THE CIVIL LIBERTIES IMPLICATIONS OF A NUCLEAR EMERGENCY

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During a nuclear emergency, the government might be tempted to actions that violate or nearly violate our civil liberties traditions. Such actions would create practical precedents affecting future official attitudes; moreover, such actions might be upheld by the courts, creating formal legal precedents as well. And, regardless of what the government does or does not do, a nuclear emergency might create public demands for increased governmental powers that could later infringe upon civil liberties. This paper attempts to evaluate these risks to civil liberties.[1]

I

INTRODUCTION

In the mid-1970's, scholars analyzed this civil liberties issue extensively.[2] Publication of the Willrich & Taylor book[3] on nuclear terrorism led to great interest in tightening up the nuclear safeguards system, and there was substantial national debate on the recycling of plutonium, the nuclear fuel that poses the most significant risk of use for terrorism.

Changes since 1975, however, make it possible to be much more analytically precise than ever before. Many of the new safeguards procedures, especially preventive systems and contingency planning, are in place.[4] The post-Watergate discussion and investigation of our national policing and

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1. For the purpose of this paper, "emergency" is defined to include both accidents and the panoply of sabotage and terrorist incidents. The paper also restricts itself to incidents occurring in the United States. The questions of U.S. participation in the investigation of a foreign event, of U.S. security in American-made nuclear facilities abroad, and of extradition of a suspect found in the United States are beyond the paper's scope.

2. Comment, *Policing Plutonium: The Civil Liberties Fallout*, 10 HARV. C.R.-C.L. L. REV. 369 (1975); J. Barton, Intensified Nuclear Safeguards and Civil Liberties, *supra* note *; R. Bartkus and G. Block, Rapporteurs' Report, Conference on the Impact of Intensified Nuclear Safeguards on Civil Liberties (Oct. 17-18, 1975) (on file in the office of the *Review of Law and Social Change*).

3. M. WILLRICH & T. TAYLOR, NUCLEAR THEFT: RISKS AND SAFEGUARDS (1974).

4. Criteria and Procedures for Determining Eligibility for Access to or Control over Special Nuclear Material, 10 C.F.R. § 11 (1981); Physical Protection of Plants and Materials: Purpose and Scope, 10 C.F.R. § 73.1 (1981); 10 C.F.R. §§ 73.2, 73.30 (1981) (security personnel qualifications).

intelligence forces has continued, so much more information is available about their activities. A related political thrust toward improving our society's response to terrorism has also produced substantial, new public information. Further, the Three Mile Island (TMI) incident in 1979 provided a well publicized and analyzed example of nuclear emergency systems in operation. Its aftermath also provided an example of public reaction to a nuclear emergency, and increased the ability to analyze these emotional reactions.

The "threat," the character of a relatively likely nuclear incident, has also changed significantly since 1975. At that time, the key issue in the safeguards discussion was the possibility that the nuclear industry would shift to breeder reactors and to extensive recycling and use of plutonium. For a variety of reasons, including high interest rates, long regulatory delays, and slowed growth in overall energy demand arising from conservation and from increased prices, the growth of nuclear power has slowed in the United States and in many foreign nations. It is true that the findings of the International Fuel Cycle Evaluation Conference[5] were relatively favorable to recycling and that the United States is proceeding with the Clinch River Breeder Reactor. Nevertheless, only a few nations are likely to proceed with the breeder, and its commercialization in the United States is likely to proceed slowly.

For at least the next decade, therefore, the issue of the civil liberties implications of a nuclear emergency is not one of plutonium recycling or the breeder reactor. Nor is the issue really accidents at conventional reactors. Such accidents are a concern, but they are unlikely to intrude significantly on civil liberties. The serious issue is that of terrorist events involving weapons-grade material obtained from a military program or from a foreign source (with or without a foreign government's connivance), rather than diverted from a civilian reactor.

There are two immediate implications of this realization. First, it is terrorism generally, rather than nuclear terrorism specifically, that poses the greatest concern from a civil liberties perspective. Second, national security and foreign policy arguments will most likely be available to the government in the event of nuclear terrorism. The availability of such arguments facilitates intrusions on civil liberties.

II

THE ALLOCATION OF GOVERNMENTAL AUTHORITY AND RESPONSIBILITY

The characters of both the governmental reaction to, and the civil liberties effects of, a nuclear emergency depend on the type of incident. In a pure accident, like that at TMI, the state government clearly takes the lead,

5. G. Smith, *INFCE—Final Plenary Conference*, 80 DEPT. STATE BULL. 56 (1980).

and the goals of both the state and federal governments are to make the reactor safe and to help those affected. If there is substantial fallout, there might be evacuations and, ultimately, seizures and clean-ups of topsoil and other contaminated material. But there would be practically no special civil liberties issues; the legal situation is little different from that of any large-scale disaster. Even in a case of nuclear sabotage, assuming that the fact of sabotage is not realized until after the event, there are few new civil liberties issues. For instance, federal authority is likely to play an important role, but the tasks of investigation and prosecution will change little, if at all, and the disaster relief problem is little different from that arising from an accident.

Other events, however, are certain to involve a major federal role and are likely to raise important new civil liberties questions. If there is a hostage-taking at a nuclear facility or if an attempted nuclear theft or sabotage is detected, there may be combat action and the use of deadly force. Even a misunderstanding arising from someone innocently approaching a nuclear facility can trigger the use of deadly force. And a terrorist's message that a nuclear device is hidden somewhere poses a different kind of emergency problem, one of search, and perhaps of intensive surveillance, detention, and interrogation to try to find the device.

A. Background

TMI reminded us that, even in the midst of a major emergency, this is a federal system. The Governor of the State of Pennsylvania held full jurisdiction over the off-site area and was as important an actor as any federal official. It was he, for example, who had to make the ultimate decision to evacuate.[6]

The federal authority to deal with nuclear disasters derives in large part from the civil defense laws. These laws are written on the assumptions that the civil defense structure can reasonably be used in several disaster contexts, and that both civil defense and disaster situations must be met by federal-state cooperation.[7] In general, this federal authority is currently assigned to the Federal Emergency Management Agency (FEMA), the creation of which Congress ratified in 1978.[8]

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6. U.S. NUCLEAR REGULATORY COMMISSION, SPECIAL INQUIRY GROUP, II THREE MILE ISLAND, A REPORT TO THE COMMISSIONERS AND TO THE PUBLIC, NUREG/CR-1250, 957-59, 1026, 1080, 1192 (undated) [hereinafter cited as II ROGOVIN REPORT].

7. 50 U.S.C. App. § 2251 (1976 & Supp. III 1979). This provision, part of the Federal Civil Defense Act of 1951, 50 U.S.C. App. § 2260 (1976 & Supp. III 1979), is supplemented by the Disaster Relief Act of 1974, 42 U.S.C. §§ 5121-5202 (1976 & Supp. III 1979). The Relief Act gives the President a broad array of emergency powers, primarily to assist state governments through providing goods, finances, and services, but only upon the request of a state governor. There is also provision for the federal government to provide the state governments with technical assistance in planning, 42 U.S.C. § 5131 (1976). *See generally* II ROGOVIN REPORT, *supra* note 6.

