

Natural Hazards Research Working Paper #107

Major Terrorism Events and Their U.S. Outcomes (1988-2001)

Appendix A: Legal References

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Statutes

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The Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub.L. 100-707, 1988

Enacted on November 22, 1988, this statute amended the Disaster Relief Act of 1974, PubL.93-288. Both the Stafford Act and the amended Disaster Relief Act of 1974 are codified at 42 USC Section 5121, et seq.

When FEMA was created by Reorganization Plan No. 3 of 1978 (USC section 901), the Disaster Relief Act of 1974 was delegated to the Director of FEMA by Executive Order 12148 of July 15, 1979. Because both the DRA of 1974 and the Stafford Act vested authority directly in the President and not the Director of FEMA, some form of updated delegation was required. That delegation was made in E.O. 12673 of March 1989, 3 CFR 1989, comp. p. 214. The E.O. was entitled "Delegation of Disaster Relief and Emergency Assistance Functions." As in the past, the delegation to FEMA did not include the authority to declare disasters or emergencies. But what seemed at first a simple delegation

provided some bureaucratic drama for FEMA during its review. At the time of enactment neither the DRA of 1974 nor the Stafford Act directly named FEMA in these statutes or vested authority directly in the Director of FEMA. Even now, the only direct authority Title VI, the remnants of the former Federal Civil Defense Act of 1950.

The provisions of Title VI were added by the FY 95 Defense Authorization Act, Pub.L 103-337. Authority also has been vested in the President by the Disaster Mitigation Act of 2000, Pub.L.106-390 signed October 30, 2000, and amends the Stafford Act.

There have been no subsequent delegations to the FEMA Director since the issuance of E.O. 12673, even though the Stafford Act has been amended several times. Any revised Stafford Act delegations from the President will now account for the creation of the Department of Homeland Security on November 25, 2002, by Pub.L.107-296.

[For additional discussion of the Stafford Act, see the legal handbook produced by The Oklahoma City National Memorial Institute for the Prevention of Terrorism at: <http://www.mipt.org/index.html>

Oil Pollution Act of 1990

The Oil Pollution Act of 1990 (PL 101-380), referred to herein as OPA '90, was a direct Congressional response to the Exxon Valdez Oil Spill. ¹ The Act had several impacts on emergency management and hazardous materials response, even while upgrading technical safety standards for tankers (e.g., mandating double hulling for new tankers).

In 1989 Senator Ted Stevens (Alaska) pushed the amendments of the Stafford Act in response to FEMA's recommendation to the President not to declare a disaster under the authority of the Stafford Act. In a Senate appropriations hearing on May 1, 1989, FEMA officials testified that they interpreted the Stafford Act as not giving the President authority to respond if another statute authorized a federal response. Regarding the Exxon Valdez incident, the National Contingency Plan (NCP), authorized by the Federal Water Pollution Control Act (33USC. § 1321), was triggered, and FEMA did not respond under the Stafford Act.

The NCP, a Memorandum of Agreement to which 16 federal agencies are signatories, is designed to respond to intentional or unintentional releases of oil or hazardous materials on land or water. There was, however, a requirement in place in OPA '90 to update the NCP on a comprehensive basis. The NCP was completed in Sept. 1994 and codified and published at 40 CFR Part 300. ²

OPA '90 also mandated a report to Congress on duplications, overlaps, and deficiencies in the federal response to hazardous materials releases. EPA submitted that report to Congress in December 1993. Two key documents are: (1) Review of Federal Authorities for Hazardous Materials Accident Safety. Report to Congress Section 112(r)(10), Clean Air Act as Amended (Presidential Review), 12-01-93, 550-R-93-002; and (2) Review of Emergency Systems, Report to Congress Section 305(b) Title III Superfund Amendments and Reauthorization Act of 1986 Final Report, 6-01-88, OSWER 305B. Both are in hard

copy only, available from EPA.

Additionally EO 12580, delegating authority from the President to a number of departments and agencies and creating the National Response System, was amended after passage of OPA '90 to reflect experience from the Valdez oil spill and administrative procedures connected with that incident. Nothing in the floor debates, committee hearings, committee reports or conference report on OPA '90 addressed hazardous materials releases caused by terrorists. Administratively, however, in the revisions to the NCP required by OPA'90, it was made clear that the NCP had full applicability in response to terrorism incidents/events. See E.O. 12580 of January 23, 1987, "Superfund Implementation" as amended by E.O. 12777 and E.O. 13016. See also President's memorandum of August 19, 1993, 52 Fed. Reg. 2923, 3 CFR, 1994 Comp, p. 767.

In February 1998 and every year since, the subject of response to terrorist-related hazardous materials releases has been a principal issue at the annual meeting of the National Response Team co-chairs (EPA and USCG). E.O. 12580 of January 23, 1987, was originally published at 52 Fed Reg. 2923, 3 CFR 1987 comp., p. 193. An additional reference for the EPA role in terrorism response is Part 16 of E.O. 12656, "Assignment of Emergency Preparedness Responsibilities." See Part 2 of this Appendix.

November 20, 1993 - Joint Resolution of Congress

In Section 1704 of Pub.L. 103-160 [107 Stat. 1655], signed by the President November 30, 1993, Congress provided that:

It is the sense of Congress that the President should strengthen Federal interagency emergency planning by the Federal Emergency Management Agency and other appropriate Federal, State, and local agencies for development of a capability for early detection and warning of and response to:

potential terrorist use of chemical or biological agents or weapons; and

emergencies or natural disasters involving industrial chemicals or the widespread outbreak of disease.

This joint resolution appeared in the context of the following sequence of events and decisions.

Chapter 32 of Title 50 [War and National Defense] of the United States Code is entitled "Chemical and Biological Warfare Program." This title contains the authorization for destruction of the chemical weapons stockpile of the United States by 2008, pursuant to International Conventions and obligations developed in the 1920's. That Chapter also calls for an annual report by the Secretary of Defense on the status of U.S. defensive programs for chemical and biological weapons.

The Chemical Demilitarization Program established pursuant to that Chapter is a combined effort between on-site [on-post] activities led by DOD and off-site activities of

State and local governments in cooperation with FEMA.

The potential use by Iraq of chemical and biological weapons has been cited by Congress in authorization of the use of force against Iraq in Pub.L. 102-1 [105 Stat.3] signed January 14, 1991, in compliance with the War Powers Resolution, 50 U.S.C. Section 1547. Additionally, on October 23, 1992, in Pub.L. 102-484, Congress had enacted and the President signed the "Iran-Iraq Arms Non-Proliferation Act of 1992."

The Foreign Assistance Act of 1961 (Title 22 of the United States Code, section 2151 et seq.) had also been amended in 1991 by the Chemical and Biological Weapons and Warfare Elimination Act, 50 U.S.C, section 5601 et seq., with the objective of preventing the proliferation of chemical and biological weapons.

During the Desert Shield timeframe, President Bush signed an Executive Order on November 16, 1990, declaring a national emergency with respect to the unusual and extraordinary threat to the national security posed by proliferation of chemical and biological weapons. This national emergency has been continued in effect to date.

On September 30, 1993, President Clinton signed E.O. 12868 (58 Fed. Reg. 51749) titled "Measures to Restrict the Participation by United States Persons in Weapon Proliferation Activities." In the Order, the President declared that the proliferation of nuclear, biological, and chemical weapons, and the means of delivering them constitutes an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States and declared a further national emergency that also continues in effect.

Congress had held hearings and had other information to indicate a lack of preparedness in civil government for both chemical and biological preparedness and response during 1991-1993. ³ Accordingly, the Joint Resolution was promulgated.

In response to the Joint Resolution of Congress, no documented response by FEMA has been located. Also, if FEMA was relying on improvement in the technical response capability (detection, monitoring, decontamination, protective action recommendations) of CDC and EPA, it was not improved by the time of the anthrax attacks in the fall of 2001.

Repeal of the Federal Civil Defense Act (1994)

The President signed into law the Federal Civil Defense Act of 1950 (FCDA) on January 12, 1951 (Pub.L. 920-81st Congress.) The statute was amended many times in subsequent decades and ultimately repealed in November 1994 by PL 103-337, the National Defense Authorization Act for fiscal year 1995.

For the lawyers, the FCDA, Pub.L. 81-920, is cited as the Civil Defense Act of 1950, ch. 1228, 64 stat 1245 (1951) and was codified at 50 USC appx. 2151 et seq. A modified portion of the statute remains in new Title VI of the Robert T. Stafford Act, 108 stat. 2599, 3100-11, Pl 100-707, amending Pub.L. 93-288. An important cross-reference should also be noted in section 3911, Pub.L 103-337, section 602 (b) of the Stafford Act, as amended. The terms "national defense" and "defense" as used in the Defense Production Act of 1950

[see elsewhere in this document for details] emergency preparedness activities conducted pursuant to this title (Title VI). There is, however, no cross-reference to the Stafford Act in the Defense Production Act.

