1998 & Supp. 2001)**; and **CAL. PENAL CODE § 13823.11 (LEXIS through Aug. 12, 2001)**.

Section VI07 Access to and disclosure of protected health information.

- (a) **Access.** Access to protected health information of persons who have participated in medical testing, treatment, vaccination, isolation, or quarantine programs or efforts by the public health authority during a public health emergency shall be limited to those persons having a legitimate need to acquire or use the information to:
 - (1) provide treatment to the individual who is the subject of the health information,
 - (2) conduct epidemiologic research, or
 - (3) investigate the causes of transmission.
- (b) **Disclosure.** Protected health information held by the public health authority shall not be disclosed to others without individual written, specific informed consent, except for disclosures made:
 - (1) directly to the individual;
 - (2) to the individual's immediate family members or personal representative;
 - (3) to appropriate federal agencies or authorities pursuant to federal law;
 - (4) pursuant to a court order to avert a clear danger to an individual or the public health; or

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- (5) to identify a deceased individual or determine the manner or cause of death.

Legislative History. Section 607 was adapted from LAWRENCE O. GOSTIN AND JAMES G. HODGE, JR., THE MODEL STATE PUBLIC HEALTH PRIVACY ACT OF 1999.

Section VI08 **Licensing and appointment of health personnel.** The public health authority may exercise, for such period as the state of public health emergency exists, the following emergency powers regarding licensing and appointment of health personnel—

- (a) **Health care providers.** To require in-state health care providers to assist in the performance of vaccination, treatment, examination, or testing of any individual as a condition of licensure, authorization, or the ability to continue to function as a health care provider in this State.
- (b) **Health care providers from other jurisdictions.** To appoint and prescribe the duties of such out-of-state emergency health care providers as may be reasonable and necessary to respond to the public health emergency.
 - (1) The appointment of out-of-state emergency health care providers may be for a limited or unlimited time, but shall not exceed the termination of the declaration of a state of public health emergency. The public health authority may terminate the out-of-state appointments at any time or for any reason provided that any such termination will not jeopardize the health, safety, and welfare of the people of this State.
 - (2) The public health authority may waive any or all licensing requirements, permits, or fees required by the State code and applicable orders, rules, or regulations for health care providers from other jurisdictions to practice in this State.
 - (3) Any out-of-state emergency health care provider appointed pursuant to this Section shall not be held liable for any civil damages as a result of medical care or treatment related to the response to the public health emergency unless such damages result from providing, or failing to provide, medical care or treatment under circumstances demonstrating a reckless disregard for the consequences so as to affect the life or health of the patient.
- (c) **Personnel to perform duties of medical examiner or coroner.** To authorize the medical examiner or coroner to appoint and prescribe the duties of such emergency assistant medical examiners or coroners as may be required for the proper performance of the duties of the office.
 - (1) The appointment of emergency assistant medical examiners or coroners may be for a limited or unlimited time, but shall not exceed the termination of the declaration of a state of public health emergency. The medical examiner or coroner may terminate such emergency appointments at any time or for any reason, provided that any such termination will not impede the performance of the duties of the office.

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- (2) The medical examiner or coroner may waive licensing requirements, permits, or fees required by the State code and applicable orders, rules, or regulations for the performance of these duties.
- (3) Any emergency assistant medical examiner or coroner appointed pursuant to this Section and acting without malice and within the scope of the prescribed duties shall be immune from civil liability in the performance of such duties.

Legislative History. Section 608(b) was adapted from **FLA. STAT. ANN. § 768.13(2)(b)(1) (West 1997 & Supp. 2001)**. Subsection (c) was adapted from **D.C. CODE ANN. § 2-1605 (2001)**; **KAN. STAT. ANN. § 22a-226(e) (1995)**; **GA. CODE ANN. § 45-16-23 (1990)**; **COLO. REV. STAT. ANN. § 30-10-601 (West 1990)**.

ARTICLE VII PUBLIC INFORMATION REGARDING PUBLIC HEALTH EMERGENCY

Section VII01 **Dissemination of information.** The public health authority shall inform the people of the State when a state of public health emergency has been declared or terminated, how to protect themselves during a state of public health emergency, and what actions are being taken to control the emergency.