8. H. Res. 1242, 95th Cong., 2d Sess., 124 CONG. REC. 29,524-25 (1978) (Reorganization Plan No. 3 of 1978 (Emerging Preparedness)). The President's reorganization of federal

More specific responsibilities are divided among other agencies operating under FEMA coordination. The Attorney General has responsibility for planning relations with local and state law enforcement officials.[9] The Energy Research and Development Administration (now the Department of Energy (DOE)) was authorized to "participate in the conduct, direction or coordination of search and recovery operations for nuclear materials, weapons or devices; assist in the identification and deactivation of improvised nuclear devices; and render advice on radiation and damage probabilities in the event of the detonation of an improvised nuclear device."[10] Thus, DOE is the specialist in looking for nuclear weapons and operates the Nuclear Emergency Search Teams (NEST).[11] The Department of Defense (DOD), however, operates the Explosive Ordinance Disposal groups which have the task of deactivating any device that is found.[12]

The Nuclear Regulatory Commission (NRC), in consultation with DOE and, as will be seen below, with FEMA, has responsibility for the civilian reactors and for implementing contingency plans "for dealing with threats, thefts, and sabotage relating to special nuclear materials, . . . and nuclear facilities resulting from all activities licensed under the Atomic Energy Act of 1954 . . . ."[13] To complete the cast of key actors, the Federal Bureau of Investigation (FBI) has statutory authority to enforce the Atomic Energy Act of 1954.[14]

B. Accident Situations

As part of its facility licensing function, the NRC has long required reactor licensees to develop an emergency plan, including a description of

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emergency preparedness and disaster response programs went into effect Sept. 16 after Congress failed to block the plan on Sept. 14. A number of additional agencies were placed under it by Executive Order No. 12148, 44 Fed. Reg. 43239 (1979), *reprinted as amended in* 50 U.S.C. App. § 2251 (Supp. III 1979). There is an explanatory chart in STAFF REPORT TO PRESIDENT'S COMMISSION ON THE ACCIDENT AT THREE MILE ISLAND, REPORT OF THE EMERGENCY PREPAREDNESS AND RESPONSE TASK FORCE 7 (1979). And for general background description of the emergency organization, see NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, MAJOR ALTERNATIVES FOR GOVERNMENT POLICIES, ORGANIZATIONAL STRUCTURES, AND ACTIONS IN CIVILIAN NUCLEAR REACTOR EMERGENCY MANAGEMENT IN THE UNITED STATES, NUREG/CR-1225, 65-98 (1980) (Report to the Rogovin Commission).

9. Exec. Order No. 11490, § 502, 34 Fed. Reg. 19567 (1969), as amended, *reprinted in* 50 U.S.C. App. § 2251 (Supp. III 1979).

10. Exec. Order No. 11490, § 1401(b)(2) (1976).

11. *An Act to Combat International Terrorism: Hearings Before the Senate Comm. on Governmental Affairs*, 95th Cong., 2d Sess. 303-04 (1978) (testimony of D. Kerr, Acting Assistant Secretary for Defense Programs of DOE) [hereinafter cited as *International Terrorism Hearings*]; *id.* at 337 (undated DOE memorandum describing its emergency response capabilities).

12. *See* U.S. ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION, INTERAGENCY RADIOLOGICAL ASSISTANCE PLAN, ERDA-10, UC-41 II (revised April 1975).

13. Exec. Order No. 11490, *supra* note 9, at § 1450(b)(3) (1976).

14. § 2271(b), 42 U.S.C. § 2271(b) (1976 & Supp. III 1979). More general provisions affecting the FBI appear at 28 U.S.C. §§ 531-37 (1976 & Supp. III 1979).

contacts and arrangements with local agencies in the event of a nuclear emergency.[15] FEMA's new National Radiological Emergency Preparedness/Response Plan for Commercial Nuclear Power Plant Accidents[16] details the next steps. This plan, which specifically excludes acts of sabotage or terrorism,[17] is based on the assumption that the states will play the lead role.[18] It then allocates federal responsibility following the areas of expertise already suggested. The NRC is to be concerned with reactor status and the like;[19] the DOE is concerned with off-site radiological monitoring;[20] the FEMA is concerned with communications, with non-technical issues, and, if the President makes the appropriate findings under the Federal Disaster Relief Act of 1974,[21] with the allocation of federal financial assistance.[22]

The federal-state relationship in this area is still not entirely clear. In his December 1979 statement of actions taken in response to TMI, President Carter gave FEMA responsibility for off-site emergency preparedness.[23] The FEMA and the NRC then negotiated with each other to define an arrangement under which state authorities would prepare the plans for off-site contingencies, including evacuation, and the FEMA would review, assess, and evaluate the state plans.[24] To enforce the process, the NRC would suspend the license to operate any reactor in an area for which the state government had not prepared an adequate emergency plan.[25] This arrangement was controversial. It pressured the state governments into developing plans if they wanted to keep their reactors running. Alternatively, by stalling on their plans, state governments could impose a *de facto* nuclear morato-

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15. 10 C.F.R. part 50, app. E (II) (1981). *See also* II ROGOVIN REPORT, *supra* note 6, at 923, which describes Regulatory Guide 1.101 (Nov. 1975) Annex A, Organization and Content of Emergency Plans for Nuclear Power Plants, and Annex B, Implementing Procedures for Emergency Plan (issued for comment).

16. 45 Fed. Reg. 84,910 (1980), *reprinted in* [1981] NUCLEAR REG. REP. (CCH) ¶ 1035. FEMA developed this plan as a replacement for the Federal Response Plan for Peacetime Nuclear Emergencies after Congress expressed concern regarding TMI in § 304 of the Nuclear Regulatory Commission Appropriation Authorization, Pub. L. No. 96-295, 94 Stat. 790 (1980). *See* 45 Fed. Reg. 84,910 (1980); II ROGOVIN REPORT, *supra* note 6, at 1008-09. *See also* interim Radiological Emergency Response Planning and Preparedness, 45 Fed. Reg. 69,904 (1980).

17. 45 Fed. Reg. 84,910 (1980).

18. *Id.* at 84,911.

19. *Id.* at 84,915.

20. *Id.*

21. 42 U.S.C. §§ 5121-5202, 5141 (1976 & Supp. III 1979).

22. 45 Fed. Reg. 84,911 (1980).

23. Federal Emergency Management Agency, 45 Fed Reg. 84,910 (1980); Statement of Presidential Commission on the Accident at Three Mile Island, 15 WEEKLY COMP. OF PRES. Doc. 2202, 2203 (1979), *discussed in* U.S. NUCLEAR REGULATORY COMMISSION, REPORT TO CONGRESS ON STATUS OF EMERGENCY RESPONSE PLANNING FOR NUCLEAR POWER PLANTS, NUREG-0755, 3 (1981).

24. Review and Approval of State and Local Radiological Emergency Plans and Preparedness, 45 Fed. Reg. 42,341 (1980) (proposed rule) (to be codified at 44 C.F.R. part 350).