The FDCA vested authority in the President, although authority was delegated almost immediately (see 3 USC s. 301). The newly added Title VI of the Stafford Act vests authority in the Director of the Federal Emergency Management Agency. As of November 2002, the date of this analysis, regulations under that title have yet to be issued.

Brief History of Civil Defense in the U.S.

The history most properly begins with the declaration of an unlimited National Emergency (Proclamation 2487 of May 27, 1941, 3 CFR 1938-43, comp., p. 234 by the President. Wartime administration of civil defense and war production is more properly examined separately from this analysis. The President reorganized his offices in E.O. 8248 of September 8, 1939, 3 CFR 1938-43, comp. p. 576, establishing the following offices: (1) the White House Office, (2) the Bureau of the Budget, (3) the National Resources Planning Board; (4) the Liaison Office for Personnel Management; (5) the Office of Government Reports; and (6) in the event of a national emergency or threat of a national emergency, such office for emergency management as the President shall determine.

Although the civil defense function was part of the sixth office identified above, no specific statute existed until the enactment of the FCDA in 1950.

For researchers, the principal archival sources in the National Archives are as follows:

Records of Civil and Defense Mobilization Recovery Groups 397 NA;

Records of the Defense Civil Preparedness Agency, Report groups 396 NA;

Records of the Office of Emergency Preparedness, Record Group 311 NO;

Records of the Federal Emergency Management Agency.

Additional materials may be found in various presidential libraries.

A visual depiction of the history is shown in the Homeland Security Time Line: An Historical Overview of Civil Organization (1933-2003, forthcoming in 2003. URL: <http://www.disaster-timeline.com>. The TTL provides a summary of key events and outcomes; the HSTL provides an overview of organizations.

The history of civil defense does not exclude concerns about terrorism, but its primary focus was nuclear attack. But starting with Presidential Review Memorandum 32 and Presidential Decision 41 under President Carter, the various National Security Decision Directives under President Reagan concerning civil defense (NSDD-22, 26, and 259), and NSDD-66 under President George H.W. Bush, the administration of civil defense moved further and further away from any relevance in the strategic balance. The strategic doctrine of mutually assured destruction (MAD) was inconsistent with active civil defense. See the

Hart/Rudman report (2002) issued by the Council on Foreign Relations.

Accordingly, the Senate and House Armed Services Committees became increasingly disenchanted with the dedication of scarce defense dollars to civil defense, particularly the context between domestic and defense allocations under the so-called Graham-Rudman Balanced Budget legislation in 1989.

In August 1992, after Hurricane Andrew made landfall in Florida and then Louisiana, Congressional legislators believed that civil defense resources were improperly restricted from being used to alleviate state and local needs. After significant criticism on many fronts about the response by all levels of government to Hurricane Andrew, Congress mandated a study of the federal response to Hurricane Andrew and earmarked the National Academy of Public Administration (NAPA) to conduct the study. The NAPA study, entitled *Coping with Catastrophe*, issued in 1993, concluded that civil defense resources were improperly restricted from utilization in responses to natural disasters.

Although administrative discretion had existed since at least 1976 to adopt a "dual use" strategy for civil defense resources (meaning both attack-related and natural disaster-related), a formal all-hazards approach was not adopted by Congress until the National Defense Authorization Act, 1994, PL 103-160, one year before the FCDA was repealed in 1994. ⁴

When the FCDA was repealed in 1994, select portions were incorporated in the Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L.100-107, amending Pub.L.93-288 as a new Title IV.

Nunn-Lugar-Domenici Act

The Defense Against Weapons of Mass Destruction Act of 1996, Pub.L. 104-201, September 23, 1996 (also known as the Nunn-Lugar-Domenici Act) was a direct response to a number of developments in the world. Additionally, the 1996 Atlanta Olympics had raised grave concerns in the mind of Senator Sam Nunn of Georgia as to the preparedness of the United States against the threat of terrorist attacks. In fact there was a bombing at the Olympics with one death and over 100 injured. In the spring of 1996, Senator Nunn held a number of hearings on preparedness issues after his staff was unable to get accurate and convincing information from the Executive Branch on its arrangements and preparation for the Olympics. These hearings led directly to this statute, which set in place a long-term effort to prepare domestic response to the increased threats. Although the authors of the act had wanted to have civil agencies, particularly FEMA, lead the training and equipping of first responders, FEMA testimony led the Senate staff to the conclusion that only DOD had the knowledge and assets to upgrade preparedness. Believing that long-term the function was one for the civil agencies, the Act provided that after three years the function could be transferred from DOD to some other lead agency with the President's approval. The transfer was made to the Department of Justice (DOJ) in 1999 and the Office of State and Local Domestic Preparedness became the lead. Both FEMA and this organization are now in the new Department of Homeland Security created by Pub.L. 107-296.

Most of the statutory authority in the Act is of little lasting significance. What is of lasting significance given changes in the perception of the terrorist threat in the United States since September 11, 2001 is the Act's premises. The Congressional findings stated in section 1402 of the Act, however, are of continuing interest.

Anti-Terrorism and Effective Death Penalty Act of 1996, Pub.L 104-132; April 24, 1996

Consisting of 105 pages of U.S. Code, Congressional and Administration News this statute (AEDPA) addresses the culmination of law enforcement lessons learned prior to its adoption. Enactment of the U.S.A. Patriot Act in October 2001 further refined some of the AEDPA changes. Both prosecutorial lessons and administrative lessons were included based on the prior decade's law enforcement efforts.

The substantive Titles of the AEDPA are instructive:

Title II-Justice for Victims

This title addresses both restitution to the victims and enhanced procedures to favor terrorist victims in the U.S. court system.

Title III-International Terrorism Prohibition

This title authorizes a system of both designating foreign organizations as terrorist organizations and prohibiting monetary and other assistance to so-called Terrorist states.

Title IV-Terrorist and Criminal Alien Removal and Exclusion

This title addresses both the specifics of removal (deportation), visa application procedural changes, modifications of asylum procedures, and extensive procedural modifications for handling criminal aliens.

Title V-Nuclear, Biological and Chemical Weapon Restrictions

This title adds further restrictions on possession of certain materials and provides enhancements in the controls of biological agents and increased penalties for violations. Section 521 of this title required a comprehensive study of the training of responders to the use of chemical and biological weapons.

Title VI-Implementation of Plastic Explosive Convention

This title regulates and restricts production and possession of plastic explosive agents, including identifying markers.

Title VII-Criminal Law Modifications to Counter Terrorism

Increases penalties, including penalties for dissemination of certain information, assigns the death penalty for certain violations with other technical modifications.

Title VIII-Assistance to Law Enforcement

Provides for enhanced overseas training, special protection for federal buildings in the District of Columbia, and authorizes funding for law enforcement antiterrorism training. Section 819, captioned Local Firefighters and Emergency Services Training, authorized the Attorney General to make grants through FEMA for specialized training and equipment to enhance firefighter response to terrorist attacks. \$8 million was authorized for fiscal year 1997, the AEDPA first year.

It should be noted that under the provisions of Presidential Directive 39 signed in June 1995 FEMA had been made chair of the Interagency Working Group on Training and Preparedness for Consequences Management.

An additional provision, section 827, authorized grants for specialized training and equipment for law enforcement personnel to deal with terrorist attacks. Section 821 authorized a new program of research and development to support counterterrorism technologies. This included technology to provide detection, tracking, surveillance, vulnerability assessment, and information technology. Section 808 mandated a report to Congress annually on threats or intimidation efforts directed against federal employees related to terrorism.

Title IX provided miscellaneous changes. Section 901 expanded the Territorial Sea definition. Section 902 prevented the use of voting identification and registration for proof of citizenship. Section 903 capped representation fees for defense counsel experts at \$7500 unless modified by court order. Finally, section 904 provided severability if any portion of the AEDPA was determined to be unconstitutional.

