

**A PRECARIOUS "HOT ZONE"—
THE PRESIDENT'S PLAN TO COMBAT BIOTERRORISM**

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I. Introduction

The President, since taking office, has "made the fight against terrorism a top national security objective."² President Clinton announced on 22 May 1998 that he "is determined that in the coming century, we will be capable of deterring and preventing such terrorist attacks."³ The President is also convinced that we must also have the ability to limit the damage and manage the consequences should such an attack occur."⁴ With this most recent announcement, the President introduced Presidential Decision Directive 62 (PDD 62), which is to "create a new and more systematic approach to fighting the terrorist threat of the next century"⁵ and to clarify the roles of agencies and departments to ensure a coordinated approach to planning for such terrorist induced emergencies. However, as yet no formal procedure exists for coordinating federal, state, and local forces should we have a bioterrorism event, or an effective plan for participation of the nation's military forces in response to such an event.

While nuclear, chemical, and biological weaponry all fall within the general classification of WMD; until very recently, nuclear weaponry has dominated planning and discussion. Today, however, it is increasingly recognized that chemical and particularly biological weapons represent much more credible threats in the hands of terrorists than do nuclear ones. This follows for many reasons, for example, ease of maintaining secrecy in

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2. The White House, Office of the Press Secretary, Fact Sheet: Combating Terrorism: Presidential Decision Directive 626, Annapolis, Md. (May 22, 1998) [hereinafter Combating Terrorism].

3. *Id.*

4. *Id.*

5. *Id.*

preparation of the weapons, ease of production and delivery of the weapons, ease of obtaining wide dispersal of the weapons—particularly in the case of biological weapons. It is also true that modern genetic engineering carries with it the specter of modification of familiar weapons species such as anthrax and smallpox into forms against which all our vaccines and other defenses would be worthless.

This current planning is directed against all weapons of mass destruction (WMD), which include technological as well as specifically chemical and biological activities. This article will focus on a plan for biological and chemical weapons that should be distinguished from the approach to a plan for all other technological threats. While the United States skills in planning to combat nuclear weapons and other technological weapons have been practiced throughout the cold war, our skills in beginning to comprehend and meet the threats of chemical and biological warfare on a domestic level have only recently begun to be developed fully.

Although PDD 62 is the most recent formal action, the planning for responses to domestic bioterrorism is shaped by prior presidential directives, statutes, and U.S. constitutional guidance. The planning for the prevention, detection, and actual encounters with bioterrorism now has actually begun, but as separate departmental missions under the auspices of individual agencies and departments. These initial planning and funding activities have been examined through a number of Government Account Office (GAO) investigatory reports at the request of Congress, criticizing the lack of coordination. The implementation of any emergency response capability, fortunately, has not been tested on a major scale as yet, and this article addresses the legal status of the coordination of federal agencies, the military, as well as state and local governments under the constraints of statutes, regulations, case law and the U.S. Constitution.

Richard Preston, a science thriller novelist, produced a response scenario to a bioterrorism event in his 1997 book, *The Cobra Event*.⁶ *The New York Times* reported that “Mr. Clinton was so alarmed by . . . *The Cobra Event* . . . that he instructed intelligence experts to evaluate its credibility.”⁷ More alarming perhaps even than its suggested biological possibility, is the lack of statutory clarity that would be essential for effectively implementing of a strategy for the United States in terms of preparedness and emergency responsiveness. This article examines the present status of federal, state,

6. RICHARD PRESTON, *THE COBRA EVENT* (1997).

7. See Interview by *New York Times* with President Bill Clinton (Jan. 21, 1999).

and local preparedness and proposes such changes to statutes and federal regulations and to the implementation of currently applicable statutes to enable our federal, state, and local resources to be effectively used in research, preparedness as well as in emergency responsiveness.

II. Who Is In Charge?

The President's strategy has been to combine threats of all WMD into a single framework for preparation and planned response.⁸ The designation of a lead agency or department for coordination appears to fall within the responsibility of the newly created Office of the National Coordinator for Security Infrastructure Protection and Counter-Terrorism, working "within the National Security Council and report[ing] to the Assistant to the President for National Security Affairs."⁹ This office is to give "advice on budgets . . . lead in the development of guidelines that might be needed for crisis management, . . . oversee the broad variety of relevant policies and programs included in such areas as counter-terrorism, [and oversee the] protection of critical infrastructure and preparedness and consequence management for [response to] [WMD]" under PDD 62.¹⁰

The separation of WMD between technological weapons on the one hand and chemical and biological weapons on the other is suggested in the introduction to this article. Moreover, a separation of leadership among preparedness, research, funding, and planning activities and the emergency response activities, matched with respective missions of the departments and agencies would provide the most effective use of our resources. Perhaps a lesson from the Cherokee tribal custom of designating a wartime chief and a peacetime chief, where, "war was decided upon, its conduct was turned over to the town war organization,"¹¹ should be considered in structuring the leadership for these two activities. That is, preparedness and research are very different activities and require very different skills as compared to the activities and skills of emergency response. Whether the proposed separation is a workable plan is examined in the following sections.

