

# Taking the Gloves off of Homeland Security: Rethinking the Federalism Framework for Responding to Domestic Emergencies

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## I. INTRODUCTION

The Bush Administration often asserts that the rules changed after September 11. As Cofer Black, the onetime director of the CIA's counterterrorism unit, testified to Congress in early 2002, "There was a before-9/11 and an after-9/11 . . . . After 9/11 the gloves came off."<sup>1</sup> While this has certainly been true on the law enforcement and intelligence side of the war on terror, the federal government has failed to reexamine the role it should play in responding to terrorist attacks and other public health and safety crises. On the contrary, despite increased funding and new institutional resources (including the Department of Homeland Security), the federal government continues to work within the pre-September 11 state-centered legal framework, preventing it from implementing the ambitious post-September 11 agenda it developed. Restrictions on federal involvement have contributed to systematic weaknesses including uneven implementation of national priorities, "unfunded mandates," poor information flows between the different levels of government, and poor coordination during actual crisis periods. It is time for the gloves to come off on homeland security. Federalism preferences must take a backseat to the country's immediate need for a functional preparedness and response system.

This Essay will first contrast the Bush Administration's status quo approach to homeland security with the paradigm shift that the Administration engineered in intelligence gathering and detention policy after September 11. Next, the Essay will explain how formal and informal federalism limitations shift too much of the burden and authority for homeland security away from federal authorities. Finally, the Essay will discuss some ways the federal government can correct this misalignment by expanding its involvement in crisis preparedness and response.

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<sup>1</sup> John Barry, Michael Hirsh, & Michael Isakoff, *The Roots of Torture*, NEWSWEEK, May 24, 2004, at 26 (quoting *Joint Investigation Into September 11th: Hearing Before the Joint House-Senate Intelligence Comm.*, 109th Cong. (2002) (statement of Cofer Black, Former Chief of the Counterterrorist Center, Central Intelligence Agency)).

## II. TAKING THE GLOVES OFF OF COUNTERTERRORISM

In response to September 11, Bush Administration officials set an ambitious counterterrorism agenda and then stretched the legal framework to enable the federal government to carry out those goals. As a result, the legal framework for federal law enforcement, intelligence, and detention capabilities has changed dramatically. The scope of these legal reforms demonstrates the Bush Administration's willingness to question formal restraints on its counterterrorism powers—in stark contrast to its approach to disaster preparedness and response.

The Bush Administration's willingness to challenge legal restraints on federal authority to arrest, detain, and interrogate terrorism suspects illustrates its functional approach to counterterrorism. Before September 11, the government investigated, detained, and prosecuted terrorism suspects. After September 11, the Administration shifted from this law enforcement framework to a war paradigm, arguing that constitutional and statutory limitations did not apply to "unlawful combatants" in the war on terror. Officials further argued that the President's commander-in-chief powers over detention,<sup>2</sup> together with Congressional authorization to use all "necessary and appropriate" force against those responsible for the September 11 attacks,<sup>3</sup> gave the federal government sufficient authority to detain individuals (including U.S. citizens) as enemy combatants and to hold them indefinitely without access to judicial processes or constitutionally guaranteed civil liberties.<sup>4</sup> The Administration also declared that Common Article III of the Geneva Conventions did not apply to members of Al Qaeda or the Taliban.<sup>5</sup> It engaged in potentially cruel and inhumane means of interrogation, established secret detention facilities, and used extraordinary rendition to send detainees to countries that engage in torture,<sup>6</sup> all in contravention of U.S. treaty obligations.<sup>7</sup> It also tried to place combatants outside of Arti-

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<sup>2</sup> See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 516–17 (2004).

<sup>3</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). See, e.g., Reply Brief for the Petitioner at 13, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027) (arguing that the President is authorized to designate enemy combatants for detention).

<sup>4</sup> See, e.g., Martha Minow, *What is the Greatest Evil?*, 118 HARV. L. REV. 2134, 2149 (2005) (reviewing MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* (2004)) (documenting the Administration's attempts to restrict legal rights of Guantanamo detainees).

<sup>5</sup> See Memorandum from Jay S. Bybee, Assistant Attorney Gen., Dep't of Justice, to William J. Haynes, II, Gen. Counsel, Dep't of Def. (Jan. 22, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf>.