Disaster Mitigation Act of 2000

In 1994 FEMA rejected the argument that the Robert T. Stafford Act, Pub.L 100-707, which had been signed into law on November 23, 1988, contained authority for pre-disaster mitigation. This decision led to the eventual adoption of the Disaster Mitigation Act of 2000, Pub.L. 106-390, October 30, 2000. The FEMA decision was made despite the fact that the Disaster Relief Act of 1974, Pub.L.93-288 mandated community mitigation plans after each disaster. The required post-disaster mitigation was to take place in every community receiving disaster relief, but no substantive regulations were issued until 1979. The pre-disaster post-disaster conundrum was in reality FEMA's way of ignoring the requirements of the 1974 Act. The legislative history of that statute was fully entwined with that of the Flood Disaster Protection Act of 1973 (codified together with the National Flood Insurance Act of 1968 at 42 U.S.C. 4001-4128) that had removed the barrier to disaster relief in Pennsylvania communities and other affected by Tropical Storm Agnes if the communities had been eligible for flood insurance and individual property owners had not purchased it. Believing that for the first disaster the prohibition on receipt of disaster relief was too onerous, a so-called first-bite free rule was adopted. That is, individuals in a flood-prone community could receive disaster relief if they then purchased and maintained flood insurance. Additionally, disaster impacted communities had to adopt a mitigation plan before receiving further disaster relief.

The Disaster Mitigation Act of 2000, Pub.L. 106-390 (H.R. 707) was signed October 30,

2000. An interim rule was published at 67 Fed. Reg. 61445-61460. Among other issues, the FEMA rule postponed for a full year the requirement that statewide mitigation plans be adopted. Thus, the cycle of delay and lack of enforcement continues.

The signing of Pub.L. 107-296 on November 25, 2002, of the Department of Homeland Security Act of 2002, raises questions about mitigation. It is possible that mitigation could be extended to non-natural disasters. A recommendation made by the General Accounting Office on September 30, 2002, in a Report to the Chairman, Subcommittee on International Security, Proliferation, and Federal Services. Committee on Governmental Affairs, United States Senate. A committee to be chaired by Senator Susan Collins of Maine in the 108th Congress beginning January 7, 2003. The GAO report (GAO-02-1035) is entitled "Hazard Mitigation-Proposed Changes to FEMA's Multi-hazard Mitigation Programs Present Challenges."

Accordingly, a major decision of interest in the future will be how the Secretary of the Department of Homeland Security interprets the Department's mitigation role.

The U.S.A. Patriot Act, Pub.L 107-56, October 26, 2001

The U.S.A. Patriot Act consists of ten titles (Over 130 pages of the U.S. Code Congressional and Administrative News). The full title of the Act is "Uniting and Strengthening America By Providing Appropriate Tools Required To Intercept and Obstruct Terrorism" (USA Patriot Act) of 2001.

The titles are instructive and are as follows:

- Title I Enhancing Domestic Security Against Terrorism
- Title II Enhancing Surveillance Procedure
- Title III International Money Laundering Abatement and Anti-Terrorism Financing Act of 2001
- Title IV Protecting the Border
- Title V Removing Obstacles to Investigating Terrorism
- Title VI Providing for Victims of Terrorism, Public Safety Officers, and Their Families
- Title VII Increased Information Sharing for Critical Infrastructure Protection
- Title VIII Strengthening the Criminal Laws Against Terrorism
- Title IX Improved Intelligence
- Title X Miscellaneous

Much of this statute had been in the "wish list" of the Department of Justice even prior to September 11, 2001. Some portions seem not to relate to the war on terrorism. For example, the so-called "Gratuity Act," which dates back to the Civil War was the basis of the prosecution for former Secretary of Agriculture Espy, and is found in Title 31 (Money & Finance) of the United States Code, is restated, amended, and updated to reflect case

law (DOJ losses). See Section 329.

Section 411 provides new definitions of terrorism so as to affect the admissibility of persons seeking admission as legal resident aliens or seeking citizenship. For example, solicitation of funds for terrorist activity becomes a new absolute bar to temporary or permanent immigration. Additionally, a broadened definition of "terrorist organization" and association with them triggers immigration bans. By implication, authority for new investigation and tracking systems are authorized to enforce such restrictions. See also the Enhanced Border Security and Visa Entry Reform Act of 2002, Pub.L 107-173, May 14, 2002.

Section 412 of the U.S.A. Patriot Act concerns mandatory detention of suspected terrorist and has been the subject of many articles in the press.

Title VI involving victim compensation has been extensively discussed in the news, particularly the requirement to reduce awards from the DOJ supervised fund by the amount of life insurance and pensions.

Numerous amendments to the United States Code (Title 18-Crime) are contained in this new statute. For example, section 817 expands the prohibitions on possession or use of certain biologic agents. See also the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub.L. 107-188, June 12, 2002. Section 1013 of the U.S.A. Patriot Act lists extensive Senate findings on bioterrorism issues. While Congressional findings do not make substantive law, they are useful in construing Congressional intent. On this basis, one could conclude from the Senate findings that the entire public health system requires reconstruction to effectively deal with bioterrorism.

Section 1005 of the Act is called the "First Responder Assistance Act" and authorizes so-called "Terrorism Prevention Grants." These grants would fund equipment, technical assistance, materials, and training. DOJ has already published grant application procedures. If there is a permanent appropriation, as opposed to a Continuing Resolution, for FY 2003, this would be the largest federal first responder grant program ever. FEMA also provides grants for similar objectives through its EMPG function, as well as grants through the United States Fire Administration to the fire community. The dollar amounts of these latter programs are much smaller. It remains to be seen whether the First Responder community will receive more grant money from DOJ, DHS, or DOD. If one includes the medical community, then HHS may also rival these organizations in total outlays for First Responders.

Perhaps confusingly, section 1014-Grant Program for State and Local Domestic Preparedness authorizes a grant to each state to prepare for and respond to terrorist acts involving weapons of mass destruction (WMD's) and biological, nuclear, radiological, chemical, and explosive devices.

Section 1012 requires a security risk determination to be made for all persons with HAZMAT transportation licenses. Since no investigatory or adjudication standards are included in the statute, presumably this is left entirely to the discretion of the Executive Branch.

Section 1016 concerns Critical Infrastructure Protection. The statute funds the Defense Threat Reduction Agency (successor to the former Defense Nuclear Agency) for certain functions now being transferred to the new Department of Homeland Security.

Interestingly, sections 224 and 303 contain mandatory review or sunset provisions. By December 31, 2005, certain portions of the statute, but not all, will expire (unless of course extended by new Congressional action). Foreign Intelligence Investigations (a term of art) started before that date will be allowed to continue. Other saving provisions may have to result from legal interpretations.

There is a key new provision giving immunity from suit in Section 225 to persons who cooperate with the government on so-called FISA (Foreign Intelligence Surveillance Act of 1978) wiretaps. Of course, under current Supreme Court case law there can be no immunity for violations of an individual's Constitutional protected rights.

This statute will probably see numerous technical amendments in the 108th Congress convening in January 2003. The statute has been cited in numerous court filings, but its real significance awaits final judicial construction, which may take years.

Emergency Supplemental Appropriations-Response To Terrorist Attack on September 11, 2001, Pub.L.107-38, September 18, 2001

In one of the most unusual and rapid responses by Congress to the need for emergency funding of the federal response to any emergency, September 11th generated rapid action on the part of Congress to deal with the consequences of the attack on the United States. Additional momentum was supplied because the event occurred during the fourth quarter of the fiscal year so that the availability of adequate appropriations was an immediate problem that reprogramming could not address.

The \$40 billion appropriated was divided into four parts, with each part requiring different oversight and approval by Congress. The Congress designated the entire amount as an emergency requirement thereby bypassing the Balanced Budget and Emergency Deficit control Act of 1985 (Graham-Rudman) and its procedures. This also allowed the budget requests of the Executive Branch to be modified. Essentially, the first \$10 billion was almost immediate available, with the President having to submit reports on how it was expended. The second \$10 billion was subject to more restrictive rules and subject to a minimum 15-day wait after the Director of OMB submitted to the Congress a proposed allocation plan for the use of the funds. The final \$20 billion actually require further enactments that did not occur until 2002.

An additional requirement was that of the total \$40 billion, \$20 billion was reserved for disaster recovery in New York and Virginia, but with full appropriation review and approval, including quarterly reports and other required Executive Branch submissions.

Whatever direct and indirect economic costs from the tragedy, this Act is still being argued over by the Executive Branch and the Congress. By some estimates less than 40% of the appropriation has been spent. FEMA and DOD seem to have been the most efficient at spending their OMB apportioned funds. The confusion over outlays exists in because the

funds were not subject to normal fiscal year limitations (essentially they were no-year funds, i.e. did not require obligation within any specific fiscal year). Probably, General Accounting Office (GAO) audits will be required to determine the specific outlays and their dates and amounts. This could well be an election year campaign issue in 2004.

