Domestic Security and Maintenance of Liberty: Striking the Balance

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Introduction

We have seen extraordinary changes in the role of the military within domestic American society since September 11, 2001. The National Defense Authorization Act of 2003 created the office that I now hold. The statutory mission assigned to the assistant secretary of defense for homeland defense was—and is—to supervise all of the homeland defense activities of the Department of Defense. In short, to supervise the domestic role of the US military, to include both the warfighting defense of the United States and the consequence management activities of the Department of Defense when providing support to civilian authorities. That is a sobering mission. It reflects the intent of Congress to bring a special geographic focus to the department that reflects the paramount security considerations associated with the immediate defense of the American people. It is a mission that sobers me every morning.

Constitutional Principles

When I was asked to take this position I thought seriously about the role of the military within domestic society, the historic and statutory constraints upon that role and the appropriate opportunity within the boundaries of those constraints for the
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US armed forces to make a contribution to the physical security of the American people. It required me to re-examine some first principles of constitutional government and the effective protection of civilian democratic principles so deeply embedded in our US Constitution.

With that as motivation, I returned to the Federalist papers. I served three terms in the House of Representatives in the 1990s. When I left the House, I decided to read the Federalist papers in their entirety. Like many political science majors, I had read portions—Federalist 10 and Federalist 51—but I had never read all eighty-five from beginning to end.

I think most of you participating in this conference are familiar to at least some degree with the Federalist papers. For those of you in the international community who may not be familiar with them, just let me briefly set the stage. Over the summer of 1787 the Constitution of the United States was written in the city of Philadelphia. The framers of the Constitution finished their work in September 1787. Then the question became whether or not the required nine of the original thirteen states would ratify the framers’ work. As in any political context there was serious debate, on this occasion between the federalists and the anti-federalists. That debate was carried on in the newspapers of the day. Between the time of the completion of the draft and the ultimate ratification of the Constitution, Alexander Hamilton, James Madison and John Jay—principally Hamilton and Madison—wrote eighty-five op-ed pieces. Those commentaries were ultimately bound together into the published work that we know today as *The Federalist.*

There are legal scholars who believe that *The Federalist* may be the finest work of legal literature ever written in the English language. A few years ago Professor Bernard Schwartz, Chapman Distinguished Professor of Law at the University of Tulsa, came up with his list of the top ten legal books ever written in the English language; at the top of the list was *The Federalist.* I’m not sure that I would go that far, but I knew when I retired from Congress I wanted to read the Federalist papers. I knew that the only way in which I would have the discipline to do so would be if I volunteered to teach a course on the Federalist papers at one of the colleges in my hometown. So I returned to Pennsylvania and taught a course on the Federalist papers for a year or so staying about three papers ahead of the students and developing my expertise in explaining their meaning.

Federalist Paper No. 8 talks with specificity about the role of the military within the borders of our nation; it is a cautionary message. When I first read Alexander Hamilton’s words I thought they were an anachronism. He was concerned that the role of the military would become too intrusive within domestic American society. He feared that if that role were to be too powerful the character of our nation and

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the core principles of the Constitution would be adversely affected. Those fears were expressed in the following words (to which I have added my own thoughts):

Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war [think September 11], the continual effort and alarm attendant on a state of continual danger [think al-Qaeda], will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they at length become willing to run the risk of being less free.3

Later in Federalist 8 he talks very specifically about the US military in a manner that, I think, was prescient. When I studied government in college and first looked at the Federalist papers and first considered the role of the military, I knew there was concern among our founders related to a large standing army. The implication was that a large standing army would by brute force impose military values upon a civilian government and a republican Constitution. The force of arms would be seen as the danger.

