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Domestic Preparedness

Law, Policy, and National Security

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Contents

Table of Authorities	xv
Preface	xix
About the Author	xxiii
Acknowledgments	xxv
Chapter One • An Overview of Domestic Preparedness	3
1.1. Civil Defense, Disaster Response, and Emergency Management to 2001	4
1.1.1. Disaster Response in Early America	4
<i>The Federal Response to Hurricane Katrina: Lessons Learned</i>	4
1.1.2. The Introduction of Civil Defense	5
<i>Civil Defense and Homeland Security: A Short History of National Preparedness Efforts</i>	5
1.1.3. Civil Defense and Disaster Response after World War II	7
<i>Civil Defense and Homeland Security: A Short History of National Preparedness Efforts</i>	7
1.1.4. The Convergence of Civil Defense and Disaster Response	11
<i>Civil Defense and Homeland Security: A Short History of National Preparedness Efforts</i>	11
1.1.5. FEMA, All-Hazards Emergency Management, and Domestic Terrorism Response until September 11, 2001	15
<i>Civil Defense and Homeland Security: A Short History of National Preparedness Efforts</i>	15
Notes and Questions	20
Highlight Summary Table of Major Disasters, Legislation, and Executive Orders, 1803–2001	22
1.2. The September 11 Attacks and Hurricane Katrina	23
1.2.1. The September 11 Attacks	24
<i>Emergency Preparedness and Response</i>	24
Notes and Questions	35
Summary Table of Attacks and Collapses, September 11, 2001	38
1.2.2. Hurricane Katrina	39
<i>The Federal Response to Hurricane Katrina: Lessons Learned</i>	39
Notes and Questions	61
Summary Table of Hurricane Katrina’s Approach and Landfall	61
1.3. Homeland Security and Domestic Preparedness	62
1.3.1. The Immediate Reaction to 9/11	62
<i>Civil Defense and Homeland Security: A Short History of National Preparedness Efforts</i>	62

Richard Falkenrath, <i>Homeland Security and Consequence Management</i>	63
1.3.2. The First National Strategy	65
<i>National Strategy for Homeland Security</i>	65
1.3.3. The Second National Strategy	69
<i>National Strategy for Homeland Security</i>	70
Notes and Questions	73
1.3.4. The Quadrennial Homeland Security Review	75
<i>Quadrennial Homeland Security Review Report</i>	76
Notes and Questions	77
Chapter Two • Federalism, State Sovereignty, and Domestic Preparedness	79
2.1. Domestic Preparedness and the Extent of Federal Power	80
2.1.1. Federal Authority	80
2.1.1.1. Constitutional Authority	80
U.S. Constitution	81
<i>Federalism, State Sovereignty, and the Constitution: Basis and Limits of Congressional Power</i>	82
Notes and Questions	86
2.1.1.2. Presidential Authority	88
<i>United States v. Curtiss-Wright Export Corp.</i>	89
<i>Youngstown Sheet & Tube Co. v. Sawyer</i>	92
<i>Padilla v. Rumsfeld</i>	97
Notes and Questions	103
2.1.2. Practical Limitations on Federal Authority	109
Ernest B. Abbott, Otto J. Hetzel, and Alan D. Cohn, <i>Federalism and Constitutional Challenges</i>	109
Richard Falkenrath, <i>Homeland Security and Consequence Management</i>	111
Notes and Questions	112
2.2. State Sovereignty and the Limits of Federal Power	114
2.2.1. The Police Power	114
2.2.1.1. Scope of the Police Power	114
Ernest B. Abbott, Otto J. Hetzel, and Alan D. Cohn, <i>State, Local, and First Responder Issues</i>	114
<i>Jacobson v. Massachusetts</i>	115
Notes and Questions	119
2.2.1.2. The Police Power and the Commerce Clause	121
Santiago Legarre, <i>The Historical Background of the Police Power</i>	121
Geoffrey C. Kertesz, <i>And Then Along Came John: Federal Statutory Interpretation in Contravention of State Law Violates Principles of Federalism</i>	123
Notes and Questions	125
2.2.2. State Authority	125
2.2.2.1. Overview	126
Ernest B. Abbott, Otto J. Hetzel, and Alan D. Cohn, <i>State, Local, and First Responder Issues</i>	126
Notes and Questions	129
2.2.2.2. State Governors' Authorities	129