Aviation and Transportation Security Act of 2002, Pub.L.107-71, November 7, 2001

The Aviation and Transportation Security Act of 2002 had the primary purpose of federalizing the airport security functions of screening passengers and baggage. It created the new Transportation Security Administration (TSA) within the Department of Transportation, headed by a new Undersecretary for Transportation Security. The first confirmed head of the TSA was John W. Magaw. He resigned in September, and the position has been filled on an Acting basis by the retired Coast Guard Commandant, Paul Loy. [The TSA was made part of the new Department of Homeland Security by Pub.L. 107-296, signed November 25, 2002.]

The TSA, during a declared National Emergency, has the assignment to (1) coordinate domestic transport, (2) coordinate and oversee other departments and agencies transportation related activities, and (3) give notice of threats to the transportation system, land, air, or sea. Since there is no direct command and control over the personnel, resources, or programs, functions, and activities of other departments and agencies, it remains to be seen as to how this will work. For example, the final rule for civil aviation security was issued as a joint FAA and TSA regulation on February 22, 2002 (14 CFR Parts 91 and 49 CFR Part 1500). In the first year after September 11, 2002, this was the most substantive rule issued by any federal department or agency modifying a pre-September 11th system.

The TSA is also charged with management of the security information function relating to transportation. It created Federal Security Managers for each airport. The training and deployment of Airmarshalls, security training of aircrews, screening of persons with access to aircraft or loading areas, were also functions of TSA.

It should be noted that a related statute, the Airport Security Improvement Act of 2000 Pub.L. 106-528 [S.2440] November 22, 2000, requiring background investigations for certain airport staff among other purposes, had not been fully implemented by September 11, 2001. The TSA in Pub.L. 107-71 received additional authority to develop employment investigations for the transportation system.

An additional TSA function was to conduct Research and Development for all security systems relating to transportation systems. The language of section 120 of Pub.L. 107-71 mandates the Secretary DOT to maximize the use of technology and equipment designed to detect or neutralize potential chemical or biological weapons used to attack transportation systems.

Finally, the Congress had also passed the Air Transportation Safety and System Stabilization Act, Pub.L. 107-42 [H.R. 2926] signed into law on September 22, 2001, in response to the terrorist attacks on September 11th. Section 101 of that Act provided various kinds of aviation disaster relief, including federal payment of increased insurance

expenses for the first year after September 11th. It also created the Air Transport Stabilization Board to provide emergency funding to the airlines based on certain statutory criteria.

In Title V a victim compensation fund was created for the families of both the aircrew and passengers on the aircraft seized by the terrorists. This should not be confused with the victim compensation fund established in the USA Patriot Act, Pub.L.107-56.

Two other Presidential actions are of interest. First the issuance of Presidential Determination No. 2001-29 of September 23, 2001, "Provision of Aviation Insurance Coverage for Commercial Air Carrier Service in Domestic and International Operations," which provides federal war risk insurance pursuant to Chapter 443 of Title 49 of the United States Code. Second, a Memorandum of September 25, 2001 from the President to the Secretary of the Department of Transportation, "Delegation of Authority To Compensate Air Carriers for Losses Resulting From the Terrorist Attacks of September 11, 2001." This delegation pursuant to Pub.L. 107-42 was to authorize immediate action under the statute. These documents may be found at 3 CFR, 2001 Comp, pp 910-913.

National Defense Authorization Act for FY 2002, Pub.L. 107-107, December 28, 2001

The annual Defense Authorization Act for FY 2002 was enacted three months into FY 2002. In addition to the normal reauthorizations, Title XV-Activities Related to Combating Terrorism relates to events on the TTL (Terrorism Timeline). This title served to comply with the requirement of the Emergency Supplemental Appropriation Act, 2002, so that additional portions of the \$40 billion appropriated by that Act could be spent. This included \$1.4 billion for offensive counter-terrorism and \$600 million for crisis-response, both undefined terms. Also further Pentagon reconstruction and upgrades related to September 11th were included. Many authorizations unrelated to terrorism were also included even in Title XV, e.g. Energy Department environmental restoration and waste management.

One item of interest was section 1511, which required a report by the SECDEF on the role of DOD in homeland security generally. The report was due March 15, 2002, but was still circulating in draft in December 2002. A specific section of the report was to describe how the DOD WMD Civil Support Teams (56 teams is the target by 2004) would interact with the FBI and FEMA (part of DHS as of March 1, 2003) during crisis response and consequence management situations.

Section 1513 authorized DOD to transfer specialized equipment and materials to State and local governments for terrorism preparedness.

Section 1514 extended the Gilmore Commission (Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving WMD). That Commission issued its fourth report this December (2002).

The current indications are that neither the United States Senate nor the United States House of Representatives will reorganize to have one principal homeland security oversight committee. If this remains the case, the importance of the Senate and House

Armed Services Committee looms large in domestic terrorism preparedness and response.

Although the Armed Services Committees lost any jurisdiction over FEMA with the repeal of the Federal Civil Defense Act in 1994 (the FCDA was law from 1951-1994), those Committees have demonstrated an active interest in WMD response and homeland security already.

Executive Orders⁵

[Exec. Order 12472 of April 3, 1984](#)
[Exec. Order 12656 of November 18, 1988](#)
[Exec. Order 12657 of November 18, 1988](#)
[Exec. Order 12673 of March 23, 1989](#)
[Exec. Order 12686 of August 4, 1989](#)
[Exec. Order 12919 of June 3, 1994](#)
[Exec. Order 13015 of August 22, 1996](#)
[Exec. Order 13129 of July 4, 1999](#)
[Exec. Order 13130 of July 14, 1999](#)
[Exec. Order 13223 of September 21, 2001](#)
[Exec. Order 13228 of October 8, 2001](#)
[Exec. Order 13231 of October 16, 2001](#)
[Exec. Order 13234 of November 9, 2001](#)

Executive Order 12472 of April 3, 1984, "Assignment of National Security and Emergency Preparedness Telecommunications Functions," 3 CFR, 1984, comp. p. 193 ⁶

E. O. 12472, entitled Assignment of National Security and Emergency Preparedness Telecommunications Functions, was published in the Federal Register at 49 F.R. 13471. This E.O. refines and further implements the National Communications Systems (NCS),⁷ which was established originally by Presidential Memorandum on August 21, 1963. The primary purpose of the NCS is to ensure that communications requirements of the President in his/her functions as both Commander-in-Chief and Chief Executive can be fulfilled.

Probably the most successful example of interagency coordination and collaboration in the civil government area, the NCS is also supported by annual appropriations, found in the Treasury and General Government Appropriations Act. The most recent, Public Law 107-67, signed November 12, 2001, provides in Section 116 as follows:

Notwithstanding Sections 1346 of Title 31 [a restriction on agency funding of interagency committees] or Section 610 of this Act, funds made available for the fiscal year 2002 by this or any other Act shall be available for the National Security and Emergency Preparedness Telecommunications initiative that benefit multiple federal departments,

agencies, or entities, as provided by E.O. 12472 (April 3, 1984).

The NCS, created by E.O. 12472, supported by an advisory body, the National Security Telecommunications Advisory Council (NSTAC), is composed of the chief executive officers of the major telecommunications companies in the U.S. Prior to the 1984 consent order requiring the divestiture of certain corporate business entities of AT&T, the federal government relied on other mechanisms to ensure that technical developments in the industry were incorporated for compatibility and interoperability of systems. The NSTAC is authorized separately under E.O. 12382 and is currently continued in effect until Sept. 30, 2003 by E.O. 13225 of Sept. 28, 2001.

Executive Order 12656 of November 18, 1988, "Assignment of Emergency Preparedness Responsibilities," 3 CFR, 1988 comp. p. 585

E.O. 12656 was signed by President Reagan on November 18, 1988 and published at 53 Fed. Reg. 47491.

The purpose of the order is to assign to various departments and agencies on a functional basis to the extent possible the emergency preparedness responsibilities of the federal government. It has been amended twice, most substantively by Section 9 of E.O. 13228 on October 8, 2001, to recognize the Office of Homeland Security and the Homeland Security Council established by that order.

Section 102 (b) of the order states, "This order does not constitute authority to implement the plans prepared pursuant to this Order. Plans so developed may be executed only in the event that authority for such executive is authorized by law."

This language was used in order to deflect criticism of the Reagan Administration, or any other President, that some form of non-Constitutional secret government was being planned for by the national security establishment. Interestingly, it is one of only two Executive Orders delegating authority to the National Security Council or the Assistant to the President for National Security Affairs, the other being E.O. 12919, June 1999. E.O. 12656 revoked E.O. 11490, published originally in 1969, which had the same purpose but was longer and more detailed. Other than reflecting the establishment of FEMA and the Department of Energy, the departmental and agency assignments remained substantially the same.

