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Use of the Nation's Military Capability in Homeland Security

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April 29, 2003

*Testimony before the Subcommittee on National
Security, Emerging Threats, and International
Relations of the Committee on Government
Reform*

U.S. House of Representatives

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Mr. Chairman and subcommittee Members, thank you for giving me the opportunity to appear before you today, to address the important issue of the appropriate use of the Nation's military capability in Homeland Security.

My remarks today will be focused primarily on the my relevant research dedicated to, and the resulting, related recommendations of the Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction (also known as the "Gilmore Commission") (established by Section 1405 of the National Defense Authorization Act for Fiscal Year 1999, Public Law 105-261 (H.R. 3616, 105th Congress, 2nd Session) (October 17, 1998)). I will, nevertheless, base some testimony on other research on projects involving various components of the Department of Defense, the White House Office of Homeland Security, and the Department of Homeland Security.

You have asked that I address five principal areas:

- How do legal constraints restrict DoD deployments in the United States?
- How does DoD evaluate proposed homeland defense and civil support missions?

- What types of missions have been accepted and rejected, and what were the reasons for rejection?
- Are current force structures, plans and management organizations adequate to support the DoD homeland defense and civil support missions?
- To what extent do homeland defense and civil support missions affect military operations and personnel tempo?

I can certainly address the first and fourth of those areas comprehensively and in a current context. Although I cannot fully address the issue in the third area currently—that information will, I assume, come from Department of Defense witnesses—I can address that area, as well as the second and fifth areas generally and based on my prior experience inside the Department.

General Background

The Advisory Panel has addressed a number of issues related to the use of the military in the homeland in each of its four Annual Reports to the President and the Congress (December 15 of the years 1999 through 2002). It will continue to do so in its fifth and final report this December. Other important contemporaneous documents have also addressed those issues, including the *National Strategy for Homeland Security*, issued by the President in July of last year; the Homeland Security Act of 2002, Public Law 107–296 (H.R. 5005, 107th Congress, 2nd Session) (November 25, 2002); and *Homeland Security Presidential Directive-5*, Subject: Management of Domestic Incidents, issued by the President in February of this year. I will note the relevant provisions of each in the appropriate sections of my testimony, below.

How do legal constraints restrict DoD deployments in the United States?

The National Strategy for Homeland Security identifies appropriate homeland missions categories for the Department of Defense:

There are three circumstances under which the Department would be involved in improving security at home. In extraordinary circumstances, the Department would conduct military missions such as combat air patrols or maritime defense operations. The Department would take the lead in defending the people and the territory of our country, supported by other agencies. Plans for such contingencies will continue to be coordinated, as appropriate, with the National Security Council, Homeland Security Council, and other federal departments and agencies. Second, the Department of Defense would be involved during emergencies such as responding to an attack or to forest fires, floods, tornadoes, or other catastrophes. In these circumstances, the Department may be asked to act quickly to provide capabilities that other agencies do not have. Finally, the Department of Defense would also take part in “limited scope” missions where other agencies have the lead—for example, security at a special event like the recent Olympics. (*National Strategy*, p.13.)

The first of those three mission areas is what has commonly been referred to as the “homeland defense” mission. The second and third are missions for “military support to civil authorities” or more generically “civil support”—the terms are often used synonymously.

There continues to be considerable misunderstanding about the legal bases for military activities inside the United States. Some believe that the provisions of the Posse Comitatus Act¹ create a significant bar to many potential activities for which the Armed Forces could be employed inside our borders for civil support generally and to combat terrorism specifically. There is, however, ample authority for using the military inside our borders for responding to a variety of emergencies, many of which are explicit exceptions to the strictures of the Posse Comitatus Act.

Starting with its Second Report, the Gilmore Commission has made specific policy recommendations on the use of the military domestically—addressing the issue head on.

Referring to the military’s civil support mission, the commission said:

¹ 18 U. S. Code, Section 1385 — “Use of Army and Air Force as a posse comitatus. Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.”

Clear Constitutional and statutory authority exists for using the U.S. Armed Forces in a support role to provide significant assistance to civilian agencies. The American people must be assured that civilian leaders will always direct and oversee the employment of military capability and will limit it to restoration of order, mitigation of consequences, and apprehension or interdiction of the perpetrators.

It therefore made the following recommendation:

We recommend that the President always designate a Federal civilian agency other than the Department of Defense (DoD) as the Lead Federal Agency.

There are several constitutional bases for the use of the military domestically in support of civil authorities. Article One gives Congress the power to create military forces, and provide for their regulation, and contains explicit language for “calling forth the militia” to enforce laws, and suppress rebellions and insurrections.

Article Two designates the President as commander in chief not only of regular Federal forces, but also of the state militias, when in Federal service—“militia” in each of these cases being what we now know as the National Guard of the various States.

Article Four says that the United States shall protect each of the states not only against invasion, but also against “domestic violence.” Note the use of the word obligatory “shall” and not the permissive “may.”

In the first century of the Republic, there were a number of instances in which the military was used to enforce laws, which gave rise to some criticism of those activities, most particularly, military actions in the reconstruction and post-reconstruction periods in the South. It was the latter circumstances that caused Congress, in June of 1878, to pass what has come to be called the “Posse Comitatus Act.” (Posse Comitatus translated from Latin means “the power or force of the county.”)

It is particularly interesting to note that the Congress did not proscribe the use of the military in Title 10—the code title for military activities generally, it made it a crime under Title 18 to do so. Moreover, the statute does not refer to the laws “of the United States,” it refers to “the laws” generally, which can include the laws of the various States.

But the Congress created an exception for those cases authorized in the Constitution or other Acts of Congress. As noted above, there is at least one specific and preexisting Constitutional mandate.

In the years since the enactment of the Posse Comitatus Act, the Congress has created a number of statutory exceptions to that Act, which fall into four major categories:

- ◆ Insurrections/Civil Disturbances
- ◆ Counterdrug Operations
- ◆ Disaster Relief
- ◆ Counter-terrorism/Weapons of Mass Destruction

In 1956, Congress created broad authority for use of the military to suppress insurrections, rebellions, and unlawful combinations and conspiracies in the various states – an extension of the Constitutional mandate to protect the states against domestic violence.²

Provisions of those statutes have been used as the basis for engaging the military to integrate schools and to respond to riots in major U.S. cities. Those statutes also form a legal basis for using the military to respond to certain acts of terrorism.

Beginning in 1981, and as amended in the intervening years, Congress has created a number of authorized activities for use of the military in counterdrug operations, both inside the United States, and extraterritorially.³ Those activities include intelligence and information sharing; the use of military equipment and facilities; training and advice to law enforcement agencies; the maintenance and operations of a vast array of equipment—owned at the Federal,

² 10 U.S. Code, Section 331, et seq.

³ 10 U.S. Code, Section 124, and Sections 371, et seq.

state and local level. There is also specific authority in these provisions for air, sea, and ground detection and monitoring of the illegal transit of drugs into the United States—which includes some authority for “hot pursuit” inside U.S. borders, as well as some interception authority for vessels and aircraft detected outside of our borders for purposes of identifying and communicating with the vessel or aircraft, and directing them to a location specified by civilian law enforcement. That authority also includes the transportation of domestic and foreign law enforcement and military personnel engaged in counterdrug operations; the operation of bases of operation inside the U.S. and extraterritorially; aerial and ground reconnaissance—but not surveillance—operations inside and outside the U.S.; and the implementation of procedures for civilian law enforcement agencies to procure certain military equipment for counterdrug activities. In 1988, the Congress added to this series of provisions the authority to operate equipment in the conduct of counter-terrorism operations both foreign and domestically, including transporting suspected terrorists to the U.S. for trial.⁴

The military, may also be used for disaster relief operations, both domestically, pursuant to provisions of the Stafford Act in Title 42,⁵ and internationally, under the provisions of section 404 of Title 10. The Stafford Act provides broad authority and has been invoked frequently for using the military domestically for responses to floods, earthquakes, hurricanes, wildfires, and other natural disasters. Provisions of the Stafford Act also apply to intentional acts, such as terrorism.