<sup>6</sup> See, e.g., Eric Lichtblau & Adam Liptak, *Threats and Responses: The Suspect*, N.Y. TIMES, Mar. 4, 2003, at A13; Dana Priest & Joe Stephens, *Secret World of U.S. Interrogation: Long History of Tactics in Overseas Prisons Is Coming to Light*, WASH. POST, May 11, 2004, at A1.

<sup>7</sup> See Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, arts. 1, 3, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 113 (prohibiting torture, cruel and inhumane treatment, and extraordinary rendition of an indi-

cle III review<sup>8</sup> and created military commissions without Congressional authorization<sup>9</sup> despite the existence of contradictory Supreme Court precedent.<sup>10</sup> Although the Supreme Court and Congress ultimately forced the Administration to abide by some international and domestic legal restrictions,<sup>11</sup> the basic wartime detention model has been accepted.<sup>12</sup>

The Administration has also pushed the boundaries on traditional domestic intelligence and law enforcement capabilities. It led Congress to relax law enforcement standards and restrictions on search and seizure through the USA PATRIOT Act in ways that scholars have argued “gutted” Fourth and Fifth Amendment rights.<sup>13</sup> It expanded the use of secret and un-reviewable National Security Letters (NSLs) to demand private financial records of citizens in ways that compromise First and Fourth Amendment rights.<sup>14</sup> It authorized National Security Agency (NSA) officials to engage in warrantless wiretapping of thousands of phone and internet exchanges of persons inside the United States, in violation of Supreme Court interpretations of Fourth and Fifth Amendment rights<sup>15</sup> and also Foreign Intelligence

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vidual to a country where there is a substantial risk of torture); Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 287 [hereinafter Geneva Convention]. See also 18 U.S.C. § 2441 (2006) [hereinafter War Crimes Act] (criminalizing inhumane treatment according to U.S. treaty obligations).

<sup>8</sup> See Brief for the Respondents, *Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-334) (arguing detainees may not invoke habeas corpus rights to question detention under Geneva Conventions and the U.S. Constitution).

<sup>9</sup> See Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001).

<sup>10</sup> See *Ex Parte Milligan*, 71 U.S. 2 (1866) (holding military commissions invalid so long as Article III courts are “open” and “unobstructed” in the state where the citizen resides). But see *Ex Parte Quirin*, 317 U.S. 1 (1942) (holding that military commissions created by President Roosevelt to try Nazi saboteurs were lawful).

<sup>11</sup> See, e.g., Detainee Treatment Act of 2005, Pub. L. No. 109-148, Title X, § 1003(a) (barring cruel, inhumane, or degrading treatment of detainees under U.S. control); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (holding President Bush’s military commissions violated the Uniform Code of Military Justice and that Common Article III of the Geneva Conventions applies to Al Qaeda detainees); *Rasul*, 542 U.S. 466 (2004) (finding statutory habeas corpus jurisdiction extended to detainees at Guantanamo Bay).

<sup>12</sup> See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (responding to *Hamdan* by authorizing military commissions); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding the President may detain citizen enemy combatants until the cessation of hostilities if due process is provided).

<sup>13</sup> USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006) [hereinafter the USA PATRIOT Act]. See also Robert A. Levy, Cato Institute, *The USA Patriot Act: We Deserve Better* <http://www.cato.org/current/terrorism/pubs/levy-martial-law.html>.

<sup>14</sup> See *Doe v. Ashcroft*, 334 F. Supp. 2d. 471, 526–27 (S.D.N.Y. 2004) (finding the original PATRIOT Act provisions governing NSLs to violate the First and Fourth Amendments); see also OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION’S USE OF NATIONAL SECURITY LETTERS (2007) (finding the FBI did not provide effective monitoring and control mechanisms to manage the more than 20,000 NSLs it has issued under the PATRIOT Act).

<sup>15</sup> See *United States v. United States Dist. Court*, 407 U.S. 297 (1972) (permitting special statutory exceptions to judicial review for surveillance of a foreign agent); *Katz v. United States*, 389 U.S. 347 (1967) (holding the Fourth Amendment warrant requirement applicable to electronic surveillance).

Surveillance Act<sup>16</sup> restrictions that were reaffirmed by Congress while the unlawful wiretapping program was ongoing.<sup>17</sup> As with the detention and treatment of unlawful combatants, the Bush Administration defended its provocative actions by arguing that the nation should accept a wartime legal paradigm.<sup>18</sup>

These examples demonstrate the degree to which the Bush Administration has attempted to reshape legal norms to meet the new demands of the war on terror. Despite heavy criticism by liberal legal scholars and some pushback from the other branches in the last two years, the Administrations' hyper-functional approach to defending the nation against terrorism has been largely acquiesced to by Congress, the Supreme Court, and the American people since September 11.

