Catastrophic Terrorism: Imminent Threat, Uncertain Response

McCormick Tribune Foundation
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Cantigny Conference Series
Conference Report

Catastrophic Terrorism: Imminent Threat, Uncertain Response

Cantigny Conference Report
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Foreword

Terrorist attacks resulting in mass casualties may soon become the instrument of choice for assaulting the United States and its values. Soft, nonmilitary targets, with their great potential for lethality, make such attacks a tempting option for those determined to shake public confidence, force a change in policy, or merely wreak havoc on American society.

The danger from both groups and individuals is significant and growing. The demise of the Soviet Union and the nearly universal rejection of communism leave the Western, democratic-capitalist value system as the dominant organizing idea for modern society. But many foreign and domestic forces remain hostile to the United States and to this ideology. The most recent catastrophic terrorist event in the United States, the April 19, 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City, was committed by a self-described domestic patriot.

New ways of combating terrorism are on the public agenda. As of this writing, Vice President Dick Cheney is overseeing the development of a plan to respond to domestic terrorist attacks. The Federal Emergency Management Authority (FEMA) is establishing an Office of National Preparedness to coordinate federal programs and assist local governments in responding to these growing threats.

The importance of both public and expert understanding of these terrorist threats and our possible responses cannot be overstated. Of particular importance is the degree to which the legal authorities support necessary antiterrorist actions without unduly compromising the freedoms that are at the heart of American democracy. Without a proper understanding of the issues and their importance, experts and policymakers cannot devise the most effective response to combat a genuine menace, and the public will be in a poor position to judge their policies.

On June 22-23, 2000, the Robert R. McCormick Tribune Foundation and the Standing Committee on Law and National Security of the American Bar Association sponsored a conference on catastrophic terrorism. The conference was part of the foundation’s Cantigny Conference Series, which provides an intellectual forum for frank discussions of issues important to the nation. This publication includes the panel presentations and discussions from the two-day gathering.

The conference brought together a number of experts on this subject to analyze whether America’s legal framework is up to the challenges posed by catastrophic terrorist attacks. In the event of such an attack, the pressures for decisive action from the public and Congress will be great, but not all possible actions would be effective, wise, or constitutional.

The conference was on the record, with the opinions expressed being those of the speakers and not necessarily of the organizations with which they are affiliated.
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Conference convener Suzanne Spaulding, executive director of the National Commission on Terrorism, welcomed participants and set the terms of reference. The primary focus of the conference was to analyze whether America's legal framework is up to the challenges posed by the prospect of a catastrophic terrorist event. She asked the panelists and participants to consider three time frames: preattack, during the crisis itself, and postattack. At issue are whether the statutory authorities are adequate and how they and other authorities will be applied and interpreted.

Keynote Address

John Hamre, president of the Center for Strategic and International Studies, presented the keynote address. He argued that the central issue is not national security: "The real concern is preserving American democracy in the wake of a catastrophic terrorist incident." Citing the violations of civil liberties in the wake of the Pearl Harbor attack, he noted, "The natural reaction in this country is to reach out and try to create a sense of stability in the face of so much uncertainty." It is of paramount importance to be prepared ahead of time. "The greatest threat to civil liberties in this country is going to be if we do nothing to get ready. And then the only option for the catastrophic terrorist event is defined as any attack using chemical, biological, radiological, or nuclear materials, or a conventional attack causing mass casualties (more than 1000).

President is martial law, the Insurrection Act, or—even worse—simply to suspend due process under his supreme constitutional authority as commander-in-chief," he said.

Hamre identified three impediments to problem solving in this area. First, at a time when society is increasingly open, governmental legal authorities are based on physical borders.

Second, the distribution of authorities and resources in the federal system is quite uneven. For example, health authorities exist mainly at the state and local level, and they vary in their authority to deal with catastrophic terrorism. Therefore, the need for realistic exercises to work through problems is imperative. It is not a good idea to be surprised by problems in mid-crisis, particularly if they could have been worked out beforehand.

Third, there is a profound tension between the two governmental imperatives of peacetime efficiency and crisis preparedness. Budget cutbacks streamline government agencies for day-to-day activities, but reduce their ability to deal with large crises. The genuine need for efficiency is pushing government, like industry, toward "just-in-time" everything. In fact, only the Department of Defense (DOD) has the required depth and mobilizable resources to augment itself significantly in a crisis.

Another example of the tension between "normal" and "crisis" government operations is the requirement of due process versus the perceived needs in a crisis. Hamre said, "There's a profound tension between the nature of American democracy, with its deeply grounded procedural ethic embodying the principles of the Constitution, and what you really need in an extreme emergency situation."

Hamre offered three recommendations to improve government response to catastrophic terrorism. First, high-level decisionmakers should be required to interact on this issue through realistic exercises.

Second, consider organizational change. What, for example,
should be the role of FEMA? The Department of Justice, including the FBI? The Department of Defense? Hamre prefers a low profile for DOD.

Third, develop an overall blueprint. “There’s not a clean, neat understanding of ‘here’s what the federal government does, here’s what state government does.’ Instead, we have a tangled web, and everyone does it just a little bit differently,” he said. Complicating the problem are the many “boutique” partial solutions offered, some of them politically driven.

Hamre closed with the thought that one of the strengths of democracy is that citizens themselves take an interest in understanding such problems and assist in their solution. “If you just say, ‘the government’s going to worry about this,’ it won’t get done. It’s going to come from the remarkable American institution of an intelligent and concerned citizenry that has a sense of civic responsibility.”

Threat Scenario

Conference participants reviewed a biological attack scenario developed by Gregory D. Koblentz of the John F. Kennedy School of Government at Harvard University as an example of catastrophic terrorism. The scenario moves through nine days in which information about a possible domestic biological attack accumulates from various sources around the world, culminating in indications of an attack of unknown dimensions on Day 9. (See Appendix A)

With that chilling background, discussion moved to possible antiterrorist actions. Philip B. Heymann of Harvard Law School illustrated the nature of the problem, presenting three categories of actions that could be taken, plus combinations of the three, for a total of seven:

1. Important steps to deal with terrorism
2. Steps with significant effects on civil liberties
3. Steps for which there would be public and political demand
4. Steps that are important but have significant effects on civil liberties
5. Steps that are important and for which there would be public and political demand
6. Steps that have significant effects on civil liberties and for which there would be public and political demand
7. Steps that are important, have significant effects on civil liberties, and for which there would be public and political demand

The best policy can only be determined by a delicate balancing act. Heymann suggested five questions to ask when determining a course of action:

1. What do we want to do in a catastrophic attack and would it be really helpful?
2. Can authorization for action be passed that would not violate provisions of the Constitution?
3. What is required for such authority to be appropriately enacted: a statute, an executive order, or court approval?
4. What are the costs in American freedoms that would result from using the new powers we are considering, and can we limit those costs by asking for less or making clear the extraordinary circumstances?
5. In light of these considerations, what do we propose?

In a crisis situation, it is likely that the American people—and their representatives—would shift their priorities, to some degree, away from civil liberties toward increased protection. Juliette Kayyem, of Harvard’s Kennedy School of Government, emphasized that in the event of a catastrophic attack, “The normal rules will not apply.” Referring to the biological terrorism scenario, she discussed
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the legal issues from two perspectives: problems with the current legal regime, and how we should think about the law in a future catastrophic terrorism event.

First, a catastrophic terrorist event does not fit neatly into any perfect doctrine of law, either the rules of war, the rules of crime, or the rules of natural cataclysmic events. It may in fact fit into all three doctrines. She took issue with the opinion, "What needs to get done will get done, and we'll make apologies and reparations later," preferring instead to plan ahead. Part of this preparation should include stockpiling legal authorities and thinking carefully about the balance between effectiveness, civil liberties, and getting something passed.

Second, many resources associated with catastrophic terrorism response are "dual use," such as medicine, equipment, and so forth. This is a bad idea for the law, in Kayyem's view. Counterterrorism laws should instead be single-use (or, better still, never used), due to the potential for misuse.

Public Health Considerations

Lisa Gordon-Hagerty, director for Weapons of Mass Destruction Preparedness, National Security Council, highlighted the importance of the local "first responders" to a domestic terrorist incident. The federal role would begin from two to eight hours after the attack, with the knowledge that no two metropolitan areas in the country are the same. The question is how best to use the equipment and resources available. Further complicating the equation is the fact that responses to chemical, biological, and radiological or nuclear incidents are quite different.

Tara O'Toole, of the Johns Hopkins Center for Biodefense Studies, made three points about the response system to biological terrorism. First, the health care system has very little surge capacity to deal with a catastrophic attack. Second, there is a problem of situational awareness, which is related to the flow of information across levels of government.

Third, the 21st century is the age of "big biology," just as the 20th century was an age of "big physics," meaning, "Every advance in biotechnology and genomics will create the potential for more potent and more diverse bioweapons," she said.

Gene Matthews, legal advisor for the Centers for Disease Control and Prevention (CDC), focused on the status of public health laws applying to bioterrorism. The chemical terrorism situation is well handled by the emergency preparedness laws. State laws must address three categories of events: access to records, control of property, and management of persons. Many of the laws on the books were written some 80 years ago and have not been used for the last 50 years or so. Not many people remember how to apply these police powers. Additionally, it is not clear how they would withstand the sort of judicial scrutiny applied since the Warren Court in matters of individual rights and due process. Health authorities need to understand that they are not primarily a service delivery organization, but a police power.

The Role of the Military

Michael Wermuth, senior policy analyst, RAND Corporation, raised the question of posse comitatus: the legal restrictions on using regular military forces in a law-enforcement role. He pointed out numerous statutory exceptions to posse comitatus, such as the insurrection statutes, Section 331 et seq. of Title 10 of the U.S. Code, "used to integrate the schools in the South and to respond to major
riots in U.S. cities.” He also noted that the U.S. military also supports local law enforcement in the fight against illegal drugs, based on Section 371 et seq. of Title 10 of the U.S. Code.

Rear Admiral Michael Lohr, deputy judge advocate general of the Navy, addressed the adequacy of the current legal framework for crisis response and for consequence management. Between the insurrection statutes and the president’s inherent constitutional authority, DOD has the authorities it needs to assist the lead federal agencies in a crisis. The department views itself in a supporting role, rather than as the lead federal agency. With respect to crisis response, the military has a number of helpful capabilities. These range from technical advice to the employment of military force. The posse comitatus rule applies unless “action is necessary for the immediate protection of human life, and civilian law enforcement is not capable of responding and dealing with that threat.”