Most significantly in the terrorism context, the Congress has also provided the authority for use of the military domestically to assist in combating biological and chemical terrorist incidents, which may, under certain exceptional circumstances, include direct involvement in

⁴ 10 U.S. Code, Section 374. See statutory text at Tab 2.

⁵ 42 U.S. Code 5121, et seq.

arrests, searches, seizures, and the collection of specific intelligence⁶; and authority to provide assistance in nuclear terrorism cases, which may also include participation in arrest, search, and seizure activities.⁷ Under each of these statutes, it only requires an agreement between the Attorney General and the Secretary of Defense to engage the military.

Some of the specific authority, and the conduct of activities pursuant to that authority, have not of course been without their detractors. From both within and outside of military circles, there have been concerns about the use of the military in this fashion, as being outside of the scope of normal military operations. And military leaders have often expressed concern about the effect of such activities on military preparedness for war and other contingencies.

Some in the Congress and elsewhere also express concern that, in times of reduced force structure and other limitations on defense spending, the military should focus on preparing for and participating in purely military operations. Others, including the Gilmore Commission, have expressed concern about the potential for the abuse of civil liberties through use of the military domestically.

There are, however, a number of protections against abuse that are built directly into some of the statutes and contained in a number of Federal regulations and policy documents. In several statutes, there are conditions precedent, which must occur or exist, for the use of the military. Examples include:

- A Presidential Declaration of Disaster for support under the Stafford Act⁸
- A proclamation to persons engaged in civil disorders to disperse and retire, contained in the Insurrections Statutes⁹
- A specific order from the President in cases of suppressing insurrections and other civil disobedience;¹⁰

⁶ 10 U.S. Code, Section 382.

⁷ 18 U.S. Code, Section 831.

⁸ See 42 U.S. Code, Section 5170, 5170b, and 5191.

⁹ 10 U.S. Code, Section 374.

¹⁰ 10 U.S. Code, Sections 331 and 334.

- Either a specific request from a State governor or legislature for assistance to suppress an insurrection,¹¹ or a determination that others have refused, failed, or are not capable of enforcing the laws to suppress insurrection and other civil disorder.¹²

In a number of cases, senior Federal officials must request or approve, either individually or jointly with others, the use of military support:

- For several activities in the counterdrug arena, a specific support request must come from the head of a Federal law enforcement agency—the Drug Enforcement Administration, U.S. Customs Service, U.S. Coast Guard, U.S. Marshals, U.S. Border Patrol, Federal Bureau of Investigation—even if the support is ultimately intended for a State or local government.¹³
- The Secretary of Defense and the Attorney General (and for foreign operations, the Secretary of State as well) must approve the transportation of law enforcement and military personnel, and the operation of bases of operation for counterdrug activities.¹⁴
- For response to biological, chemical, and nuclear terrorist incidents, as well as for many of the minor statutes, the Secretary of Defense and the Attorney General must approve the specific activity.¹⁵

There are also numerous statutory, regulatory, and other policy limitations on military activities in support of civil authorities:

- There are provisions in several sections that require a determination that the activity will not have an adverse impact on military preparedness.¹⁶
- Several sections also require reimbursement from the supported agency under provisions of the Economy Act, although there is an exception where the activity is conducted in the course of training or provides equivalent training.¹⁷
- Although the Legal Counsel at the Department of Justice at one point opined that many of these statutes do not, unless stated explicitly, apply outside of the border of the United States, the Department of Defense has consistently done so, and the key DoD Directive for such support states that exceptions to such extraterritorial application will be considered on a case-by-case basis, and then only in “compelling and extraordinary circumstances.”¹⁸
- There is an overarching provision in the counterdrug statutes that prohibits military involvement in search, seizure, arrest or similar activity¹⁹ (but *cf* 10 U.S. Code, Section 382, and 18 U.S. Code, Section 831).

¹¹ 10 U.S. Code, Section 331.

¹² 10 U.S. Code, Section 334.

¹³ 10 U.S. Code, Section 374.

¹⁴ 10 U.S. Code, Section 374.

¹⁵ 10 U.S. Code, Section 382, and 18 U.S. Code, Section 831.

¹⁶ E.g., 10 U.S. Code, Sections 376 and 382; and 18 U.S. Code, Section 831.

¹⁷ See 10 U.S. Code, Sections 374 and 381.

¹⁸ DoD Directive 5525.5.

¹⁹ 10 U.S. Code, Section 375.

- Although the specific provisions of the Posse Comitatus Act do not apply to the U.S. Navy and the U.S. Marines, they have been included in the provisions of the counterdrug statute that prevents direct involvement in law enforcement; the Navy and Marines are also covered under Posse Comitatus Act provisions by regulation;²⁰ and other provisions require the presence on naval vessels of U.S. Coast Guard law enforcement personnel during counterdrug operations.²¹

The rulings and interpretations of the Federal courts, in construing the specific statutory language and the legal implications of domestic activities conducted by the military, are relatively few and they have been remarkably consistent. Two are notable:

In *Laird v. Tatum*,²² the U.S. Supreme Court very succinctly noted that the Constitutionality of the Insurrection Statutes was not an issue; nor was the Posse Comitatus Act a limiting factor. In *Gilligan*, the Supreme Court noted both Constitutional and Federal statutory authority for the use of the National Guard for executing the Insurrection Statutes (although the Guard was actually not Federalized at Kent State).²³

While the terrorism-specific statutes have not yet been tested in Federal court, there is no reason to believe that courts would find a *prima facie* Constitutional deficiency in them.

The National Guard, when serving under the control of a State governor, is generally thought to be exempt from the Posse Comitatus Act. Statutes and regulations in certain States, however, prohibit the use of the Guard for law enforcement activities. Guard units currently providing security at many of the nation's airports remain in their "State" or Title 32 status, perhaps in the belief that Posse Comitatus will universally not apply to their activities. But many States, including some that do not generally prohibit the Guard from performing a law

²⁰ 10 U.S. Code, Section 375; 32 CFR 213.2.

²¹ 10 U.S. Code, Section 379.

²² *Laird v. Tatum*, 408 U.S. 1 (1971) (1967 Detroit riots), ruling on 10 U.S. Code, Section 333, citing Art. IV, Sec. 4 of the Constitution.

²³ *Gilligan v. Morgan*, 413 U.S. 1(1972) (1970 Kent State shootings), citing Congressional authority under Art. I, Sec. 8, and Presidential authority under the Constitution, and the use of the National Guard (10 U.S. Code, Section 331, et seq.) to assist in controlling civil disorders.

enforcement role, have specifically prohibited them from performing those functions in their current airport missions.