### III. PUTTING FORM ABOVE FUNCTION IN HOMELAND PREPAREDNESS

In contrast to its gloves-off approach to counterterrorism, the Bush Administration has continued to put form over function in the realm of homeland preparedness and response. Nine days after the attacks on New York and Washington, D.C., President Bush announced a new initiative to "take defensive measures against terrorism" at home and to coordinate "at the highest level" the "dozens of federal departments and agencies, as well as state and local governments [with] . . . responsibilities affecting homeland security."<sup>19</sup> A new department was created to manage homeland security, and funding for homeland preparedness increased significantly. Yet pre-September 11 legal restrictions, particularly those restraints imposed by principles of federalism, have continued to limit the federal government's efforts to improve the country's homeland security preparedness and response systems. Despite the Bush Administration's success at pushing legal boundaries in the fields of law enforcement and detention, in the area of homeland security the Administration has been either unwilling or unable to reshape legal rules to improve intergovernmental response to the next terrorist attack or crisis situation.

The Tenth Amendment reserves to the states many of the legal powers that would be useful in preparing for and responding to a terrorist attack or natural disaster. In a crisis situation, state officials alone would have the authority to enforce an intrastate quarantine,<sup>20</sup> command the National Guard

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<sup>16</sup> Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. §§ 1801–1863 (2006).

<sup>17</sup> USA PATRIOT Act § 218.

<sup>18</sup> See, e.g., U.S. DEP'T. OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT (2006), available at <http://www.fas.org/irp/nsa/doj011906.pdf>.

<sup>19</sup> President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>.

<sup>20</sup> NAT'L COMM'N ON TERRORISM, COUNTERING THE CHANGING THREAT OF INTERNATIONAL TERRORISM 27 (2000) (finding no federal authority to mandate an intrastate quaran-

to enforce order,<sup>21</sup> and commandeer intra-state resources, including means of transportation, shelter locations, and medical facilities.<sup>22</sup> States have the responsibility to develop emergency resources and contingency planning with limited federal funding and some voluntary cooperation with the Federal Emergency Management Agency (FEMA).<sup>23</sup> Upon request by a state, the President may declare a national disaster or national emergency under the Stafford Act,<sup>24</sup> triggering emergency funding assistance. The Stafford Act also permits federal agencies to direct *federal* resources toward emergency response measures (including search and rescue, medical assistance, or supply and logistics efforts).<sup>25</sup> In practice, however, federal agencies have a limited number of personnel to deploy because of the Posse Comitatus Act.<sup>26</sup>

These constitutional and statutory restrictions have created a culture of deference within the federal homeland preparedness and response community. According to Richard Falkenrath, former homeland security policy adviser to President Bush, “[T]he basic federal compact . . . is that the state and local agencies are responsible for disaster relief and management, and the federal government is just there to help as asked.”<sup>27</sup> Because local input and expertise are so critical to crisis response and because preparedness has traditionally fallen under the umbrella of state public health and safety, there is a strong presumption that crisis preparedness and response are state responsibilities.

Given its aggressively functionalist approach to deterring and preventing future terrorist acts, the Administration might have been expected to challenge this traditional deference where necessary to carry out its post-September 11 commitment to improving homeland preparedness. Instead, the Administration has accepted the restrictions imposed by federalism preferences and consequently has worked within the existing state-centered

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tine).

<sup>21</sup> 18 U.S.C. § 1385 (2006). The Posse Comitatus Act bars the federal government from deploying the military to civilian law enforcement activities, subject to exceptions authorized by the Constitution and acts of Congress. U.S. CONG. RESEARCH SERV., HURRICANE KATRINA: DOD DISASTER RESPONSE 6–9 (2006).

<sup>22</sup> See, e.g., California Emergency Services Act, CAL. GOV’T CODE §§ 8565–8575 (2005) (defining the powers of the governor during a disaster); IOWA CODE § 29C.6 (2003) (same); Louisiana Homeland Security and Emergency Assistance and Disaster Act, LA. R.S. 29:724 (2006) (same).