It should be noted that no discussion of budget issues is contained in the order. The draft order was only cleared by OMB on the basis that it had no budget implications. As with many NSC-originated assignments, it is left to the departments and agencies to seek OMB approval for funds to prepare for the assigned functions and activities. No automatic funding or even justification for funding exists because the President has made the assignments in this key emergency preparedness executive order. Many of the agencies assigned functions were systematically denied funding by either the Office of Management and Budget (OMB) or Congress when they sought funding for assigned functions under the order. Since emergency preparedness assignments do not always reflect day-to-day departmental and agency priorities, the

functions are left unfunded and the departments and agencies are unprepared.

The E.O. formally ended the Director of FEMA's policy role in National Security Emergency Preparedness (NSEP) that has existed since the formation of FEMA in 1979. (Compare for example, National Security Decision Directive (NSDD) 47 and NSDD-188.) The role of advisor to the National Security Council and the President for FEMA was maintained in the E.O., but it was made clear that FEMA could not mandate activity in other departments and agencies. Even informal guidance through Federal Preparedness Circulars (FPCs) issued by FEMA was often ignored.

Interestingly, except in the area of continuity of government and administration of the Defense Production Act of 1950, FEMA never made any policy recommendations to the President or the National Security Council after E.O. 12656 was signed and no reports on activities under the order were submitted to the President as authorized by the order.

FEMA did provide drafts and submitted proposed revisions on a series of NSDDs throughout the Reagan-Bush Administrations, including NSDDs #23, 26, 259, and 66. These NSDDs attempted to provide a rationale for the Federal Civil Defense Act of 1950, Public Law 81-920, but it was repealed in 1994 by Pub.L. 103-337. Some of its concepts were incorporated into the Robert T. Stafford Disaster Relief and Assistance Act, Pub.L. 100-707, which amended the Disaster Relief Act of 1979, Pub.L.93-255.

The authority cited in the E.O. 12656 for its promulgation includes Reorganization Plan No. 1 of 1958 (72 Statute 1799), the National Security Act of 1947, the Defense Production Act, and the Federal Civil Defense Act (now repealed). The repeal of the Federal Civil Defense Act effectively negated the authority of the Reorganization Plan No. 1 of 1958. However, full authority still exists for promulgation of the order under the National Security Act of 1947, as amended. The citation of the Defense Production Act is extraneous, since a separate E.O. (#12919) delegates the President's authority under that statute.

Under Section 103 of E.O.12656, concerning its scope, three other "exclusions/exemptions" are significant.

i. Section 103 (b) states, "This order does not apply to those natural disasters, technological emergencies, or other emergency, the alleviation of which is normally the responsibility of individuals, the private sector, volunteer organizations, state and local governments, and federal departments and agencies unless such situations also constitute a national security emergency." [8](#)

ii. Section 103(c) provides, "This order does not require the provision of information concerning, or evaluation of, military policies, plans, programs, or states of military readiness." The purpose of this section was to specifically exempt the Dept. of Defense (DOD) from any implied review under the order, although the authority to conduct any review is already absent.

iii. Section 103(d) provides, "This order does not apply to national security emergency preparedness telecommunications function and responsibilities that are otherwise assigned by E.O. 12472." Once again, the impact of this exemption was to ensure that the National Communications System (NCS) established by E.O. 12472 could operate without any restraints of independent or FEMA review under E.O. 12656.

Since the drafters of E.O. 13228 chose to amend E.O. 12656 rather than revoke it, E.O. 12656, as amended, still accurately reflects the assignments to the respective departments and agencies to the extent applicable to terrorism as a national security issue.

This Executive Order was again amended on February 28, 2003 by E.O. 13286 to reflect the new Department of Homeland Security created by Pub.L. 107-296. Everywhere the Director of Federal Emergency Management Agency appears the substitution of the Secretary of Homeland Security is made. This reinforces the position that E.O. 12656 reflects national security assignments to the departments and agencies generally and also encompasses terrorism events.⁹

Executive Order 12657 of November 18, 1988, "Federal Emergency Management Agency Assistance in Emergency Preparedness Planning at Commercial Nuclear Power Plants," 3 CFR, 1988 Comp., p. 611

This E.O. allows FEMA to initially respond by coordinating federal response activities when advance state and local commitments (i.e., response planning) for accidents at fixed nuclear or power plants are absent or inadequate.¹⁰ FEMA is authorized to assume any necessary command-and-control function or delegate such function to another federal agency, in the event that no competent state and local authority is available to perform such function. Drafted by the Department of Energy and the Department of Justice, the E.O. makes FEMA responsible for five distinct activities. These are as follows:

Issuing appropriate regulations. (See 44 CFR Parts 350-354)

Updating the Federal Radiological Emergency Response Plan mandated By E.O. 12241 of September 29, 1980;

Preparing and responding to nuclear power plant accidents. (See 10 CFR Appendix E)

Coordination of the Federal response to nuclear power plant accidents;

Responding to accidents where the State response is inadequate.

The E.O. is silent on how and when FEMA would make a determination that the

State or local planning or response in an actual event is inadequate. However, see NUREG-0654/FEMA-REP-1, Rev. 1, Supp. 1.

FEMA charges the owners of the NRC-licensed nuclear power plants a user fee that reimburses FEMA for any costs associated with its radiological preparedness program (REP).

While the regulation of nuclear power is pre-empted by the federal government pursuant to the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011 et seq. there is no direct authority to allow federal command and control of state and local resources or personnel. Accordingly, the E.O. assumes FEMA utilization of exclusively federal resources and no direct assertion of command and control of state and local resources or personnel.

Final implementing regulations were published on August 2, 1989 and are codified at 44 CFR Part 352.

Executive Order 12673 of March 23, 1989, Delegation of Disaster Relief and Emergency Assistance Functions," 3 CFR, 1989 Comp., p. 214

Executive Order 12686 of August 4, 1989, "President's Commission on Aviation Security and Terrorism," 3 CFR, 1989 Comp., p. 232

This Order was in response to the destruction on December 21, 1988, of Pan American World Airways Flight 103. The Commission established by the Order was to conduct a comprehensive study and appraisal of the practices and policy options with respect to preventing terrorist acts involving aviation. The Commission was also to review options for handling terrorist threats, including prior notification to the public. The Commission was also to report on the policies and laws impacting the treatment of families of victims of terrorist acts.

The unclassified Final Report to President Clinton of the White House Commission on Aviation Safety and Security, February 12, 1997, is available to the public at <http://apo.faa.gov/strategicgoals/docs/WHCrpt.html>.

Executive Order 12919 of June 3, 1994, "National Defense Industrial Resources Preparedness," 3 CFR, 1994 Comp., p. 901

Executive Order 12919 provides a delegation of Presidential authority for the Defense Production Act of 1950, as amended, 50 USC, Appx. Sect. 2061 et seq. (http://www.archives.gov/federal_register/executive_orders/pdf/12919.pdf)

This Executive Order delegates authorities and addresses national defense industrial resource policies and programs under the Defense Production Act of 1950, as amended, except for the amendments to Title III of the Act in the Energy Security Act of 1980 and excludes telecommunication authorities under Executive Order No.12472.

Under this order, the FEMA Director:

Serves as an advisor to the National Security Council on issues of national security resource preparedness and on the use of the authorities and functions delegated by this order;

Provides for the central coordination of the plans and programs incident to authorities and functions delegated under this order, and provides guidance and procedures approved by the Assistant to the President for National Security Affairs to the federal departments and agencies under this order;

Establishes procedures, in consultation with federal departments and agencies assigned functions under this order, to resolve in a timely and effective manner conflicts and issues that may arise in implementing the authorities and functions delegated under this order; and

Reports to the President periodically concerning all program activities conducted pursuant to this order. [See also 15 CFR Part 700.]

Published on June 7, 1994, in the Federal Register at 59 Fed. Reg. 29525-34, this E.O. represents the most recent link in an unbroken chain of E.O.s concerning the Defense Production Act (DPA) of 1950 since its enactment. That statute was most recently extended for three years by the DPA extension, Pub.L. 106-363 (H.R.1715), approved October 27, 2000, which authorizes the non-permanent provisions of the DPA to Sept. 30, 2003.