Given all of the foregoing discussion, it is fairly straightforward to suggest that both ample authority as well as sufficient protections exist for using the military domestically for a variety of purposes. Yet, it is interesting to note that the Congress, in the Homeland Security Act of 2002, while acknowledging that the *Posse Comitatus Act* “is not a complete barrier to the use of the Armed Forces for a range of domestic purposes, including law enforcement functions” under certain circumstances (citing several of the statutes noted above), nevertheless felt compelled to express the Sense of the Congress of the “continued importance” of that statute.²⁴

Notwithstanding the diversity of Constitutional underpinnings and statutory provisions that are exceptions to *Posse Comitatus*, there is no broad recognition of this body of law—even among military personnel themselves. It is important that these authorities and the limitations on their use are well understood by Federal, State, and local entities that may be involved in

²⁴ SEC. 886. SENSE OF CONGRESS REAFFIRMING THE CONTINUED IMPORTANCE AND APPLICABILITY OF THE POSSE COMITATUS ACT.

(a) FINDINGS.—Congress finds the following:

(1) Section 1385 of title 18, United States Code (commonly known as the “Posse Comitatus Act”), prohibits the use of the Armed Forces as a posse comitatus to execute the laws except in cases and under circumstances expressly authorized by the Constitution or Act of Congress.

(2) Enacted in 1878, the Posse Comitatus Act was expressly intended to prevent United States Marshals, on their own initiative, from calling on the Army for assistance in enforcing Federal law.

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

(4) Nevertheless, by its express terms, the Posse Comitatus Act is not a complete barrier to the use of the Armed Forces for a range of domestic purposes, including law enforcement functions, when the use of the Armed Forces is authorized by Act of Congress or the President determines that the use of the Armed Forces is required to fulfill the President’s obligations under the Constitution to respond promptly in time of war, insurrection, or other serious emergency.

(5) Existing laws, including chapter 15 of title 10, United States Code (commonly known as the “Insurrection Act”), and the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.), grant the President broad powers that may be invoked in the event of domestic emergencies, including an attack against the Nation using weapons of mass destruction, and these laws specifically authorize the President to use the Armed Forces to help restore public order.

(b) SENSE OF CONGRESS.—Congress reaffirms the continued importance of section 1385 of title 18, United States Code, and it is the sense of Congress that nothing in this Act should be construed to alter the applicability of such section to any use of the Armed Forces as a posse comitatus to execute the laws.

combating terrorism, and by the uniformed military as well. For this reason, the Gilmore Commission, its Third Report (December 2001), recommended

(T)hat the Secretary of Defense publish a compendium, in layman's terms, of the statutory authorities for using the military domestically to combat terrorism, with detailed explanations about the procedures for implementing those authorities.

Currently, there continues to be much debate within the country on the authorities granted to use the military domestically and the restrictions under the *Posse Comitatus Act*. Some believe the laws governing the domestic use of the military should be modified to tighten restrictions on military law enforcement activities. But in the last year, the military has been used in new ways to support homeland security missions. For example, in October 2002 military reconnaissance aircraft were used in an attempt to locate the sniper terrorizing the Washington, DC area. Some leading members of the Congress believe the time has come to re-examine the 1878 law in light of the new security environment the Nation faces.²⁵

The President's homeland security strategy calls for a "thorough review of the laws permitting the military to act within the United States in order to determine whether domestic preparedness and response efforts would benefit from greater involvement of military personnel and, if so, how." The Gilmore Commission, in its Fourth Report (December 2002), supports the review proposed by the Administration in the *National Strategy* as a means to bring clarity to this important issue.

To achieve that clarity, the laws governing domestic use of the military should, in the commission's view, be consolidated and (in a recapitulation of its earlier recommendation) the

²⁵ These positions are detailed in Pat Towell, "Northern Command Stirs Issue of Military's Role in Security," *Congressional Quarterly Weekly*, 2 November 2002, p. 2867; and Harry Levins, "Loopholes in Law Give Military Ability to Play Role in U.S.," *St. Louis Post-Dispatch*, 21 April 2002.

Federal government should publish a document that clearly explains these laws.²⁶ In consolidating the laws, the legislation should clarify ambiguities about the authority to use the military to respond to terrorist acts involving chemical, biological, radiological and/or nuclear weapons as well as conventional or cyber attacks. The commission explicitly recommended

That the President and the Congress amend existing statutes to ensure that sufficient authorities and safeguards exist for use of the military across the entire spectrum of potential terrorist attacks (including conventional, chemical, biological, radiological, and nuclear threats as well as cyber); that the authorities be consolidated in a single chapter of Title 10; and that DoD prepare a legal “handbook” to ensure that military and civilian authorities better understand the legal authorities governing the use of the military domestically in support of civilian authorities for all hazards—natural and manmade.

How does DoD evaluate proposed homeland defense and civil support missions?

The DoD Directive covering “military assistance to civil authorities” requires that each such request be evaluated against the six criteria, most of which are a regulatory expression of statutory requirements, as are many other provisions in regulatory and policy guidance:

- Legality (compliance with laws);
- Lethality (potential use of lethal force by or against DoD forces);
- Risk (safety of DoD forces);
- Cost (who pays, impact on DoD budget);
- Appropriateness (whether the requested mission is in the interest of the Department to conduct); and
- Readiness (impact on the DoD's ability to perform its primary mission).²⁷

I am not in a position to address the process by which DoD evaluates homeland defense missions.

²⁶ In April 2001 the Department of the Army’s Center for Law and Military Operations published an “advisory” guide entitled *Domestic Operational Law Handbook for Judge Advocates*. Although its contents do not represent official DoD legal positions, the Army guide could serve as the basis for an official DoD handbook of the type recommend by the commission. The Army’s guide is available at on the Internet at <https://www.jagcnet.army.mil/clamo/publications>.

²⁷ DoD Directive 3025.15.

What types of missions have been accepted and rejected, and what were the reasons for rejection?

The military regularly is called on to provide assistance to civil authorities to deal with natural disasters (e.g., hurricanes, floods, and fires), as well as manmade incidents (e.g., riots and drug trafficking).

The military is called on to perform these missions because it moves and organizes large numbers of trained personnel to provide a coordinated response to incidents at home and because the military has developed specialized capabilities (particularly medical, engineering, and chemical, biological, radiological, nuclear, and high-yield explosive (CBRNE) weapon response capabilities) that either do not exist at the State and local level or do not exist in sufficient quantities.

DoD defines civil support as mutual support activities it undertakes with any civil government agency for planning or responding to the “consequences of civil emergencies or attacks, including national security emergencies.” Civil emergencies include “any natural or manmade disaster or emergency that causes or could cause substantial harm to the population or infrastructure.”²⁸ The 2002 deployment of military forces to assist Federal border security agencies is a recent example of a civil support operation.

There is a logical sequence of commitment for the appropriate place for employment of military forces domestically. In this regard, response to a variety of natural or manmade events will be led by first responders—those who serve the communities in which the incident has occurred. Responding second are those organizations mobilized under the leadership and authority of the State governors (including the National Guard of the several States), and which

²⁸ Department of Defense, Directive 3025.15 (Washington, DC: Department of Defense, Office of the Assistant Secretary of Defense for Special Operations and Low Intensity Conflict, 18 February 1997), sections E2.1.3 and E2.1.9.

may include requests from neighboring states. Within this context, a governor could, for example, request assistance from National Guard units from adjoining States under voluntary State compacts. At the point when response requirements exceed the State's capacity, a governor could request Federal assistance from the President. That assistance might include the deployment of Federal military forces.

The military has a long history of providing support to civil authorities to deal with natural and manmade disasters. This assistance is now common: between 1998 and 2000, the military supported an average of 73 events per year.²⁹ Large-scale incidents can create significant demand for military forces. Notable examples of such incidents in the last decade, beyond the post – September 11 activities, include the Los Angeles Riots and Hurricane Andrew in 1992, the 1995 bombing of the Murrah Federal Office Building in Oklahoma City, Hurricane Floyd in 1999, the Western forest fires of 2000, and the 2002 Olympics in Salt Lake City.