<sup>23</sup> Pre-disaster funding assistance programs total less than \$50 million annually. See Ernest B. Abbott, *Representing Local Governments in Catastrophic Events: DHS/FEMA Response and Recovery Issues*, 37 URB. LAW. 467, 469 n.6 (2005). Many states also enter into mutual assistance compacts with other states. See, e.g., Emergency Management Assistance Compact, Pub. L. No. 104-321, 110 Stat. 3877 (1996) (granting congressional consent to a compact between thirteen states).

<sup>24</sup> 42 U.S.C. §§ 5121–5207 (2006).

<sup>25</sup> *Id.* § 5170(a)(1).

<sup>26</sup> See 18 U.S.C. § 1385 (2006).

<sup>27</sup> *Frontline: The Storm: Interview with Richard Falkenrath* (PBS television broadcast Sept. 27, 2005) (edited transcript available at <http://www.pbs.org/wgbh/pages/frontline/storm/interviews/falkenrath.html>) [hereinafter *Frontline*].

framework. The only compulsory federal regulation enacted since September 11 was the National Incident Management System (NIMS)—the much-derided color-coded system of threat warnings.<sup>28</sup> According to Falkenrath, despite awareness that the emergency response system was “inadequate,” the Bush Administration was too focused on other priorities to truly rethink the basic federal-state division of authority.<sup>29</sup>

If anything, the Bush Administration has resisted legal or institutional reforms that would have enabled more aggressive federal action, and it has embraced federalism restrictions that limit its authority. President Bush’s original plan envisioned a leanly staffed White House Homeland Security office to manage existing agency activities.<sup>30</sup> The President proposed a cabinet-level department only after extreme public and Congressional pressure to do so.<sup>31</sup> Even after the Department of Homeland Security (DHS) was created, top Administration officials emphasized the department’s respect for existing federalism restrictions and deference to local authorities. The National Strategy for Homeland Security states, “[W]e should work carefully to ensure that newly crafted federal laws do not preempt state law unnecessarily or overly federalize counterterrorism efforts.”<sup>32</sup> Secretary Tom Ridge proudly proclaimed that DHS had “redefined a new federalism” with such initiatives as weekly conference calls with state directors and voluntary regulations on private businesses.<sup>33</sup>

Congressional legislation has also reinforced the current state-centered framework. The Homeland Security Act of 2002,<sup>34</sup> which created DHS, set broad goals for the agency to direct and coordinate state and local response systems along national homeland security priorities, but gave it little legal authority to do so. For example, Section 201 directed DHS to develop “a comprehensive national plan,” specific measures that federal and state officials should take, information-sharing mechanisms, and to coordinate state-level training and support.<sup>35</sup> Among the Act’s nineteen enumerated

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<sup>28</sup> Homeland Security Presidential Directive, HSPD-5 (Feb. 28, 2003), available at <http://www.whitehouse.gov/news/releases/2003/02/20030228-9.html> [hereinafter HSPD-5].

<sup>29</sup> See *Frontline*, supra note 27.

<sup>30</sup> This limited model of homeland security management was due, in part, to the Administration’s dislike of big government. DONALD F. KETTL, *SYSTEM UNDER STRESS* 38 (2d ed. 2007).

<sup>31</sup> See Todd Datz, *From the Ground Up*, CSO MAG., Mar. 1, 2004, available at <http://www.csoonline.com/read/030104/ground.html>.

<sup>32</sup> OFFICE OF HOMELAND SECURITY, NATIONAL STRATEGY FOR HOMELAND SECURITY 47 (2002), available at <http://www.whitehouse.gov/homeland/book/sect4.pdf>.

<sup>33</sup> Siobhan Gorman, *On Guard, But How Well?*, 36 NAT’L J. 696, 702 (2004). See also Julia Nienaber et al., *Ridge Approach: A New Trend?*, 45 STATE GOV’T NEWS 24, 24–25 (2002) (claiming that Ridge was developing “an innovative model of inter-governmental communication” that respects the “judicial trend favoring states’ rights”); Lee Walczak et al., *America’s Biggest Job*, BUS. WK., June 10, 2002, at 34 (describing Ridge’s plan for the federal role in homeland security as a “decentralized, largely voluntary system with an occasional stream of mandatory security directives”).

<sup>34</sup> 116 Stat. 2135 (2002).

<sup>35</sup> *Id.* § 201.

goals, however, not one grants DHS the power to mandate that federal or state officials take the recommended information-sharing, emergency preparedness, or infrastructure-building measures.