The Defense Department can also be helpful in consequence management. DOD has a history of providing disaster relief assistance through the Federal Emergency Management Agency (FEMA), under the Stafford Act. Other authorities could also be invoked, including the insurrection statutes. The “rules of engagement” terminology has been discontinued in the context of domestic support operations in favor of the FBI’s “use of force” rules.

Former general counsel for the Defense Department Judith Miller said that the enormous capabilities of DOD virtually ensure they will be called upon to assume a major role in a terrorist response. A great deal of public goodwill could be lost if DOD is perceived as just another police force, and in any case the training is so different that switching in and out of the police role is difficult.

Stephen M. Duncan, president and chief executive officer of Southeastern Computer Consultants, Inc., emphasized the serious federal responsibilities in a catastrophic terrorist attack. The person responsible for coordinating that effort should be a senior civilian official, he said, perhaps even the vice president. He continued that interagency coordination will be a difficult task, and government bureaucracies do not willingly spend their resources on others’ priorities. In his view, there are enough laws on the books already, but clear and decisive leadership is essential. He believes that DOD is not well prepared for this mission. In the event of a major attack, he said, use of military forces in law enforcement will be more widely accepted.

Spaulding cautioned that DOD might well play a leading role under certain circumstances—even helping to enforce a quarantine—and should plan for what they are going to do. However, according to Kate Martin, director of the Center for National Security Studies, this kind of training would breed a significant amount of public suspicion and mistrust.

The danger in military law enforcement efforts was pointed out by Elizabeth Rindskopf Parker, general counsel of the University of Wisconsin System and chair of the American Bar Association Standing Committee on Law and National Security. She said, “Accidents and worse will inevitably happen,” due to the complex training required to do law enforcement and the degree to which the “rules of engagement” mentality necessarily dominates in the military. In addition, Robert P. Sullivan, city attorney for Portsmouth, New Hampshire, noted that there is a “significant dissenting group” who does not view the military positively and who monitor DOD domestic activities with great suspicion.

Law Enforcement Authorities

Robert M. Blitzer, of the Center for Counterterrorism Technology & Analysis, Science Applications International Corporation (SAIC),
said that the necessary legal authorities for counterterrorism law enforcement are on the books. There is sufficient authority to collect intelligence inside the United States, although there is necessarily a higher standard when dealing with U.S. persons. A separate set of domestic terrorism guidelines for the FBI field agents would be helpful, he suggested. There are 26 joint terrorism task forces located around the country, with state, local, and other federal agencies working with the FBI.

Sullivan shared his perceptions from a local level about the May 2000 “Top-Off” exercise, which simulated a chemical attack on his city, Portsmouth, New Hampshire, and a biological disaster in Denver, Colorado. He emphasized the role of local first responders, who necessarily will be first on the scene and may well be the best ones to handle the situation as time goes on. The tendency of federal law enforcement to step in and try to take over was not perceived as helpful. New criminal laws are not needed: “Every event that happened at Portsmouth, in addition to being a terrorist act, was also a violation of state law.”

Michelle Van Cleave, president, National Security Concepts, emphasized the larger domestic and international context of a catastrophic terrorism event. For example, during Operation Desert Storm, there was White House concern that Saddam Hussein might mount some kind of action within the United States. She agreed that current laws are sufficient, but “authority is not the same thing as ability,” and practice and training are necessary. “Emergency authorities exist, but can be interpreted in ways that will support most anything that needs to be done.” How these authorities would be interpreted in practice is the issue, and it may be time to consider updating them.

Kate Martin warned that certain changes under the Foreign Intelligence Surveillance Act have made the system less transparent, and it is harder to convince outsiders that authorities are being exercised in a constitutional manner. Secrecy erodes the trust and confidence of various U.S. ethnic and racial communities, she concluded.

Elizabeth Rindskopf Parker noted the role of intelligence is “to preempt, to anticipate, to prevent the problems of coordination that we have so graphically discussed.” How can we then preempt such actions so such problems of coordination do not arise?

Stuart Baker, of Steptoe & Johnson, began with the issue of cyberterrorism, which he believes for the foreseeable future “is a weapon of mass annoyance, not a weapon of mass destruction.” There are limitations on contacts between the FBI and the White House. For example, the Justice Department will not permit a White House briefing by the FBI on a criminal investigation unless the deputy attorney general reviews the contents of the briefing in advance. “It's hard to imagine that working well in a crisis.” He continued, “There is sufficient authority to collect intelligence against foreign nationals, but executive orders, in particular, limit what the National Security Agency (NSA) does against U.S. persons. In a major crisis, these restrictions are likely to be lowered. One problem is the anonymity of the Internet, as “anonymity is not generally consistent with ordered liberty.”

Richard Shiffrin, deputy general counsel for intelligence, Office of the General Council, Department of Defense, emphasized the “extraordinary capabilities” of the intelligence community. He pointed out some limitations, however:

- The nature of the threat is changing.
- Technological changes such as fiber-optic communications and strong encryption complicate intelligence gathering.
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- Finite resources require setting priorities.
- There are necessarily policy limitations due to the very intrusive nature of intelligence operations.
- There are legal restraints, although they are not unwarranted and they do not "in any way stymie our ability to do an effective job."

Eugene Bowman, associate general counsel of the FBI, noted the dramatic increase in the number of terrorist threats in the United States, especially in the last two years. To do its job effectively, he argued, the Bureau needs continued public support, and the attorney general's guidelines set useful limits on how things are done—particularly in view of the increasing threat and necessarily more intrusive nature of FBI activities. He observed that intelligence information is now coming to law enforcement for criminal as well as intelligence purposes, forcing officials to reevaluate how it is used. In addition, technological change is so rapid that new equipment has a shelf life of about 90 days and it is often necessary to gain physical access to a computer to decrypt messages.

Concluding Observations

Conference participants agreed on the following:
- The threat of catastrophic terrorism is real, and officials need to plan for an immediate, effective response.
- Certain conceivable actions could pose a threat to civil liberties.
- The legal community must take the lead in ensuring that the right balance is struck between effectiveness and civil liberties.
- Public officials are genuinely concerned about civil liberties.

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- Legal authorities appear, on the whole, to be adequate.
- The public health community needs to work more closely with the health delivery community.
- Coordination and training are critical imperatives.

There are also a number of uncertainties in the event of a catastrophic terrorist attack, including:
- The nature and severity of the attack
- The actual and perceived effectiveness of the governmental response
- The appropriateness of state and federal legal authorities
- Public response to the attack
- The effect on civil liberties of the attack and its aftermath
- The long-term political implications of the attack

David L. Grange, executive vice president and chief operating officer of the McCormick Tribune Foundation, closed the conference with thanks to the participants for their outstanding contributions. His own experiences in Delta Force and as director of military support in the Department of the Army made him aware of the importance of the subject matter of this conference and he hoped the efforts of the participants will lead to greater public understanding of this important issue.
Chapter 1: Keynote Address

John Hamre, President
Center for Strategic and International Studies

Dr. John Hamre opened his remarks by observing that national security is not the most important issue to consider when talking about catastrophic terrorism and its aftermath. The real concern is preserving American democracy in the wake of a catastrophic terrorist incident. Citing the response to the Pearl Harbor attack, he noted, “Within four months, we had locked up 120,000 people—many of them American citizens. The natural reaction in this country is to reach out and try to create a sense of stability in the face of so much uncertainty.”

This highlights the importance of preparedness in advance of a crisis. “The greatest threat to civil liberties in this country is going to be if we do nothing to get ready. And then the only option for the president is martial law, the Insurrection Act, or—even worse—simply to suspend due process under his supreme constitutional authority as commander-in-chief.”

Impediments to Problem Solving

Hamre suggested three impediments to problem solving in this area. First, we rely too much on physical borders for security. At a time in which society is increasingly open and porous, government legal authorities remain based on physical borders. “We organize our thinking of power in terms of territorial dimensions. We still have the notion of security grounded in physical dimensions, physical borders. When you think about it, how do you intercept a 50-pound device that is coming into the United States someplace in the next three days? As one high-ranking State Department official rather indelicately said, ‘The best way to smuggle anthrax into the United States is to put it in a bale of marijuana.’”

Hamre continued, “The reality is that we are a porous, dynamic, and open society, and business has become interconnected—and we still have a government with all its legal authorities grounded in physical borders. I really think that the future of customs is about process, not borders. You need to use your intelligence to find potentially suspect transactions. The old notion that you’re somehow going to catch things moving across the border is naïve.”

A second problem is the uneven nature of federalism, making it hard to deal with easily foreseeable problems. “There are surprisingly few legal health authorities at the federal level. They are almost all at the state and local level. There are no quarantine authorities at the federal level. What is the legal basis for ordering a local commander, for example, to start trench burial for radioactive corpses? We’re going to have to think this through,” said Hamre.

While there is a better federal presence in law enforcement, communications, and transportation, states vary in their authorities on the books to deal with catastrophic terrorism. “Some states have a fairly robust set of authorities on the books and others don’t—side by side. And there is a vacuum at the federal level.”

Third, there are inevitable tensions between the two governmental imperatives of peacetime efficiency and crisis preparedness. For the former, “just-in-time” planning is more economical, but there is a lack of surge capacity. “Your government is moving, just like industry, toward ‘just-in-time anything.’ We are cutting back anything that was excess.” For the latter, excess capacity is crucial, but
“we just don’t have the depth or the resources any longer to have lots of redundant capacity—even in police and fire departments. There is only one part of the federal government that has mobilizable resources: the Defense Department—the only organization designed to be qualitatively different the day after, as compared to the day before, and to put things in the field,” said Hamre.

An additional issue for DOD participation is the political consequences, including the paranoia of certain groups. “As soon as you start raising the issue of DOD in this context, all of a sudden those people who have watched The Siege too many times say the DOD wants to take over America. We have enough to do already—we don’t need to take over America. It’s fearful for the Defense Department to be put in that position.”

A more subtle political issue, however, is the loss of public confidence when things go wrong. “The most frightening event for me in the years I was in DOD was when the four Marines shot that young man on the southwest border. You don’t ever want to be in a situation where an American kills another American. And yet that mission was pushing us into that. We weren’t attentive enough to realize that we had gotten into a very dangerous situation for the institution and for the confidence the American people would have in us. We need to work through this sort of thing well in advance, with a lot of planning, preparation, and exercises. If we try to make it up when we confront it, it will be too late,” Hamre said.