Each homeland security incident that requires military support to civil authorities will involve a unique size and mix of forces. Specialized military capabilities are deployed as required and responding forces also typically include general-purpose units and military police; air transportation; engineers; signal operators with communication equipment; medical experts; and a command element with expertise in the law, public affairs, and intergovernmental coordination.

Are current force structures, plans and management organizations adequate to support the DoD homeland defense and civil support missions?

New homeland security missions warrant dedicated civilian and military organizational structures. Since the terrorist attacks of September 2001, the Department of Defense has

²⁹ LTC James Rice, United States Army, Deputy Special Assistant for Military Support, Office of the Secretary of the Army, remarks before the Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction, September 30, 2002, Arlington, Virginia.

restructured both the civilian oversight roles and the military organizations that deal with homeland security.

Decisions to deploy military forces for homeland security activities are not made by the uniformed military; the Secretary of Defense, or his designated agent makes such decisions. The Department of Defense is reorganizing both the military command structure and the civilian oversight structure dedicated to homeland security.

Section 901 of the National Defense Authorization Act for Fiscal Year 2001 (NDAA FY01),³⁰ required the Secretary of Defense to designate an Assistant Secretary of Defense as the senior civilian with responsibility for “the overall supervision of the Department’s combating terrorism activities.” That designation was made in a directive issued on March 29, 2001—the Assistant Secretary of Defense for Special Operations/Low Intensity Conflict (ASD-SO/LIC).³¹ Nevertheless, in its Third Report, the Gilmore Commission recommended

that the Secretary of Defense seek and that the Congress approve the authority to establish a new under secretary position for homeland security.

It argued that that the issues are so important that an under secretary position was justified and would foster stronger relations with the White House Office of Homeland Security and strengthen coordination with the military departments and the Joint Chiefs of Staff.

In November 2002, the Congress approved the request from the Secretary of Defense to create a new Assistant Secretary position within the Office of the Secretary of Defense to oversee the support that the military provides for homeland security. The new Assistant Secretary for Homeland Security will formulate DoD homeland security policy and oversee the approval of military contributions to the national homeland security effort. In situations

³⁰ HR 4205, Pub. L. 106–398. See discussion in Conference Report to accompany NDAA FY01, p. 833.

³¹ Memorandum of the Deputy Secretary of Defense, Subject: Combating Terrorism, March 29, 2001.

where the lead Federal agency (most likely either the Department of Homeland Security or the Department of Justice) determines it needs military assistance, it would direct a request to the Secretary of Defense. To expedite the process, decisional authority is anticipated to be delegated to the new Assistant Secretary for Homeland Defense; however, the Secretary of Defense will retain approval authority for responses to acts of terrorism, deployment of assets to deal with CBRNE, and military assistance for civil disturbances. The Assistant Secretary of Defense would review the request and, if it were determined that DoD can meet the request, would direct the Joint Staff to select the military assets that will be used and issue deployment orders.

In this arrangement, the Assistant Secretary of Defense for Homeland Defense will assume the role that the Secretary of the Army (i.e., as the Secretary of Defense's Executive Agent for civil support) and his Director of Military Support (DOMS) filled in the past. The ASD Homeland Defense will apparently have a much broader portfolio than DOMS had, because he will be responsible for all DoD homeland security support to Federal, State, and local authorities as well. In most cases DoD would play a supporting role in homeland security; however, there are some cases when the President might order the military to take the lead to thwart a terrorist attack. Oversight of preparations for such activities to combat terrorism is vested by the Secretary of Defense in the Under Secretary for Policy and the Assistant Secretary for Special Operations-Low Intensity Conflict (SOLIC).

These are important developments in DoD's organization. Command and control relationships must be very clear and practiced. Responsibilities and authorities must be clearly prescribed and exercised. However, it is also important for DoD to articulate the many changes it is making so that the American people understand how their government is moving to protect them from new threats. The Congress has, therefore, logically directed the Secretary of Defense to submit

a detailed report describing DoD's homeland security responsibilities and how it is preparing to discharge them.³²

In its *Third Report*, the Gilmore Commission recommended “that the National Command Authority establish a single, unified command and control structure to execute all functions for providing military support or assistance to civil authorities.” A new geographic combatant command, U.S. Northern Command (NORTHCOM), has been established in the Unified Command Plan, effective October 1, 2002. Based at Petersen Air Force Base in Colorado, the new command has been assigned the mission of defending the continental United States, Alaska, Puerto Rico, and the U.S. Virgin Islands and for providing military support to civil authorities.³³ The Command describes its mission, inclusive of both its homeland defense and civil support responsibilities, as follows:

The command's mission is homeland defense and civil support, specifically:

- *Conduct operations to deter, prevent, and defeat threats and aggression aimed at the United States, its territories, and interests within the assigned area of responsibility; and*
- *As directed by the President or Secretary of Defense, provide military assistance to civil authorities including consequence management operations.*³⁴

NORTHCOM is in a transition between initial operational capability and full operational capability. In its initial structure, NORTHCOM has few permanently assigned forces, and most of them serve as part of its homeland security command structure. NORTHCOM's commander will exercise combatant command authority over his own headquarters in Colorado Springs, the Joint Force Headquarters Homeland Security (JFHQ- HLS), the Joint Task Force 6 (JTF-6) counterdrug headquarters, and the Joint Task Force Civil Support (JTF-CS), which provides

³² U.S. House, 107th Congress, 2nd Session, Conference Report on H.R. 4546, *Bob Stump National Defense Authorization Act for Fiscal Year 2003*, November 12, 2002, section 1404.

³³ U.S. Pacific Command has responsibility for Hawaii.

³⁴ NORTHCOM Mission Statement, available at <http://www.northcom.mil/index.cfm?fuseaction=s.whoweare§ion=3>, accessed on December 5, 2002.

command and control for all Federal military forces operating in support of a lead Federal Agency to manage the consequences of CBRNE incidents.

Joint Forces Command established the JFHQ-HLS, located in Norfolk, Virginia, immediately after September 11, 2001 to coordinate the land and maritime defense of the continental U.S. as well as military assistance to civil authorities for "all hazards." At NORTHCOM's initial operational capability, combatant command over JFHQ-HLS was transferred to NORTHCOM. The ultimate role and status of this headquarters is pending design determination of NORTHCOM at full operational capability. The Commander of NORTHCOM also serves as Commander, U.S. Element NORAD, and currently as commander of NORAD, the U.S.-Canadian Aerospace Defense Command. In these, roles he conducts and coordinates North American air defense. NORTHCOM, at least initially, does not have control of any other operating units, only headquarters elements of dual-hatted component commanders. As is the case with other regional combatant commanders, Joint Forces Command (JFCOM) will act as NORTHCOM's primary "force provider" if additional units or personnel are needed for any planned or contingency operations and for exercises. As such, NORTHCOM will only be given control of air, land, sea, and maritime forces when required to perform an assigned task.