<i>Cougar Business Owners Association v. State</i>	129
<i>Karr v. State</i>	137
Notes and Questions	139
2.3. Practical Application of Federal and State Authority	144
<i>Federalism and Disaster Response: Examining the Roles and Responsibilities of Local, State, and Federal Agencies</i>	144
Notes and Questions	147
Chapter Three • Federal Authorities for Management of Domestic Incidents	149
3.1. Statutory Emergency Authorities	149
3.1.1. National Emergencies Act	150
<i>National Emergencies Act</i>	151
Notes and Questions	152
3.1.2. Robert T. Stafford Disaster Relief and Emergency Assistance Act	152
<i>Robert T. Stafford Disaster Relief and Emergency Assistance Act</i>	152
Notes and Questions	159
3.1.3. Invocation of Federal Disaster-Related Authorities	163
Proclamation 7463, <i>Declaration of National Emergency by Reason of Certain Terrorist Attacks</i>	163
Notice of Presidential Declaration FEMA-1391-DR: New York; Major Disaster and Related Determinations	164
Notice of Presidential Declaration FEMA-3169-EM: New Jersey; Emergency and Related Determinations	165
Notes and Questions	166
3.1.4. State Emergency Authorities	167
<i>Michigan Emergency Management Act</i>	167
Notes and Questions	176
3.2. The Federal Emergency Management Agency and the Department of Homeland Security	176
3.2.1. The Creation of FEMA	177
Executive Order 12127, <i>Federal Emergency Management Agency</i>	177
Executive Order 12148, <i>Federal Emergency Management and Homeland Security</i>	178
<i>Organization: Historical Developments and Legislative Options</i>	181
Notes and Questions	183
3.2.2. The Homeland Security Act and Post-9/11 Federal Emergency Management	183
<i>Homeland Security Act of 2002</i>	184
Notes and Questions	189
3.3. The National Security Council Process and Domestic Preparedness	193
3.3.1. The National Security Council	194
50 U.S.C. § 402	195
Presidential Policy Directive 1, <i>Organization of the National Security Council System</i>	198
Notes and Questions	201
3.3.2. The Homeland Security Council	202
Executive Order 13228, <i>Establishing the Office of Homeland Security and the Homeland Security Council</i>	202

Homeland Security Presidential Directive 1, <i>Organization and Operation of the Homeland Security Council</i>	208
3.3.3. Review and Reorganization of the Homeland Security Council	210
Presidential Study Directive 1, <i>Organizing for Homeland Security and Counterterrorism</i>	211
Statement by the President on the White House Organization for Homeland Security and Counterterrorism	212
Notes and Questions	213
Chapter Four • National Incident Management Doctrine	217
4.1. The Framework for National Response	218
4.1.1. The Federal Response Plan, the National Response Plan, and the National Response Framework	218
4.1.1.1. The Federal Response Plan and Presidential Decision Directive 39	218
Notes and Questions	222
4.1.1.2. Homeland Security Presidential Directive 5, the National Response Plan, and Hurricane Katrina	223
Homeland Security Presidential Directive 5, <i>Management of Domestic Incidents</i>	223
<i>National Response Plan</i>	228
Notes and Questions	230
4.1.1.3. The National Response Framework	233
<i>National Response Framework</i>	233
Notes and Questions	239
4.1.2. The National Incident Management System and the Incident Command System	240
<i>National Incident Management System</i>	241
Notes and Questions	248
4.1.3. Political Control and Incident Management	249
4.1.3.1. Political Control and Operational Command	250
<i>Political Control and Operational Command: Building an Effective Disaster Response System</i>	250
Notes and Questions	253
4.1.3.2. Approaches to Political Control	254
Notes and Questions	258
4.2. Mutual Aid	259
4.2.1. Mutual Aid Agreements	259
Alan D. Cohn, <i>Mutual Aid: Intergovernmental Agreements for Emergency Preparedness and Response</i>	259
Northern Virginia Emergency Services Mutual Response Memorandum of Agreement	261
Notes and Questions	263
4.2.2. Liability and Mutual Aid	264
<i>Roma v. United States</i>	265
<i>Buttram v. United States</i>	269
Notes and Questions	282
4.2.3. Interstate Mutual Aid: The Emergency Management Assistance Compact	291