- (a) **Means of dissemination.** The public health authority shall provide information by all available and reasonable means calculated to bring the information promptly to the attention of the general public.
- (b) **Languages.** If the public health authority has reason to believe there are large numbers of people of the State who lack sufficient skills in English to understand the information, the public health authority shall make reasonable efforts to provide the information in the primary languages of those people as well as in English.
- (c) **Accessibility.** The provision of information shall be made in a manner accessible to individuals with disabilities.

Legislative History. In Section 701, the main text following the title “Dissemination of information” is adapted from **6 COLO. CODE REGS. § 1009-5, reg. 1 (WESTLAW through Aug. 2001)**. Subsection (a) is adapted from **2001 ILL. LAWS 73(3)**; **ALASKA STAT. §§ 26.23.020, 26.23.200 (Michie 2000)**. Subsection (b) is adapted from **CAL. ELEC. CODE § 14201(c) (West 1996)**.

Section VII02 **Access to mental health support personnel.** During and after the declaration of a state of public health emergency, the public health authority shall provide information about and referrals to mental health support personnel to address psychological responses to the public health emergency.

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Legislative History. Section 702 is adapted from the ***Bioterrorism Readiness Plan: A Template for Healthcare Facilities (Prepared by APIC Bioterrorism Task Force & CDC Hospital Infections Program Bioterrorism Working Group)***.

ARTICLE VIII MISCELLANEOUS

Section VIII01 **Titles.** For the purposes of this Act, titles and subtitles of Articles, Sections, and Subsections are instructive, but not binding.

Section VIII02 **Rules and regulations.** The public health authority and other affected agencies are authorized to promulgate and implement such rules and regulations as are reasonable and necessary to implement and effectuate the provisions of this Act. The public health authority and other affected agencies shall have the power to enforce the provisions of this Act through the imposition of fines and penalties, the issuance of orders, and such other remedies as are provided by law, but nothing in this Section shall be construed to limit specific enforcement powers enumerated in this Act.

Section VIII03 **Financing and expenses.**

- (a) **Transfer of funds.** The Governor may transfer from any fund available to the Governor in the State treasury such sums as may be necessary during a state of public health emergency.
- (b) **Repayment.** Monies so transferred shall be repaid to the fund from which they were transferred when monies become available for that purpose, by legislative appropriation or otherwise.
- (c) **Conditions.** A transfer of funds by the Governor under the provisions of this Section may be made only when one or more of the following conditions exist:
 - (1) No appropriation or other authorization is available to meet the public health emergency.
 - (2) An appropriation is insufficient to meet the public health emergency.
 - (3) Federal monies available for such a public health emergency require the use of State or other public monies.
- (d) **Expenses.** All expenses incurred by the State during a state of public health emergency shall be subject to the following limitations:
 - (1) No expense shall be incurred against the monies authorized under this Section, without the general approval of the Governor.
 - (2) The aggregate amount of all expenses incurred pursuant to this Section shall not exceed [state amount] for any fiscal year.

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- (3) Monies authorized for a state of public health emergency in prior fiscal years may be used in subsequent fiscal years only for the public health emergency for which they were authorized. Monies authorized for a public health emergency in prior fiscal years, and expended in subsequent fiscal years for the public health emergency for which they were authorized, apply toward the [state amount] expense limit for the fiscal year in which they were authorized.

Legislative History. In Section 803, Subsections (a) and (b) are adapted from **GA. CODE ANN. § 38-3-51 (1995)**. Subsections (c) and (d) are adapted from **ARIZ. REV. STAT. ANN. § 35-192 (West 2000)**.
Section VIII04 Liability.