The importance of the DPA, which is under the jurisdiction of the Banking Committees in Congress, is that it provides a continual statutory basis for the President to order economic resources for national needs in both emergency situations and wartime. It should be noted that the DPA is not standby legislation because no declaration of war or national emergency is required to trigger the authority of the statute. The DPA does not allow the restructuring of the economy in any way (a frequent charge by free-market advocates), but it does allow the federal government to become first in line with respect to the output of privately owned production facilities, materials, and supplies upon a finding that these are defense or emergency preparedness related.

An example of that priority in the 1980's was the high-speed computing equipment (Cray), which was essentially hand-built customized high-speed computers in great demand and for which production and order backlogs existed. By assigning defense ratings, several of these computers for which customers already existed went first to the federal government.

In Section 3411 of Pub.L. 103-337 [Section 602(b) of the Stafford Act, (Pub.L.100-707 amending Pub.L. 93-288), Congress included the following cross reference: "the terms "national defense" and "defense" as used in the Defense Production Act of 1950 [50USC appx. S. 2061 et seq.) includes (sic) emergency preparedness activities conducted pursuant to this title" The cross reference above, almost a decade after enactment, remains controversial because the DOD in all

delegations under the existing orders - leading up to and including E.O. 12919 - is the final arbiter of whether priorities requested fell in the "national defense" or "defense" categories or definition. It was noted that several extensions of the DPA arose in Defense Authorization Acts of various years, and without question both the Senate and House Armed Services Committees would welcome transfer to their jurisdictions under the DPA.

The problem the Armed Services Committees of the Senate and House have respectively, together with DOD, is that the DPA has been construed as one of the key statutes in maintaining civilian control over the military, or in this instance, maintenance of civilian authority over the economy.

This is evidenced by the DPA's repeated charges that the "essential" civilian economy must be protected by those administering the statute. Accordingly, prioritizing production for the military must never be allowed to disrupt or even destroy the civilian economy. For example, during the Korean War, the Navy placed a priority on light trucks. The size of its order for light trucks was so great that not only would no light trucks have been available to the Army and Air Force, but also not a single light truck would have been available to the civilian economy.^{[11](#)}

Executive Order 13015 of August 22, 1996, "White House Commission on Aviation Safety and Security," 61 FR 43937, revoked by Executive Order 13062 of September 29, 1997, "Continuance of Certain Federal Advisory Committees and Amendments to Executive Orders 13038 and 13054," 3 CFR, 1997 Comp., p. 226

Executive Order 13129 of July 4, 1999, "Blocking Property and Prohibiting Transactions With the Taliban," 3 CFR, 1999 Comp., p. 200

Perhaps the most lasting significance of the Order is the introductory language of this asset blocking and trade sanction listing of the Order.

I, WILLIAM J. CLINTON, President of the United States of American, find that the actions and policies of the Taliban in Afghanistan, in allowing territory under its control in Afghanistan to be used as a safe haven and base of operations for Usama bin Ladin and the Al-Qaida organization who have committed and threaten to continue to commit acts of violence against the United States and its nationals, constitute an unusual and extraordinary threat to the national security and foreign policy of the United States, and hereby declare a national emergency to deal with that threat.

The normal listing of the types of economic activity prescribed are then listed.

Executive Order 13130 of July 14, 1999, "National Infrastructure Assurance Council," 3

CFR, 1999 Comp., p. 203

In further response to activity under Presidential Directive 63 and the need for interaction with the private sector, which has 90% of the critical infrastructure in the United States, the President in this Order established the Council for the following purposes:

enhance the partnership of the public and private sectors in protecting our critical infrastructure and provide reports to the President;

propose and develop ways to encourage private industry to perform periodic risk assessments of critical processes, including information and telecommunication systems;

monitor the development of Private Sector Information Sharing and Analysis Centers (PSISACs) and provide recommendations to the National Coordinator and the National Economic Council on how these organizations can best foster improved cooperation among the PSISACs, the National Infrastructure Protection Center (NIPC) and other Federal government entities.

The Council was to terminate two years after its creation. This was done when E.O. 13231 was signed on October 16, 2001, and this Order was revoked.

Executive Order 13223 of September 21, 2001, "Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit or Support," 3 CFR, 2001, Comp. p. 786 [12](#)

The purpose of the E.O., among other things, is to list those individuals or organizations subject to the Order's proscriptions. Section 3(d) defined "terrorism" as activities that: (i) involve a violent act or an act dangerous to human life; (ii) appear to be intended (a) to intimidate or coerce a civilian population, (b) influence the policy of a government by intimidation or coercion, or (c) affect the conduct of a government by mass destruction, assassination, kidnapping, or hostage-taking. [13](#)

For an example of a civil statute addressing a related issue, see the Victims of Terrorism Tax Relief Act of 2001 (p. 107-134), signed January 23, 2002.

As one of the many organizations that dealt with terrorism in the past few years, the National Commission on Terrorism 2000, called the Bremer Commission, developed its own definitions. (<http://www.fas.org/irp/threat/commission.html>.)

For the related subject of so-called "weapons of mass destruction," see Defense Against Weapons of Mass Destruction Act, Title XIV of Public Law 104-201, the so-called Nunn-Lugar-Domenici Act, codified in the USC at 50 U.S.C., Sections 2301-2367 (suppl. 1999). 50 U.S. C. 2302 defines a weapon of mass destruction as "any weapon or device that is intended, or has the capability to cause death or serious bodily injury to a significant number of people through the release,

transmission, or impact of (a) a toxic or poisonous chemical or their precursors (b) a disease organism; or (c) radiation or radioactivity."

Executive Order 13228 of October 8, 2001, "Establishing the Office of Homeland Security and the Homeland Security Council," 3 CFR, 2001 Comp., p.796

Representing the first and most important initial organization change in response to the events of September 11, 2001, President Bush established the new Office of Homeland Security (OHS) in the Executive Office of the President. The primary mission of the new organization was to develop a national strategy to secure the United States from terrorist threats or attacks. This "National Strategy for Homeland Security" was issued in July 2002.

It is interesting to note that the OHS eventually reached a staffing level of over one hundred personnel who largely were consumed not with developing a strategy but individual policy papers. Perhaps most importantly, the OHS recommended opposition to a proposed Department of Homeland Security consistently until President Bush changed to supporting the new Department on June 6, 2002. The Administration submitted its own proposal for departmental legislation on June 18, 2002, largely drafted over the period of a week by the President's Chief of Staff, Andrew Card; White House General Counsel Gonzales; OMB Director Mitch Daniels; and Tom Ridge, Director of OHS, and Assistant to the President for Homeland Security (now the Secretary of DHS designate).

The Executive Order addressed detection, preparedness, prevention, protection, response and recovery, incident management, continuity of government, public affairs, cooperation with state and local governments and private entities, review of legal authorities and development of legislative proposals, and budget review. The Order language is the best description of these assignments and is not duplicated here.

The Order also established a Homeland Security Council as an advisory body to the President. Efforts to show that it had importance and had met to deliberate on issues consumed valuable time until finally the White House Press Office argued that meetings of Tom Ridge with the President and other cabinet officials on homeland security issues were de facto meetings of the Council. Like the Emergency Management Council established to advise the President on Emergency Management issues that was established originally in Reorganization Plan No. 3 of 1978 (the EMC was eliminated in 1994 by E.O. 12919) and met only twice early on, the concept probably will last, but not be an important feature of homeland security administration, especially once the new Department of Homeland Security (DHS) begins operations on January 24, 2003.

Of more significance than the Homeland Security Council is the little noticed section 9 of E.O. 13228 that amends E.O. 12656 (see discussion in this Appendix). E.O. 12656 was the most recent effort (1988) to comprehensively assign national security emergency preparedness responsibilities to the civil departments and agencies. Only indirectly relating to terrorism, E.O. 12656, as amended,

comprehensive revision once DHS is established could short-cut much bureaucratic infighting and dispute over roles.

Executive Order 13231 of October 16, 2001, "Critical Infrastructure Protection in the Information Age," 3 CFR, 2001 Com., p. 805

This E.O. revoked E.O. 13130 (July 1999). A comprehensive, well-drafted Executive Order that essentially supersedes Presidential Directive 63, this Order promises to become a milestone administrative event over the next decade.

The background of the order is extremely important. Senator Jon Kyle had become interested in issues related to critical life-style support systems when the so-called Y2K issue surfaced. Leading eventually, to a Senate Select Committee on Y2K Issues, Senator Kyle had been in the forefront of the creation of a Presidential Commission on Critical Infrastructure Protection (PCCIP) (sometimes known as the Marsh Commission since it was headed by a retired four star Air Force General Tom Marsh). The report issued in 1997 was titled "Critical Foundations-Protecting America's Infrastructure." The report can be found at <http://www.terrorism.com/homeland/PCCIPreport.pdf>.