25. Emergency Planning, 10 C.F.R. §§ 50.47, 50.54(q), part 50, app. E, 70.32(i) (1981).

rium. To avoid the latter effect, FEMA and the NRC reached an additional understanding which allowed the NRC to request a FEMA evaluation of the "current status of emergency preparedness" around a site, regardless of a state's desires.[26]

The civil liberties issues associated with possible emergency declarations are relatively minor. These issues are determined by state law. The locus and character of the authority, therefore, vary from state to state.[27] But the exercise of these powers promises to have little civil liberties impact, given the limited context in which they are to be exercised: in an evacuation, in use of the National Guard for disaster relief, and in distribution of various forms of federal emergency assistance.

A major component of the federal-state bargaining in the TMI case involved finding ways to provide federal assistance despite the Governor's refusal to declare an emergency.[28] The Governor was extremely hesitant to declare such an emergemcy for fear of the psychological effects.[29] This balance between psychology and federal funds is likely to be the typical pattern. How it will resolve itself in practice will depend on the psychological character of the particular crisis and on the responses to earlier crises. If a governor makes the wrong decision, a popular sense could emerge that these situations need to be put into federal hands. This could conceivably weaken some of the civil liberties protections inherent in federalism, protections that are particularly important in crises where the federal judiciary provides an independent check on a state's emergency actions.[30]

C. Sabotage and Terrorism

An incident of sabotage or terrorism can raise all the issues already discussed as well as a number of new, more complex issues, including law

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26. Memorandum of Understanding Between NRC and FEMA Relating to Radiological Emergency Planning and Preparedness (Nov. 4, 1980), *reprinted in* NUREG-0755, *supra* note 23, at E-1. There are also two more recent memoranda of understanding between the two agencies, but they do not appear to change the result described in text, 45 Fed. Reg. 82,713, 82,715 *reprinted in* [1981] NUCLEAR REG. REP. (CCH) ¶¶ 1033, 1034.

27. The governor is frequently said to be the locus of authority to declare martial law, but the situation varies from state to state, particularly in terms of authority such as the authority to require an evacuation, an authority that does not exist in all states. *See* EMERGENCY PREPAREDNESS PROJECT, CENTER FOR POLICY RESEARCH, NATIONAL GOVERNORS' ASSOCIATION, DOMESTIC TERRORISM 15-25 (1978) (printed for Defense Civil Preparedness Agency 1979).

28. *See* STAFF REPORTS TO THE PRESIDENT'S COMMISSION ON THE ACCIDENT AT THREE MILE ISLAND, REPORTS OF THE OFFICE OF CHIEF COUNSEL ON EMERGENCY PREPAREDNESS, EMERGENCY RESPONSE 176 (1979).

29. II ROGOVIN REPORT, *supra* note 6, at 1004, 1007, 1167.

30. *See, e.g.*, Sterling v. Constantin, 287 U.S. 378 (1932) (district courts retain jurisdiction over suits involving *ultra vires* actions of state governors, as here where Texas governor declared martial law to curtail "wasteful" oil "overproduction"); Note, *Riot Control and the Fourth Amendment*, 81 HARV. L. REV. 625 (1968).

violations that may bring in the FBI and the military. Although there is an understandable secrecy about the area, some details of response procedures have been laid out publicly.[31]

Preventive responsibility is again placed on the licensee, which must develop procedures for the physical protection of its nuclear materials. These procedures, which vary depending on the amount and type of nuclear material present, include the obvious panoply of detection devices and barriers and also the use of armed guards and response forces. Although the armed guards (and perhaps some levels of response forces) are likely to be licensee or contractor employees, licensees are required to call in local law enforcement officials in the event of an incident.[32]

The licensee must also report the events to a network which includes NRC, DOE, and FBI.[33] At the federal level, the FBI is the lead agency due to its statutory responsibility for investigating all suspected or alleged violations of the Atomic Energy Act. But the FBI works in a much wider context, reportedly defined by the Presidential Review Memorandum No. 30, an unpublished document issued in October 1977, dealing with the general problem of control of and response to terrorism. Pursuant to this Memorandum, the executive branch is said to have created an elaborate committee structure under the National Security Council. Moreover, the different federal agencies have signed a series of agreements allocating their respective responsibilities.[34]

Under this structure, DOE provides the technical nuclear searching expertise (as it does for off-site radioactivity surveys in the case of accidents), in particular, the NEST groups which search for nuclear weapons. Under the agreement between the FBI and DOE's predecessor to allocate responsibilities in the event of a "nuclear threat incident," however, the FBI takes primary jurisdiction over all field operations and coordinates them. It also promises to protect the personnel who conduct actual search, deactiva-

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31. *See International Terrorism Hearings, supra* note 11; STAFF OF SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE HOUSE COMM. ON THE JUDICIARY, 95th Cong., 2d Sess., REPORT ON FEDERAL CAPABILITIES IN CRISIS MANAGEMENT AND TERRORISM (Comm. Print 1978) [hereinafter cited as STAFF REPORT]; TASK FORCE ON DISORDERS AND TERRORISM, NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS, DISORDERS AND TERRORISM (1976) [hereinafter cited as DISORDERS AND TERRORISM].

32. 10 C.F.R. part 73, especially appendix C (1981). DOE follows different principles, using federal guards for its shipments (probably primarily in support of the nuclear weapons program); *International Terrorism Hearings, supra* note 11, at 369 (testimony of D. Kerr, Acting Assistant Secretary for Defense Programs, DOE).

33. National Radiological Emergency Plan for Commercial Nuclear Power Plant Accidents, *supra* note 16, at 84,912-13. *Cf.* II ROGOVIN REPORT, *supra* note 6, at 995-1001 (emergency response chronology at TMI).

34. R. KUPPERMAN & D. TRENT, TERRORISM: THREAT, REALITY, RESPONSE 164-77 (1979); *International Terrorism Hearings, supra* note 11, at 8 (testimony of Secretary of State C. Vance); STAFF REPORT, *supra* note 31, at 34, 59-61 (organization charts); N.Y. Times, Jan. 9, 1978, at A14, col. 1.

tion, and clean-up operations.[35] Presumably, therefore, it decides whether or not to conduct a wide area search for nuclear materials.

The NRC retains the role of evaluating reactor safety, and perhaps personal safety, during the course of a crisis, but the agreement which it signed with the FBI in December 1979 gives the FBI the rather broad roles of

> actively investigating the incident and coordinating other necessary action by state and local law enforcement agencies in order to apprehend the perpetrators, recover[ing] any stolen or diverted nuclear material, and support[ing] Federal prosecutions as appropriate. FBI special weapons and tactics teams and hostage negotiation experts also would be available for contingency response against barricaded adversaries if needed.[36]

This appears to put the FBI very much in charge.