**Recommendations**

Hamre offered three recommendations for conference attendees to consider. First, we should require periodic exercises to force interaction among high-level decisionmakers and enable them to work through problems ahead of time. He suggested, “At least once a year, every senior government manager who has some responsibility in this area should have to go through some process of exercising himself or herself to confront this realistically. The most important reason for this kind of senior level, integrated government exercise is to force the bureaucracy to talk to each other and work through problems.”

For example, should the National Guard be federalized in a particular crisis? Training exercises force decisionmakers to think about the effect this would have on posse comitatus. The use of federalized troops in a law enforcement role is restricted in ways not applicable to National Guard forces in their state capacity. In addition, what is the effect of federalizing the troops on their relationship with the state agencies whose assistance is also vital in mitigating the effects of a crisis? The point is not to suggest that the National Guard should or should not be federalized, only to say that officials need to think about such questions in advance so they are not surprised by unforeseen problems in mid-crisis.

Second, Hamre suggested that conference participants consider organizational change. The nature of White House decision-making does not encourage clear and systematic thinking on the catastrophic terrorism issue. “In the White House there are two hot water circuits; everybody else is on the cold water circuit. On the hot water circuit are the National Security Council and the Office of Management and Budget (OMB). If you’re there on the OMB circuit, you’re there to protect your money; you’re not coming in to cooperate. And if you’re coming in under NSC, the problem is that a crisis may arise somewhere and you’re off the charts for the next
three weeks. There is an organizational problem.

There are a number of federal agencies involved in this issue. What should be the role of the Federal Emergency Management Agency (FEMA)? The Department of Justice? The Defense Department? FEMA is well prepared for natural disasters, but not well enough prepared for catastrophic terrorism. "What we have is a profound problem where Washington is looking out to the countryside through the Department of Justice, and the countryside is looking back to Washington through FEMA, and we aren't seeing each other. This isn't working in the long run, and we've got to tackle that," said Hamre.

The DOD prefers a low profile for the reasons noted above. "Recommendations to involve DOD become a lightning rod for the left and the right; it becomes a radioactive recommendation, and the debate becomes politicized. I think we've got it about right at DOD: good enough to be able to do realistic work and low enough below the political threshold so we don't get shot every time we walk around town."

The two aspects of the problem require different capabilities, depending on whether you are concerned about prevention or consequence management, Hamre continued. "The skill sets to do these things are so radically different you can't put them in the same organization. For example, you can't ask special forces ('snake eaters') to do consequence management. These guys don't talk to anyone else anyway. They don't want to do anything public. They want to swoop around in their little vehicles, and get in and get out, and there are so few of them. That isn't the skill set you need when you've got 100,000 people that you need to move into another state."

Third, Hamre suggests that we develop an overall blueprint. "There's not a clean, neat understanding of 'here's what the federal government does, here's what state government does.' Instead, we have a tangled web, and everyone does it just a little bit differently."

We need to sort that out. There is no good topographical map for how the government is going to behave when this happens. We could use that."

There are many "boutique" solutions out there, some driven by politics rather than effectiveness. Hamre noted that his Center for Strategic and International Studies (CSIS) has a study on homeland defense underway now to develop an overall picture of the problem and arrive at a preliminary estimate of the issues.

Hamre remarked in closing that we cannot leave such problems to government alone. The importance of an informed citizenry as an active participant in problem solving cannot be overstated. "If you just say, 'the government's going to worry about this,' it won't get done. It's going to come from the remarkable American institution of an intelligent and concerned citizenry that has a sense of civic responsibility."

Discussion

Several issues came up in the discussion session following Hamre's address. He pointed out that there is a tension between the American procedural ethic (e.g., due process) and the needs of a crisis. "So much in government is about due process—taking the time, hearing people out, setting up mechanisms to arbitrate contending interests—exactly the sort of things you can't afford and don't have time for when you have a crisis. So there's a profound tension, it seems to me, between the nature of American democracy, with its deeply grounded procedural ethic embodying the principles of the Constitution, and what you really need in an extreme emergency situation."

Also, he said, there is a need for resources for contingency planning. "One of the real problems we've experienced when we go
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out to train emergency responders (as we have done for about four years) is that you can have a wonderful retreat for two weeks, but you go back a year later and no one has carried on a training program, no one has done contingency planning, and no one has done mobilization planning because they just don’t have the resources.”

Further, Hamre said, the government must use the media to communicate effectively with the populace in a crisis. “One of the key questions for how the government interacts with its society is how it’s able to use the media—not spin the media, but use the media to communicate, reassure, and communicate effective instructions. The government has to act and reassure a frightened public. But it’s got to do it in ways that don’t make it worse. You’ve got to get out there early and say as much as you can to reassure people, but you can’t afford to say the wrong things.”

Hamre suggested there are particular difficulties in dealing with an ambiguous biological terrorism scenario. “The nuclear scenario is the easiest one; the biological one is really hard. When do you find out that you’re under attack? Even then, how do you decide what to say?” Vast quantities of biological materials remain from the Cold War stockpile: “It’s astounding how much bad stuff was built during the old conflict with the Soviet Union. There are just mounds of agents and pathogens. The good Lord in His mercy only created six in the world that would ever kill us, but they’ve invented another hundred off of that six.”

This highlights the need to improve the dialogue with the private biological and pharmaceutical sectors. “You need to create a dialogue with the private sector that isn’t just a defense-only dialogue. Interesting things are coming out of some of the genome research where they’re trying to find ways to turn off the ‘virilism’ of an agent. That will have a universal applicability, whether it’s coming from a bad bug in nature or a really bad bug designed by humans.”

Hamre closed with the thought that “we’re always going to have some people who just don’t believe. And that puts the burden on the rest of us who do believe to find effective ways to prepare. We just have to press on.”
Chapter 2: The Threat

For many, the threat of terrorism in the United States became real with the 1983 Beirut bombing. By 1996, according to Eugene Bowman, FBI associate general counsel, "about 25% of all of the terrorist threats in the world were directed at U.S. persons or U.S. interests. In 1997, it was up to 30%. In 1998, it was 35%. In those same years, and continuing today, the number of terrorist incidents around the world is decreasing. The number of terrorist incidents that are affecting U.S. interests is increasing, and the lethality is up."

Biological Attack Scenario

Perhaps the most daunting catastrophic terrorist challenge for a complex civil society would be a biological attack. The basic knowledge of how to develop deadly and antidote-resistant biological pathogens is widely dispersed, and revolutionary developments in genetic engineering increase the danger exponentially. Tara O'Toole, of the Johns Hopkins Center for Civilian Biodefense Studies, observed, "This is not 1944, when we had all 100 nuclear physicists in the country up on a mesa in Los Alamos. There are tens of thousands of people out there who understand this technology and are capable of deploying it."

O'Toole continued, "Just as the 20th century was one of 'big physics,' the 21st century will be one of 'big biology.' Every advance in biotechnology and genomics will create the potential for more potent and more diverse bioweapons. The more we know about antibiotic resistance, the better able we will be to engineer it into organisms," she said.

Such an attack could be unimaginably destructive, yet the indications of the attack could well be delayed and ambiguous. Conference attendees reviewed a biological attack scenario developed by Gregory D. Koblenz, of the John F. Kennedy School of Government at Harvard University, as an example of catastrophic terrorism. The scenario moves through nine days in which information about a possible domestic biological attack accumulates from various sources around the world, culminating in indications of an attack of unknown dimensions on Day 9. (See Appendix A)

Antiterrorist Activities

With that chilling background, conferees discussed possible antiterrorist actions. The diagram in Figure 1, developed by Philip B. Heymann of Harvard Law School, illustrates the nature of the problem. There are three categories of actions that could be taken, plus combinations of the three, for a total of seven:

1. Important steps to deal with terrorism (A)
2. Steps with significant effects on civil liberties (B)
3. Steps for which there would be public and political demand (C)
4. Steps that are important but have significant effects on civil liberties (AB)
5. Steps that are important and for which there would be public and political demand (AC)
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Figure 1: Categories of Antiterrorism Actions

- **A:** Important Steps to Deal with Terrorism
- **B:** Steps with significant effects on civil liberties
- **C:** Steps for which there would be public and political demand

6. Steps that have significant effects on civil liberties and for which there would be public and political demand (BC)

7. Steps that are important, have significant effects on civil liberties, and for which there would be public and political demand (ABC)

The best policy can only be determined by a delicate balancing act. Important steps with wide approval but without significant civil liberties effects should certainly be undertaken (Figure 1, AC). On the other extreme, nonimportant steps affecting civil liberties should be avoided, no matter how popular (Figure 1, BC). Of course, the most effective policies cannot be determined in a vacuum, but this typology of possible steps helps sort out the theoretical possibilities and alerts policymakers to some dangers.

Heymann suggested five questions to ask when determining a course of action:

1. What do we want to do in a catastrophic attack and would it really be helpful? (For example, can the media really be controlled, even by law?)
2. Can authorization for an action be passed that would not violate provisions of the Constitution, including individual rights and the Tenth Amendment?
3. What is required for such authority to be appropriately enacted: a statute, an executive order, or court approval?
4. What are the costs, in American freedoms, that would result from using the new powers we are considering, and can we limit those costs by asking for less or making clear the extraordinary circumstances?
5. In light of these considerations, what do we propose?

The Danger to Civil Liberties

In a crisis situation, it is likely that the American people—and their representatives—would shift their priorities, to some degree, away from civil liberties toward increased protection. Spaulding noted, "Part of the responsibility of government officials, and those in this room, is to try to anticipate that and not necessarily take all the authority the American public would be willing to cede in that kind of situation, but to try to figure out what are the important steps that need to be taken and how can they be taken in a way that minimizes the infringement on civil liberties."

Juliette Kayyem, of Harvard’s Kennedy School of Government,
emphasized that in the event of a catastrophic attack, "The normal rules will not apply." The instinct of the first responders on the scene, when presented with such a scenario, is to do a number of things that are very questionable from a civil liberties perspective and which may not even be effective. They may, for example, "declare a formal state of emergency, seize community and private assets, control transportation terminals, utilize the military, require notification to states and localities, control access over mass communication, quarantine, permit more liberal interpretation of our general criminal law standards, detain individuals for short periods of time, investigate groups that might be defined in part by race or religion, grant broad state authority over the bodies of deceased individuals, loosen our confidentiality and licensing laws to permit broader access and interstate travel rights to health officials, order production of necessary goods, and order citizens to take medicine."