8. See Presidential Decision Directive 62 (May 1998).

9. Combating Terrorism, *supra* note 2.

10. *Id.*

11. V. Richard Persico, Jr., *Early Nineteenth-Century Cherokee Political Organization*, in *THE CHEROKEE INDIAN NATION* (Duane H. King ed., 1979).

A. Preparedness, Research, Funding and Planning—Who is in Charge?

Recent GAO testimony before Congress describes the scope of combating foreign-origin as well as domestic terrorism and makes recommendations for crosscutting and coordination management,¹² which repeats many of the same criticisms included in a GAO report issued just over a year earlier.¹³

The second report recommends that the Office of Management and Budget (OMB) conduct a crosscutting review, identify priorities and gaps and identify funding. However, the scope of the responsibility requires the staffer in OMB charged with this duty, to fully understand the scientific merit of programs spanning approximately twenty-two departments and agencies, as well as the legal and interagency constraints. In addition, this OMB staffer must compose a line-item budget for each agency identifying those items which fit into the comprehensive, government-wide program, which will probably be reviewed by dozens of congressional committees and subcommittees that claim departmental jurisdiction—not program jurisdiction.

Before the line-item, crosscutting coordination can be accomplished, as envisioned by the GAO, Congress must also agree to a joint appropriations hearing, with each department's and agency's appropriations committee coming together to receive a joint presentation of the coordinated budget.

This is not an unprecedented achievement. In an historical joint meeting of congressional committees, the Mathematics and Science Education Initiative of the Bush Administration was presented to two congressional committees as a line-item program crosscutting twelve departments' budgets in a comprehensive, coordinated program, which identified priorities and avoided gaps and overlaps in funding and programming.¹⁴ This type of joint hearing would ensure that duplication of terrorism research and

12. *Testimony of Henry L. Hinton, Jr., Assistant Comptroller General, National Security and International Affairs Division, before the Subcomm. on Nat'l Security, Veterans Affairs, and Int'l Relations, Committee on Government Reform, U.S. House of Representatives, GAO/T-NSIAD/GGD-99-107 (March 11, 1999) [hereinafter Testimony of Henry L. Hinton, Jr.]*.

13. U.S. GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, COMBATING TERRORISM: SPENDING ON GOVERNMENT WIDE PROGRAMS REQUIRES BETTER MANAGEMENT AND COORDINATION, GAO/NSIAD-98-39 (Dec. 1997).

14. D. ALLAN BROMLEY, THE PRESIDENT'S SCIENTISTS 84 (1994).

development programs would not occur as they did in one instance identified by the State Department where one congressional committee established a program and approved funds for that program while an identical program already existed and was funded through another congressional committee.¹⁵

1. Federal Coordination and Leadership

The design of a plan to confront the threats of bioterrorism, with a logical division of leadership between the planning and the emergency response responsibilities could follow previous statutory designs having demonstrated efficacy. Current statutory mechanisms are currently in place that could provide a framework for the recommendations made by the GAO.

The GAO recommendation that these responsibilities be assigned to the OMB represents an overwhelming range of duties. The performance of such crosscutting, coordinated functions was, in fact, performed in a previous Administration by a well-coordinated assemblage of federal employees and appointees, meeting once a month over an annual planning period enabled by the Federal Coordinating Council for Science, Engineering and Technology (FCCSET) statute.¹⁶ During the period from 1989 to 1992, the implementation of this statute required three Ph.D.-level staff from the Office of Science and Technology Policy, one staff member from the OMB, and two levels of coordination among staff and senior policy appointees from twelve or more agencies and departments involved in each of the crosscutting programs.¹⁷

The GAO has identified twenty-two departments and agencies that should be involved in the crosscutting, coordinated plan to combat terrorism.¹⁸ The use of the statutory FCCSET mechanism fluctuates with the priorities of the Director of the Office of Science and Technology Policy. During the GAO reporting period, the FCCSET mechanism had fallen out of use, otherwise GAO might have identified it as a potential mechanism to implement their recommendations. Such initiatives as biotechnology, advanced computing, global climate change, and math and science educa-

15. GAO REPORT, GAO/NSIAD-98-39, app. III (Dec. 1997).

16. 42 U.S.C.S. § 6651 (LEXIS 2000).

17. OFFICE OF SCIENCE AND TECHNOLOGY POLICY, FCCSET HANDBOOK (March 1991).

18. U.S. General Accounting Office, GAO/NSIAD-98-39, app. I (Dec. 1997).

tion were each coordinated in a crosscutting program such as this between 1989 and 1992. Bioterrorism certainly meets the criteria under the statute and could be identified for this congressionally mandated research and planning mechanism to accomplish the recommendations made by GAO.