The jurisdictional aspects of FBI coordination with local police officials are quite ambiguous. The NRC's concept of emergency planning seems to assume that a conflict would escalate through local law enforcement officials and conceivably to the state National Guard. In contrast, the FBI seems to think in terms of doing the job itself with Special Weapons and Tactics (SWAT) teams.[37] It is unclear how well the FBI gets along in practice with local law enforcement officials. The issue may vary from one geographic and legal area to another, but there is some evidence of discord. For example, an FBI representative testified that having the local police is "the price we pay for a democracy," that they are "the first line of defense," and that when they are on the scene "there is no way you can tell [them] to leave."[38] But there are also more optimistic sources on record. In

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35. Memorandum of Understanding Between the Energy Research and Development Administration [now the DOE] and the FBI for Responding to Nuclear Threat Incidents (June 8, 1976), *reprinted in International Terrorism Hearings, supra* note 11, at 349-50.

36. Memorandum of Understanding Between the Federal Bureau of Investigation and the Nuclear Regulatory Commission, § 4.1 (Dec. 13, 1979), 44 Fed. Reg. 75,535, *reprinted in* [1981] NUCLEAR REG. REP. (CCH) ¶ 1030.

37. Special Weapons and Tactics teams "consist of individuals trained in the use of military-type equipment, weapons, and tactics, for use in a situation where a siege or hostage incident [*sic*], where usual law enforcement weapons and apprehension tactics would not be effective." *FBI Oversight: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 96th Cong., 1st & 2d Sess. 3 (1979-1980) (testimony of D. Moore, Assistant Director, FBI); *see International Terrorism Hearings, supra* note 11, at 131 (testimony of R. Kupperman, Arms Control and Disarmament Agency); STAFF REPORT, *supra* note 31, at 17. *See also* DISORDERS AND TERRORISM, *supra* note 31, at 149-55. For a description of a state unit that is presumably similar, *see Federal Capabilities in Crisis Management and Terrorism: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 96th Cong., 1st & 2d Sess. 60 (1979-1980) (testimony of C. Pagano, Director, N.J. State Police) [hereinafter cited as *Oversight Hearings*].

38. *International Terrorism Hearings, supra* note 11, at 213-14 (testimony of Sebastian Mignosa, Terrorism Section Chief, FBI). For a scenario of how federal-state political problems could produce difficulty, *see* KUPPERMAN & TRENT, *supra* note 34, at 93.

what seems like the strongest kind of evidence, the California emergency plan falls open at a page that states only (and in large letters): "If you receive a threat involving radioactive material, turn to Attachment No. 2 [listing FBI branch offices and phone numbers] and *CALL THE FBI.*"[39]

This situation therefore has the potential for even more administrative confusion that at TMI. The governor can call out the National Guard to reinforce standard police organizations. The President can also call out and federalize the National Guard, but cannot do so with other state forces. Only the President can call out the Army, but he cannot use federal troops to enforce federal law except under the conditions of the Posse Comitatus Act, generally when federal law cannot be enforced by ordinary judicial proceedings.[40] Moreover, Army regulations prohibit putting the Army

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39. *California Office of Emergency Services, Nuclear Blackmail or Nuclear Threat Emergency Response Plan for the State of California*, second unnumbered page (1978). *See* STAFF REPORT, *supra* note 31, at 16. For another optimistic view, see *Oversight Hearings, supra* note 37, at 43-49 (testimony of Monroe, Inspector-Deputy for Criminal Investigative Division, FBI).

There are further issues with respect to the relative authority of the FBI and the DOD. Under a 1949 delimitations agreement, the FBI has all jurisdiction with respect to violations of the Atomic Energy Act, with the relevant exception that the Commander of the Armed Forces assumes all responsibility once the President has declared a state of martial law. Delimitations Agreement Between the FBI and U.S. Military Intelligence Services with Supplements, February 23, 1949, *reprinted in* SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 95th Cong., 2d Sess., 2 FBI STATUTORY CHARTER 194 (1978) [hereinafter cited as FBI STATUTORY CHARTER]. There is also a 1977 ERDA-DOD agreement, *reprinted in International Terrorism Hearings, supra* note 11, at 359-63.

40. The basic limitations arise from the Posse Comitatus Act, 18 U.S.C. § 1385 (1976), which prohibits the use of the military to enforce federal law except as specifically authorized by law. The key cases interpreting this statute arose out of the struggle at Wounded Knee: United States v. Red Feather, 392 F. Supp. 916 (D.S.D. 1975); United States v. Jaramillo, 380 F. Supp. 1375 (D. Neb. 1974), *appeal dismissed*, 510 F.2d 808 (8th Cir. 1975); United States v. Banks, 383 F. Supp. 368 (D.S.D. 1974).

According to the STAFF REPORT, *supra* note 31, at 4, the President could use U.S. military forces, even under 10 U.S.C. §§ 332 or 333(2) (1976), only as a matter of last resort and after consulting with the Attorney General. The first of these provisions gives the President authority to use military force when "unlawful obstructions . . . make it impracticable to enforce the laws of the United States . . . "; the second when "insurrection, [or] domestic violence . . . opposes or obstructs the execution of the laws of the United States . . . . " The Attorney General has also laid out conditions on the use of the military under the Posse Comitatus Act. Letter of former Attorney General Ramsey Clark of 1967, *quoted in* NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, LEGAL ISSUES CONCERNING THE ROLE OF THE NATIONAL GUARD IN CIVIL DISORDERS: STAFF REPORT TO THE SPECIAL COMM. ON LEGAL SERVICES TO MILITARY FORCES 49-50 (1973). *See generally* Note, *Riot Control and the Use of Federal Troops*, 81 HARV. L. REV. 638 (1968).

It is presumably the Posse Comitatus restrictions, however, which explain why the military forces being trained for counter-terrorist action are "primarily designed" for operation abroad. *International Terrorism Hearings, supra* note 11, at 192 (testimony of D. McGiffert, Assistant Secretary of Defense for International Security Affairs). These forces are rather extensive, *see* KUPPERMAN & TRENT, *supra* note 34, at 153-54, and there are hints of some possible domestic use; the Army Forces Command, for example, is to protect the "security interest of the United States government at the scene of a nuclear incident." NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, MAJOR ALTERNATIVES, *supra* note 8, at 92.

under state authority.[41] Perhaps most importantly, each of these types of force has its own response time and tactical characteristics.[42]

The governor may be just as hesitant to declare an emergency or call out the militia as at TMI, although she might be more willing to accept the federal government's advice when there is a national security dimension. The federal government itself probably has the legal authority to declare the requisite emergency and to intervene since federal law is in question.[43] In fact, unless everyone resolves jurisdictional conflicts quickly and easily, the federal government may feel compelled to declare martial law or to federalize the National Guard to unify emergency authority as much as possible. Again, the emergency problem poses a threat to federalism.

III

IMPLICATIONS FOR SPECIFIC RIGHTS

The preceding discussion provides the background as to agency responsibility for sensitive operations during a nuclear emergency. It is worth noting that the organizational picture, strongly supported by experience at TMI, suggests that there would be great confusion as to agency jurisdiction. This confusion is more likely to broaden civil liberties than to restrict them.