Executive branch regulations interpreting this legislation have only reinforced DHS's deference to state authority. Shortly after the creation of DHS, the President issued Homeland Security Presidential Directive 5 (HSPD-5)<sup>36</sup>—one of the key regulations designed to give DHS the primary responsibility for preparing for and responding to a terrorist attack.<sup>37</sup> Although the goal is to take “a national approach to domestic incident management,” HSPD-5 places most of the burden for planning and responding to these crises at the state level.<sup>38</sup> Despite the fact that DHS assists states in the development and coordination of crisis preparation, the initial responsibility for managing any crisis falls on state and local authorities.<sup>39</sup> When state and local resources are overwhelmed, DHS may step in to “assist” state and local authorities, but only when requested to do so.<sup>40</sup> Notably, while HSPD-5 does not interfere with state or local planning and efforts, it expresses no such hesitation to encroach on a state's power to direct criminal investigations of terrorist acts or threats. HSPD-5 vests “lead responsibility” for criminal investigations in the Attorney General, who, acting through the FBI, is in charge of coordinating any detection, prevention, or preemption of terrorist acts.<sup>41</sup> Unlike the limited leadership authority vested in DHS, the FBI's authority over these matters does not require any legal trigger, and the authority to investigate and prosecute terrorists is permanent and exists even in the absence of an immediate threat.

The unwillingness to challenge the traditional legal framework has been consistent even in the face of direct threats that would seem to demand a greater federal response. A week after September 11, a series of anthrax attacks reignited debate about how to prepare the nation for a biological or chemical terrorist attack. Despite renewed interest and federal funding grants for bio-defense research, the Department of Health and Human Services (HHS) did not issue implementing regulations that would have allowed the Secretary of HHS to use the Public Health Service Act of 1994 to deploy greater resources in the event of a bioterrorist attack.<sup>42</sup>

The Bush Administration's hesitancy to erode federalism restrictions was even more surprising in the face of the humanitarian disaster following Hurricane Katrina. Bush Administration officials argued that Louisiana Governor Kathleen Blanco's failure to request federal assistance pre-

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<sup>36</sup> See HSPD-5, *supra* note 28.

<sup>37</sup> *Id.* §§ 3–4.

<sup>38</sup> *Id.* § 3.

<sup>39</sup> *Id.* § 6.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* § 8.

<sup>42</sup> 42 U.S.C. § 264 (2006) (granting the Surgeon General, with the approval of the Secretary of HHS, the power to take whatever measures are necessary, including detaining infected individuals and limiting interstate travel).

vented the federal government from acting under Stafford Act authority. Whether this claim is true or not,<sup>43</sup> other legal arguments could have supported federal assistance even without the Governor's request. Although Presidents have generally waited until the state governor makes a request for aid, Section 5191(b) of the Stafford Act authorizes the President to declare a federal emergency without such a request if "the primary responsibility for response rests with the United States."<sup>44</sup> Given the deteriorating public order in New Orleans, the President could also have relied on the Insurrection Act<sup>45</sup>—one of the few statutory exceptions to the Posse Comitatus Act—to send federal troops to help restore order and provide emergency assistance. White House officials reportedly considered this option but rejected it due to the political consequences of wresting control of the Louisiana National Guard from a democratic state governor.<sup>46</sup> Although using either the "primarily federal" loophole of the Stafford Act or the Insurrection Act might have been a legal stretch, it would have been less controversial than the Administration's other counterterrorism strategies. The Administration's unwillingness to subordinate federalism to the exigencies of the humanitarian disaster demonstrates the strength of the current attachment to federalism. As Mayor Ray Nagin later complained, "The federal government in my opinion was dancing around this whole issue of states' rights . . . there was this dance about who had final authority. People were suffering because of it."<sup>47</sup>

These policies and legal positions demonstrate that the Bush Administration is either unwilling or unable to challenge the formal and informal limits on the federal government's promises of stronger federal leadership and assistance in improving national preparedness and response.

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<sup>43</sup> Governor Blanco maintains that she did request assistance. *Blanco Papers Recount Katrina Response*, CNN.COM, Dec. 6, 2005, <http://www.cnn.com/2005/US/12/04/blanco.papers/index.html>.