With obviously no alternatives, and a vital need to match resources with programmatic goals, the GAO was left to suggest that OMB itself carry out the entire crosscutting, coordination function. On the basis of prior experience with crosscutting budgets, it is apparent that this is an impossible task for OMB acting alone. Without scientific expertise across all agencies working carefully with OMB to prepare a comprehensive research plan matched with specific funding on a line item basis from each participating department or agency, no government-wide plan can be said to be truly crosscutting or coordinated. Such programs in the past were highlighted in the federal budget as separately identified and funded Presidential Initiatives, distinguished by the crosscutting, coordinated line-item approach.¹⁹

2. Intergovernmental Planning and Coordination

The threat of domestic terrorism demands an intergovernmental coordination system as well as a coordinated federal intra-governmental process. This issue was also addressed by the GAO report in its acknowledgment that the Attorney General was in the process of establishing a National Domestic Preparedness Office within the Federal Bureau of Investigation “to reduce state and local confusion over the many federal training and equipment programs necessary to prepare for terrorist incidents involving weapons of mass destruction.”²⁰ This addresses the question of the availability of training resources for state and local governments, but fails to address the more comprehensive issue of ensuring that each state and local government is linked to a process which addresses the legal and public health responsibilities and expectations. The effort to create an accessible laundry list of training programs in the hope of preparing state and local governments is comparable to sending state and local governments out to a grocery store with a grocery list (but without money) to make a specific unique cuisine for which only the federal government has the recipe.

19. U.S. OFFICE OF MANAGEMENT AND BUDGET, FEDERAL BUDGET 1990, FEDERAL BUDGET 1991, FEDERAL BUDGET 1992.

20. *Testimony of Henry L. Hinton, Jr., supra* note 12, at 2.

B. Emergency Response—Who's in Charge?

1. *Federal Coordination and Leadership*

Intragovernmental relationships are addressed by Presidential Decision Directive 39 (PDD 39), which identifies the Federal Bureau of Investigation (FBI) as the lead agency for domestic crisis response and the Federal Emergency Management Agency (FEMA) as the lead agency for consequence management. The National Security Council is charged with the lead for interagency terrorism policy coordination.²¹ The most recently issued of the directives—PDD 62—designated an office of “National Coordinator for Security Infrastructure Protection and Counter-Terrorism”²² charged with government-wide responsibility for the broad GAO mandate for accountability, as discussed above. The FBI or FEMA, under the Economy Act of 1932,²³ could then use the broad authority given by Congress to any executive department to place orders with the military (or any other department) for materials, supplies, equipment, work or—from the military—passive services (those not statutorily prohibited).²⁴

While the mission of the FBI is reflected in its leadership role in the investigation of terrorism, the expertise required for epidemiological investigations is much more strongly centered in the mission of the Public Health Service. The Centers for Disease Control (CDC) and the U.S. Army Medical Research Institute of Infectious Diseases (USAMRIID) are the world's leading centers for forensic analysis and have been recommended for leadership roles in bioterrorism response.²⁵ While apprehension of the bioterrorist is clearly within the mission of the FBI,²⁶ the Public Health Service, the CDC, and the USAMRIID, are more adequately staffed to investigate biological contamination and to provide epidemiological identification of the process and agent being used in any particular bioterrorism event.

21. Presidential Decision Directive 39 (June 1995).

22. Presidential Decision Directive 62 (May 1998).

23. 31 U.S.C.S. § 686 (LEXIS 2000).

24. *U.S. v. Jaramillo*, 380 F. Supp. 1375, 1379 (D. Neb. 1974).

25. RICHARD A. FALKENRATH ET AL., *AMERICAN'S ACHILLES' HEEL—NUCLEAR, BIOLOGICAL, AND CHEMICAL TERRORISM AND COVERT ATTACK* 298 (1998).

26. See Federal Bureau of Investigations, *FBI Mission Statement* (visited Mar. 22, 2000) <<http://www.fbi.gov/contact/fo/kc/mission.htm>>.

The shortcomings of the FBI in the context of its leadership of domestic bioterrorism, preparedness, and response have been identified to include its lack of expertise in WMD and its limited experience in counterintelligence within governmental agencies, and the lack of skills in the investigation and apprehension of extra-governmental counterintelligence agents required in bioterrorism events.²⁷ The experience in building capacity in interdepartmental bureaucracies in substantive matters is also clearly lacking in the FBI's portfolio of skills, which would make the agency a poor candidate for the leadership role in planning and executing response and preparedness for domestic bioterrorism.²⁸

So, too, FEMA, as the lead agency for response to a bioterrorism event, has skill primarily in planning for natural disaster responses. These typically require immediate infrastructure compensation to communities for such natural disasters as earthquakes, flooding, and volcanic eruption and do not address the kinds of responses necessary for the leadership role for bioterrorism response and preparedness.²⁹

2. *Intergovernmental Coordination and Leadership—Sovereignty Analysis*

The authority for the federal government to intervene in state matters such as public health presents an issue of state sovereignty, and must be considered in any intergovernmental plan. Indian reservations, both those held in trust by the Department of Interior or held in fee simple by the tribes, do not have the same sovereignty issues as do states; because although they are separate governments, these reservations apply federal law in areas where states enjoy exclusive jurisdiction. The importance of Indian tribal governments and Indian reservations are critical, however, in

26. (continued)

The mission of the FBI is to uphold the law through the investigation of violations of federal criminal law; to protect the United States from foreign intelligence and terrorist activities; to provide leadership and law enforcement assistance to federal, state, local, and international agencies; and to perform these responsibilities in a manner that is responsive to the Constitution of the United States.