A. The Use of Deadly Force

The current regulatory arrangements governing guard forces and their use of deadly force are nearly as favorable to civil liberties as one could expect. The possibility of a federal plutonium guard force, an idea repugnant to most civil libertarians, has not been actualized. Instead, guard forces are private employees.[44] Rules for the use of deadly force by private guards

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41. 32 C.F.R. § 501.3 (1980). *See also* N. Warnanoff, The National Guard and the Constitution 100 (undated) (an ACLU Legal Study, on file in the office of the *Review of Law and Social Change*).

42. O.C. BALDONADO, M. KEVANY, D. RODNEY, D. PITTS, M. MAZUR, P. STEPHENS, V. OLCUTT, SAFEGUARDS SYSTEMS CONCEPTS FOR NUCLEAR MATERIAL TRANSPORTATION NUREG-0335, NRC-13, 6-10, 6-11 (Sept. 1977) [hereinafter cited as BALDONADO].

43. In draft materials, the Federal Preparedness Agency, a predecessor of FEMA, asserts great federal power in the terrorist area. According to its draft, in incidents of "[d]isruptive terrorism" impacting upon "national conditions . . . the Federal Government will be the primary actor . . . . States will be expected to conform to Federal guidelines and operate in a manner consistent with the Federal response." The authority the draft cites is the National Emergencies Act, 50 U.S.C. § 1651 (1976 & Supp. III 1979). U.S. FEDERAL PREPAREDNESS AGENCY, INITIAL PLANNING GUIDANCE: FEDERAL RESPONSE TO THE CONSEQUENCES OF TERRORISM (Sixth Draft, Oct. 3, 1977), *reprinted in International Terrorism Hearings, supra* note 11, at 880, 908.

For an interesting sidelight, consider the existence of a classified report on constitutional authority to release prisoners in response to a terrorist demand. STAFF REPORT, *supra* note 31, at 73 (Research on International Terrorism).

44. OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS, U.S. NUCLEAR REGULATORY COMMISSION, SECURITY AGENCY STUDY NUREG-0015, III-3-4 (1976).

are generally quite unclear,[45] although the NRC has chosen conservative rules. Guards are directed to interpose themselves between threatening individuals and threatened areas or to intercept any person exiting with material, to inform and seek aid from local law enforcement officials.[46] They are instructed to use deadly force "when the guard or other armed response person has a reasonable belief that it is necessary in self-defense or in the defense of others."[47] The NRC's clear intention was to allow guards to use only the quantum of deadly force allowable to any citizen in self-defense, but to direct the guards to position themselves so that the assailants would be unable to do harm without invoking the guard's right of self-defense.

After the official police forces assume control, there is generally somewhat greater authority to use deadly force, for example, to prevent the commission of a felony, such as nuclear theft. Even at this point the standards are ill defined. In particular, principles for the use of force by the National Guard or the military are quite unclear.[48]

The fundamental civil liberties risk in this area is that the public may be more sympathetic to the government's use of force in a nuclear context. This creates the risk that such force may be directed against legitimate demonstrations with public acceptance.

There are at least two ways to control these dangers to civil liberties. The less effective way is after-the-fact review, such as through legal damage actions or analogues of a police review board. Existing law provides the basis for such review, but both the legal standards and the realities of trial practice prevent review from being very effective.[49] In particular, the Supreme Court has refused to involve itself in applying judicial standards to National Guard tactics.[50] A more effective approach to protecting civil liberties is better training and carefully developed guidelines and rules for the use of armed guards. The current training program for the guards appears fairly reasonable.[51] But it is hard to gain information about the higher, more nearly military levels of response where there may be a need for better programs.

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45. BALDONADO, *supra* note 42, at 6-7, 6-9.

46. 10 C.F.R. § 73.46(h)(4) (1981).

47. *Id.* § 73.46(h)(5).

48. *See* Waranoff, *supra* note 41, at 79-97. DISORDERS AND TERRORISM, *supra* note 31, recognizes the difficulty and uncertainty and calls for well-defined rules that use the "minimum official force adequate to tactical objectives." Standard 6.15 at 201, 202. It is, however, unable to establish the parameters of these rules. Moreover, it is ambiguous as to review, arguing against outside review procedures in discussing the general standard, *id.*, but favoring judicial review when discussing the role of the militia. Standard 5.12 at 113, 114.

49. *See* Scheuer v. Rhodes, 416 U.S. 232 (1973) (Kent State riots); Sterling v. Constantin, 287 U.S. 378 (1932) (martial law in Texas).

50. Gilligan v. Morgan, 413 U.S. 1 (1972). Consider also the legal difficulties in reaching police behavior in Rizzo v. Goode, 423 U.S. 362 (1975) and Washington Mobilization Committee v. Cullinane, 566 F.2d 107 (D.C. Cir. 1977).

51. The criteria for security personnel are presented at 10 C.F.R. Part 73, App. B. (1981).

B. Area Searches

Under the allocation for authority described above, searches for weapons or for missing nuclear material is a NEST task supervised by the FBI. The sensitivity of technical search devices is, understandably, kept confidential. A sensor in a truck or helicopter might be able to narrow suspicion down to one house that authorities could readily search under traditional principles. However, it may be possible for terrorists to hide a weapon against search devices in a way that would require either a door-to-door or a room-to-room search.[52] This latter type of search raises more fundamental civil liberties questions.

Such searches are subject to the standards imposed by the federal constitution. It is unlikely that state law would apply, because the DOE would be acting as a federal agency prosecuting a federal interest. If state law does apply, it varies radically and is not always well defined. States differ, for example, in permitting emergency response personnel to conduct operations on private property or to seize property during an emergency.[53] If the Attorney General's Guidelines[54] apply at this phase,[55] it is inconceivable that FBI headquarters would not authorize a "full investigation" which would come very close to the constitutional limits. The new United States Intelligence Activity Executive Order, even if applicable, places little limitation on such search procedures.[56]

The leading constitutional case on the issue is *Marshall v. Barlow's, Inc.*[57] The Court in *Barlow's* held that searches of business premises for violations of OSHA regulations require a warrant, but that the warrant could issue "not only on specific evidence of an existing violation but also on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].'"[58] The Court followed past decisions which permit area

52. The precise data, of course, is classified. But some information is available in O'Brien, *The Detection and Recovery of Contraband Nuclear Material,* 15 AKRON L. REV. 57, 73-74 (1981). Technological development is the responsibility of the Military Applications Group of DOE, which supports the NEST groups. *See* U.S. DEPARTMENT OF ENERGY, NUCLEAR SAFEGUARDS TECHNOLOGY HANDBOOK, HCP/D6540-01, A-21 (1977).

53. E.L. MITTER, R.D. HUME, F. VILARDO, E. FEIGENBAUM, H. BRIGGS, SURVEY OF CURRENT STATE RADIOLOGICAL EMERGENCY RESPONSE CAPABILITIES FOR TRANSPORTATION RELATED INCIDENTS, NUREG/CR-1620, 160-66 (Sept. 1980).

54. Attorney General's Guidelines for FBI Domestic Security Investigations, March 10, 1976, *reprinted in* FBI STATUTORY CHARTER, *supra* note 39, at 235. For background on these guidelines, *see* J. ELLIFF, THE REFORM OF FBI INTELLIGENCE OPERATIONS (1979).