That is not the rationale of Federalist 8—it’s much more sophisticated, much more nuanced. It is not about brute force; it is about the choice to sacrifice liberty in order to achieve security. Hamilton wrote about nations that are internally secure from external attack, as opposed to nations which remain internally subject to foreign attack; again think al-Qaeda. The twenty-first-century reality, at least from our perspective within the Department of Defense, is that the United States is now an inherent, integrated element of a global battlespace from the vantage point of transnational terrorists.4 Indeed, I think it could be argued successfully that, from the terrorist standpoint, we are the pre-eminent element of that battlespace. Their intent is not to achieve victory through a war of attrition but to bring brutality into the internal confines of the United States. By bringing death and destruction to our citizens, they believe they can affect our political will. Well short of success in terms of attrition, they believe they can shape our political conscious by acts of brutality and if they can succeed in engaging in such acts within the United States they will have achieved pre-eminent success.

Alexander Hamilton wrote of nations that must fear that kind of internal attack versus those that are relatively secure within a domestic setting. Let me take those in reverse order the way Hamilton did. He wrote, “[t]here is a wide difference . . . between military establishments in a country seldom exposed by its situation to internal invasions. . . .”5 A recent example of such a country would be the United States during the Cold War when there was little danger of attack upon our territory. In this, the first case, the civil state remains in full vigor:
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The smallness of the army renders the natural strength of the community an overmatch for it; and the citizens, not habituated to look up to the military power for protection, or to submit to its oppressions, neither love nor fear the soldiery; they view them with a spirit of jealous acquiescence in a necessary evil. . . .

Hamilton then goes on to address, by contrast, the state of a nation that is “often subject to them [internal invasions], and always apprehensive of them.” Since September 11, 2001 we in the United States, on a daily basis, remain uncertain as a matter of harsh reality as to when and under what circumstances our transnational terrorist adversaries might again strike us internally. Three thousand people were killed on our own soil on September 11th. Another attack could conceivably occur tomorrow so we remain subject to that continuing threat. Describing a nation in that circumstance, Hamilton wrote (again with the insertion of my thoughts):

In a country, in the predicament last described, the contrary of all this happens. The perpetual menacings of danger [al-Qaeda] oblige the government to be always prepared to repel it. . . . The continual necessity for their services enhances the importance of the soldier, and proportionably degrades the condition of the citizen. The military state becomes elevated above the civil. The inhabitants . . . are unavoidably subjected to frequent infringements on their rights, which serve to weaken their sense of those rights; and by degrees, the people are brought to consider the soldiery not only as their protectors, but as their superiors. The transition from this disposition to that of considering them as masters, is neither remote, nor difficult. But it is very difficult to prevail upon a people under such impressions, to make a bold, or effectual resistance, to usurpations, supported by the military power.

Hamilton’s concern was that if we allowed ourselves to get to the point where we were disproportionately dependent upon the military for internal security then we in the military would become the saviors of society and citizens would no longer trust civilian government to provide for their physical security. The citizenry would conclude, perhaps correctly, that only the military could provide for its internal security. Once that recognition occurred, the military would be seen as the masters and, ultimately, the leaders and superiors of society. In short, not brute force but rather the voluntary relinquishment of the civilian character of our government would raise the role of the military disproportionately and ultimately threaten the civilian character of our Constitution. It would not be by force but by choice that the character of our nation would change because of the core mistake of allowing a disproportionate dependence upon military power for internal security, rather than a core dependence upon civilian law enforcement and civilian capabilities to guarantee that same security.
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Those were sobering thoughts for me when I was nominated for the position in which I now serve and those have remained sobering thoughts guiding me and many others with whom I work. On a daily basis we consider the roles of the military and civilian government and civilian capabilities when achieving security within our own borders. Obviously when we begin to address national security issues in terms of power projection and the ability to take the fight to the enemy overseas, the role of the military historically has been dominant. In my judgment that is correct. When we seek out terrorists and their supporters in places like Afghanistan and Iraq, men and women in military uniform are at the vanguard of our nation’s effort to achieve physical security. We send men and women in the armed forces forward in a lead role to engage the enemy and defeat such enemy attacks. But within our own country, it remains an issue of constant, sobering judgment to remain loyal and committed to the preservation of the civilian character of our government and the democratic nature of our Constitution, and, within that balance, properly employ the military in a manner that will enhance our security, while ensuring it remains ultimately subordinate to clear and decisive civilian authority, which in turn will ensure the civilian character of our government. That is the nature of the challenge. There are many things we can do with military power within our own borders in order to achieve the security of the American people while not endangering the civilian character of our Constitution. But that is a continuing issue of sober assessment. We ought not blindly commit military forces to missions that should remain inherently civilian in character. If we use the military within our own borders for every mission that the military in theory could achieve, we will, in fact, tip the balance towards security and pay a price in terms of liberty.