Id.

27. FALKENRATH ET AL., *supra* note 25, at 272-73.

28. *Id.* at 272-73.

29. *Id.* at 273.

part because there are at least nine reservations that have boundaries on international borders or international waters.³⁰ This requires a federal and tribal relationship focusing on national security against the entry of bioterroristic threats into the U.S. Border-crossing agreements. While the federal government has made agreements with these tribes, special focus is required on the emerging issues of possible bioterrorism.

3. *Constitutional Tenth Amendment State Sovereignty*

The readiness of state and local governments to respond to domestic terrorism was assessed by RAND Corporation in 1995 through a grant from the U.S. Department of Justice, National Institute of Justice.³¹ Although the sponsoring department's mission is the application of law, this effort failed to address or even to identify legal issues for state and local governments as one of import in analyzing readiness.³²

The first step in the response protocol to bioterrorism must necessarily take place at the state and local levels. The CDC, in collaboration with the Council of State and Territorial Epidemiologists, have developed guidance for public health surveillance which—for the first time—established uniform criteria for state health departments in reporting diseases.³³ This provides for uniform identification of the occurrence of reportable diseases. Laws that mandate the reporting of specific diseases however are state laws which result in variation in multiple lists of varying reportable diseases. A list of nationally reportable diseases however has been identified in the CDC protocol applicable to all states.³⁴

Because the myriad of state laws provide no uniformity for federal response, the effort to address public health through the federal level has been lead by associations of state professionals. This reporting protocol was developed in collaboration with the Council of State and Territorial

30. Telephone Interview with Ron Andrade, former-President, National Congress of American Indians (Nov. 30, 1999) (identifying the following international border reservations: Tohona O'Dum, Cocopah, Ft. Huoma, Blackfeet, Red Lake Chippewa, Portage, Sue St. Marie, St. Regis, and Maloceet).

31. KEVIN JACK RILEY ET AL., *DOMESTIC TERRORISM—A NATIONAL ASSESSMENT OF STATE AND LOCAL PREPAREDNESS* 1-4 (1995).

32. *Id.*

33. Centers for Disease Control, *Case Definitions for Public Health Surveillance*, *MMWR* 1997; 46 (No. RR-10): [p.57].

34. *Id.* at 1.

Epidemiologists (CSTE) and approved by a full vote of the CSTE membership. It was also endorsed by the Association of State and Territorial Public Health Laboratory Directors (ASTPHLD). From this, CDC in collaboration with the Council of State and Territorial Epidemiologists have developed a “policy” that requires state health departments nationwide to report cases of the selected diseases to CDC’s National Notifiable Diseases Surveillance System (NNDSS).³⁵ Interestingly, a recommendation was proposed to develop an “NBC Response Center” to respond to nuclear, biological, and chemical attacks as a part of an interagency effort to combine the FBI, FEMA, Department of Defense, Department of Health and Human Services, the EPA, the U.S. Marine Corps, the Chemical and Biological Defense Command and the Department of Energy into a central group, modeled after the existing Counterterrorist Centers, another interagency effort led by the Central Intelligence Agency.³⁶ Although the NNDSS had been in existence for more than four years, at the time of the recommendation, it was never included in this analysis as a possible national reporting center. While the use of these agencies as the lead intelligence agencies avoids the immediate concern of public health and state sovereignty, it all but ignores the unique agency missions, training, and skills demanded in a public health epidemic crisis.

The responsibilities for developing the reporting protocol of the NNDSS have been set forth in federal regulations promulgated by the CDC, which address the interface between the state associations and the federal agencies.³⁷ This rather surprising reliance upon non-governmental support for systems to safeguard our nation against presumptively catastrophic biological risks has evolved because of Tenth Amendment³⁸ constitutional prohibitions against usurping states’ authority in the area of public health.

4. *Constitutional Non-Delegation of Authority or Ultra Vires Analysis*

Further, the broad delegation of authority for rulemaking to these non-governmental organizations suggests that the non-delegation doctrine³⁹

35. *Id.* at 1-2.

36. FALKENRATH ET AL., *supra* note 25, at 274-76.

37. 64 Fed. Reg. 17,674 (Apr. 12, 1999).