- (a) **State immunity.** Neither the State, its political subdivisions, nor, except in cases of gross negligence or willful misconduct, the Governor, the public health authority, or any other State or local official referenced in this Act, is liable for the death of or any injury to persons, or damage to property, as a result of complying with or attempting to comply with this Act or any rule or regulations promulgated pursuant to this Act during a state of public health emergency.
- (b) **Private liability.**
- (1) During a state of public health emergency, any person owning or controlling real estate or other premises who voluntarily and without compensation grants a license or privilege, or otherwise permits the designation or use of the whole or any part or parts of such real estate or premises for the purpose of sheltering persons, together with that person's successors in interest, if any, shall not be civilly liable for negligently causing the death of, or injury to, any person on or about such real estate or premises under such license, privilege, or other permission, or for negligently causing loss of, or damage to, the property of such person.
- (2) During a state of public health emergency, any private person, firm or corporation and employees and agents of such person, firm or corporation in the performance of a contract with, and under the direction of, the State or its political subdivisions under the provisions of this Act shall not be civilly liable for causing the death of, or injury to, any person or damage to any property except in the event of gross negligence or willful misconduct.
- (3) During a state of public health emergency, any private person, firm or corporation and employees and agents of such person, firm or corporation, who renders assistance or advice at the request of the State or its political subdivisions under the provisions of this Act shall not be civilly liable for causing the death of, or injury to, any person or damage to any property except in the event of gross negligence or willful misconduct.
- (4) The immunities provided in this Subsection shall not apply to any private person, firm, or corporation or employees and agents of such person, firm, or corporation

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whose act or omission caused in whole or in part the public health emergency and who would otherwise be liable therefor.

Legislative History. Section 804 is adapted from **2001 ILL. LAWS 73(15), (21)**.

Section VIII05 Compensation.

- (a) **Taking.** Compensation for property shall be made only if private property is lawfully taken or appropriated by a public health authority for its temporary or permanent use during a state of public health emergency declared by the Governor pursuant to this Act.
- (b) **Actions.** Any action against the State with regard to the payment of compensation shall be brought in the courts of this State in accordance with existing court laws and rules, or any such rules that may be developed by the courts for use during a state of public health emergency.
- (c) **Amount.** The amount of compensation shall be calculated in the same manner as compensation due for taking of property pursuant to non-emergency eminent domain procedures, as provided in [*State to insert appropriate statutory citation*], except that the amount of compensation calculated for items obtained under Section 505 shall be limited to the costs incurred to produce the item.

Legislative History. Section 805 is adapted from **COLO. REV. STAT. § 24-32-2111.5 (LEXIS through 2001 Sess.)**.

Section VIII06 Severability. The provisions of this Act are severable. If any provision of this Act or its application to any person or circumstances is held invalid in a federal or state court having jurisdiction, the invalidity will not affect other provisions or applications of this Act that can be given effect without the invalid provision or application.

Legislative History. Section 806 is adapted from the LAWRENCE O. GOSTIN AND JAMES G. HODGE, JR., THE MODEL STATE PUBLIC HEALTH PRIVACY ACT OF 1999.

Section VIII07 Repeals. The following acts, laws, or parts thereof, are explicitly repealed with the passage of this Act:

- (a) [*To be inserted in each state considering passage of the Act*]
- (b) [*To be inserted in each state considering passage of the Act*]
- (c) [*To be inserted in each state considering passage of the Act*] . . .

Legislative History. Section 807 is adapted from the LAWRENCE O. GOSTIN AND JAMES G. HODGE, JR., THE MODEL STATE PUBLIC HEALTH PRIVACY ACT OF 1999.

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Section VIII08 **Saving clause.** This Act does not explicitly preempt other laws or regulations that preserve to a greater degree the powers of the Governor or public health authority, provided such laws or regulations are consistent, and do not otherwise restrict or interfere, with the operation or enforcement of the provisions of this Act.

Legislative History. Section 808 is adapted from the LAWRENCE O. GOSTIN AND JAMES G. HODGE, JR., THE MODEL STATE PUBLIC HEALTH PRIVACY ACT OF 1999.

Section VIII09 Conflicting laws.

- (a) **Federal supremacy.** This Act does not restrict any person from complying with federal law or regulations.
- (b) **Prior conflicting acts.** In the event of a conflict between this Act and other State or local laws or regulations concerning public health powers, the provisions of this Act apply.

Legislative History. Section 809 is adapted from the LAWRENCE O. GOSTIN AND JAMES G. HODGE, JR., THE MODEL STATE PUBLIC HEALTH PRIVACY ACT OF 1999.

Section VIII10 **Effective date.** The provisions of this Act shall take effect upon signature of the Governor. [*State to insert language appropriate to its legislative process.*]

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