Thus, the question becomes how do you strike that balance? The remainder of my remarks will touch upon certain specific areas of operational activity where there are significant legal implications. But as I go through these challenges, both operational and legal, in each and every case I urge you to consider them in the continuing context of that balance between security and liberty and between the role of the military and the role of civilian government within the boundaries of domestic American society. Underlying the determination of that balance is the overarching requirement that those roles be consistent with the civilian core principles of the US Constitution.
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Homeland Security

It became operationally clear—indeed it was instinctively obvious—that in light of the attack we had experienced on September 11th there was a need for enhanced physical security within the borders of our nation; the enemy had struck and might do so again. The Department of Defense, acting with operational prudence, created rapid reaction forces that could act within our own country. US Army and Marine Corps forces, in a classified number, were placed on alert for potential domestic deployment of military force in order to defeat a follow-on al-Qaeda attack. It was clear that having struck us once the enemy might strike us again and that there was a role for military power in defeating such a foreign attack on our soil.

When I was confirmed as assistant secretary of defense for homeland defense and began to exercise the responsibilities and authority of supervising the homeland defense activities of the Department of Defense, I determined that having rapid reaction Army and Marine Corps ground forces on alert for domestic deployment was a reasonable course of action. But as a lawyer I asked myself, “Is that constitutional?” Is the ground deployment of US Army forces consistent with the Posse Comitatus Act of 1878? How do we deploy soldiers on our own soil in a manner consistent with the Constitution when to do so may potentially conflict with the posse comitatus statute? How do we reconcile the need to defend against another potential al-Qaeda attack with the Constitution and the law?

I know there are individuals in the audience today from a nation-State that is today an extremely close friend and ally of the United States. But in 1812 that nation-State—I am not going to say which one—deployed ground forces to the United States. Those ground forces left, shall we say, a lasting impact upon the Capitol of our nation. While those forces were en route to the capital, US Marines were employed at Bladensburg, Maryland to defend against that attack. We were not quite as successful as we hoped we would be, but we utilized US military forces to defend our own soil under the same Constitution with which we live today against a foreign attack in order to save American lives and defend American property.

The Constitution has not fundamentally changed in that regard. Article 2 of the Constitution provides “The President shall be commander in chief of the Army and Navy of the United States. . . .” That executive power remains essentially the same today as it was 1814 when the defense of the capital occurred. As I thought it through, I turned to the US Army’s Domestic Operational Law Handbook where I read about the Military Purpose Doctrine. The Military Purpose Doctrine states that the Posse Comitatus Act does not apply to those missions which are being executed primarily for a military purpose. The use of force for purposes other than arrest, search
and seizure is not proscribed by posse comitatus. When those Marines were deployed in Bladensburg in 1814 they weren't there to arrest anybody and when we established quick reaction forces in the wake of September 11th the purpose was not law enforcement but warfighting on our own soil as it had taken place during the War of 1812 and, some would argue, as Lincoln exercised that power during the Civil War. It was not that the power was not there; it was that we had not used it on our own soil for a military purpose in quite a long time. But I personally concluded that the Military Purpose Doctrine allows us to have Army units on alert—and we continue to have them on alert—prepared for ground deployment within the United States to defend, for instance, critical infrastructure, perhaps a nuclear power plant, against a transnational terrorist threat.

We do not anticipate, however, that the first several layers of our defense against a foreign attack on our own soil would be military in character. We emphasize that the primary dependence is upon civilian law enforcement. But if federal, state and local law enforcement authorities and ultimately the National Guard cannot physically defend American citizens against a foreign threat on our soil, under the Military Purpose Doctrine and consistent with the Posse Comitatus Act, we do have quick reaction forces ready to be deployed, not for purposes of law enforcement, but for purposes of warfighting under Article 2 of the Constitution in defense of the American people.