Model Emergency Management Assistance Compact Statute	291
Notes and Questions	295
4.2.4. Multi-Governmental Mutual Aid: The California Fire Assistance Agreement	298
California Fire Assistance Agreement	298
<i>Enslow v. United States</i>	301
<i>Enslow v. United States</i>	304
Notes and Questions	307
4.3. Federal Law Enforcement Assistance for Major Incident Response	308
4.3.1. The Investigation of Terrorist Attacks	308
<i>Terrorism Incident Law Enforcement Investigation Annex to the National Response Plan</i>	309
Notes and Questions	314
4.3.2. Federal Support to State, Local, Territorial, and Tribal Law Enforcement Authorities	314
<i>The Federal Response to Hurricane Katrina: Lessons Learned</i>	314
<i>Emergency Response Function 13: Public Safety and Security Annex to the National Response Framework</i>	318
28 U.S.C. §§ 561, 564, 566	322
<i>Emergency Federal Law Enforcement Assistance Act</i>	323
Notes and Questions	324
Chapter Five • National Preparedness	327
5.1. National Preparedness Doctrine	328
5.1.1. The Stafford Act and Civil Defense Act Authorities for National Preparedness	328
<i>Robert T. Stafford Disaster Relief and Emergency Assistance Act</i>	328
Notes and Questions	336
5.1.2. Post-9/11 National Preparedness Doctrine	336
Homeland Security Presidential Directive 8, <i>National Preparedness Interim National Preparedness Goal</i>	337
Notes and Questions	342
5.1.3. The Post-Katrina Emergency Management Reform Act and the National Preparedness System	350
<i>Homeland Security Act of 2002</i>	350
<i>Federal Preparedness Report</i>	359
Notes and Questions	362
5.1.4. National Planning	363
<i>National Response Framework</i>	365
Notes and Questions	367
5.1.5. Presidential Preparedness Directive 8 and the Evolution of National Preparedness	368
Presidential Policy Directive 8, <i>National Preparedness</i>	368
Notes and Questions	372
5.2. National Preparedness Grants	374
5.2.1. Federal Grants-in-Aid and Federal Authorities to Administer Grant Programs	374
5.2.1.1. History of Federal Grants-in-Aid	374
<i>Federal Grants to State and Local Governments: A Brief History</i>	374

5.2.1.2. Spending Clause Authority	379
<i>South Dakota v. Dole</i>	379
5.2.1.3. Types of Grants	384
<i>Federal Grants to State and Local Governments: Overview and Characteristics</i>	384
42 U.S.C. § 4102	387
44 C.F.R. §§ 60.1–60.5	388
Notes and Questions	391
5.2.2. National Preparedness Grants Authority and Structure	392
5.2.2.1. National Preparedness Grants Authority	392
42 U.S.C. § 3714	393
Alan D. Cohn, <i>Preparedness Funding</i>	394
<i>Homeland Security Act of 2002</i>	398
Notes and Questions	412
5.2.2.2. The National Preparedness Grant Programs	413
FY 2010 Preparedness Grant Programs Overview	413
Notes and Questions	420
Chapter Six • The Role of the Military in Domestic Preparedness	425
6.1. Homeland Defense and Civil Support	425
6.1.1. Civil Support Missions and Organizations	425
<i>Strategy for Homeland Defense and Civil Support</i>	428
Joint Publication 3-28: Civil Support	430
Notes and Questions	433
6.1.2. Civil Support and Hurricane Katrina	436
<i>Hurricane Katrina: Better Plans and Exercises Needed to Guide the Military's Response to Catastrophic Natural Disasters</i>	436
Notes and Questions	440
6.2. The Posse Comitatus Act and Its Domestic Preparedness-Related Exceptions	441
6.2.1. The Posse Comitatus Act	442
18 U.S.C. § 1385	443
<i>Domestic Operational Law Handbook for Judge Advocates</i>	443
Notes and Questions	444
6.2.2. Domestic Preparedness-Related Posse Comitatus Act Exceptions	444
6.2.2.1. Military Support to Civilian Law Enforcement Agencies	445
<i>United States v. Red Feather</i>	445
Notes and Questions	449
6.2.2.2. The National Guard	451
<i>Perpich v. Department of Defense</i>	453
<i>Gilbert v. United States</i>	461
Notes and Questions	464
6.2.2.3. The Coast Guard	468
14 U.S.C. §§ 2, 89	468
10 U.S.C. § 379	470
<i>United States v. Klimavicius-Viloria</i>	470
Notes and Questions	474
6.3. The Debate Over a Larger Role for the Military	474
6.3.1. The Insurrection Act	475