55. STAFF REPORT, *supra* note 31, at 11, refers to the use of the Guidelines in the context of background surveillance of groups posing potential threats, but says nothing about the emergency phase of a nuclear terrorist event. Mr. Mignosa likewise spoke of the Guidelines only in the "preventive" context. *International Terrorism Hearings, supra* note 11, at 223 (testimony of Sebastian Mignosa, Terrorism Section Chief, FBI).

56. *See* United States Intelligence Activities, Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (1981) (revoking Executive Order 12,036, 43 Fed. Reg. 3674 (1980)).

57. 436 U.S. 307 (1978).

58. *Id.* at 320, *citing* Camara v. Municipal Court, 387 U.S. 523, 538 (1966).

searches with warrants to enforce fire, health, and building codes.[59] The dissent argued that the search was reasonable and therefore satisfied the first clause of the fourth amendment, but that a warrant requirement was inappropriate since there was no probable cause needed to satisfy the second (warrant) clause of the amendment.[60]

The Court is likely to uphold a nuclear search as having satisfied its intuitive sense of reasonableness. Nevertheless, the constitutional problem remains: the absence of probable cause to issue a warrant with respect to any individual home. Although the Court has held that a warrantless search is generally unreasonable,[61] it has, at times, dispensed with warrant requirements when the search does not involve the enforcement of criminal law.[62] The courts have also traditionally allowed warrantless searches in emergency situations.[63] The Supreme Court recently reiterated that "a warrantless entry by criminal law enforcement officials may be legal when there is compelling need for official action and no time to secure a warrant,"[64] and "[t]he need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency."[65] If the Court adopted this reasoning in nuclear search cases, the Constitution would not impose a barrier to the warrantless searches.

The counter-argument is that the Court has said that "[the] public interest could hardly justify a sweeping search of an entire city conducted in the hope that [specific stolen or contraband] goods might be found."[66] Moreover, lower courts have held that the police must show probable cause for each dwelling unit searched and that a warrant specifying more than one dwelling may fail for lack of specificity.[67] They have also rejected the emergency rationale for door-to-door criminal searches in riot and near-riot situations.[68] Nevertheless, in other situations, such as airport searches,[69] perceived overwhelming necessity has led to change in the legal standard.

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59. Camara v. Municipal Court, 387 U.S. at 554-55 (Clark, J., dissenting); See v. Seattle, 387 U.S. 541 (1966).

60. 436 U.S. at 325-39 (Stevens, J., dissenting).

61. 436 U.S. at 312.

62. Wyman v. James, 400 U.S. 309 (1971).

63. 387 U.S. at 539 (dictum).

64. Michigan v. Tyler, 436 U.S. 499, 509 (1978) (firefighters may seize evidence of arson in plain view).

65. Mincey v. Ariz., 437 U.S. 385, 392 (1977), *quoting* Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir. 1963).

66. 387 U.S. at 535.

67. United States v. Higgins, 428 F.2d 232 (7th Cir. 1970).

68. Waranoff, *supra* note 41, at 55. *See* Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966).

69. Among the leading cases are United States v. Davis, 482 F.2d 893 (9th Cir. 1973); United States v. Skipwith, 482 F.2d 1972 (5th Cir. 1973); People v. Hyde, 12 C.3d 158, 524 P.2d 830, 115 Cal. Rptr. 358 (1974). As an example of extension, the airport search cases are cited as support for hospital searches to prevent pilferage in Chenkin v. Bellevue Hosp. Center, 479 F. Supp. 207, 214 (S.D.N.Y. 1979).

The current Supreme Court is quite sensitive both to emergency concerns and national security considerations.[70]

Public opinion would also probably support a search for stolen plutonium. The cost of legal permission would be the usual one of pressing the limits of a standard for emergency reasons. If the courts are explicit and honest about changing the standards, they may weaken constitutional protections in closely related areas; if, to limit such damage, the courts are less honest, they may hurt general respect for the law. In this particular case, we would probably be better off if the courts directly permitted a warrantless emergency search exception rather than weakening the particularity requirement of warrants, for it has already weakened the warrant requirement in the emergency cases described above. Evidence of collateral crimes found during a nuclear search should be inadmissible, since the exception could become a means to conduct an otherwise unconstitutional search. The courts, however, have admitted such evidence in the context of airport searches.[71]

C. Wiretapping and Surveillance

There is also little doubt that wiretapping to help locate stolen plutonium or the perpetrators of a nuclear threat would be upheld in court; the only issue is the precise authority for such a holding. Should there be clear enough indications of foreign participation in the nuclear threat, the principles of the Foreign Intelligence Surveillance Act would apply, and the government would be entitled to proceed under its emergency provisions on the authority of the Attorney General.[72]

Without that tie to foreign action, the government would almost certainly argue that it is empowered to tap under a "domestic security" power. Even pursuant to this power the government may still need a warrant; in fact, the Supreme Court has so held.[73] However, the detailed provisions of the Omnibus Crime Control and Safe Streets Act, which limit domestic intelligence gathering generally, might not apply.[74] The Supreme Court has not considered this issue, and the only lower court to face it is divided.[75] The

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70. *E.g.*, Dames & Moore v. Regan, 101 S. Ct. 2972 (1981) (Iran hostage settlement); Haig v. Agee, 101 S. Ct. 2766 (1981) (executive suspension of passport); Rostker v. Goldberg, 101 S. Ct. 2646 (1981) (exclusion of women from the draft).

71. *E.g.*, United States v. Gorman, 637 F.2d 352 (5th Cir. 1981) (narcotics detective positioning self to observe search of defendant's bag at airport check-point).

72. Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-1811 (Supp. III 1979). The emergency provision is 50 U.S.C. § 1805(e) (Supp. III 1979).

73. United States v. United States Dist. Court, 407 U.S. 297 (1972).

74. Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §§ 3701-3796c and 18 U.S.C. §§ 2510-2520 (1976).

75. Zweibon v. Mitchell, 516 F.2d 594, 659-70, 686-87, 693-99 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

Safe Streets Act specifies various emergency procedures for limited periods of surveillance without a warrant.[76] The Act authorizes wiretapping only for certain crimes, not including crimes relating to the possession of special nuclear materials, but including crimes relating to restricted data, sabotage, riots, extortion, and the use of explosives.[77] In the context of an actual nuclear emergency it is likely that at least one of these latter crimes would be involved, so that the requirement of the Act would be satisfied and the relevant procedures easily complied with, even if the Act is inapplicable. The surveillance aspect of a nuclear emergency is thus unlikely to create new constitutional law.