<sup>44</sup> The President can only declare a federal "emergency," not a "major disaster," without state consent. U.S. CENTER FOR DISEASE CONTROL AND PREVENTION, PUBLIC HEALTH EMERGENCY LAW: LEGAL ISSUES: DETECTING AND DECLARING EMERGENCIES 55 (2005), available at <http://www2.cdc.gov/php/docs/Unit%202.pdf>. However, either declaration would trigger federal assistance, and the deteriorating situation in Louisiana was sufficient to qualify as a federal "emergency" under the Stafford Act. See 42 U.S.C. § 5191(b) (2006).

<sup>45</sup> 10 U.S.C. §§ 331–335 (2006) (permitting the President to activate the National Guard or send in the military in cases of domestic insurrection).

<sup>46</sup> Eric Lipton, Eric Schmitt, & Thom Shanker, *Political Issues Snarled Plans for Troop Aid*, N.Y. TIMES, Sept. 9, 2005, at A1. In response to critiques that the federal government should have deployed military resources sooner to the Hurricane Katrina situation, Congress recently broadened one of the statutory exceptions to the Posse Comitatus Act. The new amendment to the Insurrection Act would permit the President to federalize the National Guard or send in the military in case of "natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident" without prior authorization from the state governor. See The John Warner National Defense Authorization Act, H.R. 5122, 109th Cong. § 1076 (2007).

<sup>47</sup> Interview with Ray Nagin, Mayor of New Orleans, *WHEN THE LEVEES BROKE: A REQUIEM IN FOUR ACTS* (HBO Documentary Films 2006).

#### IV. FRICTION IN THE SYSTEM: SIDE EFFECTS OF AN OFF-KILTER FEDERAL-STATE BALANCE

What is most troubling about the federal government's failure is that that the current intergovernmental response system is not meeting basic expectations for crisis preparedness and response. Although no crisis response would be problem-free, some of the common complaints that arise in disaster preparedness and response seem to transcend issues specific to any one situation or program. Federal, state, and local governments each bring unique comparative advantages to an integrated national response system. An effective inter-governmental system would take advantage of these respective strengths and balance the burdens fairly across the different levels of government. Recurring problems in national preparedness and response suggest that the current balance is not the right one. In fact, the current flawed framework contributes to the system's weaknesses, such as the uneven implementation of national priorities, unfunded mandates, poor information flows between the different levels of government, and subpar coordination during actual crisis periods.

Although it makes sense for the federal government to set national priorities and distribute funding accordingly, federalism restrictions hinder the effective implementation of those priorities. The federal government is in a better position to amalgamate overall threat and vulnerability information nationwide, and to develop national priorities in response to this information. However, because federalism restrictions prevent DHS from executing these priorities itself, much of the burden of implementation falls on state and local actors. These actors may not have the administrative or financial capacity to execute these programs in the way the federal government would like given their more immediate competing state and local priorities.<sup>48</sup> Researchers note that the implementation of homeland preparedness initiatives is ad hoc, in large part due to the decentralized nature of the federal system and to shortfalls in local funds and administrative capacities.<sup>49</sup> To address these problems and to have some control over how funds are spent, DHS sometimes uses conditional spending

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<sup>48</sup> See SUSAN E. CLARKE & ERICA CHENOWETH, NAT'L LEAGUE OF CITIES, RESEARCH REPORT: THE STATE OF AMERICA'S CITIES 32 (2005) (noting homeland security was ranked thirtieth out of thirty-eight priorities to address for the next two years in a 2005 survey by the National League of Cities).

<sup>49</sup> See Susan E. Clarke & Erica Chenoweth, *The Politics of Vulnerability: Constructing Local Performance Regimes for Homeland Security*, 23 REV. OF POL'Y RES. 98, 102 (2006) (suggesting the weak centralization created by federalism makes local to federal coordination difficult and is in part responsible for inadequate federal response to local vulnerabilities); Brian J. Gerber et al., *On the Front Line: American Cities and the Challenge of Homeland Security Preparedness*, 41 URB. AFF. REV. 182, 184 (2005) (finding lack of administrative capacity to apply for or implement federal grants as a significant limiting factor on implementing homeland security initiatives). Anecdotally, Philadelphia Mayor John Street refused to comply with a DHS directive to close temporarily a street near Independence Hall due to the expense involved. KETTL, *supra* note 30, at 97.