Stephen I. Vladeck, <i>Emergency Power and the Militia Acts</i>	475
<i>Insurrection Act</i>	480
Proclamation 6023, <i>Law and Order in the Virgin Islands</i>	481
Executive Order 12690, <i>Providing for the Restoration of Law and Order in the Virgin Islands</i>	481
Notes and Questions	482
6.3.2. The Post-Katrina Debate Over Posse Comitatus and the Role of the Military	485
Bill Nichols and Richard Benedetto, <i>Govs to Bush: Relief Our Job</i>	486
John A. McCarthy, Randall Jackson, and Maeve Dion, <i>Posse Comitatus and the Military's Role in Disaster Relief</i>	487
<i>Insurrection Act</i>	492
Notes and Questions	493
6.3.3. Martial Law	494
<i>Ex Parte Milligan</i>	496
<i>Duncan v. Kahanamoku</i>	500
Notes and Questions	505
Chapter Seven • National Security Emergency Preparedness and Defense Production Authorities	517
7.1. National Security Emergency Preparedness and Continuity of Operations	517
7.1.1. National Security Emergency Preparedness	517
<i>Continuity of Operations in the Executive Branch: Background and Issues for Congress</i>	517
Executive Order 12656, <i>Assignment of Emergency Preparedness Responsibilities</i>	520
Notes and Questions	524
7.1.2. Homeland Security Presidential Directive 20 and National Continuity	525
National Security Presidential Directive 51, Homeland Security Presidential Directive 20, <i>National Continuity Policy</i>	525
Notes and Questions	531
7.1.3. National Security Emergency Preparedness Telecommunications	531
Executive Order 12472, <i>Assignment of National Security and Emergency Preparedness Telecommunications Functions</i>	532
Notes and Questions	540
7.1.4. Public Alert and Warning	542
<i>The Emergency Alert System (EAS) and All-Hazard Warning</i>	543
Executive Order 13407, <i>Public Alert and Warning System</i>	546
Notes and Questions	547
7.2. National Security Resource Prioritization and Major Incident Management	549
7.2.1. Defense Production Act Overview	549
H. Crane Miller, <i>The Defense Production Act of 1950 and Homeland Security</i>	549
<i>Defense Production Act of 1950</i>	551
Notes and Questions	559
7.2.2. Implementing the Defense Production Act	559
Executive Order 12919, <i>National Defense Industrial Resources Preparedness</i>	560

	<i>Defense Production Act: Purpose and Scope</i>	562
	Notes and Questions	563
Chapter Eight • Private Sector Preparedness		565
8.1. An Overview of Private Sector Preparedness		565
National Response Framework		565
<i>Leveraging the Private Sector to Strengthen Emergency Preparedness and Response</i>		567
Notes and Questions		568
8.2. Regulation, Standards, and Tort Liability		570
8.2.1. Regulation		570
8.2.1.1. Regulation of Dangerous Facilities and Processes		571
10 C.F.R. §§ 50.47–50.48		571
29 C.F.R. § 1910.120		575
Notes and Questions		579
8.2.1.2. Regulation of Communities Housing Dangerous Facilities and Processes		580
<i>Emergency Planning and Community Right-to-Know Act</i>		581
Notes and Questions		584
8.2.2. Standards		585
<i>The National Commission on Terrorist Attacks Upon The United States, Final Report</i>		585
<i>Intelligence Reform and Terrorism Prevention Act of 2004</i>		586
Voluntary Private Sector Accreditation and Certification Preparedness Program		587
Voluntary Private Sector Accreditation and Certification Preparedness Program		595
Notes and Questions		596
8.2.3. Tort Liability		596
8.2.3.1. The 1993 World Trade Center Bombing and the Question of Foreseeability		596
<i>Nash v. Port Authority of New York and New Jersey</i>		598
Notes and Questions		606
8.2.3.2. The 2001 World Trade Center Attack and the Adequacy of Preparedness		607
<i>In Re September 11 Litigation</i>		607
Notes and Questions		612
8.3. Insurance and Market Forces		612
8.3.1. Insurance		612
<i>T.H.E. Insurance Co. v. Chicago Fireworks Manufacturing Co.</i>		613
Notes and Questions		615
8.3.2. Market Forces		616
8.3.2.1. Market Listing Rules		616
National Association of Securities Dealers Rule 3510: Business Continuity Plans		616
Notes and Questions		618
8.3.2.2. Information Disclosure		618
Robert Housman and Timothy Olson, <i>New Strategies to Protect America: A Market-Based Approach to Private Sector Security</i>		618
Notes and Questions		624

8.4. Private Sector Emergency Response	624
<i>The EXXON VALDEZ Oil Spill: A Report to the President</i>	624
<i>Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling—Report to the President</i>	636
Notes and Questions	649
Index	651

Table of Authorities

Principal cases are in bold type. Cases and authorities only cited in principal cases or within other quoted materials are not included.