D. Detention

During a plutonium crisis, suspects and dissidents might be seized and detained, perhaps to immobilize them during the emergency or to interrogate them. The normal deterrent to police misconduct, the inadmissibility of evidence in court, would be virtually irrelevant under these circumstances. Moreover, the executive might attempt to suspend normal judicial review through habeas corpus if it were to declare a state of emergency or martial law.[78]

However, the use of detention is not without some legal standards. First, third-degree methods of interrogation, impermissible even under the rules of war, are clearly illegal and unconstitutional. No American court would uphold them even in the nuclear emergency context. Second, indiscriminate arrest and detention without formal charges or the opportunity for bail are also contrary to constitutional norms, as indicated by the congressional report accompanying the repeal of the Emergency Detention Act of 1950.[79] Significantly, the 1971 repeal sought to restrict any inherent executive power to detain persons. Courts have nevertheless upheld the

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76. 18 U.S.C. § 2518(7) (1976 & Supp. III 1979).

77. 18 U.S.C. § 2516 (1976).

78. Thus, the United Kingdom Prevention of Terrorism (Temporary Provisions) Act, 1974, ch. 56, permits detention without a hearing for 48 hours, extendable by five more days. Canada did much the same thing by its Public Order Regulations, Oct. 16, 1970 (§ 9), issued under the authority War Measures Act, CAN. REV. STAT. ch. 288 (1970), later replaced by the Public Order (Temporary Measures) Act, CAN. REV. STAT. ch. 2, § 9 (1970). *See* Grossman, *Dissent and Disorder in Canada,* in DISORDERS AND TERRORISM, *supra* note 31. The War Measures Act expired April 30, 1971, however, leaving only the Public Order Regulations in force. *Id.* at 4791. The regulations authorize three days of detention without a hearing, extendable to seven. CAN. REV. STAT. § 9(2). The act also authorizes warrantless entry, *id.* § 10, and expressly suspends the Canadian Bill of Rights. *Id.* § 12. *See generally* Grossman, *Dissent and Disorder in Canada, in* DISORDERS AND TERRORISM, *supra* note 31, at 479. For a discussion of comparable U.S. law, *see* Note, *Riot Control: The Constitutional Limits of Search, Arrest, and Fair Trial Procedure,* 68 COLUM. L. REV. 85, 98-104 (1968).

79. Title II of the Internal Security Act of 1950, 50 U.S.C. § 811-826, repealed by Act of Sept. 25, 1971, Pub. L. No. 92-128, 85 Stat. 347. *See* H.R. REP. No. 92-116, 92d Cong., 1st Sess., *reprinted in* [1971] U.S. CODE CONG. & AD. NEWS 1435, 1438.

detention of persons potentially capable of crime in a number of unusual circumstances. One example is the relocation of aliens and U.S. citizens of Japanese origin on the Pacific Coast early in World War II.[80] Another example is the tradition of denying bail to aliens pending appeal of deportation proceedings if the aliens are viewed as threats to the national security.[81]

Other examples are closer to nuclear emergency situations. One is that of presidential protection. Courts have drawn limits here and have attempted to distinguish Secret Service responses that are reasonably related to removing threats from those responses that appear to threaten civil liberties without contributing to presidential protection.[82] Nevertheless, if the threat to the President seems clear, the courts have denied damages to the victim of Secret Service preventive action, even when the victim's constitutional rights clearly were infringed.[83] There is also a tradition of preventive detention during the course of a riot; a number of older courts have upheld this practice,[84] but the trend may be away from such judicial validation.[85] In the context of a nuclear emergency, any form of unsupervised detention invites the mistreatment of suspects.

The application of governmental authority in this area seems far riskier than in the area of searches, considering the possibilities of improper interrogation methods and the importance of the rights involved. However, this area is like the search area in that the nuclear issue is only a little more likely to produce change in the law than are a number of other issues. The nuclear area might produce a set of facts sympathetic to permitting preventive action, but so might presidential protection or non-nuclear terrorism. The implication of a nuclear emergency is that an authority previously applied to only a small group of special situations would be extended to one more. One more absolute would be added to the list of absolutes that override normal constitutional guarantees. Although it may be best not to have such special doctrines, there are still practical questions of how common the exceptional situations are and how likely it is that the exceptional doctrines will be extended to unexceptional situations.

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80. Korematsu v. United States, 323 U.S. 214 (1944); Ex parte Endo, 323 U.S. 283 (1944).

81. Carlson v. Landon, 342 U.S. 524 (1952); United States ex rel. Barbour v. District Director, 419 F.2d 573 (5th Cir. 1969), *cert. denied*, 419 U.S. 873 (1974). Note, however, the international human rights limitations applied in Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980), *aff'd.*, 654 F.2d 1382 (10th Cir. 1981).

82. *Compare* Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973) ("Paparazzi" harrassing Kennedy family), *with* Rowley v. McMillan, 502 F.2d 1326 (4th Cir. 1974) (ejection of dissenters from presidential speech).

83. *See e.g.*, Scherer v. Brennan, 379 F.2d 609 (7th Cir.), *cert. denied*, 389 U.S. 1021 (1967) (agents acting without warrant tried to prevent gun dealer from entering own residence alone near airport where president was to arrive).

84. Cox v. McNutt, 12 F. Supp. 355 (S.D. Ind. 1935); Moyer v. Peabody, 212 U.S. 78, 84-85 (1909).

85. The doctrine may not survive Sterling v. Constantin, 287 U.S. 378 (1932). *See also* Note, *supra* note 78, at 109-15; Waranoff, *supra* note 41, at 39-41.

IV

SOCIOLOGICAL IMPLICATIONS

Thus far, this analysis has been relatively technical, based on the logic that the government will carry out nuclear emergency contingency plans, pushing its powers to the limits, and that the courts will then reshape constitutional traditions in an effort to uphold the government's actions. Under this analysis, the most significant risks are in the search and detention areas; in no others does a nuclear emergency do more than add weight to ongoing constitutional evolution. Even in the affected areas, the nuclear issue is only one of a number of parallel pressures.

There are other possible repercussions, which are more the product of sociology than of the legal process, and which may be more important. Any crisis could produce a greater centralization of authority and a public willingness to let that authority override individual freedom. For example, during the Civil War, both World Wars, and the New Deal, governmental powers increased, and the population supported such steps. A nuclear disaster would probably evoke a similar public willingness to give greater authority to the government: authority to search, to crack down on dissidents, to bolster the armed forces' power to protect sensitive facilities, to detain suspected terrorists, and to eliminate their rights at trial. This, for example, was the effect in Canada of the early terrorist campaign for Quebec's independence.[86]

Another symptom of this pressure to centralize authority could be a movement against federalism. Consequently, more power could be transferred from state to federal authorities. There are many areas in which a lack of harmony between federal and state governments could complicate the resolution of a crisis; the public might react by pressing to allow the FBI to override local police forces, to weaken the *Posse Comitatus* Act, or to give the President more power to override a governor's decisions.

Media issues are commonly discussed in connection with terrorism. Following specific hostage takings and terrorist actions, government officials have regularly urged restraints on the media, such as voluntary codes of conduct.[87] Their position is that terrorism is theater, and they argue that

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86. *See* the examples cited *supra* note 77. The Task Force on Disorders and Terrorism, however, rejects the idea of suspending habeas corpus, because the "institution of internment without trial has been particularly criticized, and, despite its efficacy as a preventive or security measure in a terroristic situation, the implicit erosion of fundamental liberties has been considered too high a price to pay for its use." DISORDERS AND TERRORISM, *supra* note 31, at 105.