grants with eligibility and implementation conditions attached, but state and local officials object that these conditions are unrealistic given competing local needs.<sup>50</sup> Thus the current federal-state balance produces both concerns about unfunded federal mandates,<sup>51</sup> and uneven implementation of homeland preparedness priorities.<sup>52</sup>

Formal restrictions on federal involvement in state and local implementation, and the informal assumption that the federal government should take a “hands-off” approach until states ask for crisis assistance may inhibit critical information sharing.<sup>53</sup> Much of the information critical to developing plans and priorities—from knowing the best local evacuation routes to understanding local emergency response shortfalls—rests at the state and local level. Federal planning could be more effective if federalism restrictions did not prevent DHS employees from developing this local expertise through regular involvement in state and local preparedness planning. Instead, due to formal restraints and the “hands-off” mindset, DHS officials’ familiarity with a given area or region comes from periodic revisions of the contingency plans, voluntary updates from state and local actors, and limited hands-on experience during crisis situations.<sup>54</sup>

Finally, restrictions on federal involvement both before and during crisis situations make it difficult to integrate federal resources into state and local response systems. First, limited federal involvement in pre-crisis periods leads to poorer coordination during actual crises. Despite extensive planning for the consequences of a direct hurricane hit on New Orleans, poor coordination between state and federal agencies weakened the response to Hurricane Katrina. Relief support was delayed, lines of authority between federal and local actors were blurred, and thousands of people were stranded in New Orleans in inhumane conditions for days as a result.<sup>55</sup> Homeland security scholar Donald Kettl notes that first responders need to have established teams and relationships in order respond effectively under crisis pressure. “Indeed, part of what complicated and de-

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<sup>50</sup> As Arkansas Governor Mike Huckabee commented, “These responsibilities are unprecedented, and it’s an extra cost burden when none of us can absorb it . . . . If you put extra personnel on bridges, you’re taking money from public schools or telling scholarship students they can’t go to college or taking medicine from elderly people.” Dale Russakoff & Rene Sanchez, *Begging, Borrowing for Security: Homeland Burden Grows for Cash-Strapped States, Cities*, WASH. POST, Apr. 1, 2003, at A01.

<sup>51</sup> In 2003, the National Governors Association listed homeland security as one of the “unfunded mandates” that require more federal assistance. *Id.*

<sup>52</sup> See also DONALD F. KETTL, CENTURY FOUNDATION, *THE STATES AND HOMELAND SECURITY* 10 (2003) (noting wide variance in levels of preparedness across four states where homeland security preparedness was examined).

<sup>53</sup> See *supra* note 27 and accompanying text.

<sup>54</sup> See, e.g., Homeland Security Act of 2002, 6 U.S.C. § 121 (2006) (giving DHS the authority to “request” information from and consult state and local officials); Critical Infrastructure Information Act, 6 U.S.C. § 133 (2006) (giving DHS authority to “request” and “receive” relevant information from state and local entities, but not to mandate it).

<sup>55</sup> See, e.g., *Special Report: Washing Away*, TIMES PICAYUNE, June 23–27, 2002, available at <http://www.nola.com/hurricane/?/washingaway>.

layed the response to Katrina was the great difficulty of putting together partnership, from scratch and on the run.”<sup>56</sup> The Coast Guard, the lone federal presence aiding the local community on the day that Hurricane Katrina hit, is also one of the few federal actors that has a regular presence in the area and is not statutorily limited from working with state and local authorities.<sup>57</sup> The same coordination problems have recurred in other crisis simulations: participants in two bioterrorism simulations found poor working relationships between federal and state actors hampered their ability to respond.<sup>58</sup>

Secondly, restrictions on federal involvement absent state consent may prevent the federal government from effectively dispatching greater resources in times of crisis. Emergencies tend to quickly overwhelm local resources. Even if initially contained, disasters may produce spillover effects that exceed the ability or authority of one state government to manage. Being able to draw on additional federal emergency response capabilities in such situations might significantly improve the federal response system. If it were a biological, nuclear, or chemical attack, federal expertise in containing the situation and providing medical help to affected residents would be even more critical. Under the Stafford Act, the federal government can deploy federal resources to assist in an emergency, but in practice it has little deployable federal manpower. Federalism restrictions on deploying the National Guard or directing non-federal resources prevent the federal government from marshalling other available resources to the affected areas.<sup>59</sup>

Although funding or management reforms could address some of the current glitches, they will not fix many of the underlying coordination and burden-sharing problems in the national response system. Many state and local officials argue that they are not receiving sufficient funding for the increased homeland security demands.<sup>60</sup> In addition, critics argue that the funding is not being used effectively because the majority of funds are not distributed according to national threat priorities.<sup>61</sup> Funding reforms, though

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<sup>56</sup> KETTL, *supra* note 30, at 79.