Legal Issues

Referring to the biological terrorism scenario, Kayyem discussed the legal issues from two perspectives: problems with the current legal regime and how we should think about the law in the case of a future catastrophic terrorism event.

First, a catastrophic terrorist event does not fit neatly into any perfect doctrine of law, either the rules of war, the rules of crime, or the rules of natural cataclysmic events. Kayyem noted, "A catastrophic terrorism event is similar to an act of aggression on American soil, but it is not obviously characterized as the kind of event justifying the use of the military and the other expansive governmental powers that we think of during a civil war or an invasion. Such a terrorist event is similar to a heinous crime, but its potential impact and devastation may be too overwhelming to be contained by the traditional rules embodied in the Bill of Rights. And a catastrophic terrorist event is similar to other crises, like an earthquake or hurricane, but it also has national security and criminal implications not seen in a natural disaster like an earthquake."

A catastrophic terrorist attack may, in fact, fit into all three doctrines. Domestic preparedness for such an event must therefore include legal preparedness. Kayyem said, "In many cases, the appropriate authorities may exist, but they are hidden in a variety of doctrines of law. It is important for us to address legal preparedness and for us to think about it beforehand. I am of the personal opinion that a lot of what we might want to do is already in the law. We just need to find it, refine it, and let people know that it's there."

Kayyem took issue with the idea that "What needs to get done will get done, and we'll make apologies and reparations later," preferring instead to plan ahead. "Cautious and realistic legal planning now will both tell the government what they can do and also curb them from doing things we know they shouldn't be doing," she said. "Where more authority is desired, the government should seek it, and where it's not needed the government should be told that it's not necessary."

Part of this preparation should include stockpiling legal authorities and thinking carefully about the balance between effectiveness, civil liberties, and getting something passed. The danger of such stockpiling is that counterterrorism legislation is an aggrandizing force and stockpiled authorities could become a new baseline rather than an exceptional case.

Second, many resources associated with catastrophic terrorism response are "dual use," such as medicine, equipment, and so forth. This is a bad idea for the law, in Kayyem's view. Counterterrorism
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laws should instead be single use (or, better still, never used), due to the potential for misuse. "You want a law that is only going to come into play during the worst-case scenario that we discussed. You want to ensure that you have some triggering event. You also want to ensure that the genie somehow gets put back in the bottle when the crisis is over," she said.

The role of law in such a situation is clear, according to Barry Kellman, professor, DePaul University College of Law. "Law is the antidote to panic. If officials respond effectively and judiciously to a catastrophic terrorism event, then the event will demonstrate that our system of government and rule of law offer a richness and vitality capable of sustaining our way of life, even in the face of a great tragedy. To the extent that that capability is apparent in advance, it serves to diminish the terrorist incentive to commit the attack in the first place," he said.

Chapter 3: Public Health Considerations

Public health considerations were reviewed by a panel chaired by Barry Kellman, DePaul University College of Law. Panelists were Dr. Tara O'Toole, deputy director of the Johns Hopkins School of Public Health's Center for Civilian Biodefense Studies; Gene W. Matthews, legal advisor to the Centers for Disease Control and Prevention (CDC); and Lisa Gordon-Hagerty, director, transnational threats, National Security Council.

The public health officials on the scene of a catastrophic terrorist attack would be the local first responders. They will not be from the federal government, but will be the local emergency response agencies, augmented first by other local and then state-level resources. Physicist Lisa Gordon-Hagerty emphasized that the federal role would begin in the two to eight hours after an attack. The question is how best to use available equipment and resources. The fact that responses to chemical, biological, and radiological or nuclear incidents are quite different further complicates this issue.

Limitations of the Health Care System

Unfortunately, according to Dr. Tara O'Toole, the health care system is fragile, with a "lack of elasticity." This means, in particular, that
there is a lack of excess capacity to use in the event of a crisis. "The quest for efficiency, mostly financial, that has beset the health care system in the last 10 years or so has effectively eliminated surge capacity. This is true not only in hospitals and in doctors' offices, but in the pharmaceutical manufacturers' terrain as well," she said.

"Virtually every hospital in this country has gone to just-in-time methods of staffing, maintaining supplies, and acquiring drugs. Beds are likely to be the least important limiting factor in trying to accommodate large sudden increases in patients. Staffing will be the real limitation."

O'Toole went on to discuss how serious such limitations would be. "Virtually no hospital in the United States, or any group of hospitals in a geographically clustered region, could handle a mass-casualty situation, by which I mean more than 1,000 casualties at once--let alone a mass-casualty situation demanding intensive complex care, as would be the case for most biological weapons attacks, or the need for respirators or intensive care units."

She continued, "On any given day, the Johns Hopkins Hospital is renting between 12 and 15 ventilators. After a fire in downtown Baltimore, the secretary of health in Maryland determined that it would be impossible for Baltimore, the home of two university medical schools and 13 hospitals, to cope with a situation requiring 100 ventilators over and above the normal load."

The panelists discussed legal issues as well. May hospitals close their doors if they are overwhelmed? Must everyone who arrives receive a clinical evaluation and care? What if hospitals deliver sub-standard care? May they use drugs in a manner not approved by the Food and Drug Administration? What if medical and ancillary personnel refuse to work in a highly infectious environment?

Situational Awareness

The system also has a problem with situational awareness, which is related to the flow of information across levels of government. According to O'Toole, "The challenge of getting information from the local level to the top of the federal government, and then using this information wisely to deploy federal resources as direct response, is likely to be as formidable a problem as establishing a clear chain of command."

As noted later in this report, however, establishing such a chain of command will be difficult. The federal government has an interest in controlling terrorism, but, as panelist Gene Matthews pointed out, the Tenth Amendment makes public health a local responsibility.

Lack of situational awareness will lead to problems in dealing with a biological attack. Is an outbreak of disease due to an attack or is it a natural outbreak? "Even an unsophisticated terrorist might well choose a weapon, such as influenza, that would make such distinctions especially difficult. And even if we had the technology, ultimately, to decide whether a weapon was bioengineered or unnatural, it would take days to figure that out, and that delay could cause a lot of havoc in and of itself," said O'Toole.

If the outbreak is deliberately spread, she continued, "How extensive is the attack? Depending upon the incubation period of a bioagent, the people who were originally exposed in an attack may be all over the country or the world by the time they become symptomatic and seek medical care. It will be difficult during the first hours or days of a biological attack to understand the dimensions of the problem, how many people were exposed, where they are, and how to get hold of them."
Public Health Considerations

The Public Health System

Unfortunately, our public health system, tasked with answering such questions, has been underfunded for decades, and does not interact well with the health care system. According to O'Toole, "Doctors are not in the habit of calling their public health counterparts and saying, 'I think I have a problem that you should know about.'"

The contacts between those two communities—and they are separate, distinct, communities—for the most part are tenuous, if they exist; and that differs from one locality to the next."

A complicating factor is that an act of biological terrorism would be both a public health emergency and a national security crisis.

Given the magnitude of the threat, it is important that government at all levels responds as effectively as possible. As noted earlier, the local EMT, fire department, and police will be the first responders. Panelist Lisa Gordon-Hagerty said that the regional response would not be for two to eight hours, and the federal response only after 16 to 24 hours.

Gordon-Hagerty said that the federal government is aware of the increased risk from biological agents and is focusing its attention on that threat. She added that the frightening residue of the biological programs of the former Soviet Union magnifies the problem of groups such as the Japanese "Aum Shinrikyo," which unleashed a chemical attack in the Tokyo subway in March 1995. They remain an international threat. Federal training efforts are complicated by the fact that first-response training and equipment differ in our nation's 157 metropolitan areas.

Public Health Laws

Given the central role of state agencies in responding to a terrorist event, the status of state public health laws relating to bioterrorism is crucial. This was the focus of CDC legal advisor Gene Matthews' remarks during his panel presentation. The federal laws in Title 42 of the U.S. Code give the secretary of health and human services the authority to take action, including establishing quarantines. He also believes that a chemical terrorism situation could be covered by current emergency preparedness laws. However, biological terrorism is a different and more difficult problem, he said.

Existing laws were generally written in the 1920s and are very broad. "The health officer shall take such steps as necessary in order to control diseases," quoted Matthews. These laws grant police powers to health officers, but these have generally not been used since the first attempt to conquer polio in the U.S. Public health authorities need to understand that they are not only a service delivery organization, but a police power, according to Matthews. "A lot of us in the public health legal community have known for years how antiquated the laws are." In short, he noted, "We don't have currently in place the procedures, the mechanisms, the lore, the way of going about doing this that our professional grandparents would have had."

Not only are public health officials unaccustomed to viewing themselves as police officials, the evolution of judicial scrutiny on individual rights issues ensures that any attempt to control an epidemic will need to conform to current legal standards. It is not clear how laws currently on the books would withstand the sort of judicial scrutiny applied to matters of individual rights and due process since the Warren Court.

Matthews suggests that state laws address three categories of
Public Health Considerations

events: access to records, control of property, and management of persons. Table 1 shows just how extensive—and how intrusive—such laws could be. Actions unthinkable in normal times are necessary to preserve public health in the aftermath of a terrorist event.