**Responding to Natural Disasters**

Having considered and addressed the use of military forces for defensive purposes, we then encountered the issue of the utilization of US military capabilities within US borders in the event of a natural disaster. Hurricane Katrina emphasized the challenges associated not with warfighting but the statutory authority related to incident management. Arguably the worst natural disaster in American history took place on August 29, 2005 when Hurricane Katrina came ashore along the Gulf Coast. Nearly two thousand lives were lost; the damage is measured in the billions of dollars. The performance of the US military in response to what were truly horrific circumstances was by most accounts superbly competent. That is not to say that the response to catastrophic events cannot be improved upon, but the simple fact is that the military response to Hurricane Katrina was arguably the largest, fastest deployment of military capabilities in US history. Between August 29 and September 10, the United States deployed seventy-two thousand military personnel—fifty thousand National Guardsmen, twenty-two thousand active duty—to the Gulf Coast to provide humanitarian relief. Out of that military response came, I believe, a significant respect for military capabilities, while simultaneously fairly
harsh criticism was being directed, often with justification, towards some civilian response authorities. The discussion began immediately thereafter as to the appropriate role of the military in response to a catastrophic natural event. The Stafford Act and the Economy Act, as well as other provisions of statutory law, provide the Department of Defense authority to assist a lead civilian agency in responding to a natural disaster or a man-made event. The issue then becomes: if the military does well in such circumstances, why not put the military in charge? That, again, raises some of the issues that were first raised in Federalist 8. President Bush sparked serious and thoughtful discussion on that issue in a way that I think he consciously intended. We were able to think through both the opportunities and the challenges associated with the use of military capabilities in providing such a response. There was discussion in the media and at senior levels of government with regard to the possibility of designating the Department of Defense as the lead federal agency replacing, at least on a temporary basis, the Department of Homeland Security in providing a federal response to a disaster. Then the lawyers got into the act.

I have learned something from the Department of Justice with regard to the scope of the executive power under Article 2 of the Constitution and frankly it surprised me; it might not have surprised Hamilton and Madison but it surprised me. The Department of Justice in a series of opinions, the most fundamental of which goes back to 2002, concluded that when the Congress of the United States assigns a certain responsibility by statute to a particular cabinet-level department, the president lacks the authority thereafter to re-delegate that responsibility from the designated agency to another. That theory of law came into play in preliminary analyses of the issue of whether or not the authorities assigned to the Department of Homeland Security under the Homeland Security Act of 2002 could be re-delegated by the president to the Department of Defense. Some very thoughtful legal scholars, including some within the Department of Justice, concluded that the president could not do that.

The Department of Homeland Security has been uniquely and specifically assigned the responsibility as the lead federal agency in responding to catastrophic events and in consequence management related to disasters. Whether or not it makes operational sense to reassign that responsibility, because Congress had spoken on the issue, in the absence of follow-on congressional reconsideration of the Homeland Security Act of 2002, it would appear, at least for the time being, that by law the lead federal agency in responding to natural disasters must remain the Department of Homeland Security.

As lawyers I ask you to consider what a profound impact the law and your profession had on a significant public policy debate. The outcome of that debate, at
least in the first phase, was conclusively determined by legal analysis. That doesn’t
close the door on a more robust military role, but it means that that military role
will remain, at least under current law, subordinate to a lead federal agency which
is civilian in character. Whether or not one would agree with him, I suspect Ae­
xander Hamilton would feel pretty good about that result.

The position of the Office of General Counsel of the Department of Defense is
that we do not need to amend the Posse Comitatus Act of 1878. The Defense De­
partment has concluded the act does not impede in any significant way the military
missions that the Department of Defense has been assigned to execute nor does the
act present an unreasonable impediment to foreseeable military missions within
the United States. Senator Warner and others have, from time to time, said as a
matter of due diligence and prudence that a statute drafted in the Reconstruction
era perhaps ought to be re-examined for its continued utility in the vastly different
context of transnational terrorism of the twenty-first century.