87. *E.g., International Terrorism Hearings, supra* note 11, at 529 (A. Evans and J. Murphy, eds., Legal Aspects of International Terrorism: the Trees and the Forest, a study by a working group of the American Society of International Law for the Department of State); STAFF REPORT, *supra* note 31, at 15, 63 (Chairperson Rodino's letter to media representatives and their responses); Media and Terrorism: The Psychological Impact (seminar sponsored by Growth Associates, March 3-4, 1978), *reprinted in* STAFF REPORT, *supra*

the media often provide the platform that terrorists seek, sometimes tie up critical telephone lines, or reveal facts which the authorities wish to withold from the terrorists. The large amount of attention which this point has received casts serious doubt upon press freedom in an era of nuclear terrorism.

These risks to civil liberties, however, may be greatly overstated. There was neither public nor governmental pressure for centralization or press control following TMI. Public response, in fact, was one of mistrust; it blamed the government for the accident rather than favoring a grant of greater authority. Even after the predictable commission reports, the legislative and political response to TMI was minimal.

One example is not a solid basis for predicting sociological impact, but the TMI example strongly suggests that governmental chaos is likely to encourage mistrust of the government in a way that is generally beneficial to civil liberties.[88] It seems likely that chaos and confusion will recur in similar circumstances.[89] Post-TMI planning is not reassuring. The emergency response system that did not function very well in that incident will probably not fare better in the context of a different kind of incident. The next incident surely will be different in kind, and this analysis suggests that the potential for chaos is far greater during a terrorist incident than during a safety-related incident.

There is an important limit to this logic, a limit which arises with the most likely sort of terrorist incident. If the terrorists are foreign, a we-they mentality favoring increased government authority might occur. In this context, the public might react strongly, as it did following the Iranian hostage-taking or the stories of Soviet nuclear espionage in the late 1940's and early 1950's.

The critical element of this phenomenon is the terrorists' foreign character. For example, the fact that those who dissented from the government's Vietnam policies were American and were not controlled by foreign forces, together with a national tolerance for their protest, explains why our government's reaction did not harm civil liberties in the long run. In fact, the

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note 31, at 129; The Media and Terrorism (seminar sponsored by The Chicago Sun-Times and Chicago Daily News, April 1977), *reprinted in* STAFF REPORT, *supra* note 31, at 178. *See* Y. Alexander, *Terrorism, the Media, and the Police, reprinted in* KUPPERMAN & TRENT, *supra* note 34, at 331-48 (strong anti-media statement). Even so, the Disorders and Terrorism Task Force, although speaking rather firmly in its general statements about the need for a balance, DISORDERS AND TERRORISM, *supra* note 31, at 30-31, moved to a position relatively protective of the freedom of the press in its detailed statements, *id.* at 236, 318, 366, 387 (emphasis on self regulation and role of providing information).

88. Similarly, an egregious error on the part of the press could bring public opinion down against the media.

89. Not only did TMI revise the rather complicated question of the allocation of power between the federal and the state governments, there was also a question of the relative responsibility of the NRC and the licensee. *See* II ROGOVIN REPORT, *supra* note 6, at 948, 975, 1083-84.

government's reaction produced a countermovement that improved the status of civil liberties. In contrast, reactions against Iranian student demonstrations and against the alleged criminals sent by Castro during the exodus from Cuba in 1980 seem more likely to support repression. At stake are governmental immigration policies and public acquiescence in international intelligence operations, international narcotics control, and counterinsurgency warfare. Although the Reagan Administration's campaign against international terrorism has not now gained popular acclaim, it might gain such support if there were a serious nuclear incident in the United States that appeared to be fomented by international terrorists.

V

CONCLUSIONS

When I wrote in this area in 1975, I concluded that the most serious threat to civil liberties would be the general surveillance that might accompany plutonium recycling and that other issues, particularly the crisis issue, were less serious. Developments since then, especially TMI, reinforce the judgment that nuclear terrorist crises are among the less serious elements of the threat.

I then raised the possibility of legislation to deal in advance with derogations from regular civil liberties norms in the event of a crisis. Arguably, such legislation would have provided the benefit of defining acceptable parameters for deviating from civil liberties norms in an emergency. There may be value in the emergency derogation clauses that mark many foreign constitutions, provided the clauses include real checks on the authorization of emergency powers. These emergency clauses, however, have the negative effect of encouraging derogations and could spill over, diminishing effective constitutional standards for non-emergency situations.

In 1975 I was undecided about the desirability of such special legislation to deal with a crisis. Today, it seems clear that such legislation is both undesirable and unnecessary. It is very unlikely that the United States will recycle plutonium in any quantity. Moreover, the experience of the TMI crisis, although not encouraging from a management viewpoint, is quite encouraging from the civil liberties perspective. Additionally, the Supreme Court has gone farther in creating the equivalent of emergency constitutional provisions. Hence, there is little need to face the serious side effects of statutory derogation provisions.

If society does seek emergency-oriented legislation in the near future for other purposes, such as streamlining the federal-state relationship in crisis circumstances,[90] civil libertarians might profitably raise two points.

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90. *See* Note, *The National Emergency Dilemma: Balancing the Executive's Crisis Powers with the Need for Accountability,* 52 So. CAL. L. REV. 1453 (1979).

First, such legislation should address the problem of collateral information gained during a search. If there is an area search for plutonium, for example, and narcotics are found, the evidence of narcotics violations should not be admissible in court in a subsequent criminal proceeding. Though courts have been unwilling to state such a principle it would be a desirable legislative goal. Second, there should be explicit legislation on the use of deadly force at higher levels of escalation. Rules applying to the use of deadly force by the National Guard, for example, are unclear and invite the misuse of such force.

Much more important than special legislation or judicial doctrine is public mood. In this connection, there are at least two ways to minimize the negative civil liberties impact of a nuclear incident, particularly one stemming from a foreign source. The first is to ensure openness. The TMI experience highlights the value of public information to civil liberties. The reports and discussions following TMI were, in themselves, major protections against increased government power. This openness demonstrated the government's ineptness and permitted a broader understanding of the utility of certain responses. Notwithstanding national security arguments against similar openness in a nuclear terrorist situation, access to information will be even more important. Thorough investigations, like the ones conducted at TMI, would provide a very valuable service to civil liberties.[91]

The second need is to build a much stronger public sense that civil liberties transcend national boundaries. Although the United States has substantial constitutional protections for resident aliens,[92] it has been unwilling to extend its constitutional protections to non-resident aliens in situations such as extradition, international police cooperation, or counter-insurgency. This is typical of most nations, including those with strong commitments to civil liberties. Yet an international response to international terrorism implies that civil liberties must be extended internationally or they will perish. This is an area where we need better constitutional theory, perhaps new legislation, and most of all better public understanding.

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91. *See* DISORDERS AND TERRORISM, *supra* note 31, at 71.
92. *See, e.g.*, J. WASSERMAN, IMMIGRATION LAW AND PRACTICE 531-37 (3d ed. 1979).