Although NORTHCOM's mission statement implies that the Command could be directed to execute *counterterrorism* operations in support of civil authorities.³⁵ Conceivable events (e.g., multiple, geographically dispersed terrorist operations within U.S. territory) might exhaust civil and other limited military resources envisioned for use in existing national plans. Moreover, scenarios exists within which NORTHCOM might then be directed to provide additional support

³⁵ DoD defines counterterrorism as "offensive measures taken to prevent, deter, and respond to terrorism." It defines antiterrorism as, "Defensive measures used to reduce the vulnerability of individuals and property to terrorist acts, to include limited response and containment by local military forces." See Department of Defense, *DoD Dictionary of Military and Associated Terms*, Joint Publication 1-02, as amended through August 14, 2002, available at on the Internet at <http://www.dtic.mil/doctrine/jel/doddict/index.html>.

to civil authorities *regardless* of its pre-incident focus on planning and training for the so-called “consequence management” mission. As a result, the Gilmore Commission recently recommended

That the Secretary of Defense clarify the NORTHCOM mission to ensure that the Command is developing plans across the full spectrum of potential activities to provide military support to civil authorities, including circumstances when other national assets are fully engaged or otherwise unable to respond, or the mission requires additional or different military support. NORTHCOM should plan and train for such missions accordingly

The creation of NORTHCOM is an important step toward enhanced civil-military integration for homeland security planning and operations and could result in an enhancement of homeland security response capabilities. NORTHCOM has the responsibility to plan for a number of critical military homeland security activities. NORTHCOM will need to train and exercise with civil authorities at all levels of government—Federal, State, and local. Given its command relationships, Commander, NORTHCOM will be well positioned to ensure unity of command and effort when military units are employed for homeland missions under Federal authority.

In our Third Report, the Gilmore Commission recommended that a unified command be created “to execute all functions for providing military support or assistance to civil authorities”—an all-hazards approach. In its Fourth Report, it added the following recommendation:

That the NORTHCOM combatant commander have, at a minimum, operational control of all Federal military forces engaged in missions within the command’s area of responsibility for support to civil authorities

The Administration and the Congress have improved the Federal government’s structure for the delivery of military support to civil authorities. However, the panel believes additional enhancements are possible and necessary. In addition to clarifying legal authorities for military activities within U.S. territory, training for civil support operations should be increased across the armed forces. The President should initiate a rigorous assessment of national preparedness

requirements. That assessment should be used to evaluate further enhancements to the military's ability to deliver needed capabilities as part of the national homeland security effort. Importantly, the National Guard's homeland roles and missions must be reevaluated in light of the new security environment facing the Nation.

Northern Command and supporting service and Joint Staff structures have the capability to identify purely military homeland defense requirements for land, maritime, and air combat missions. The problem, however, is that no process is clearly in place to identify among the full scope of participants the requirements for support to civil authorities. It is critical that States, cities, and municipalities define requirements beyond their current capabilities that should be met by Federal augmentation. As a result, the Gilmore Commission, in its most recent report recommended

That the President direct the Department of Homeland Security to coordinate a comprehensive effort among DoD (including NORTHCOM) and Federal, State, and local authorities to identify the types and levels of Federal support, including military support, that may be required to assist civil authorities in homeland security efforts and to articulate those requirements in the National Incident Response Plan

The DHS should evaluate shortfalls and allocate augmentation responsibilities to other Federal agencies, including DoD. The Defense Department, supported by NORTHCOM, should give DHS full cooperation in completing this effort.

Military personnel in the United States have long adhered to this principle: "train as you fight and fight as you train." This principle is certainly valid for homeland defense and civil support operations. The panel is reasonably confident that NORTHCOM will develop adequate plans for its homeland defense, military-led mission and that most combat training and exercises for military units will have some application in that mission. Nevertheless, there will be special considerations for conducting military operations inside or over the United States and in adjacent waters—proximity to the civilian population, coordination with other governmental entities, and air or sea traffic issues, as examples—that will need significant attention in training and exercises. Moreover, States and

localities should be provided information and definitive guidance on what to expect in the event of future homeland defense, military-led operations.

In addition, there is concern that there is no assurance that specially trained forces will be available to NORTHCOM prior to a crisis, and that current civil support training across the armed forces in general is insufficient.

Although the military trains extensively for combat operations, training for homeland activities differs in essential ways. Compared to coordination within a purely military command structure, coordinating homeland operations with other Federal, State, and local authorities will require comparable skills but different applications. Liaison activities among the elements involved in planning, training, and exercising will take on greater importance. For response operations, command and control processes may be different. Requirements for joint training will take on a new meaning, as joint exercises with State and local responders will be very important. Finally, certain homeland missions will require support to civil law enforcement and the execution of law enforcement tasks. Military personnel will require specific training to support local law enforcement agencies in performing law enforcement missions.

The *problem* has been that insufficient attention has been paid to and resources made available for civil support training. We now know the pervasiveness of the threat, the increased probabilities of terrorist acts, and the need for enhanced preparation for effective response. Therefore, there should be a significant increase in the emphasis on civil support missions for all hazards incidents, with special emphasis on response to acts of terror. Specifically, the Department of Defense should increase the planning, training, and exercising of Active, Guard, and Reserve forces to execute civil support missions. In its December 2002 report, the Gilmore Commission recommended

That the Secretary of Defense direct that all military personnel and units under NORTHCOM, or designated for NORTHCOM use in any contingency, receive

special training for domestic missions. Furthermore, in those cases where military personnel support civil law enforcement, special training programs should be established and executed.

As noted above, NORTHCOM's initial force structure will include few permanently assigned forces. The problem with this initial force structure is that it leaves unanswered questions about the scope and level of training and exercising of units and personnel that might be used for civil support missions. It is not clear that Commander NORTHCOM's pre-incident authorities have been aligned with the civil support responsibilities that he has been assigned. Indeed, there are no assurances that civil support training will be conducted unless NORTHCOM is given command of specific units, some other pre-incident authority over units, or specific units commanded by others are designated and trained for civil support missions.

The latest plan for NORTHCOM command authorities is that its commander will have a "combatant command"(COCOM) relationship with the various service component commands (i.e., ARNORTH, NAVNORTH, NORTHAF, MARNORTH). Its full implications are not yet clear. There is a question about this whether command relationship is only for the purpose of unity of *homeland defense* authority and responsibility or applies more broadly to all *homeland security* missions, including NORTHCOM's civil support mission. Thus, the extent to which the new command will be able to direct new and expanded civil support training and exercises at the operational unit level remains unclear. For those reasons, the Gilmore Commission has recommended

That the Secretary of Defense clarify NORTHCOM's combatant command authority to ensure that Commander NORTHCOM can direct subordinate commands to conduct pre-incident planning, training, and exercising of forces required to conduct civil support missions

The U.S. military is rightly focused on warfighting. However, the concerns related to pre-incident planning, training, and exercises could be rectified if NORTHCOM were assigned forces for civil support missions. Indeed, the possibility of a major attack on U.S. soil of a size that would

overwhelm even the best-prepared cities and States warrants consideration of dedicating a small number of specialized, “rapid reaction” forces to NORTHCOM for civil support. The advantages of dedicated forces are that they can respond quickly and can be well trained to operate effectively at the scene.

Currently, DoD has several small, specialized units that are prepared to deploy quickly to support civil authorities in dealing with a terrorist attack. The Department has, for example, units that, under certain circumstances, could respond to ongoing terrorist or hostage situations that exceed the capability of law enforcement agencies. The employment of these units within the United States is reserved for only the most severe circumstances. The National Guard has a dedicated but limited CBRNE response capability for homeland operations: the Weapons of Mass Destruction Civil Support Teams.³⁶ Several small active duty response teams have been specially designed to deal with CBRNE events. However, other than the WMDCSTs, those additional existing CBRNE response teams are deployable to theaters abroad. In addition, existing CBRNE response teams, including the WMDCSTs, are designed to provide a command capability, or specialized capability (e.g., chemical or biological agent decontamination), or technical advice and a communications channel to follow-on forces. They could not by themselves handle medium- or large-size events.