Table 1: Health Officer Authority Needed in a Bioterrorism Event

<table>
<thead>
<tr>
<th>Records and Data for Health Officers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reporting new diseases, unusual clusters, and suspicious events</td>
</tr>
<tr>
<td>Accessing hospital and provider records</td>
</tr>
<tr>
<td>Sharing data with law enforcement agencies</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Control of Property by Health Officers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accessing suspicious premises</td>
</tr>
<tr>
<td>Closing facilities in case of emergency</td>
</tr>
<tr>
<td>Securing temporary use of hospitals</td>
</tr>
<tr>
<td>Procuring or confiscating medicines and vaccines</td>
</tr>
<tr>
<td>Decontaminating areas</td>
</tr>
<tr>
<td>Seizing and destroying affected materials</td>
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</tbody>
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<table>
<thead>
<tr>
<th>Management of Persons by Health Officers</th>
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</thead>
<tbody>
<tr>
<td>Identifying exposed persons</td>
</tr>
<tr>
<td>Conducting mandatory medical examinations</td>
</tr>
<tr>
<td>Collecting lab specimens and performing tests</td>
</tr>
<tr>
<td>Conducting mandatory vaccination and drug treatments</td>
</tr>
<tr>
<td>Rationing limited stockpiles</td>
</tr>
<tr>
<td>Tracking and following up with individuals</td>
</tr>
<tr>
<td>Isolating and quarantining individuals</td>
</tr>
<tr>
<td>Providing logistical authority necessary for patient management</td>
</tr>
<tr>
<td>Safely disposing of corpses</td>
</tr>
</tbody>
</table>

SOURCE: Gene Matthews, Centers for Disease Control and Prevention

Evolving Legal Issues

The discussion of the broad powers of public health officials suggests some legal issues to consider. Matthews highlighted several of these:

1. There need to be procedures for exercising existing public health powers.
2. The role of health officers in a biological emergency is different than in other emergency situations.
3. There are liability concerns for some easily anticipated scenarios.
4. State and local legal authorities for quarantine need to be enforceable and effective. “If you’re talking about controlling an epidemic, the most important decision to make in those first few hours may be to use controls that will seal off the spread.”
5. Public health and police authorities need to be coordinated. “If you look at old photographs of public health workers in New York in 1920, you see a health officer standing with a policeman. Those two lineages are now separated. But police used to help enforce quarantines or vaccinations or whatever. We’ve got to redefine that,” said Matthews.

Communicating with the Public

Communication among all levels of government and between medical responders and public health officials is not the only issue related to the flow of information after a crisis. The most difficult problem, Lisa Gordon-Hagerty believes, is public affairs. “It’s public affairs that’s going to do us in, whether it’s media tension or inat-
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tention, or the disinformation and misinformation that get passed. We need to deal with those issues,” she said.

During the Cold War, there was much public discussion about what to do in the event of a nuclear attack. Gordon-Hagerty believes a similar public education program should be undertaken to advise the public about responding to a catastrophic terrorism event.

“Instead of just training the fire departments and the police departments and health care communities, perhaps we need to start training people to have a better awareness of what would be the result from an anthrax attack, or a smallpox attack, or a plague attack, or, for that matter, a chemical attack,” she said.

One key to such a strategy is realizing that the “community” is actually a number of communities. “There’s a tendency to think of the public as a mob, as a kind of undifferentiated whole. And we know from the AIDS experience, for example, that is not true. People are going to bring to any crisis their own perceptions, their own ways of communicating, and their own ways of fitting the event into their world view,” said panelist Tara O’Toole. It is therefore important to enlist the help of people with moral authority in those communities to assist in public information efforts.

O’Toole described an international example. “The Israelis have selected a number of people from different professions who are not in uniform and not in government whom they brief three times a year to let them know what the government plans to do in response to a bio or chemical terrorist attack. In the event that something happens, these individuals are made available to the media to speak for themselves, based on their own expertise and their own name recog-
Chapter 4: The Role of the Military

The role of the military was considered by a panel chaired by Michael Wermuth, senior policy analyst at RAND Corporation and former deputy assistant secretary of defense for drug enforcement policy. The panelists were Rear Admiral Michael Lohr, USN, deputy judge advocate general of the U.S. Navy; Judith Miller, of Williams & Connolly and former general counsel, Department of Defense; and Stephen M. Duncan, president and CEO, Southeastern Computer Consultants, Inc., and former assistant secretary of defense for reserve affairs.

The U.S. military has extraordinary capabilities that could be deployed in the event of a catastrophic terrorist attack, as it does in natural disasters, but hesitates to take the lead. In general, military assets are brought to bear in supporting the work of civilian officials. Several aspects of using active or reserve military forces are important in understanding this issue: the provisions of the Posse Comitatus Act; military capabilities; organizational issues; public support; and the adequacy of existing laws.

Posse comitatus

Perhaps the most important factor in considering the use of military forces in civil emergencies is that federalized forces generally may not be used in a law enforcement role. As Michael Wermuth of RAND pointed out, “We have a long tradition in this country of using our federal armed forces almost exclusively to repel invasions and fight our foreign wars. That tradition is supported by the Posse Comitatus Act, 18 U.S.C. 1835. We don’t want to see our military routinely used as some kind of national police force, as we have seen in many other countries right here in our own hemisphere.”

The prohibitions of the statute and supporting regulations of the military services are not absolute. For example, posse comitatus restrictions do not apply to National Guard units when they are under the control of their state governors. By calling up the National Guard, the president reduces their effectiveness in the law enforcement role, which is one of the arguments against federalizing such forces in a civil emergency, according to Wermuth. Additionally, the federal chain of command changes the relationship they have with the state agencies with whom they generally work and who are providing the bulk of the resources for disaster relief. This may increase coordination difficulties. Miller, “There are plenty of state and local resources and National Guard resources available, and that may, in fact, be a better interface.”

Wermuth discussed several statutory exceptions, including insurrection statutes, Section 331 et seq. of Title 10 of the U.S. Code, that were “used to integrate the schools in the South and to respond to major riots in U.S. cities.” The U.S. military also supports local law enforcement in the fight against illegal drugs, based on Section 371, Title 10, U.S.C. Panelist Rear Admiral Michael Lohr concurred, adding, “Unless we’re in extraordinary or exceptional circumstances, the posse comitatus prohibitions apply.”

Lohr regards posse comitatus as “a useful firebreak” for not relying on military resources too much. Still, he noted, “There is a very broad expanse of statutory and constitutional authority that allows the DOD to provide the full range of support to the desig-
nated lead federal agencies for terrorism: the Department of Justice for U.S.-based terrorism, Department of State outside the U.S., and FEMA for consequence management."

Lohr outlined the provisions of Chapter 18, Title 10, U.S.C., which specify, in his words, that, "Particular assistance can be provided to law enforcement in a range of areas, including expert advice, equipment, information support, intelligence support, or logistic support. Chapter 18 does exclude direct participation by DOD personnel in searches, seizures, or arrests. Support under Chapter 18 is normally reimbursable," he said.

These provisions were amended in the 1996 Defense Against Weapons of Mass Destruction Act (the Nunn-Lugar-Dominici Act) to include emergency situations involving chemical and biological weapons of mass destruction. The posse comitatus exception is preserved, except when action, in Lohr's words, is "necessary for the immediate protection of human life, and civilian law enforcement is not capable of responding and dealing with the threat."

Posse comitatus exceptions existed in the nuclear era even before these amendments. Lohr quoted 18 U.S. Code, Section 831, "'Not withstanding the Posse Comitatus Act, the secretary of Defense may provide assistance in the enforcement of Section 831,' which is essentially nuclear terrorism. If there is an emergency situation that poses a serious threat to the interests of the United States, enforcement of the law is seriously impaired if support is not provided, and civilian law enforcement is not capable of enforcing the law."

That the posse comitatus exceptions do not arise until civil authority cannot enforce the law is a high bar to cross. Judith Miller pointed out that senior Defense officials agree on this point. The

Title 10 insurrection statutes provide a clear basis for military intervention, as they "allow the president to direct military forces to restore order and engage in law enforcement activities in response to widespread civil disorder or the threat of civil disorder," said Lohr. Even so, the Justice Department would take the lead. In addition, Lohr concluded, "You could rely on the president's commander-in-chief and chief executive authority to protect the people of the United States in a truly extraordinary case." Wermuth agreed that significant authorities exist at the federal level, including provisions to use the military for arrests, searches, and seizures, and intelligence collection. There is even a federal statute permitting quarantine, however difficult it would be to enforce.

Military Capabilities

The enormous capabilities of the Department of Defense (DOD) virtually ensure the military will be called upon to assume a major role in a terrorist response, according to panelist Judith Miller. Admiral Lohr noted that the DOD assumes a role in supporting the lead federal agency. With respect to crisis response, the military has a number of helpful capabilities, ranging from offering technical advice to employing military force. The former is permitted under Chapter 18, Title 10, of the U.S. Code, and the latter is greatly restricted by posse comitatus, as previously noted. John Bellinger, of the Department of Justice, highlighted the great military capacity in public health: "The military is equipped to [respond] in terms of a surge capacity. If there is one group capable of treating people in large numbers in a crisis capacity, it's going to be the military."

The issue of intelligence collection by the military remains controversial. Stephen Sloan, of the University of Oklahoma, said, "I
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can't conceive of the military not getting involved in the intelligence field." He continued that the requirement of military-type intelligence in this area is contributing to two trends, the "militarization of police" and the "gendarmification of the military." Lohr said the military has been very careful not to conduct domestic intelligence collection, but there will be one or two military liaison officers working with the FBI, though the FBI does the actual data collection.

The Defense Department can also help with consequence management. The DOD has a history of providing disaster relief assistance through FEMA, under the Stafford Act. Other authorities could also be invoked, including the insurrection statutes. Such assistance, Lohr continued, "may not adversely affect readiness, and it's normally provided on a reimbursable basis." Miller emphasized the ability of the DOD to organize mass events: "They think about things such as, 'If you have a biological event, how long can you keep people? How do you support them in the field? How do you rotate new people in?' One of its great strengths is that it plans in advance and tries to sort through all those detailed issues so they can carry out the assignment well, with the least loss of life--both for the personnel of the department and for the people they're trying to help."

Suzanne Spaulding, executive director of the National Commission on Terrorism, cautioned that the DOD might well play a leading role under certain circumstances--even helping to enforce a quarantine and detention for purposes of preventing introduction of such diseases. I know the surgeon general has people in uniform that work for him, but I doubt very seriously if they have the capability to enforce a federal quarantine of the magnitude that a biological terrorism scenario would paint for us today."

Panelist Stephen M. Duncan also expressed doubt that the DOD is well enough prepared for this mission. Quoting a CSIS study, he said, "Inadequate or insufficiently understood legal authorities for a military role in homeland defense against a broad base of weapons of mass destruction (WMD) is also a major national security concern."

O'Toole cautioned that augmenting the capacities of the DOD to deal with catastrophic terrorism might not be the best approach. "It makes sense to augment the capacity of the civil sector, not just in order to enhance their functional ability to deal with crises, but because of the long-term implications of polluting the very clear DOD mission," she said. The increased involvement of the DOD in "controversial and complex civil missions" could harm its ability to get bipartisan support. O'Toole joins those in the public health and the medical community who "see catastrophic terrorism as basically the Trojan horse for rebuilding the public health system," similar to the way in which the interstate highway system was built in the name of national defense.