U.S. constitution provisions and primary statutes are also included.

Cases

- Alden v. Maine, 527 U.S. 706 (1999), 88
- Bredesen v. Rumsfeld, No. 3:05-0640, 2005 WL 2175175 (M.D. Tenn. Sept. 7, 2005), 466
- Bredesen v. Rumsfeld, 500 F. Supp.2d 752 (M.D. Tenn. 2007), 466
- Buttram v. United States**, Civ. Case No. 96-0324-S-BLW, slip op. (Nov. 10, 1998), 285–286
- Buttram v. United States**, Civ. Case No. 96-0324-S-BLW, slip op. (Feb. 19, 1999), 269–281
- City of Erie v. Pap’s A.M., 529 U.S. 277 (2000), 121
- Cleveland v. United States, 531 U.S. 12 (2000), 121
- Compagnie Francaise de Navigation a Vapeur v. Board of Health of State of Louisiana, 186 U.S. 380 (1902), 121
- Cougar Business Owners Ass’n v. State**, 97 Wash.2d 466, 647 P.2d 481 (Wash. 1982), 129–136, 137, 167
- Dames & Moore v. Regan, 453 U.S. 654 (1981), 99, 104–105
- Duncan v. Kahanamoku, 327 U.S. 304 (1946), 499–500, 500–505
- Enslow v. United States, 811 F. Supp. 503 (C.D. Cal. 1992), 301–304
- Enslow v. United States, No. 93-55164, 1994 WL 649979 (9th Cir. 1994), 304–307
- Ex Parte Milligan**, 71 U.S. (4 Wall.) 2 (1866), 95, 494, 495, 496–499, 501, 502, 503, 505, 510, 514, 515
- Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146 (1963), 121
- Forest Serv. Employees for Env’tl. Ethics v. U.S. Forest Serv., No. Civ. 05-6015-HO, 2005 WL 3488453 (D. Ore. Dec. 21, 2005), 289
- Gilbert v. United States**, 165 F.3d 470 (6th Cir. 1999), 461–463
- Goldblatt v. Town of Hempstead, N.Y., 369 U.S. 590 (1962), 121, 135, 136
- Gonzales v. Raich, 545 U.S. 1 (2005), 86–87, 123, 125
- Hamdan v. Rumsfeld, 548 U.S. 557 (2006), 107
- Hamdi v. Rumsfeld, 542 U.S. 547 (2004), 99, 107, 511, 512, 514
- Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., 471 U.S. 707 (1985), 120, 121