38. U.S. CONST. art. X.

39. The source of the non-delegation doctrine is found in the U.S. Constitution, Article I, § 1, which provides that “[a]ll legislative powers herein granted shall be vested in a

may be quietly eroding under the pressure of urgent need for essential national components of our national security considered within a state sovereignty context. If, in fact, this is a delegation of federal legislative powers, what is the legislative source of those powers?

The more obscure *ultra vires* doctrine,⁴⁰ which does not permit an agency to go beyond the scope of its delegated authority, may be at the heart of this analysis. Indeed, absent a congressional mandate to carry out a federal public health response system to bioterrorism, the agency has no defined scope to exceed. In fact, the very activity of rulemaking to develop a national public health bioterrorism response system, something that Congress is itself prevented from doing, must be beyond the scope of authority for any agency—*ultra vires*.

5. Federal Laws Applicable to Nationwide Bioterrorism Preparedness and Response

Given these constitutional limitations on congressional and Executive authority to usurp states' sovereignty, the application of existing federal laws must necessarily be considered as a partial solution to the bioterrorism challenge.

Under the Posse Comitatus Act⁴¹ the military cannot be used to enforce any laws against civilians. However, an exception to this use of the military is made where states make a request, or where there is no state request, to suppress any insurrection where it is "impracticable to enforce the laws of the U.S. . . . by the ordinary course of judicial proceedings."⁴² The only clear exception (in the absence of insurrection) here is that a state must make a request prior to the use of military enforcement. In addition, to activate this latter exception, the President must issue an order activating the military for that specific exception. Failure to do so can leave in ques-

39. (continued) Congress of the United States," and in the Constitution, Article I, § 8 which provides that Congress has the power "[t]o make all laws which shall be necessary and proper for carrying into execution" the other powers in Article I. Therefore, Congress cannot delegate its legislative powers, but can delegate authority to promulgate rules to carry out those legislative powers.

40. 5 U.S.C.S. § 706(2)(C) (LEXIS 2000) (allowing judicial review to determine whether an agency has acted "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right").

41. 18 U.S.C.S. § 1385 (LEXIS 2000).

42. 10 U.S.C.S. § 333 (LEXIS 2000).

tion the authority under which the military might be acting, as was the case in the Wounded Knee incident.⁴³ Under the Posse Comitatus Act, however, the military can be used for the provision of materials and supplies, and certain other passive activities.⁴⁴

An innovative and clearly viable intergovernmental emergency preparedness statute exists in the area of environmental emergency preparedness. The Emergency Planning and Community Right-to-Know Act of 1986⁴⁵ provided for the coordination of local emergency planning committees (LEPCs) with both state and federal emergency planning authorities.⁴⁶ By 1989, most states had appointed LEPCs primarily based upon county delineations in compliance with this statute.⁴⁷

The LEPC has a statutorily prescribed membership which is “to include, at a minimum, representatives from each of the following groups or organizations: elected state and local officials; law enforcement; civil defense; firefighting; first aid; health; local environmental; hospital; and transportation personnel; broadcast and print media; community groups; and owners and operators of facilities subject to the requirements of this subchapter.”⁴⁸

The responsibilities of these LEPCs include the collection of release information from local toxic substance emitters, as well as the development of comprehensive emergency response plans.⁴⁹

While there is no mandate for the federal government to avoid duplication of resources at the local level as the result of federal mandates, members of Congress are ultimately accountable for such overlaps.

43. *United States v. Jaramillo*, 380 F. Supp. 1375, 1379 (1974).

44. *United States v. Red Feather*, 392 F. Supp. 916 (DCSD 1975). This case sets forth a number of examples of passive activities under the Act to include, reconnaissance missions, but specifically includes advice from the military as participatory and non-passive.

45. 42 U.S.C.S. §§ 11001-11050 (LEXIS 2000).

46. *Id.* § 11001(b).

47. *See generally* Vickie V. Sutton, *Perceptions of Local Emergency Planning Committee Members Responsibility for Risk Communication and a Proposed Model Risk Communication Program for Local Emergency Planning Committees Under SARA, Title III (1989)* (unpublished Ph.D. dissertation, University of Texas at Dallas) (on file with author) (providing information on the formation of the LEPCs).

48. 42 U.S.C.S. § 11001(c).

49. *Id.* § 11003(a).

Amending the Emergency Planning and Community Right-to-Know Act to provide for the emergency planning for bioterrorism emergencies, using the LEPC resource, would accelerate the development of plans for bioterrorism response by at least one or two years.⁵⁰ While the LEPC plans are subject to review and approval by the National Response Team⁵¹ under the National Contingency Plan of the Superfund statute;⁵² the bioterrorism component should also be reviewable by the FBI, as well as FEMA under the current leadership designations. The Attorney General's establishment of a National Domestic Preparedness Office within the Federal Bureau of Investigation "to reduce state and local confusion over the many federal training and equipment programs to prepare for terrorist incidents involving weapons of mass destruction"⁵³ might also be used to review such emergency plans and to identify training needs.