Organizational Issues

In terms of federal administrative structure, Admiral Lohr noted the creation of a new position of assistant to the secretary of defense for civil support. In 1999 the president established the Joint Task Force for Civil Support, which is to report to the Joint Forces Command in Norfolk, Virginia as part of the Unified Command Plan. Its task
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is “to coordinate the department’s efforts in providing support to state and local authorities, preferably through FEMA. We haven’t quite worked how that support might be provided outside of FEMA.”

Miller regards the Joint Task Force for Civil Support as an evolving institution. Some conferees thought responsibility should remain solely with the secretary of the Army’s Department of Military Support (DOMS), which currently coordinates military support for civil authority (MSCA). Miller said, “Ultimately, John Hamre concluded that we needed a new organization that could be devoted to planning for big-picture catastrophic terrorism events, to worry about that issue exclusively, rather than adding that on to the natural disaster responsibilities that the Department of the Army had.” One problem, she noted, is maintaining civilian control “if you put Joint Task Force for Civil Support inside Joint Forces Command, which is this Unified Command that reports through the chairman and the chiefs to the secretary of defense. When you have that set-up, it’s tricky to have civilian oversight or an effective civilian spokesman.” This discussion continues in the Department of Defense and in Congress.

In his panel presentation, Duncan highlighted the issue of effective civilian control. In his view, the most effective organization would be headed by a presidential appointee who is confirmed by the Senate. He said, “I found that people like assistants to the secretary of defense don’t have either the clout or the institutional or line authority to make things happen as much as a presidential appointee, who reports to the president.” He continued, “If the top of the pyramid is a brand-new, well-intentioned, presumably well qualified reserve officer or National Guard officer, with no previous experience, the message sent to the military community is, ‘This isn’t being treated seriously.’”

Duncan emphasized that interagency coordination will be a difficult task. “Since agencies are balancing multiple policy objectives, expressions of presidential policy in a specific area do not always overcome a reluctance by government bureaucracies to spend their own budgets executing someone else’s priorities,” he said. There are enough laws on the books already. “What we need is some clear, decisive leadership and an organizational structure that uses the existing statutory schemes to make it clear who’s in charge at what time to provide what resources when needed,” said Duncan. That person might well be the vice president, he suggested.

Maintaining Public Support

Especially in times of severe civil emergency, public support of governmental actions is essential. Judith Miller cautioned, “A great deal of public goodwill could be lost if the DOD is perceived as just another police force, and in any case, the training is different that switching in and out of the police role is difficult.” She continued, “Interactions with the American public in a law enforcement capacity will end up risking some of the confidence and respect that they deserve in their regular roles, because they haven’t been trained effectively to deal with the American public in a law enforcement role.”

The danger, said University of Wisconsin’s Elizabeth Rindskopf Parker, is that “accidents and worse will inevitably happen” due to the complex training required to do law enforcement and the degree
to which the “rules of engagement” mentality necessarily domi­
nates the military. She added, “You cannot ask people with this
kind of training to reverse what has been inculcated into them and
suddenly use the standard ways that police operate.”

Lohr, representing the military viewpoint, said, “The dilemma
for us is, we’ve got to train people to these new rules. We’re trying
to train 18-, 19-year-olds who we want to be warriors to be cops
on the beat.” After the 1997 incident on the Southwest border when
Marine counterdrug forces mistakenly shot and killed a young
goatherd, the warfighting “rules of engagement” terminology was
discontinued for domestic support operations in favor of the FBI’s
“use of force” rules. Duncan noted that the military includes com­
battle service support people, not only front-line combat troops, as the
contributions of these truck drivers, corpsmen, and so forth would
be badly needed in a crisis.

Even in the absence of mistakes, there is a “significant dis­
senting group,” according to Robert P. Sullivan, which does not
view the military positively and which monitors DOD domestic
activities with great suspicion. Observing these people closely was a
concern even in the context of an exercise simulation. Miller and
Duncan concurred, pointing out that many nonextremists also resent
a significant DOD law enforcement presence. Miller said, “People
support the military to the extent they do because they’ve never
interacted with them in a way that is unpleasant or dangerous. They
trust the military to be out there protecting us against our foreign
enemies, but as soon as you put a lot of people in uniform in differ­
en contexts, you raise a lot of different issues.”

Stephen Duncan said, “The local communities love their troops
if they’re marching off to the Persian Gulf War. But if those same
troops are being used in a law enforcement capacity, they like their
police and fire departments a whole lot better, and they resent the
local troops.” He went on to say, though, that his resentment might
be less apparent in a truly catastrophic incident, when people under­
stand they need all the help they can get. Robert M. Blitzer, of the
Science Applications International Corporation (SAIC), concurred,
saying, “Just as in a natural disaster, a lot of people are going to be
terribly happy to see the military come in and get them back in
shape. I think that civilian authority would be rapidly reconstituted,
but there’s going to be a period of time when it just isn’t going to be there.”

Kate Martin, of the Center for National

Security Studies, agreed with the deleterious
effect of unpopular military operations on
popular support for the military. “If you start
talking about training for possible quarantine,
and having U.S. soldiers being trained on the
question of whether or not they’re going to
enforce that quarantine and how, the kind of
public suspicion and mistrust that will be bred
by that will be as much of a problem in the
short run as any of these other things will be in
the long run,” said Martin.

Paul Schott Stevens, of Dechert, Price & Rhoads, brought up
the crucial role of the president in responding to a catastrophic ter­
orist event. He said, “Whatever role the DOD might or might not
like, it’s going to be assigned, insofar as the president perceives the
situation and the DOD has the resources to address it.” He contin­
ued, “You can postulate all sorts of situations where DOD person­

nel, therefore, would come into contact with American civilian pop­
ulations. Many of them would be, presumably, quite benign. They
would be transport, logistical support, skilled personnel, field hos­
pitals, and all sorts of things. But there would also be a key role for
situation control, for keeping order—peacekeeping, if you will. And
I don’t think anyone’s going to feel that with the kinds of roles that
The Role of the Military

DOD is accepting abroad, it should refuse to act here in the United States when circumstances require it.

"To the extent that the situation seemed to require it, and the DOD had the resources to address it, the American population would probably be very accepting of a significant DOD presence in controlling a situation," said Schott Stevens.

Adequacy of Existing Laws

Ann C. Peterson, of the American Bar Association’s Standing Committee on Law and National Security, highlighted the issue of the adequacy of existing laws. She asked, "Are the laws we have about right? Should we have more, should we have less? Should we modify them in some way?"

Conferees agreed that the legal authorities are generally adequate. The insurrection statute requires a presidential declaration to implement, but many require only a declaration from the secretary of defense or the attorney general. The Department of Justice seems to prefer the latter, but the Department of Defense seems to prefer a presidential declaration, according to Admiral Lohr.

He described current authorities as "a pretty full package." He continued, "From the Department of Defense perspective, it seems that we’ve got the authority we feel we need to provide assistance to the lead federal agencies. If the president makes the determination to put us in the lead, those authorities exist, too, relying on inherent constitutional authority or the insurrection statutes." He summed up the situation: "There’s a pretty good statutory scheme out there right now. Could it be enhanced? There are ways it could be improved: it could be clarified, it could all be consolidated some place. But I think that the outlines of it are certainly there."

Catastrophic Terrorism: Imminent Threat, Uncertain Response

Panelist Miller concurred. "Do we have the authorities, if something terrible happens? I think we clearly do. The DOD will be able to do what the president wants based on the statutory regime that we have. Can we improve a little around the margins to make it clear that we can do some of the things we need to do to prepare in advance? I think there’s room for improvement there," she concluded.
Chapter 5: Law Enforcement Authorities

The status of authorities related to law enforcement was discussed by a panel chaired by Juliette Kayyem, of the John F. Kennedy School of Government at Harvard University. The panelists were Robert M. Blitzer, associate director for counterterrorism technology and analysis, Science Applications International Corporation (SAIC) and former domestic terrorism section chief of the FBI; Robert Sullivan, city attorney, Portsmouth, New Hampshire; and Michelle Van Cleave, president, National Security Concepts, and former staff director for the Senate Judiciary Subcommittee on Technology and Terrorism.

Kayyem emphasized the importance of all types of communication in her opening remarks. "The American public is very diverse. Certainly African American communities and Arab and Muslim communities have a very different reaction to law enforcement—especially during a terrorism event—than we might think nonminority communities would have. How we talk to different communities about law enforcement efforts is an important challenge."

Existing Authorities

Panelist Robert Blitzer said that the necessary legal authorities for counterterrorism law enforcement are on the books. "There is plenty of criminal law that law enforcement officials can exercise very well," he said. There is sufficient authority to collect intelligence inside the United States, although there is necessarily a higher standard when dealing with U.S. persons. Indeed, Blitzer believes that the standard for getting technical surveillance permission is too high in some cases. It would be useful, he said, to have a set of domestic terrorism guidelines, separate from the criminal guidelines, for the FBI to follow. One problem is the difficulty of opening a preliminary investigation that focuses on just one person, especially given the amount of damage just one person can do.

Dissemination of information in these situations is crucial, and guidelines for doing so should be in place. Blitzer discussed current practice: "There are 26 joint terrorism task forces strategically located around the United States. They all have the necessary security clearances. They include state, local, and other federal agencies. These people work with the Bureau every single day, on the street, and they have the necessary security clearances. There are a number of effective electronic systems in place to kick out both classified and unclassified threats. It has worked relatively well, without revealing sources and methods," said Blitzer.

Federal and Local Interaction

Robert Sullivan, who participated in the "Top-Off" exercise (which simulated a biological disaster in Denver, Colorado and a chemical attack in Portsmouth, New Hampshire) as Portsmouth, New Hampshire city attorney, discussed the local perspective. He began, "I am a career city attorney of a small city in a small state. If I have ever been inside the Beltway, it's because I was lost trying to get around Washington to go someplace I wanted to be." He empha-
sized the role of local first responders, who necessarily will be first on the scene and may well be the best ones to handle the situation as time goes on.

Speaking of his Portsmouth experience, Sullivan believed the tendency of federal law enforcement to step in and try to take over was not helpful; they disregarded a fully functional emergency operations center set up by the city of Portsmouth.

"The nature of every single one of these guys was they wanted the control. 'It's my site; it is my site. This is Portsmouth, my site. This is a federal thing, it's a bomb, it's ours.' And they fought. They stood in a circle and fought with each other over these things, while bodies rolled in the field behind them. It was not a pretty picture," said Sullivan. At the end of the exercise, "There was great skepticism on the part of local law enforcement and emergency responders as to whether they would not perhaps have been better off to handle the whole thing themselves."