I believe without question the terminology of the Posse Comitatus Act is out of
date. We found ourselves, for instance, in the aftermath of Katrina dealing with
civil disorder on the streets of New Orleans. If we were to experience a terrorist at­
tack involving a weapon of mass destruction, it is entirely possible that the social
chaos inevitably associated with such a catastrophic event would generate substan­
tial civil disorder. In those circumstances, it might well be that the principles of the
Posse Comitatus Act would come into play in terms of the use of Title 10 active­
duty military personnel in providing immediate protection of constitutional rights
and enforcement of federal statutes in circumstances where, for a limited period of
time, civilian law enforcement authorities found themselves incapable of guaran­
teeing those constitutional rights or enforcing those federal statutes.

Counterterrorism

It is those circumstances that authorize the federalization of the National Guard
and the use of the armed forces under the Insurrection Act of 1807. But when we
examine transnational terrorism in the context of the Insurrection Act, we are not
really dealing with an insurrection as that act defines it. At a minimum, we need to
re-examine the archaic terminology of the Insurrection and the Posse Comitatus
acts in order to ensure that their language remains consistent with the character of
the threat that we face in the twenty-first century. The Defense Department's posi­
tion has been that the Posse Comitatus Act does not need to be substantively
amended, but that the terminology of both the Posse Comitatus and the Insurrec­
tion acts should be reconsidered in order to ensure the principles of law reflected in
those statutes remain relevant to the twenty-first-century threat.
Can we use the National Guard for domestic counterterrorism missions in support of civilian law enforcement? I am not certain the law is clear on that point. That too must be examined, probably by legislative authorities. Congress about a year ago amended the law to provide that a joint task force (JTF) engaged in counter-narcotic activities, typically along the borders of the United States, could engage in counterterrorism activities domestically in support of civilian law enforcement. It was a very brief amendment to the law. With virtually no legislative history, we are still trying to figure out the legislative intent reflected in that statutory change, but the law now provides that Title 10 active-duty military forces, like JTF North in El Paso, Texas, may engage in counterterrorism activity in support of civilian law enforcement authorities. There is no analogous provision of law empowering the National Guard to engage in similar missions. As a result, we now have a disparity in the law in which Title 10 forces may take on such counterterrorism missions, but National Guard forces may not, even though they may be colocated.

In the absence of other specific legislation, we find ourselves struggling, under pre-existing authorities not particularly well suited to counterterrorism missions, to shoehorn what are at least in appearance and perhaps in substance counterterrorism activities into other statutory authority. What I suggest needs to be undertaken, in a sober, serious and deliberative manner, is an effort to better define the counterterrorism mission assigned to Title 10 joint task forces and the parallel authority, if any, granted to the National Guard to also engage in counterterrorism activities in support of civilian law enforcement.

**Intelligence Support**

Another issue that I’m going to be unable to resolve in my remarks, but want to pose for your consideration, is intelligence support for domestic uses of the armed forces. When military forces are used within our own borders for certain warfighting, counterterrorism and force protection missions, there is a requirement for intelligence, as is the case for all military missions. I suspect when those Marines defended against those unnamed invading forces at Bladensburg in 1814 they had military intelligence requirements, such as: Where are the enemy forces? By what means are they moving towards our positions? How many are there and how are they equipped? In short, the information needed to better anticipate and respond to the enemy attack.

That requirement is as necessary today as it was then. As we look at the domestic warfighting responsibilities of both the Title 10 military forces and, under the recent statutory amendment to Title 32, the National Guard, the question arises,
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how, consistent with the civilian character of our government and the preservation of domestic civil liberties, do we acquire the intelligence information necessary to support our domestic military missions? There is no easy answer to that question and determining the answer will require sober judgment. We in the military see ourselves as consumers, not collectors, of domestic intelligence. I believe the law sees us as consumers as well. There are provisions of the law, very tightly constrained, that do allow certain military units, such as counterterrorism units, military intelligence units and general utility forces, to collect intelligence domestically. But, for reasons that are obvious and fundamental to the character of our nation, the role of the military in collecting domestic intelligence is very tightly and, in my judgment, appropriately constrained.