The Army has brigade-size elements (e.g., comprising roughly 3,500 airborne troops³⁷) standing by for rapid deployment to trouble spots throughout the world. Similar capabilities for rapid deployment exist in the Air Force, Navy, and Marine Corps. Analogous rapid response-type

³⁶ In the Fiscal Year 2003 Defense Authorization Act, Congress directed the Secretary of Defense to establish WMDCSTs in each of the remaining States and territories; thus, a total of 55 teams have been authorized, with two stationed in California. Each team has 22 personnel. U.S. House, 107th Congress, 2nd Session, Conference Report on H.R. 4546, *Bob Stump National Defense Authorization Act for Fiscal Year 2003*, November 12, 2002, section 1403.

³⁷ Army light infantry, airborne, and air assault brigades typically have between approximately 3,200 and 3,500 soldiers. For details, see Federation of American Scientists, Military Analysis Network, “U.S. Army Table of Organization and Equipment,” available at: <http://www.fas.org/man/dod-101/army/unit/toe/index.html>.

capabilities should arguably be tailored to deal with homeland terrorist events that overwhelm State and local capabilities.

Although fully understanding the principle and the importance of forward defense, the Gilmore Commission believes that military organizations should be established, trained, and dedicated to homeland defense *and* civil support missions if the *National Security Strategy of the United States of America* is to be meaningful—that “our military’s highest priority is to defend the United States.” Its belief is premised upon the fact that the territory of the United States is now a battlefield in the war on terrorism. It has, therefore, recently recommended

That the Combatant Commander, NORTHCOM, have dedicated, rapid-reaction units with a wide range of response capabilities such as an ability to support implementation of a quarantine, support crowd control activities, provide CBRNE detection and decontamination, provide emergency medical response, perform engineering, and provide communication support to and among the leadership of civil authorities in the event of a terrorist attack

If NORTHCOM’s Combatant Commander establishes the requirement, force “designers” and force providers should consider, in coordination with the States and local organizations, a mix of existing or specifically tailored rapid-reaction forces to meet civil support missions. Once designated, these rapid reaction forces should be under NORTHCOM’s operational command. They could include forces (Active, National Guard, and Reserve) representing a full range of joint capabilities, such as military police, command and control, medical, engineering, CBRNE detection/decontamination, and liaison elements.

Improving the National Guard’s Role

The National Guard’s future role in homeland security activities has moved to the forefront of the debate on military support options. The Guard’s history of service within the United States extends to its founding as a colonial militia during the Revolutionary War era. More recently its role in supporting the active force increased continuously during the Cold War and today is manifested in

increasing numbers of deployments throughout the world, including long-term commitments in Bosnia and Kosovo.

In preparing to confront terrorists, the United States and its individual States must resolve difficult issues about the role of the States and the Federal government in protecting citizens. The National Guard's potential contribution to combating terrorism is an important dimension of the assessment of appropriate State and Federal roles because the National Guard is "dual missioned": it can serve directly both the State governor and the citizens of the State, as well as the President.

In the event of a natural or manmade disaster, demand for National Guard support can escalate along a continuum that begins with a governor's call up of Guard personnel in *state active duty* (SAD) status and moves through a call to Federal service. Guard personnel in SAD status are controlled by their governor, typically compensated by their State, and perform their tasks—including assistance to law enforcement—in accordance with State statutes. If a governor believes the Guard is performing missions in support of Federal agencies, he can request moving Guard personnel to U. S. Code Title 32 status, which provides for continued State control but with Federal funding for the mission. National Guard forces in Title 32 duty status can, in accordance with State statutes, support civil law enforcement in operations to deter terrorist activities and prevent attacks.³⁸ The National Guard can operate in a third status when the President decides it is necessary to assume control of military support activities and activates the Guard in any State for Federal active duty under USC Title 10. Such a move extends to Guard personnel Federal pay and benefits, permits Title 10 officers to command mobilized National Guard forces, and permits the President to order federalized guard units to move between States (or out of the country) as part of any national response effort.

³⁸ As we note in our *Third Report*, "statutes and regulation in certain states . . . prohibit the use of the Guard for law enforcement activities." States can restrict the law enforcement activities of National Guard forces operating in state active duty or Title 32 status. See *Third Report*, p. 52.

Each of these legal authorities has strengths and weaknesses in relation to homeland security operations. States may have difficulty funding homeland security training and operations of the Guard in SAD status, especially if their missions are conducted for extended periods. Commanders are not clearly authorized under Title 32 to expend Federal funds for training for civil support tasks.³⁹ Guard personnel deployed in Title 32 status for national missions (e.g., to assist in border security operations) may therefore have varying levels of training and proficiency in their assigned tasks. Under Title 32, moreover, individual States can establish procedures and rules of engagement for Guard missions, potentially resulting in no comprehensive standards covering the activities of Guard personnel supporting a national mission. Military officers in Title 32 status cannot command Title 10 forces, which limits their ability to direct available Federal resources. For those and other reasons, the Gilmore Commission recently recommended

That the Congress expressly authorize the Secretary of Defense to provide funds to the governor of a State when such funds are requested for civil support planning, training, exercising and operations by National Guard personnel acting in Title 32 duty status and that the Secretary of Defense collaborate with State governors to develop agreed lists of National Guard civil support activities for which the Defense Department will provide funds

As the United States grapples with the role of the National Guard in homeland security missions, a fundamental issue that must be addressed is the degree to which past practices and informal and formal relationships (such as State emergency assistance compacts) will be effective in an environment in which our Nation, our cities, and our communities will potentially become the

³⁹ Several National Guard officers interviewed by RAND staff expressed the opinion that Title 32 was developed primarily for Guardsmen to train for warfighting missions and that Title 32 does not clearly authorize National Guard military support to civil authorities. The Adjutant General of Washington State, Maj. Gen. Timothy Lowenberg, expressed the view that this lack of clarity acts as a deterrent to commanders who wish to train their Guardsmen for civil support operations. Commanders might face criminal penalties under the 1906 Anti-Deficiency Act (31 USC, Section 1341) if they expend on civil support training funds appropriated by Congress to support training for warfighting missions. Indeed, the Congress had to expressly authorize the Guard's conduct of counterdrug missions while in Title 32 duty status to assure commanders that such missions would not risk a violation of the Anti-Deficiency Act. To review the legislation on National Guard counterdrug activities, see U.S. House of Representatives, Committee on Armed Services, 104th Congress, 2nd Session, *National Defense Authorization Act for Fiscal Year 1996*, House Conference Report, H. Rpt. 104-450, available at <ftp://ftp.loc.gov/pub/thomas/cp104/hr450.txt>.

battlefield. Can effective response to the war on terrorism and major CBRNE incidents within our borders be met within the current structure, practices, and command and control arrangements?

What is the appropriate balance between the responsibilities of State governors and Federal authorities? What is the most appropriate and acceptable concept to support unity of effort in local, State, and Federal response to such incidents as well as extremely grave national disasters? And, what is the appropriate relationship between NORTHCOM and the National Guard?

The National Guard's experience in responding to the September 2001 terrorist attacks illustrates some of the challenges associated with its dual State-Federal mission. The magnitude of the attacks compelled an immediate national response. New border and airport security measures were required. The President wanted a coordinated national effort; the National Guard offered organized military forces that could perform these missions.