The response of the Clinton administration was the issuance of PD 63 as an unclassified document. See discussion in this Appendix.

Returning to E.O. 13231, the Order created a number of organizational entities. These include the President's Critical Infrastructure Protection Board that issued its first draft of a National Strategy to Secure Cyberspace on September 18, 2002 in draft for comment. A second draft has already been issued: <http://www.whitehouse.gov/pcipb/>.

A number of standing committees were created by the Order, including the following:

Private Sector and Local Government Outreach;

Executive Branch Information Systems Security;

National Security Systems;

Incident Response Coordination;

Research and Development;

National Security and Emergency Preparedness Communication;

Physical security;

Infrastructure Interdependencies;

International Affairs; and

Financial and Banking Infrastructure.

The Order also sets up coordination with the NCS (National Communications System) operating under E.O. 12472 (and part of the new DHS) and the NSTAC (National Security Telecommunications Advisory Committee) established by Executive Order 12382 of September 13, 1982. The Board also includes coordination with the National Infrastructure Advisory Council (NIAC).

Executive Order 13234 of November 9, 2001, "Presidential Task Force on Citizen Preparedness in the War on Terrorism," 3 CFR, 2002 Comp., p. 819

This Order established a Task Force that was to report within 40 days to the President identifying ways the American public could prepare in their homes, neighborhoods, schools, places of worship, workplaces, and public places for the potential consequences of any terrorist attack. The Task Force was also to identify ways the American public could assist state and local public health and safety officials engaged in the effort to prevent, prepare for, and respond to any possible terrorist attacks within the United States.

This order was a response to complaints that no effort had been made to involve the public, which wanted to participate in the war on terrorism.

Presidential Decision Directives

[Presidential National Security Decision Directive \(NSDD\) 30, Managing Terrorism Incidents \(S\), April 10, 1982](#)

[NSDD 138, Preemptive Strikes Against Terrorists. Date uncertain but possibly April 3, 1984](#)

[NSDD 179, Task Force on Combating Terrorism, July 20, 1985](#)

[NSDD 207, National Program for Combating Terrorism \(TS\) January 20, 1986](#)

[Presidential Decision Directives 39 \[June 21, 1995\] and 62 \[May 22, 1998\]](#)

[National Security Directive \(NSD\) 66, March 16, 1992](#)

[Presidential Decision Directive/NSC-63, May 22, 1998](#)

[PD 67 of October 21, 1998, "Ensuring Constitutional Government and Continuity of Government Operations."](#)

For a full listing, go to the website of the Federation of American Scientists at <http://www.fas.org/irp/offdocs/pdd/>. See also National Security Directives of the Reagan and Bush Administrations-the Declassified History of U.S. Political and Military Policy, 1981-1991, Christopher Simpson (Westview Press, 1995).

Presidential National Security Decision Directive (NSDD) 30, Managing Terrorism Incidents (S) April 10, 1982

First major effort by NSC staff to assign responsibilities for a variety of functions and activities for preparing for and responding to terrorist attacks on U.S. citizens or

assets. Developed the lead agency concept carried out in later Presidential directives and E.O. 12656. Department of State, Justice, FAA (DOT), and FEMA were identified with special responsibilities. Interestingly, FEMA was to plan for the public health aspects of terrorism attacks. The whole thrust of the directive was an overseas primary focus led by the Department of State.

NSDD 138, Preemptive Strikes Against Terrorists. Date uncertain but possibly April 3, 1984

This directive remains mostly classified, but clearly it is the start of the path down the road of significant effort, just below the level of full-scale conventional warfare occurring post-September 11, 2002, in Afghanistan and possibly elsewhere against radical middle-eastern Islamic fundamentalist groups.

The directive clearly separated so-called state-sponsored terrorism from that of sub-state organized actors. Perhaps of greatest interest is the issuance of a so-called FACT SHEET by the White House Press Office on April 26, 1984 containing legislative proposals. These include the following:

Act for the Prevention and Punishment of the Crime of Hostage-Taking;

Aircraft Sabotage Act;

Act for Rewards for Information Concerning Terrorists Acts;

Prohibition Against the Training or Support of Terrorist Organization Act of 1984.

The proposals were transmitted to Congress in a message of that same date by President Ronald Reagan.

NSDD 179, Task Force on Combating Terrorism, July 20, 1985 This Confidential directive created a Task Force on Combating Terrorism headed by Vice President George Bush. The Task Force was to:

Review and evaluate the effectiveness of current U.S. policy and programs on combating terrorism, to include:

An assessment of national priorities currently assigned to effectively combat terrorism, especially earlier recommendations regarding organization in NSDD-30 and adequacy of intelligence responsibilities in NSDD-138 and Presidential Executive Order 12333;

The assignment of responsibilities and accountability for ensuring interagency cooperation and coordination before and during;

A review and evaluation of present laws and law enforcement programs dealing with terrorism;

The adequacy of public awareness and support;

Provisions for funding and personnel; and

An evaluation of current levels of programs of international cooperation and coordination.

Make recommendations as appropriate to the President by the end of 1985.

NSDD 207, National Program for Combating Terrorism (TS) January 20, 1986

Focusing on administrative measures to implement policies earlier reflected in NSDD 138, the directive detailed administrative tasks to be accomplished.

Christopher Simpson's list of these tasks on page 633-664 of his landmark book "National Security Directives of the Regan and Bush Administrations, 1981-91 (Westview Press, 1995) is instructive and reproduced here in the following bullets:

- The creation of a secret "proposed organization" within the U.S. government specializing in antiguerrilla intelligence gathering, paramilitary operations, and rescue techniques. The existence, budget, tactics, leaders, and personnel of the group were intended to remain classified.
- Authorization of an FBI and Immigration and Naturalization Service campaign to review the immigration status of "individuals [in the United States] who are known or suspected terrorists or supporters of terrorist activities" and to expel them from the country when violations of immigration regulations are detected.
- Authorization of a series of classified studies intended to identify "military, economic, and legislative policy" goals in somewhat the same fashion that earlier Reagan administration efforts had attempted to identify and remove legal obstacles to emergency management programs.
- Reform of the information-sharing and delimitation agreements among U.S. intelligence agencies intended to greatly increase the attention paid to collecting and analyzing data on states regarded as sponsors of terrorism, particularly in the Middle East and North Africa. Persons associated with such states-such as foreign nationals resident in the United States or members of political and religious groups regarded as sympathetic to them-were also targeted for more intensive observations.
- Preparation of legal arguments designed to justify various U.S. responses to guerrillas, including use of deadly force and unilateral military operations abroad. These materials were envisioned for use in domestic United States courts, in debates in Congress, and in international forums such as the United

Nations or international courts.

- Expansion of confidential cooperation and liaison with foreign intelligence agencies regarded as likely sources of information concerning terrorism, regardless of the character of the regime sponsoring that service.
- Intensified tracking of flows of conventional arms and explosives through the international arms market.
- Tightened restrictions on the Freedom of Information Act as a means of "clos[ing] loopholes [and] preventing the use or abuse of certain laws by terrorist groups to undermine the U.S. counterterrorism strategy."
- Creation of specialized tactics, equipment, and trained paramilitary operatives useful for action against guerrilla targets.

The analytic confusion between "guerrilla movements" and "terrorism" is notable through the prism of time in the Reagan era directives. See "The Public Report of the Vice President's Task Force on Combating Terrorism" (1986).

Presidential Decision Directives 39 [June 21,1995] and 62 [May 22, 1998]

These directives were a direct response to the Murrah Building bombing in Oklahoma City and related events. For text, see <http://www.fas.org/irp/offdocs/pdd39.htm>.

Through passage of time these directives are obsolete both practically and administratively, particularly with the establishment of the Homeland Security Department by Pub.L. 107-296, November 25, 2002. [Department effective start-up date is January 24, 2003] When signed, however, these directives attempted to energize the various federal bureaucracies into improving counter-terrorism, protection of critical infrastructure [see also PDD-63], preparedness, and consequence management for weapons of mass destruction (WMD). A competent biography of Richard A. Clarke's bureaucratic career will be necessary before the nuances of these directives and their implementation or non-implementation will be understood. PDD-62 created the position of National Coordinator for Security, Infrastructure Protection and Counter-Terrorism.