In any case, Sullivan feels new criminal laws are not needed. "Every event that happened at Portsmouth, in addition to being a terrorist act, was also a violation of state law. You can't kill people, even if it's in a non-terrorist fashion," he said. New protocols would be useful, however, such as those between the city and surrounding municipalities, suggested Sullivan. "They have to be very simple. They can't be a document that anybody actually has to look at. They have to be state policies so obvious that they're committed to memory and implemented by memory in times of emergency and stress. In general, if any law enforcement agency determines it needs some help, it calls for it. When the help arrives, the help is under the complete control of the agency seeking help, although responsibility for salary, benefits, overtime, workers' comp, and so forth, stays with the law enforcement agency providing the assistance. It's not much more complicated than that," said Sullivan.

The key to a successful protocol is for the assisting agencies, including the FBI, to appreciate and utilize the expertise of the local responders. He concluded, "Once it's been determined to be a terrorist act, it makes great sense that the FBI have control, but the FBI needs to understand that having the authority to control does not mean they have the knowledge or the ability to do it without any help. And that was a problem in Portsmouth."

The Importance of Planning

Robert Blitzer emphasized the importance of preplanning. He noted, "When you're facing a major crisis, that's not the time to fight it out." The personalities of the individuals involved have a great deal to do with the success of the mission. One of the pillars of "unified command" in the wake of the Oklahoma City bombing was the fact that the fire chief, police chief, and FBI Special Agent in Charge were friends who got along well.

Michelle Van Cleave, president of National Security Concepts, emphasized the larger domestic and international context of a catastrophic terrorism event. For example, during Operation Desert Storm, there was White House concern that Saddam Hussein might mount some kind of action within the United States. Van Cleave concurred with the view that current laws are sufficient. "We don't need new laws, because the constitutional authorities are there and other authorities--specific criminal authorities, public health laws, the kinds of laws that are required in order to support what needs to be done--already exist," she said.
Law Enforcement Authorities

Emergency authorities, Van Cleave noted, “can be interpreted in ways that are going to be supportive of most anything that needs to be done, but no one has spent a lot of time looking at them and what they would really mean in practice in today’s world.” How these authorities would be interpreted in practice is the issue, she said, and it may be time to consider updating them. Nevertheless, “Authority is not the same thing as ability,” and practice and training are necessary. “An organizational chart that says who is supposed to do what is insufficient in times of crisis. It isn’t real unless it’s been exercised and practiced, and people understand what their roles and responsibilities are,” said Van Cleave. “The Top-Off exercise, in that regard, is a welcome development, but it’s not going to lead to much if it is just an isolated development, or even if exercises are done only as isolated events.”

Suspicion of Authority

Kate Martin, director of the Center for National Security Studies, warned that certain changes under the Foreign Intelligence Surveillance Act (FISA) have made the justice system less transparent, and it is harder to convince outsiders that authorities are being exercised in a constitutional manner. Secrecy especially erodes the trust and confidence of various U.S. ethnic and racial communities, said Martin. Compounding the problem, she said, is “a doubling in the number of secret wiretaps conducted under FISA. Secret searches of Americans’ homes and papers have been authorized since 1994. For the first time, secret evidence is now used to deport people who have basically lived here, who may have American citizen wives and children.”

Public suspicion and mistrust of law enforcement and intelli-

gence agencies was a particular concern to Elizabeth Rindskopf Parker, general counsel of the University of Wisconsin system. She said, “The level of ignorance and mistrust of the agencies that most of us around this room have direct experience with continues to stun me.” Some suggested creating a depoliticized organization like the National Transportation Safety Board (NTSB) to exercise overall supervision of the agencies that would be involved in catastrophic terrorism response. Others were skeptical whether such an innovation would be effective or make much difference. As Martin pointed out, “In a crisis situation, you’re going to want the trust and confidence of the communities, and those communities include the African American community and the immigrant communities. That is being eroded by this increased secret law enforcement.”
Chapter 6: Intelligence Authorities

Authorities related to intelligence were discussed by a panel chaired by Elizabeth Rindskopf Parker, general counsel of the University of Wisconsin System and chair of the American Bar Association Standing Committee on Law and National Security; Eugene Bowman, associate general counsel, FBI; Stewart Baker, former general counsel, National Security Agency; and Richard Shiffrin, deputy general counsel for intelligence in the Office of the General Counsel, Department of Defense.

Parker noted the role of intelligence organizations is "to preempt, to anticipate, to prevent the problems of coordination that we have so graphically discussed." Conference discussion turned to how we can preempt such actions so such problems of coordination do not arise.

Dividing Responsibility Among Agencies

Stuart Baker began with the issue of cyberterrorism, which he described as a "weapon of mass annoyance, not a weapon of mass destruction," at least for the foreseeable future. He quipped, "If your e-mail went out for a week, you'd take a vacation." He made the tongue-in-cheek observation that, with the Justice Department taking the lead in crisis response, the president needs to consider how he announces his actions. Baker suggested people would be less comfortable by the statement, "Something terrible has happened in San Diego and I've got a hundred really good lawyers working on the problem," than if he said, "Downtown San Diego is a place where you go at mortal peril and I'm sending several hundred lawyers."

More seriously, there are limitations on contacts between the FBI and the White House. For example, the Justice Department will not permit a White House briefing by the FBI on a criminal investigation unless the deputy attorney general reviews the contents of the briefing in advance. "It's hard to imagine that working well in a crisis," he said.

There is sufficient authority to collect intelligence against foreign nationals, according to Baker, but executive orders, in particular, limit what NSA does against U.S. persons. In a major crisis, these restrictions are likely to be lowered. Baker noted the problem of anonymity the Internet allows: "Anonymity is not generally consistent with ordered liberty. We probably should be looking for ways to discourage anonymity and encourage better authentication tools."

Legal Restrictions and Changing Technology

Richard Shiffrin emphasized the "extraordinary capabilities" of the intelligence community. "With respect to anticipation and indications and warnings, we do it all the time, 24 hours a day, seven days a week, and have actually been effective in interdicting a number of possible incidents over the past few years," he said. There are, however, some limitations:

- The nature of the threat is changing. The Soviet danger has been replaced by a transnational, and possibly not state-sponsored, threat.
- Technological changes such as fiber-optic communications
Intelligence Authorities

and strong encryption complicate intelligence gathering.

- Finite resources require priorities to be set: "We only have so much money, and so much personnel, and there's only so much time in the day. We collect a lot of information, but we don't collect all of it, and we don't analyze all of it. So we have to figure out where counterterrorism fits in setting our national intelligence priorities."

- There are necessarily some policy limitations due to the nature of intelligence operations. "What we do is very intrusive. We collect, analyze, and disseminate terabytes of information. And we do so under very strict guidelines because of how intrusive we can be," said Shiffrin. "We respect the rights of U.S. citizens. As a matter of policy, we also seek to protect sources and methods so we can continue doing what we do. This plays out in how we analyze and then disseminate the information we collect. It can't be used all the time for all purposes, because we wouldn't be able to do it anymore."

- There are legal restraints, and although they are not unwarranted, they do not "in any way stymie our ability to do an effective job."

It is important to maintain a balance in intelligence operations, Shiffrin concluded. If NSA collects and disseminates too much information, even in the counterterrorism field, people might conclude, "We don't like NSA listening to everything all the time," which could prove fatal for NSA.

Panelist Eugene Bowman noted the dramatic increase in the number of terrorist threats the United States faces, especially over the last two years. This, he said, accounts for the greatly increased number of requests for technical surveillance under FISA, as discussed previously. The process, while not transparent, has appropriate safeguards to ensure the probable cause standard is met and that the purpose is to gain foreign intelligence, as opposed to crim-
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The intelligence community is very wary of doing this. Bellinger said that the restrictions are so high, "relatively little information is flowing in."

New Perspectives

Robert L. Dietz, general counsel of the National Security Agency, suggested three perspectives:

1. Teleology. "The conference premise is that we're dealing with something new: catastrophic terrorism. We just came out of a century that was full of catastrophes, and I'm not persuaded the current situation is really all that new. We toured the First Division Museum yesterday, where we learned about a number of battles in which 50,000 people died in one day. I call that a catastrophe. Dr. Hamre talked earlier about how infinitely more challenging germ warfare would be than even a nuclear device. That already happened in 1918, when we lost in the neighborhood of a million people from a flu epidemic. I assume it wasn't terrorism, but it was a catastrophe," said Dietz.

The problem with the perspective that we are dealing with something new is that it drives "solutions" that may not be the best. Dietz continued, "Something bad can follow from the misuse of language. And what can be bad about language is that if you really believe something is new, then that's the camel's nose under the civil liberties tent. Even today we've heard suggestions that, 'Well, yes, the probable cause standard is okay for normal crime, but with terrorism, it's different.' I would respectfully suggest that the worst excesses of any government in the 20th century were committed in the name of some sort of emergency. You could point to Lenin's repression of the Cossacks. You could, of course, look at the Holocaust. You can also look in our own country, at the so-called Palmer Raids. These things were all done because there was an 'emergency' and 'something was different' and we had to react and we had to 'lean forward' and 'think outside the box.' So my first point is that language matters."

2. Instrumentalities. Once there is agreement on a problem, we must decide who will act. The DOD, for example, was not always as popular as it is now. Dietz continued, "I was drafted in 1968, which may have been close to the nadir of the DOD's reputation. People thought the DOD, in many respects, was fundamentally incompetent. When Desert Storm started, I was stunned to see the enormous care and concern about the loss of life and that people actually cared what those GIs were going through in the Gulf.

"That wasn't the way it was back when I was in the army. Now, you could say, 'Well, that's because all the leaders back in the '60s were idiots, whereas now they're all geniuses.' That's one theory. It's not one I accept. I think what happened was that the DOD brilliantly realigned its capabilities with its goals. And while they have enormous prestige now, I suggest respectfully that the first time our American troops find themselves in a street somewhere doing law enforcement tasks, through some posse comitatus exception, this enormous prestige will decrease," said Dietz.

Similarly, the National Security Agency could also lose support if its capabilities are directed inward instead of outward. "I believe the average American is perfectly content to have the NSA do its marvelous tricks. They are delighted to have NSA focus its enormous skills abroad, over the Atlantic, over the Pacific, wherever. But the closer to the American shore that we bring those tricks, the greater the risks are," said Dietz. "Signals intelligence is enormously intrusive."