- In re Neagle, 135 U.S. 1 (1890), 106, 108–108
- In re September 11 Litigation**, 280 F.Supp.2d 279 (S.D.N.Y. 2003), 607–612
- In the Matter of World Trade Center Bombing Litigation**, 776 N.Y.S.2d 713, 3 Misc.3d 440 (N.Y. Sup. Ct. 2004), 597–598
- Jacobson v. Massachusetts**, 197 U.S. 11 (1905), 115–119, 120, 121
- Karr v. State**, 53 Wash.App. 1, 765 P.2d 316 (1988), 137–139, 139–141, 167
- Kleppe v. New Mexico**, 426 U.S. 529 (1976), 125
- Korematsu v. United States**, 323 U.S. 214 (1944), 106, 505, 506–509, 510, 511
- Lorillard Tobacco Co. v. Reilly**, 533 U.S. 525 (2001), 121
- Medtronic, Inc. v. Lohr**, 518 U.S. 470 (1996), 120
- Metropolitan Life Ins. Co. v. Massachusetts**, 471 U.S. 724 (1985), 120–121
- Munn v. Illinois**, 94 U.S. 113 (1876), 570–571
- Nash v. Port Authority of New York & New Jersey**, 51 A.D.3d 337, 856 N.Y.S.2d 583 (N.Y. App. Div. 2008), 598–606
- Nebbia v. New York**, 291 U.S. 502 (1934), 571
- New York v. United States**, 505 U.S. 144 (1992), 85, 391
- Padilla v. Rumsfeld**, 352 F.3d 695 (2d Cir. 2003), 97–103, 108–109
- Palmore v. United States**, 411 U.S. 389 (1973), 125
- Perpich v. Dep’t of Def.**, 496 U.S. 334 (1990), 453–460, 462, 464, 466–467
- Roma v. United States**, 344 F.3d 352 (3d Cir. 2003), 265–269, 304
- Rumsfeld v. Forum for Academic & Institutional Rights, Inc.**, 547 U.S. 47 (2006), 391
- Seminole Tribe of Florida v. Florida**, 517 U.S. 44 (1996), 88
- Small v. Marine Spill Response Corp., No. CV05-8298 SVWSHX**, 2006 WL 1429445 (C.D. Cal. May 17, 2006), 649–650
- South Dakota v. Dole**, 483 U.S. 203 (1987), 88, 379–383, 387, 391–392, 413
- Sterling v. Constantin**, 287 U.S. 378 (1932), 511, 513
- Texas v. MetroCare EMS LP, No. 09-07-010 CV**, 2007 WL 1627955 (Tex. App. June 7, 2007), 297–298
- T.H.E. Ins. Co. v. Chicago Fireworks Mfg. Co.**, 311 Ill.App.3d, 724 N.E.2d 188, 243 Ill. Dec. 879 (Ill. App. 1999), 613–615
- Theiss v. Witt**, 100 F.3d 915 (Fed. Cir. 1996), 163
- United States v. American Library Ass’n, Inc.**, 539 U.S. 194 (2003), 391
- United States v. Bollman**, 24 F. 1189 (C.C.D.D.C. 1807), 79–80, 95, 102
- United States v. Curtiss-Wright Export Co.**, 299 U.S. 304 (1936), 89–91, 95, 99, 101, 103–104, 105, 106, 108
- United States v. Lopez**, 514 U.S. 598 (2000), 83, 84, 86, 87, 122, 123, 124, 125, 391
- United States v. Khan**, 35 F.3d 426 (9th Cir. 1994), 473–474
- United States v. Klimavicius-Viloria**, 144 F.3d 1249 (9th Cir. 1998), 470–474
- United States v. Mendoza-Cecelia**, 963 F.2d 1467 (11th Cir. 1992), 474
- United States v. Morrison**, 529 U.S. 598 (2000), 86, 87, 123, 124, 125, 391
- United States v. Red Feather**, 392 F. Supp. 916 (D.S.D. 1875), 445–448

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), 79, 89, 92–96, 99, 100, 101, 102, 103–104, 105, 106–107, 451, 476

U.S. Constitution

Art. I, § 1, 101

Art. I, § 8, 81, 82, 101, 122, 125, 378, 380, 453, 456, 476, 479, 512, 542

Art. I, § 9, 81, 102, 495

Art. II, § 1, 81, 88, 93, 101, 451

Art. II, § 2, 81, 88, 99, 102, 189, 451, 542, 563

Art. II, § 3, 81, 88, 89, 101, 108

Art. IV, § 3, 125

Art. IV, § 4, 82, 476

Amend. III, 82, 102

Amend. X, 80, 82, 85–85, 109–110, 122, 124, 125, 147, 379, 382

Amend. XI, 82, 87–88, 109

Primary Statutes

Defense Production Act of 1950, ch. 932, 64 Stat. 798, as amended (codified at 50 U.S.C. App. §§ 2061 *et seq.*), 93, 178, 331, 520, 532, 549–551, 551–559, 562–564

Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 745 (codified at 6 U.S.C. §§ 111 *et seq.*), 63, 64, 183–189, 193, 207, 208, 224, 231, 236, 249, 256, 336, 337, 338, 350–359, 392, 412–413, 414, 421, 423, 449–450, 525, 546, 588, 589, 662

Implementing the 9/11 Commission Recommendations Act of 2007, Pub. L. No. 110-53, 121 Stat. 265 (2007), 249, 350, 398, 413, 420, 580, 587

Insurrection Act of 1807, ch. 39, 2 Stat. 443, as amended (codified at 10 U.S.C. §§ 331 *et seq.*), 318, 319, 425, 441, 450, 474–475, 478, 480–482, 483–486, 488–491, 492–493, 493–494, 514

Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-796, 118 Stat. 3638 (2004), 336, 394, 586

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Preface

Domestic Preparedness: Law, Policy, and National Security is the study of emergency preparedness and response and its relationship to national security. Domestic preparedness includes preparedness for and response to *all hazards*, including terrorist attacks, natural disasters, industrial accidents, and other natural and human-caused phenomena. Domestic preparedness draws its modern roots from the combination of civil defense, disaster response, and the domestic response to terrorism incidents. Since the attacks of September 11, 2001, emergency preparedness and response—as part of *homeland security*—has once again become a key element of broader U.S. national security.