The problem with these directives, and with all National Security Council official or staff actions, is that they are separate from the budget wars that exist in other policy arenas. If each NSC action required the economic or budgetary impact of the action to be analyzed, a very different policy development system might exist. Under Assistant to the President for National Security Affairs Brent Scowcroft, the NSC staff included a number of highly qualified sophisticated economists. But this analytic capability ended with the onset of the Clinton administration, with political scientists and lawyers dominating the NSC function. The bottom line is that the modern NSC operation is almost completely devoid of the need to find funds to implement policies. The assumption is that the departments and agencies will find the money to implement the policy. This clearly isn't always the case especially when the civil agencies are involved, and in particular those without classified

budgets or black world activity [no official confirmation or denial of existence].

National Security Directive (NSD) 66, March 16, 1992 ¹⁴

National Security Directive (hereinafter "NSD") 66 of March 16, 1992, titled "Civil Defense" rescinded National Security Decision Directive (hereinafter "NSDD") 259 of February 4, 1989. President Bush used the term NSD and President Regan used the term NSDD. Both Presidents actually signed approval on these Directives.

NSD 66 was the last in a succession of Directives that attempted to reconcile the nation's civil defense and strategic nuclear policy. The theory was that some degree of protection (survivability) of the civilian population could affect both Soviet and United States decision-makers in developing and, if ever required, implementing strategic nuclear strike doctrine. Political calculations, while not formally included in the SIOP (Strategic Integrated Operations Plan), were always part of its design.

Starting with NSDD 23, 26, and 259 and ending with NSD 66, the efforts of both Presidents Regan and Bush ended as labeling civil defense as something other than integral to the strategic balance and only part of the nation's efforts to build a domestic all-hazards response system.

The failure to develop a coherent rationale or theory of civil defense led to the outright repeal of the Federal Civil Defense Act of 1950, Pub.L. 81-920, by Pub. L. 107-337.

Presidential Decision Directive/NSC-63, May 22, 1998

The full text may be found at <http://www.fas.org/irp/offdocs/pdd/pdd-63.htm>. This directive was the Clinton administration effort to present an Executive Branch response to the report of the "President's Commission on Critical Infrastructure Protection" report titled "Critical Foundations: Protecting America's Infrastructure" (1997). The full text of the report may be found at http://www.ciao.gov/resource/pccip/PCCIP_Report.pdf.

The directive contains a lengthy list of mandates, including a requirement that each department and agency develop a plan for protecting its own critical infrastructure. Also, an analysis of interdepartmental and inter-governmental dependencies was to be developed. A National Infrastructure Assurance Plan with milestones was mandated, with the plan to cover the following:

Vulnerability

Remedial Plan

Warning

Response

Reconstitution

Education and Awareness

Research and Development

Intelligence

International Cooperation

Legislative and Budgetary Requirements

In addition to assigning lead agencies for sectors of the economy, assignments were given to the National Coordinator for Security, Infrastructure Protection, and Counter-Terrorism (See PDD-62). More important were the establishment of various warning and information centers. A number of these are included in the new Department of Homeland Security. Despite a period of over a year when the national security aspects were uncoordinated, especially in the civil agencies, the approach of the so-called Y2K effort provided, a dry run for what now appears to be the first outlines of the system. This system established by E.O. 13231 of October 16, 2001, "Critical Infrastructure Protection in the Information Age, 3 CFR, 2001 Com., p.13231, which can be considered to have superseded this directive.

PD 67 of October 21, 1998 "Ensuring Constitutional Government and Continuity of Government Operations" [15](#)

FEMA issued two Federal Preparedness Circulars (FPC's) to implement this directive.

Homeland Security Decision Directives

Public Policy Note: In October 2001, the White House created a new category of directive, called the Homeland Security Presidential Directive (HSPD). Two were issued during 2001, and two were issued in 2002, namely:

Homeland Security Presidential Directive #1: Homeland Security Council
<http://www.whitehouse.gov/news/releases/2001/10/20011030-1.html>

Homeland Security Presidential Directive #2. Combating Terrorism Through Immigration Policies <http://www.whitehouse.gov/news/releases/2001/10/20011030-2.html>

Homeland Security Presidential Directive #3, December 2001/January 2002

Homeland Security Presidential Directive #4, March/April 2002.

Footnotes

1. Although the Exxon Valdez accident was not a terrorist event, it is included among the milestone events on the Terrorism Time Line because it led to regulatory and organizational changes that do deal with terrorism response by some federal agencies.
2. For more details about the NCP and the lead federal agencies, go to: (1) U.S. Environmental Protection Agency <http://www.epa.gov/oerrpage/oilspill/ncpover.htm>; or (2) U.S. Coast Guard <http://www.uscg.mil/d14/units/msohono/hacp/1100.htm>
3. The Chemical Demilitarization Program was renamed the Chemical Emergency Preparedness Program in 1992. The General Accounting Office (GAO) has documented problems in the program in a series of reports.
4. Ironically, a 1982 National Security Decision Directive (NSDD), not focused on civil defense, but on mobilization for emergency response and recovery, had mandated a single response system for both attacks and natural disasters. See NSDD-47. See also discussion of NSD 66 this Appendix
5. Most Executive Orders from recent Presidential administrations may be found at: http://www.archives.gov/federal_register/executive_orders/executive_orders.html. For information on amendments and rescissions of Executive Orders generally, see http://www.archives.gov/federal_register/executive_orders/disposition_tables.html.
6. **Analyst's Note:** One of the principal authorities cited for this E.O. is the Federal Civil Defense Act of 1950, as amended (PL 81-920) and that statute was repealed by PL 103-337. Similar language to portions of that statute were incorporated in the Robert T. Stafford Disaster Relief and Emergency Assistance Act (PL 100-707), which amended the Disaster Relief Act of 1974, PL 93-288, also cited as authority for E.O. 12472.
7. **Additional information sources.** No discussion of the operations of the NCS would be complete without reference to several related systems. These include the Emergency Alerting System (EAS), formerly the Emergency Broadcasting System (EBS), discussed at 47 CFR Part 11. Also see the Telecommunications Priority System found at 47 CFR Part 67. National security concerns are addressed in part by 47 CFR, parts 201-2.
8. It should be noted, that while over 200 references exist in the United States Code to the term "National Emergency" the term "national security emergency" does not exist anywhere in the United States Code and no declaration of a "national security emergency" has been made to date. Furthermore, none is expected since the term is legally without meaning except in a hortatory sense.
9. Section 1102, listing the support functions of the Attorney General in 1102(j) and 1102 (s), provides the only reference to functions concerning critical infrastructure protection and terrorism. Thus, as of November 1988, the issue of terrorism had not affected the drafting of the E.O. Accordingly, the amendments by E.O. 13228 inferentially mandate reinterpretation of the assigned functions in the context of terrorism.
10. Some related details are at http://www.archives.gov/federal_register/executive_orders/1988.html.

11.

Analyst's note: The story of Bernard Baruch, the "czar" of war production in WWI, is fascinating since issues like the fair allocation of defense contracts to small business and accounting standards were addressed by Baruch's War Resources Board. The origins of the Small Business Administration came from this policy debate. In World War II, the record is much more complex (the economy was more complex), but the enactment of the DPA in 1950 tried to incorporate lessons from those great economic mobilizations. The daily use of the DPA remains the last statutory remnant of those great mobilizations. It was one of two statutes, the other the National Energy Security Act cited by the Clinton and Bush administrations in first addressing the California energy crisis at the end of CY 2000 and beginning of CY 2001.

12.

Originally published in the Federal Register at 66 F.R. 49079.

13.

Analyst's Note: Over 100 statutes in the U.S. Code refer to "terrorism." In the published Code of Federal Regulations, only the State Department and the Department of Justice have regulations that utilized the word "terrorism" one or more times. See Title 22 (State) and Title 28 (Justice).

A little known fact is that FEMA was assigned the consequences of terrorism role in 1979 by E.O. 12148, as amended, 3 CFR, 1979 comp. p. 412. That Executive Order assignment has no implementing regulations. See the U.S. Government Interagency Domestic Concept of Operations Plan (CONPLAN) at <http://www.fema.gov/r-n-r/conplan>.

14.

Analyst's Note: The comparison of NSDD-47 published in 1982 and NSD 66 published in 1992 demonstrates the elliptical nature of the National Security communities theorizing on civil defense, namely, going from an all-hazards approach in NSDD 47 and returning to it in 1992 in NSD 66.

For text of NSDD's, NSD's and PDD see <http://fas.org/irp/offdocs/pdd/>

For brief analysis and text see "National Security Directives of the Reagan and Bush Administrations", Christopher Simpson, Westview Press (1995).

15.

An annex to this Appendix is being developed which will include a brief history that will be available later. There is a National Security Presidential Directive believed to be #17, which is still the subject of additional research. Please refer to Homeland Security Directive #4.