The most important, recent legislation in this area which has been constructed to meet the threat of bioterrorism are the Defense Against Weapons of Mass Destruction Act of 1996⁵⁴ and the Combating Proliferation of Weapons of Mass Destruction Act of 1996⁵⁵ which finds that "the threat posed to the citizens of the United States by nuclear, radiological, biological and chemical weapons delivered by unconventional means is significant and growing."⁵⁶ On its face, the legislation attempts to approach the terrorist threat by combining biological with chemical and radiological—again, biological requiring significantly different personnel, skills and strategies than chemical and radiological threats.

The legislation also recognizes there are shortcomings in the coordination between federal, state, and local governments;⁵⁷ however, the legislation finds that the "[s]haring of the expertise and capabilities of the Department of Defense, which traditionally has provided assistance to federal, state, and local officials in neutralizing, dismantling, and disposing of explosive ordnance, as well as radiological, biological, and chemical mate-

50. The appointment of the LEPCs took more than one year, and an additional year to resolve a conflict with the state of Georgia concerning the delineation of planning districts. A similar delay could be anticipated for a bioterrorism planning network for state and local governments.

51. 42 U.S.C.S. § 11003(g).

52. *Id.* § 9605.

53. *Testimony of Henry L. Hinton, Jr., supra* note 12, at 2.

54. 50 U.S.C.S. §§ 2301-2363 (LEXIS 2000) (as amended by the Defense Against Weapons of Mass Destruction Act of 1998).

55. *Id.* §§ 2351, 2366.

56. *Id.* § 2301(13).

57. *Id.* § 2301(19)-(26).

rials”⁵⁸ can be a vital contribution against bioterrorism. Although, the Congress may have an expectation that the Department of Defense is coordinating “traditionally” with state and local governments, there is no evidence of such a system or policy. Traditional coordination with states and local governments is more likely to be the result of very long and tedious negotiations, cost allocations, budgetary planning and eventual execution of a coordinated approach to, for example, the disposing of explosive ordnance at a locally closed military base. In fact, the largest appropriation authorized by this legislation for fiscal year 1997 was for \$16.4 million to establish a training program for state and local responders, which is the list of courses discussed earlier in this article that fail to present any coordinated effort to link local and state governments with the federal government.

The most significant contribution of this legislation is the money to assist the Public Health Service in establishing Metro Medical Strike Teams in major U.S. cities; however the token \$6.6 million appropriated for this effort does not signal serious congressional support for such a plan.⁵⁹ Again, there is a “grab-bag” of solutions, under-funded, nestled in the most significant of legislation passed to date on the bioterrorism threat.

6. The Cobra Event as a Fictional Case Study

Preston skillfully develops his story in *The Cobra Event* to describe the building of a team which he called the “Reachdeep team,”⁶⁰ guided by legal constraints to respond to the unknown bioterrorist. He correctly identified PDD 39 and National Security Directive 7 as the controlling authority⁶¹ and described the FBI (and the head of its National Security Division)⁶² convening a meeting and ultimately assembling the “Reachdeep team.” A number of “high-level military officers” were included together with a representative from the Office of the Attorney General, Department of Justice.⁶³ Representatives with no team-leadership, but with supporting roles, were included from the U.S. Public Health Service and the Centers for Disease Control.⁶⁴

58. *Id.* § 2301(25).

59. FALKENRATH ET AL., *supra* note 25, at 262.

60. PRESTON, *supra* note 6, at 349.

61. *Id.* at 175.

62. *Id.* at 174.

63. *Id.* at 176.

64. *Id.* at 175.

Intergovernmental coordination included the presence of the “Chief of the Emergency Management Office for the City of New York, representing the mayor,”⁶⁵ and dismissed any specific state presence, altogether. In this scenario, the mayor never appeared at any of the meetings and the city police service and firefighting service seemed to willingly take commands from the Reachdeep team without supervision, notification or participation by any local authority. State and local governments are unlikely to respond in this manner and will require a leadership role in any such event. State sovereignty requires constraints by the federal government in the areas of protecting the public health, which is after all a state issue. The passage of the first comprehensive food and drug bill languished for seventeen years in Congress primarily because of the constitutional position of many legislators that this was a matter to be legislated by state and local governments.⁶⁶ Federal jurisdiction for this statute and others⁶⁷ is the Commerce Clause of the U.S. Constitution and thus applies to interstate sales. But to regulate bioterrorism on the basis of interstate commerce would require that the pertinent biologics be sold in interstate commerce. With the further restriction of *United States v. Lopez*⁶⁸ requiring a “substantial effects” standard on commerce further doubt would be raised as to the reliability of a Commerce Clause basis for regulation of bioterrorism in state and local government—hardly making such legislation useful to deal with public health emergencies.