Presidential Study Directive 1 (Feb. 23, 2009) (PSD-1), one of President Barack Obama’s first pronouncements on national security, includes preparedness and response as an essential element not only of homeland security but of broader national security law and policy. PSD-1 stated specifically that “Homeland Security [which includes preparedness and response] is indistinguishable from National Security—conceptually and functionally, they should be thought of together rather than separately.” This concept is emphasized and built upon in the Obama administration’s first national security strategy. See NAT’L SEC. STRATEGY (2010). The study of domestic preparedness includes such topics as federalism and state powers, federal domestic disaster response and emergency authorities, national incident management doctrine, mechanisms for building and sustaining national preparedness, the role of the military in domestic emergency response, national security emergency preparedness, and private sector preparedness authorities, incentives, and responsibilities. Domestic preparedness law and policy complements foreign relations, national security, counterterrorism, and anti-terrorism law and policy as part of a comprehensive national security law curriculum.

The goal of this casebook is to teach *both* the constitutional and legal theory *and* the policy and operational practicality of domestic preparedness. To that end, each chapter of the text focuses on a major domestic preparedness challenge: How did national emergency management strategy, policy, and doctrine evolve to its current form? How does the U.S. Constitution allocate roles and responsibilities between the federal government and the states, and how well does that align with public perception of roles and responsibilities? What are the federal government’s powers and authorities? How are those powers and authorities made operational? How does the federal government ensure national preparedness? What is the proper role of the military in domestic preparedness and major incident response, and do current legal authorities support that role? What specific authorities apply to national security emergency preparedness? What mechanisms exist—public and private—to ensure private sector preparedness and response?

Certain themes cut across each of the areas addressed in this book. The question of the proper role of the federal government versus the role of the states pervades nearly every aspect of domestic preparedness. The nature and public sense of the threats to the U.S.

homeland also drive domestic preparedness law and policy in different directions at different times. The emergence of new threats and challenges forces evolution of the domestic preparedness legal and policy framework, although often returning to familiar approaches used in previous decades rather than breaking new ground. Fears of Soviet nuclear attack have given way to fears of terrorist attacks with improvised nuclear devices; concerns about Midwest floods and their impacts on Gulf Coast cities marked both the 1920s and the first decade of the 21st century; and industrial accidents involving oil production in the Gulf of Mexico harken back to radiation leaks, chemical accidents, and oil spills in the late 1970s and 1980s. Organizational models, centers of gravity within the federal government and the states, emergency authorities and restrictions on executive power, all wax and wane, emerge and recede, as the nation is faced with a differing array of domestic preparedness challenges.

Domestic Preparedness: Law, Policy, and National Security addresses these questions, and these themes, in eight chapters. Chapters 1, 2, and 3 address the historical, constitutional, and statutory foundations for domestic preparedness. Chapter 1 sets out a short history of civil defense, disaster response, and domestic terrorism response from the founding of the country, to the establishment of the Federal Emergency Management Agency, to the September 11 attacks in 2001 and Hurricane Katrina in 2005, including the creation and operation of the Department of Homeland Security. While civil defense, disaster response, and domestic terrorism response existed prior to 2001, the September 11 attacks brought a new urgency to their execution, as well as their consolidation under the rubric of homeland security. Chapter 2 describes the relationship between federalism, state sovereignty, and domestic preparedness—the cornerstone of domestic preparedness and major incident response. Chapter 3 discusses the primary federal statutory authorities for domestic preparedness and major incident response and the accompanying presidential directives and guidance, and how these authorities and directives developed over time. These elements—the history, the concept of federalism, and the primary authorities—set the foundation for understanding domestic preparedness.

With this foundation set, chapters 4, 5, and 6 describe how the foundational elements are applied in three areas: national incident management doctrine and mutual aid; national preparedness; and the role of the military in disaster response. Chapter 4 examines the history and substance of the primary doctrinal publications of the U.S. government for domestic incident management: the NATIONAL RESPONSE FRAMEWORK and the NATIONAL INCIDENT MANAGEMENT SYSTEM (which includes the Incident Command System). Chapter 4 also discusses mutual aid arrangements—the foundational mechanisms for jurisdictions to request and receive help from others—and the legal structures for the federal government’s law enforcement response to major incidents. Chapter 5 examines national preparedness—its authorities and doctrine, as well as the national preparedness grants programs, the flashpoint for disputes about national preparedness. Chapter 6 describes the role of the military in disaster response, including the concepts of homeland defense and defense support for civil authorities, *posse comitatus* and its exceptions for major incident response, and questions about the Insurrection Act and martial law. These three elements—national incident management doctrine, national preparedness, and the role of the military—form the operational core of domestic preparedness.