3. Epistemology. This is an issue of planning. But we're facing a problem without boundaries. Not knowing what to plan for makes it extraordinarily difficult to plan at all. "Are we talking about
a nuclear explosion on a subway in L.A., or are we talking about germ warfare kinds of weapons? How many?” asked Dietz. “In trying to plan, we have no idea what we’re even planning for. It may not be a bad thing to spend some money on things, but we don’t want to build another Maginot Line,” said Dietz.

**Intelligence Agencies and Law Enforcement**

John A. Rizzo, of the CIA, noted that his agency is prohibited from domestic intelligence collection, and “we really don’t do it,” he said. The CIA does have close relationships with law enforcement agencies, though, particularly the FBI. He said, “Our relationship with law enforcement is so close, and the information almost so fungible, that it is truly a joint endeavor.” In fact, law enforcement might also be interested in a terrorist suspected of responsibility for a given act. He commended an earlier study on the relationship between intelligence and law, the Rindskopf-Richard report. Suzanne Spaulding, of the National Commission on Terrorism, noted that intelligence agencies may now collect information abroad for law enforcement purposes on non-U.S. citizens.

Yet the intelligence agencies, particularly NSA, are reluctant to get involved in law enforcement. Dietz suggested two reasons for this. First, of course, is that sources and methods could be jeopardized. “The more that sources are dispersed down the law enforcement chain, the more likely it is that you’re going to lose that method. And that’s an enormous risk.”

Second, he continued, “there are constitutional as well as various federal discovery requirements in criminal prosecutions. The prosecutor has disclosure obligations. We’ve been able to avoid that because we are not viewed as an agency of criminal law enforcement.

At some point, if we crawl into bed with prosecutors, we’re going to be viewed as prosecutors. And we’re going to end up having the same discovery requirements, exculpatory statements and all that, or we’re going to have to search our files.” To the issue of intelligence involvement in criminal cases, Kate Martin, of the Center for National Security Studies, added, “The protection of due process rights is as important a U.S. policy goal as combating terrorism.”

Elizabeth Rindskopf Parker closed the panel by observing that there is “a natural tendency to think about law enforcement as the only response to terrorism, and yet, there are other responses. These are diplomatic, political, and sometimes military,” she said.
Chapter 7: Commonalities and Uncertainties

Conferences participants brought with them a wide variety of experiences and perspectives. While there were a great many areas of agreement, a number of key uncertainties remain.

Commonalities

There was unanimous agreement that the threat of catastrophic terrorism is real and we must plan accordingly. Even if an attack is unlikely at a particular time, the consequences of such an attack would be so severe that the possibility must be taken seriously. Preventive measures and mitigating actions must be considered carefully in advance.

An often overlooked result of a catastrophic terrorist attack, and perhaps even of preparing to combat one, is that certain actions pose a risk to civil liberties. In the wake of an attack, public and political demand to take dramatic action would be great. Steps that would be effective in taking such action, however, could be dangerous to civil liberties.

The legal community should take the lead in ensuring that legal authorities strike the right balance between effectiveness and safety.

Public officials in general, and those in the intelligence and law enforcement communities in particular, are genuinely concerned about civil liberties and welcome guidelines that make it easier to know how to operate in particular cases.

With some minor exceptions, the legal authorities on the books appear to be adequate. One concern, however, is that many of the state authorities antedate important rulings concerning civil liberties, and may not, therefore, survive legal challenges.

The public health community needs to work more closely with the health delivery community and be aware that in some circumstances, they operate as part of the police power.

Coordination and training are critically deficient areas that we must address in preparing for a catastrophic terrorist attack. It is imperative that there be extensive planning and regular training for people and agencies at all levels that would be involved in responding to such an attack.

Uncertainties

While there have been catastrophes in the past, the United States has not suffered a catastrophic attack on its homeland, with the arguable exception of Pearl Harbor. Given such a lack of precedent, no one can really know what the results of a catastrophic attack would be. We will only know whether our plans are sound in the event of an actual attack.

There are numerous uncertainties, including the following:

- The actual and perceived effectiveness of governmental response.
- The appropriateness of state and federal legal authorities.
Conclusion: Commonalities and Uncertainties

Will they permit necessary actions to be taken? Will there be any impingement on civil liberties, and, if so, of what sort and for what duration? Will legal authorities be circumvented in the name of expediency?

- Public response to the attack. Will the public rally around the government as a source of support and coordination? Will it take matters into its own hands?
- What will be the combined effect on civil liberties of the attack, government response, and the public's response?
- What will be the long-term domestic and international political implications of the attack and the subsequent response?

Despite the large number of imponderables posed by a challenge of this magnitude, conferees agreed that it is important for the best minds in and out of government to explore the issues ahead of time. A catastrophic crisis is no time for improvisation.

Appendix

Biological Terrorism Scenario

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Day One

Over the past six months, U.S. intelligence has observed a revival of the membership, resources, and activities of Aum Shinrikyo, the Japanese cult that staged a nerve gas attack in the Tokyo subway in March 1995.

Members of Aum Shinrikyo have staged increasingly hostile demonstrations around Japan, including at the American Embassy and U.S. military bases, protesting the recent conviction of Shoko Asahara, the cult's founder. Sentencing is due to take place soon and it is widely believed that Asahara will receive the death penalty. At their demonstrations and on their Internet site, Aum has accused the Japanese and American governments of fabricating the evidence used to convict Asahara in order to cover up a series of illegal tests of American chemical and biological weapons on the unsuspecting Japanese population.

U.S. intelligence has also observed that Aum has stepped up its
activities in Russia. In particular, the intelligence community sus­pects that Aum has been attempting to reacquire a significant weapon of mass destruction capability from the poorly guarded Russian arsenal.

Today, the United States government received two independent reports from separate foreign governments that confirm that Aum has obtained a biological weapon capability.

The first came from Tokyo. The Japanese government has information which it considers reliable that Aum has acquired at least one biological weapon from Russia, and that these weapons are either in transit to, or have already arrived on, the West Coast of the United States.

The second came from Moscow. Senior Russian officials have informed their American counterparts that a scientist who worked at the Institute of Microbiology in Kirov is missing and may have stolen biological weapons. During the Cold War, the institute stock­piled and weaponized some 20 tons of plague bacteria. Despite official Russian assurances that the Soviet biological weapons pro­gram has been terminated, the institute remains a heavily guarded military facility closed to outsiders. The missing scientist's specialty was weaponization of a strain of antibiotic-resistant plague. He had access to stocks of plague in a dry powder form and to backpack­ized aerosol generators designed to produce particles in the 1-5 micron range. The Russian government does not know how much the scientist was able to smuggle out of the facility before he dis­appeared. The Russian government has shared this information with the United States in the hope of eliciting cooperation in tracking down the scientist and recovering the missing weapon. The Russians declined, however, to provide detailed information about the weapon or the special properties of the agent.

The FBI received a communication today from a member of Aum Shinrikyo located in the United States threatening to strike a city in California with “an unstoppable plague” in 48 hours unless the United States cuts off all political and economic ties with Japan until Shoko Asahara is released from prison.

The FBI believes the threat to be credible and has alerted the president to the possibility of a deliberate release of antibiotic­resistant plague in a major West Coast city. The typical incubation period for plague is 2-3 days. The onset of pneumonic plague is acute and progresses rapidly to respiratory failure, circulatory collapse, and death. Pneumonic plague can be spread person-to-person through droplets expelled by coughing. This disease is almost always fatal if treatment is not initiated within 24 hours of the onset of symptoms.

The FBI has traced several encrypted communications from Aum members in Japan to the San Diego vicinity. The FBI has also been monitoring the activities of several members of the Aum com­munity in San Diego but does not have sufficient evidence to justi­fy an arrest. The San Diego metropolitan area is home to 2.6 million people, including an estimated 100,000 Japanese Americans and Japanese expatriates. San Diego includes several important Navy bases, an international airport, a busy port, a 16,000-seat indoor sports arena, a 66,000-seat outdoor sports stadium, numerous tourist attractions, and a major convention center. All of these venues are scheduled to be in use during the next 48 hours.
Appendix

Day Nine

Aum’s deadline to release Shoko Asahara expired 24 hours ago. The United States has not severed its ties with Japan and Asahara remains in prison. No biological weapon has been found, and no Aum terrorists have been apprehended.

Last night, biological detection systems deployed in San Diego by the military registered a number of positive indications for aerosols of biological matter, but could not confirm the presence of plague. These systems can detect aerosolized plague in 20-25 minutes under ideal conditions, but they have not been tested in urban conditions and thus have been experiencing significant difficulties in screening out airborne pollutants and other biological material in the atmosphere. Subsequent laboratory analyses detected the presence of the plague bacteria in air samples at several points in San Diego.

This morning, the FBI is receiving the results of special medical examinations of hospital patients across the San Diego metropolitan area. The tests confirm broad plague infection; the full extent is unknown at this moment.

Biography and Acknowledgements

Dr. John Allen Williams is on the faculty of the Department of Political Science, Loyola University Chicago. He is chair of the Academic Advisory Committee of the National Strategy Forum (NSF) and executive director of the Inter-University Seminar on Armed Forces and Society (IUS). A retired Naval Reserve Captain, he has extensive experience as a designated strategic plans officer on Navy, Joint, and civilian Defense Department staffs.


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Catastrophic Terrorism: Imminent Threat, Uncertain Response

For many, the threat of terrorism against the United States became real with the 1983 bombing of the Marine barracks in Beirut. By 1996, according to the FBI, nearly 25 percent of all terrorist threats in the world were directed at U.S. persons or interests. In 1997, it was up to 30 percent. In 1998, it was 35 percent, despite a decrease in terrorist incidents globally. The threat of a catastrophic terrorist attack on U.S. soil is one we must take seriously — but are we prepared?

“We organize our thinking of power in terms of territorial dimensions. We still have the notion of security grounded in physical dimensions, physical borders. When you think about it, how do you intercept a 50-pound device that is coming into the United States someplace in the next three days?

John Hamre, Center for Strategic & International Studies

“Cautious and realistic legal planning now will both tell the government what they can do and also curb them from doing things they shouldn't. Where more authority is desired, the government should seek it, and where it's not needed, the government should be told it's not necessary.”

Juliette Kayyem, Harvard University