For airport security augmentation, the President requested that governors stand up the Guard in the several States to perform the mission. The President could have mobilized the Guard for this national mission under his Title 10 authorities. Instead, he called them to duty under Title 32. Maintaining the Guard in this status allowed State units to deploy to airports within roughly one week of the order. States maintained control of their Guard resources and had greater flexibility to meet airport and other security requirements. The governors also had greater flexibility to rotate Guard personnel in and out of duty status to deal with family, business, or employment issues. Governors and Guard commanders had greater flexibility in tailoring missions, drawing from multiple units within a State rather than having total units activated under Title 10, thus placing all personnel in such units on full time duty status. Importantly, the 9,100 National Guard personnel manning airports performed their duties in accordance with State laws, policies, and rules of engagement. This led to significant variation in the Guards' activities in airports across the Nation.⁴⁰

⁴⁰ George Cahlink, "Identity Crisis: The National Guard Is Torn Between Two Missions," *Government Executive*, September 2002.

Indeed, the varied approach among the States suggests that other processes may be required and surely would be more effective.

Deploying the Guard for border security operations posed different challenges. In this case, President Bush approved 1,600 National Guard for duty in Title 10 status. The governors initially opposed the President's decision to federalize the Guard,⁴¹ but it was decided that the border security operation was a Federal not a State mission and the Guard had no law enforcement duties to perform. Even so, the Posse Comitatus Act undermined the Guard's utility as a Title 10 force in this mission. The Defense Department determined that Guard personnel carrying weapons within U.S. territory could only use them in self defense.⁴² Most personnel went unarmed and carried out their tasks under the protection of armed Customs and INS agents. Finally, in a complex intergovernmental and Federal interagency policy and decisionmaking process involving the States, the Defense Department, INS, Customs, and the Border Patrol, it took approximately six months to complete deployment of Title 10 Guard personnel for border security.⁴³

The examples cited with the Federal, State, and city response to the September 11 terrorist operations in New York and at the Pentagon suggest the challenges all entities had in responding effectively to both the incidents as well as the pending threats. Since then, we have all learned of the pervasive and growing threat we face and, as the President states, the long-term nature of the war on terrorism. The *problem* we face is to determine the optimum way to employ all assets to protect the people of the United States and to respond effectively, efficiently, and decisively for consequence management in those cases when deterrence fails. Should the United States establish more formal association among the States so that the National Guard, and other committed assets, can be optimally trained, exercised, and sustained to meet future disasters in a national effort, covering

⁴¹ The governors' concerns are cited in, Adjutants General Association of the United States, Letter to the Governors and Legislators of the Several States, Territories and the District of Columbia and to the Congress and the President of the United States, February 25, 2002, p. 4.

⁴² Cahlink, "Identity Crisis."

⁴³ Cahlink, "Identity Crisis."

multi-State regions, but where National Guard assets remain under the control of State governors? As noted earlier, Guard units and personnel deployed in Title 32 status under the control of State governors offer great advantage to the Nation and to the Guard and its individual personnel.

An enhanced Federal-State partnership is required to support the National Guard operating in the homeland and assisting civil authorities. Experience indicates that State and Federal leaders must have options for Federal-State arrangements beyond those currently permitted in Title 32 and Title 10. Any new arrangement should permit federally-funded, multi-State activities by Title 32 Guard personnel operating under the control of State governors and with agreed Federal-State coordination mechanisms. In developing an enhanced partnership, a key objective must be to ensure that National Guard units can effectively respond to incidents of *national* significance and do so under *State* control, thus reducing the likelihood that such units will be federalized under Title 10, with all the associated disruptions and complexities such an action entails.

A Federal-State arrangement meeting these general requirements could be developed based on new Title 32 authorities and by building on the concept of existing multi-State assistance compacts that employ Guard resources. In this regard, the President should establish with the governors of the several States a process by which the States will deploy National Guard forces in Title 32 status to support national missions. This arrangement should include mechanisms for collaborative mission planning and execution in accordance with agreed-on standards. Such an arrangement will ensure an efficient deployment process and increased uniformity of operations by Title 32 Guard personnel.

Many States have participated in a long-standing mutual aid agreement: the Interstate Civil Defense and Disaster Compact. In addition, forty-eight States and two territories have joined a congressionally-approved Emergency Management Assistance Compact (EMAC)⁴⁴ and other

arrangements that permit them to provide State National Guard assets to neighboring States to deal with an emergency. However, existing compacts typically have certain limitations, which are important in the homeland security context. These compacts are designed primarily for responding to more localized events (e.g., natural disasters), as opposed to national, all-hazards incidents. States are responsible for providing funds to train their National Guard in civil support tasks. The compacts can require the State requesting assistance to fund any National Guard response effort, and they do not uniformly ensure that units from outside States will have specialized or equivalent training. Finally, Guard units deployed outside their States under the terms of the EMAC are not permitted to engage in law enforcement tasks⁴⁵ and require additional State or Federal authorization to use military force for any activity that is prohibited by the Federal Posse Comitatus Act.

Given the long-term threat environment, the States' existing National Guard military support arrangements must be enhanced to provide for more effective response capabilities in Title 32 duty status. A new construct must also include an improved Federal-State interface for military operations. To achieve these objectives a *regionally* organized system for providing National Guard military assistance to civil authorities should be developed. Such a system could be aligned with the 10 FEMA regions. If this were done, all assets within such regions could train, exercise, and coordinate response activities under the regional system's auspices, more broadly under NORTHCOM's leadership, or under both. A memorandum of understanding (MOU) providing key details on an improved National Guard response system could be developed by Federal and State participants. Through the MOU (or some other instrument) the governors in each region could, for instance, delegate operational control of their Guard forces—or any other agreed level of control—to a

⁴⁴ The EMAC is codified in Federal law. Participating States and territories duplicate the Federal law in their own implementing legislation. To review the public law, see U.S. House, 104th Congress, 2nd Session, Public Law 104-321, *Granting the Consent of Congress to the Emergency Management Assistance Compact*, available at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_cong_public_laws&docid=f:publ321.104.pdf.

⁴⁵ This is the opinion of John G. Hathaway, Acting Deputy Assistant Secretary of Defense for Military Assistance to Civil Authorities. John G. Hathaway, email communication to Panelist William Reno, November 18, 2002.

regional Guard commander, or the Adjutant General of the affected State, for crisis response activities.⁴⁶

A regionally organized National Guard response system would, like most existing emergency assistance compacts, be voluntary. The arrangement would be a “coalition of the willing”: the system’s founding MOU could stipulate that any governor may forgo participation in an individual response operation.

The States would have numerous incentives to participate in a regionally organized system for National Guard military support. Increased Federal funding could be committed for a previously agreed-on list of civil support missions and for regionally-organized training and exercises. The efficient and effective delivery of Guard resources during an emergency could enable States to manage even large-scale incidents while maintaining control of their Guard personnel. Finally, to bring specialized or additional military resources to bear, coordination arrangements could be established between DoD and the leadership of the National Guard’s regional response system. These arrangements would also establish mechanisms for coordinated Federal-State-local planning, training, exercises, and operations activities by participating organizations, including such other Federal entities as the Federal Emergency Management Agency. For all of these reasons, the Gilmore Commission made several recommendations in its recent Fourth Report:

That the President and governors of the several States establish a collaborative process for deploying National Guard forces in Title 32 duty status to support missions of national significance at the President’s request

That the Congress provide new authority under Title 32 to employ the National Guard (in non-Title 10 status) on a multi-State basis, and with governors’ consent to conduct homeland security missions, and that the Secretary of Defense define clearly the appropriate command relationships between DoD and the National Guard

⁴⁶ A Federal-State arrangement exhibiting many of the characteristics recommended here has already been established for bringing military resources to bear for fire fighting. Under this arrangement, 13 States have signed an MOU with the Secretary of the Air Force to provide for a mixed force of Title 10 and Title 32 assets in support of State fire-fighting operations. Brig Gen John E. Iffland, Commander, 146th Airlift Wing, Air National Guard, presentation 14 November 2002, at the RAND Corporation, Arlington, Virginia.