Finally, chapters 7 and 8 describe the specialized application of domestic preparedness principles to two specific issues: national security emergency preparedness and private sector preparedness. Chapter 7 describes the application of the Defense Production Act to domestic preparedness, as well as the concepts of national security emergency pre-

paredness and continuity of operations. Chapter 8 examines the ways that domestic preparedness concepts apply, and are applied, to the private sector, including through regulation and enforcement, tort liability and insurance, and market forces. Chapter 8 also discusses the role of the private sector as the responsible party for certain types of emergency response. These discussions round out the basic scope of the book.

In focusing on emergency preparedness and response and its intersection with national security, *Domestic Preparedness: Law, Policy, and National Security* does not cover certain tenets of emergency management such as pre-disaster hazard mitigation and post-incident disaster recovery. While important topics in their own right, these areas of emergency management have less of a nexus to national security than emergency preparedness and response. This casebook also does not cover authorities specific to public health emergencies. On that topic, readers should consult VICTORIA SUTTON, *BIOSECURITY LAW* (Carolina Academic Press 2011). Students interested in broader issues of national security law should consult JOHN NORTON MOORE & ROBERT F. TURNER, *NATIONAL SECURITY LAW* (2d ed., Carolina Academic Press 2005).

Domestic Preparedness: Law, Policy, and National Security provides an in-depth look at emergency preparedness and response and its relationship with national security at the end of the first decade of the new millennium. It is, necessarily, a snapshot in time, and domestic preparedness law, policy, and doctrine will continue to evolve. However, enduring themes of federalism and state power, the need for integrated incident management doctrine, the challenge of national preparedness, and arguments about the role of the military and the private sector will characterize any discussion of domestic preparedness at any time. Hopefully, the reader comes away from the casebook understanding the current state of domestic preparedness law and policy, the history from which it emerged, and the themes that will characterize its continued evolution.

A legal casebook is never truly complete, and the law of domestic preparedness is always evolving. If you have a suggestion for something you would like to see in a supplement or later version of the casebook, please send an email to the author at domesticpreparednesscasebook@gmail.com.

About the Author

Alan D. Cohn practiced law for eight years before joining the U.S. government in 2006. He represented clients regarding labor and employment matters as well as homeland security issues before courts, administrative tribunals, federal agencies, and Congress. Cohn is a member of the Maryland and District of Columbia bars, as well as the federal district and appellate courts in Maryland and the District of Columbia.

As a first responder, Cohn has been involved in emergency management and emergency services since 1990. He was an emergency medical technician (EMT) in New York City from 1990 to 1994. During that time, he was part of the New York City emergency ambulance system as an EMT for the New York Hospital—Cornell Medical Center (now the NewYork-Presbyterian Hospital), and responded to the 1992 U.S. Airways crash at LaGuardia Airport and the 1993 World Trade Center bombing. He was also an EMT for the campus volunteer ambulance service at Columbia University. Beginning in 1995, Cohn began work with the Federal Emergency Management Agency's National Urban Search & Rescue (US&R) Response System, serving as a disaster assistance employee, a member of the US&R task force in Fairfax County, Virginia, and a member and Chair of the Legal Issues Working Group of the National US&R Response System Advisory Committee. He responded to the 9/11 attacks on the World Trade Center and the Pentagon, and the 2005 hurricane season, with the National US&R Response System.

Cohn joined the federal government full-time in June 2006 as Director of Emergency Preparedness and Response Policy in the Department of Homeland Security's Office of Policy. In January 2008, as a member of the career Senior Executive Service, he became the Deputy Assistant Secretary for Policy (Strategic Plans), heading the Department's strategic planning office. In that capacity, Cohn managed the first Quadrennial Homeland Security Review, among other responsibilities.

Cohn has taught a class on domestic preparedness and national security as an adjunct professor at Georgetown University Law Center since 2006. This casebook is based on the materials developed for that class. In 2012, Cohn will begin co-teaching a second class at Georgetown University Law Center on national security crisis law.

Cohn received his Juris Doctor degree from Georgetown University Law Center, and his Bachelor of Arts from Columbia University. He lives in Potomac, Maryland with his wife, Becky, and their children, Elizabeth and Joshua.

This casebook was prepared by the author in his personal capacity and as an adjunct faculty member at Georgetown University Law Center. The opinions expressed in this casebook, and the questions presented in the text, are the author's own and do not reflect the view of the Department of Homeland Security or the United States government.

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