The military has statutory authority to collect domestic intelligence that relates to anti-terrorism force protection. Our terrorist adversaries do see, as indicated earlier, the United States as a part of the global battlespace. In the context of the past precedent of the September 11 attacks and a continuing threat of domestic attack, anti-terrorism force protection requirements for the military have been heightened as a military mission as a matter of immediacy.

The question to be considered is, given the force protection mission of conducting an active defense against the transnational terrorist threat within our borders and given the parameters of existing statutory authority that allow us to collect intelligence domestically for such a purpose, how do we bring to that framework an appropriate degree of clarity and detail that both enables the successful intelligence support of those military missions, while avoiding an intrusive and improper engagement in domestic intelligence collection activities by military forces? It is part of the balance that I addressed earlier. It is a balance that is subject to continuing assessment because of the nature of the threat that we now face domestically and the role of the military in defending against that threat.

Employment of Non-lethal Weapons

In response to Hurricane Katrina we deployed for either active or contingent military missions about fifteen thousand security personnel. Most of those military personnel were deployed to the New Orleans area. You may recall that about four or five days after Katrina came ashore, the president deployed twenty-two thousand Title 10 military forces on a humanitarian mission. They were there in conformity with the Posse Comitatus Act and also available for service in anticipation of invocation of the Insurrection Act if civil disorder had continued within New Orleans. The soldiers from the Army's 82nd Airborne and 1st Calvary divisions and Marines from the 1st and 2nd Marine divisions deployed to New Orleans for a
humanitarian mission. But they also established a military presence and were available, subject to presidential authority, for security missions if the president had chosen to invoke the Insurrection Act. In addition, we used seven thousand National Guard forces, which were not subject to the Posse Comitatus Act, in direct law enforcement roles, including over four thousand National Guard military police who actively and lawfully engaged in law enforcement–related activities.

Fifteen thousand men and women in uniform were deployed in the aftermath of Hurricane Katrina into an area of civil disorder, either directly engaged in security missions or potentially engaged in such missions. They were neither trained in the use of nor equipped with non-lethal weapons. In my judgment that was a mistake and we need to learn from that experience. Imagine, if you will, a need to respond to a larger catastrophic event, perhaps a terrorist attack involving weapons of mass destruction, where loss of life and physical devastation might be far worse than what we experienced during the very difficult and tragic days of Hurricane Katrina. We could and should anticipate that, in the context of related civil disorder, the military may have a role to play and that role might include the use of lethal force.

But, again in my judgment, we should not limit the range of options available to our military commanders. Commanders on the ground should have the flexibility to restore civil order, protect constitutional rights and preserve federal statutory authority with a proportionate degree of force which, in their determinations, would be sufficient to fulfill mission requirements. The choice should not be passivity versus lethality. We have non-lethal weapons in our inventory that would be sufficient in many circumstances to maintain or restore civil order without necessarily threatening the actual loss of life.

Certainly the legal issues associated with that are profound. If we deploy soldiers on our own streets in a catastrophic circumstance reflecting a character of civil disorder and if we do execute such a deployment for the purpose of preserving constitutional rights, equal protection of the law for instance, and enforcing other statutory authorities, what legal authority should be provided? What liability provisions should be enacted in order to ensure the proper employment of such non-lethal capabilities?

I spoke earlier about critical infrastructure protection. If we use military forces to protect critical infrastructure such as nuclear power plants against potential al-Qaeda attacks, we have non-lethal capabilities those forces can employ that are very high tech in character. Some of those capabilities are quite well developed in terms of technology—microwave beams for instance—and can be used without risking the loss of life. Defending domestic critical infrastructure under the same circumstances with rifles and machine guns would pose obvious risks to the surrounding civilian community. But what are the public policy issues related
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to use of non-lethal weapon systems? What are the legal issues? What liability questions are created? What if we were to use interlocking microwave beams to defend a nuclear power plant as a humane alternative to the use of deadly force, such as M16s and .50 caliber machine guns?