That Congress and DoD promote and support the development of a system for National Guard civil support activities that can deploy forces regionally--in coordination with DoD--to respond to incidents that overwhelm the resources of an individual State

In its *Third Report*, the Gilmore Commission recommended

That the Secretary of Defense direct specific mission areas for the use of the National Guard for providing support to civil authorities for combating terrorism.

In coordination with State governors, assess National Guard force structure, define appropriate roles and missions, and establish units with specific capabilities for homeland security missions.

Increase the percentage of full-time personnel in Guard units designated for homeland security missions and ensure that pay and benefits parallel those of active-duty service members.

Direct which National Guard units will be assigned homeland security missions as their primary missions with combat missions outside the United States as secondary missions and provide resources consistent with the designated priority of their homeland missions.

Direct that National Guard units with priority homeland security missions plan, train, and exercise with State and local agencies.”

In its latest report, it reaffirmed those recommendations but with one exception. Given the lessons learned during and after September 2001 and considering all the current circumstances and requirements, it felt that further enhancement of the National Guard’s civil support capability and responsibility is necessary. It therefore expanded the recommendation on roles and missions as follows:

That the Secretary of Defense direct that certain National Guard units be trained for and assigned homeland security missions as their *exclusive* missions (rather than primary missions as stated in the *Third Report*) and provide resources consistent with the designated priority of their homeland missions

Some may suggest that organizing National Guard units with “exclusive” homeland security missions could mean that those units will be moved under the Department of Homeland Security. Such a move is not only unlikely, it would not be prudent or consistent with the Constitutional underpinnings or historical precedents for use of the military generally and for the National Guard

specifically. The Gilmore Commission recommended a structure for using the Guard for “national” missions in a Title 32 status and for establishing certain Guard units with exclusive homeland missions—mutual goals. Nevertheless, the President could find it necessary, because of the magnitude of an attack or other circumstances, to bring National Guard units into a Title 10 status to serve with other Title 10 active and reserve forces under Federal command. For such a contingency, all National Guard forces, including those with exclusive homeland security missions, will need to continue to be trained and equipped through the Department of Defense.

Moreover, the governors of the several States should be consulted on the best possible structure and method to implement all of these recommendations that pertain to the National Guard.

To what extent do homeland defense and civil support missions affect military operations and personnel tempo?

While the military participates in numerous missions to support civil authorities each year, the Department of Defense does not consider this support as its primary mission: Warfighting is the Department’s primary mission and takes priority unless the Secretary of Defense directs otherwise.⁴⁷ Therefore, with the exception of a limited number of specially-trained units (e.g., the National Guard’s Weapons of Mass Destruction Civil Support Teams (WMDCSTs), the forces DoD provides to support civil authorities are primarily trained to perform their warfighting missions. In addition, these forces may not always be available. While demand for military civil support operations may increase in the future, so might the military’s warfighting commitments increase (e.g., for the global war on terrorism or the war in Iraq⁴⁸).

⁴⁷ An analysis of the Defense Department’s combating terrorism directives has determined that “the military’s non-MSCA [military support to civil authorities] operations take priority, unless the Secretary of Defense determines otherwise.” This guidance on civil support is provided in Department of Defense Directive 3025.1, at A.2.-6. The analysis is presented in Barry Kellman, *Managing Terrorism’s Consequences: Legal Issues* (Oklahoma City: Oklahoma City National Memorial Institute for the Prevention of Terrorism, March 2002), chap. 2, p. 14.

⁴⁸ According to an official in the office of the Defense Department’s Director of Military Support, a large-scale conflict abroad, like the recent Iraq example, could significantly reduce the military resources available for civil support operations in the U.S. homeland. COL Ricki L. Sullivan, Chief, Military Support Division, Department of the Army, RAND staff interview, the Pentagon, Arlington, Virginia, November 7, 2002.

Therefore, it is important to consider what homeland security capabilities we are counting on DoD to provide, whether it is the most appropriate provider of those capabilities, and how to handle simultaneous demand for overseas warfighting and homeland security missions.

Reviewing the historical support that the military has provided to civil authorities can provide guidance about the kinds of support and level of effort that the military may be called upon to provide in the future to respond to terror attacks. After the Oklahoma City bombing, the U.S. military deployed about 800 active and reserve personnel (Title 10), while the Oklahoma National Guard provided 465.⁴⁹ The military support provided included medical and rescue teams, structural experts, and air and ground transportation. After the September 11 attacks, DoD provided 657 active duty personnel to support response operations at the Pentagon and the World Trade Center. DoD support deployed to the Pentagon included a defense coordinating element, logistics support, and engineers. Most of the active duty military support at the World Trade Center came from the 387 personnel manning the hospital ship *Comfort*, but it also included a defense coordinating element, a medical mobilization center, logistics support (airlift), and subject matter experts on demolitions and remote sensing operations.⁵⁰ The National Guard provided the lion's share of the military forces responding to the crisis in New York City. At their peak, a total of 5,070 New York and 1,006 New Jersey National Guardsman were committed to the effort.⁵¹

Given its size, nationwide disposition, and inherent capabilities, the Army, including the Army National Guard, can be expected to provide most of the military support in the event of future attacks with CBRN weapons. The Army's potential level of effort for such incidents has

⁴⁹ "After Action Report for Oklahoma Bombing Incident of 19 Apr 95," completed by the Fifth U.S. Army and Fort Sam Houston, August 17, 1995.

⁵⁰ Department of the Army, Office of the Director of Military Support, information paper, "DOD Support to the Events of and Subsequent to Sept 11th 2001," Undated.

⁵¹ Office of the Director of Military Support, information paper, "DOD Support."

been estimated by extrapolating from past support operations. Using this approach, RAND estimates that an Army response could range from approximately 4,000 soldiers for a small biological or radiological attack, to more than 20,000 to respond to a large-scale anthrax attack in which more than 15,000 people have been exposed.⁵²

It is important to distinguish military support to civil authorities from certain responses to attacks on or inside the homeland that may be exclusively or at least primarily military missions—homeland defense. The attacks of September 11 of last year are instructive. After the two hijacked airliners crashed into the Trade Center towers and a third crashed into the Pentagon, it was quickly discovered that a fourth had also been hijacked and had turned toward the Nation’s Capital. We now know that, but for the courageous and heroic intervention of some of our fellow citizens, United Airlines Flight 93 may have been shot down by Air Force fighters launched to intercept it. We should all now acknowledge that, for certain actions by terrorists that may rise to the level of an “invasion”—from the air, from the sea, and potentially even from land external to the United States—the military may have to take the lead in responding. In certain circumstances, no other agency of government, at any level, will likely have the capability to respond to such attacks. That concept is firmly embedded in the formation of the new U.S. Northern Command. It is also (as noted earlier) not only authorized by the Constitution and other statutory authority, it rises to the level of one of the most basic Constitutional obligations of the Federal government. Such missions, therefore, will *become* normal military operations and personnel tempo.

⁵² Richard Brennan, “U.S. Army Finds Its Role at Home Up for Grabs,” *Rand Review*, Vol. 26, No. 2, Summer 2002 (Santa Monica: RAND, 2002), p. 47; and Eric V. Larson and John E. Peters, *Preparing the U.S. Army for Homeland Security: Concepts, Issues, and Options* (Santa Monica: RAND, 2001), p. 167.

Conclusion

Mr. Chairman and Members, again my thanks for inviting me to participate in this important hearing.