Whether such federal legislation to invoke federal jurisdiction in emergency preparedness and response activities comports with the Tenth Amendment of the U.S. Constitution also poses potential constitutional challenges to any such legislation. Congressional power to determine what should be regulated for states and local governments was articulated by the court in *Garcia v. San Antonio Metropolitan Transit Authority*⁶⁹ when the more restrictive test of “traditional governmental functions”⁷⁰ was abandoned as “unworkable.”⁷¹ However, dissenters find that the Court’s reasoning, in the majority opinion, that federal political officials

65. *Id.* at 175.

66. PETER B. HUTT & RICHARD A. MERRILL, *FOOD AND DRUG LAW* 8 (1991). The Federal Food and Drugs Act of 1906 was enacted after legislation was first introduced in 1879.

67. The Biologics Act of 1902, 32 Stat. 728.

68. 514 U.S. 549 (1995).

69. 469 U.S. 528 (1985).

70. *National League of Cities v. Usery, Secretary of Labor*, 426 U.S. 833, 852 (1976).

71. *Id.* at 864.

should be “the sole judges of the limits of their own power”⁷² runs afoul of the principle that the federal judiciary is the sole determiner concerning the constitutionality of legislation.⁷³

However, if the regulation of the intergovernmental process to combat bioterrorism is developed, leaving no state role, then the preemption doctrine could be applied to overcome challenges through state legislation. In one case where nuclear safety for the citizenry was argued by the state to be an issue of state interest, the court found it not to be fully preempted by federal law. But the court did not allow preemption of the federal regulations concerning safety, but on the basis of economic interests of the state, as those would not be preempted by the statute.⁷⁴ The Court seems here to find a way to protect the state’s jurisdiction over the safety of its citizens, even if through means of an economic test.

The U.S. Supreme Court, in consideration of the Twenty-First Amendment⁷⁵ to the U.S. Constitution in *South Dakota v. Dole*, permitted the withholding of highway funds from a state that failed to make unlawful the possession or purchase of alcoholic beverages by a person less than twenty-one years of age.⁷⁶ The issue turned on whether this was a condition on a grant or a regulation. Finding a condition on a grant permitted the application of the Spending Power Clause⁷⁷ rather than a violation of the Twenty-First Amendment.

A statutory solution to maintaining telecommunications during a disaster, with state and local governments, illustrates another intergovernmental emergency situation; however, the field of telecommunications is traditionally a federal area, not a state and local government issue. The subsequent regulations to implement the statute⁷⁸ address an emergency plan for telecommunications in the event of a natural disaster or non-war-time disaster, providing for communications of federal officials with state and local officials. This regulation requires a management structure to include the “legal authority for telecommunications management” and “[a]

72. *Id.*

73. *Id.* (referring to *Marbury v. Madison*).

74. *Pacific Gas & Elec. Co. v. State Energy Res. Cons. & Devel. Comm’n*, 461 U.S. 190 (1983).

75. U.S. CONST. art. XXI.

76. *South Dakota v. Dole*, 483 U.S. 203 (1987).

77. U.S. CONST. art. XVI.

78. 42 U.S.C.S. § 6611 (LEXIS 2000).

control mechanism to manage the initiation, coordination and restoration of telecommunications services.”⁷⁹

Legislation should be structured such as that in *South Dakota v. Dole*. This would mean requiring state coordination with federal governments as a condition for the receipt of grant money related to the objective of preparing and responding to bioterrorism, preempting the field through the principles of *Pacific Gas*, and satisfying the dissenters in *Garcia* by making a narrow delineation of the control of state and local resources at the direction of federal officials, in time of emergency. This would seem to satisfy the constitutional requirements of such legislation.

III. The Current Federal Plan

Current planning, research, and preparedness in the area of potential bioterrorism are accurately reflected in the GAO reports that document an absence of strong leadership and a failure to achieve a crosscutting, coordinated program matched with identified resources in the federal budget. Responses to the GAO report by the various departments identified in the reports were not encouraging and indicated more that the departments and agencies did not fully understand the scope of the problem they were purporting to address.

The Office of Management and Budget identified meetings with representatives of the National Security Council, Departments of State, Defense, Justice and the Public Health Service, for implementing the National Defense Authorization Act,⁸⁰ in which they have been establishing methodologies to identify functions in the budgets, which is unfortunate, since there exists a Congressionally mandated methodology for such identification that would address a broader range of resources.⁸¹ Further, the OMB states that it does not concur with the implementation of a formal crosscutting review process based upon its years of experience.⁸² Interestingly, the author of this OMB response seems to be unaware of the existing

79. 47 C.F.R. § 202.0 (2000).

80. GAO Report, GAO/NSIAD-98-39, App. III (Dec. 1997).

81. 42 U.S.C.S. § 6651 (LEXIS 2000).

82. GAO Report, GAO/NSIAD-98-39, App. III (Dec. 1997).

statutory, formal, crosscutting review process, which was a major part of the OMB budget review process from 1989 to 1992.