Non-lethal weapon systems certainly have the potential to effectively defend critical infrastructure. Lives, including innocent lives in the surrounding communities, could be saved through the use of such systems. But it is almost inevitable that an innocent person would be struck by a microwave beam. It seems preferable to me to be struck by a beam as opposed to a bullet from an M16, but what are the liability issues? What are the public policy questions that need to be examined? As with so many of the questions involving the domestic use of military forces, integration of non-lethal weapons into use-of-force capabilities must be preceded by public debate and legislative deliberation. In that way we can develop a legal framework that properly supports the domestic use of non-lethal weapons as a humane alternative to lethal force.

Who's in Charge?

The Hurricane Katrina experience witnessed multiple layers of local, state and federal government authorities (civilian and military) involved in the response without clarity of intent and perhaps with some insensitivity to constitutional history. I therefore ask the rather straightforward question, “Who’s in charge?” I know there are individuals in this audience from Israel. In Israel the answer to “who’s in charge” in responding to a disaster is pretty clear—it’s the Israeli Defence Force (IDF). When disaster occurs, the on-scene IDF commander is in charge.

I spent some time with the Home Front Command in Israel and have some familiarity with the system of government in Israel. It is a system that is not fundamentally federal in character.

Looking back to the historic events of 1787, it is clear that our founders created a more complex web of authorities that is consciously embedded and carefully integrated into the US Constitution. Ours is a system of checks and balances, which sounds pretty good until you have to mount an effective response to a catastrophic event. The theory of our Constitution—the wonderful theory of our Constitution—is that we preserve liberty through competition. We decentralize power throughout the federal government. But by federal I also mean the federal character of our government, which includes not just the national government but the fifty state and thousands and thousands of local governments. We defuse power in order to have a system of checks and balances. We have a Constitution that created three equal branches of government so that no one branch of government would
become too powerful and we gave certain powers to the national government and reserved the remainder to the states.

We have provisions in the Constitution, including the Tenth Amendment, guaranteeing certain authorities to the states, and others from the states to local government. So we recognize—at least I recognize—that if we are to remain consistent with the Constitution, the issue is really not “who’s in charge.” Under our Constitution, we will never have absolute unity of command. Our founders in their wisdom didn’t want that. They dispersed power in a decentralized manner throughout the various levels and branches of government. So our challenge is not to achieve unity of command; our challenge is to achieve, in military terminology, unity of effort within that system of decentralized authority, those checks and balances created by our founders. That requires very close coordination and detailed, integrated planning among all levels of government and between civilian authorities and military forces.

H.L. Mencken once said that for every complex problem, there is a solution that is simple, neat and wrong. There is no simple solution consistent with a Constitution of checks and balances. It requires hard work, integrated planning, a common understanding of the threat environment and careful consideration of foreseeable missions in advance of a crisis so that in the context of checks and balances we nonetheless achieve a unity of effort.

**Conclusion**

Forgive me for going on at such length, but I wanted to give you some sense of both the complexity of the issues and the seriousness and purpose that have been brought to those issues since September 11, 2001. We know that the US military has a tremendous ability to provide for the physical security of the American people, including the contingent missions related to domestic warfighting against foreign adversaries on our own soil if civilian law enforcement authorities are not capable of meeting the perceived or very real threat. And, as was obvious in Hurricane Katrina, we in the Department of Defense have a very important role to play in providing consequence management capabilities to augment and reinforce civilian authorities. But in the overall context of enhanced core missions evolving for the military domestically in the twenty-first century, we have not forgotten the cautionary words of Federalist 8. The achievement of security while maintaining our liberty remains our fundamental commitment and our core responsibility.
Notes

5. Federalist Paper No. 8, supra note 3, at 33.
6. Id.
7. Id.
8. Id. at 33–34.
11. US CONSTITUTION, art. II, sec. 2.