The Department of Defense concurred with the GAO recommendations and expressed concern that the Economy Act prevented its assistance to state and local law enforcement agencies without reimbursement. Such reimbursement requires statutory authority, and since PDD 39 is not a statute, it cannot provide the authorization to waive reimbursement.⁸³ This is clearly an issue, which must be addressed in any legislation directed toward coordination of federal, state, and local governmental services.

The Department of State sought to establish that the terrorism function was thoroughly coordinated through their Interagency Coordinating Subgroup—although there was no “National Security Council or Office of Management and Budget active participation” in this subgroup.⁸⁴

IV. Recommendations for a Bioterrorism Plan—Congressional Leadership is Essential

Congressional jurisdiction recently has been established by the Committee on Government Reform through its Subcommittee on National Security, Veterans Affairs, and International Relations in the U.S. House of Representatives, in its hearing on terrorism.⁸⁵ In the U.S. Senate, the Committee on Health, Education, Labor and Pensions Committee through the Subcommittee on Public Health and Safety, chaired by Senator Frist, have recently held hearings on bioterrorism.⁸⁶

There is an immediate need to propose a statute, with a title such as the Bioterrorism Research, Preparedness and Responsiveness Program, constructed much on the model of the High Performance Computing and Communications Act⁸⁷ and the Global Climate Change Research Program⁸⁸ to provide for a coordinated, crosscutting effort to avoid gaps in vital areas, to avoid duplication of programs and research and to provide for optimum use of our resources through matching resources with programmatic needs. Further, and as an essential component of this program, a joint appropriations hearing must be agreed among the Congressional

83. *Id.*

84. *Id.*

85. 11 March 1999.

86. 25 March 1999.

87. 15 U.S.C.S. § 5511 (LEXIS 2000).

88. *Id.* §§ 2921-2961.

committees having jurisdiction for appropriations for the participating agencies and departments. While some of these committees may anticipate having small parts of the crosscutting budget, a Joint Appropriations Committee representing all appropriations for this program is essential. Otherwise, each line item identified for the program may be selected for elimination by the respective appropriations committees for those agencies with no regard to the effect upon the comprehensive program placed at risk by these eliminations.

The inclusions of other amendments to existing legislation is essential to the success of such a program. An amendment of the exceptions⁸⁹ to the Posse Comitatus Act to include military responses not only for the exceptions of drug enforcement, immigration and tariff laws which were included in amendments of 1981 and 1988, but for bioterrorism-related activities, as well, should be included. An amendment of the Emergency Planning and Community Right-to-Know Act of 1986 to include the preparation of plans in coordination with FEMA and the FBI for bioterrorism prevention, preparedness and response, should also be specifically included to avoid any confusion of interpretation.

Federal leadership in the intragovernmental crosscutting and coordination area for bioterrorism, as distinguished from the broadly defined area of WMD, should be lodged with the Public Health Service, Surgeon General. While other forms of terrorism correspond with the missions of the FBI and FEMA, the mission of the Public Health Service, coupled with the statutory provision for its conversion to a military service,⁹⁰ provides the appropriate level of leadership to command both civilian and military resources in response to a bioterrorism event. The Public Health Service, although converted to a military service, is not subject to the Posse Comitatus Act according to the analysis in *United States v. Jaramillo* wherein the special unit of the U.S. Marshall's Office is not found to be subject to the Act⁹¹ and military policy statements,⁹² while the Army is regulated by the Posse Comitatus Act, and as a matter of military policy, the Act is also applicable to the Marines and Navy. The use of the Public Health Service in the top leadership role provides the best of both worlds for domestic use of the military, while avoiding the need for any legislative amendment to allow for other branches of the military to take a leadership role.

89. 10 U.S.C.S. §§ 371-380 (LEXIS 2000).

90. 42 U.S.C.S. § 217 (LEXIS 2000).

91. *United States v. Jaramillo*, 380 F. Supp. 1375 (1974).

92. U.S. DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. 5820.7 (15 May 1974).

During the NATO visit to Washington, D.C., in May 1999, over seventy museums and all of the Washington Metro stations were closed, and federal government employees were told not to report to work because of fear of a terrorism event. Unfortunately, much of congressional action in the past has been only as a result of a disaster: The Biologics Act of 1906 was a response to the death of several children due to a vaccine infected with tetanus. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 was a result of the Love Canal environmental disaster; and the Emergency Planning and Community Right-to-Know Act of 1986 was a result of the Bhopal disaster.

The importance of enactment of legislation to address the unique legal, scientific and budgeting problems presented by the issue of bioterrorism is apparent in light of the potential magnitude of the threat to public safety in the United States. As discussed, prior environmental disasters gave rise to major legislative solutions; but a bioterrorism disaster could prove to be greater in magnitude by far, than the previous problems that gave rise to congressional action. The threat of bioterrorism simply cannot be left to languish under the crippled plan of the President. Congressional action should be taken before we as a nation, defenseless, face the disaster of a shattered domestic security, a country in panic, and a national future in jeopardy.