<sup>57</sup> Posting of Mike Ahlers to The Situation Report, <http://www.cnn.com/2005/POLITICS/08/30/sr.tues/index.html?eref=sitesearch> (Aug. 30, 2005, 14:42 EST).

<sup>58</sup> See, e.g., Thomas V. Inglesby, Rita Grossman & Tara O’Toole, *A Plague on Your City: Observations from TOPOFF*, 32 CLINICAL INFECTIOUS DISEASES 436, 439 (2001); Tara O’Toole, Michael Mair, & Thomas V. Inglesby, *Shining Light on “Dark Winter,”* 34 CLINICAL INFECTIOUS DISEASES 972, 982 (2002), available at <http://www.journals.uchicago.edu/CID/journal/issues/v34n7/020165/020165.web.pdf>. See also KETTL, *supra* note 30, at 97 (noting FEMA’s poor coordination in response to Hurricane Andrew in 1992).

<sup>59</sup> See *supra* note 21. As discussed below, it is an open question whether commandeering restrictions should or could be dismantled. See *infra* Part V.

<sup>60</sup> See, e.g., Sara Kehaulani Goo, *Threat Level May Fall to Yellow*, WASH. POST, Jan. 9, 2004, at A2; Press Release, U.S. Conference of Mayors, *Survey on Cities: Direct Homeland Security Cost Increases Related to War/High Threat Alert* (Mar. 27, 2003), available at [http://www.usmayors.org/uscm/news/press\\_releases/documents/survey\\_032703.pdf](http://www.usmayors.org/uscm/news/press_releases/documents/survey_032703.pdf).

<sup>61</sup> Sixty percent of homeland security funds are allotted based on a statutory formula, and many other sources of homeland security funding are distributed by other federal agencies

important, would not address the preparedness and response problems that arise from overburdened state and local administrative capacities. Finally, there is evidence that poor management has been partially responsible for ineffective crisis response, particularly with regard to Hurricane Katrina.<sup>62</sup> Although improving federal management would be a good start, it would not resolve some of the underlying difficulties of transitioning from non-crisis to crisis periods. In addition, neither management nor funding reforms would do much to improve information sharing between state and federal actors.

#### V. CONCLUSION: TAKING THE GLOVES OFF OF CRISIS RESPONSE

To achieve the more ambitious goals declared after September 11 and Hurricane Katrina, the federal government must be willing to take on more of the burden for implementing necessary crisis preparedness and response. Greater federal involvement during non-crisis periods would help ensure that preparedness priorities are implemented more consistently, and would allow federal actors to develop the working relationships with state and local actors necessary to assist effectively during a crisis.

As the above discussion of federalism restrictions suggests, expanding the federal role in crisis response may require relaxing or getting around formal legal restraints. The Supreme Court has held that the Constitution prohibits the federal government from commandeering or directing state legislatures<sup>63</sup> or state executives<sup>64</sup> to implement federal programs, even if states consented to the legislation *ex ante*.<sup>65</sup> Justice Scalia's majority opinion in *Printz v. United States* rejected a balancing test that would have weighed the importance of the federal interest advanced, instead creating a bright-

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outside of DHS. See STEVEN MAGUIRE & SHAWN REESE, CONG. RESEARCH SERV., DEPARTMENT OF HOMELAND SECURITY GRANTS TO STATE AND LOCAL GOVERNMENTS: FY2003 TO FY2006, at 3–4 (Dec. 22, 2006). As a result, DHS funding is not proportionate to the threat level in each state. See, e.g., WARREN B. RUDMAN, RICHARD A. CLARKE & JAMIE F. METZL, EMERGENCY RESPONDERS: DRASTICALLY UNDERFUNDED, DANGEROUSLY UNPREPARED 18 (2003) (noting that under this statutory funding scheme Wyoming received \$10 per capita from DHS while New York only received \$1.40); Eric Lipton, *New Rules for Giving Out Antiterror Aid*, N.Y. TIMES, Jan. 3, 2006, at A1.

<sup>62</sup> See, e.g., SELECT BIPARTISAN COMM. TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, 109TH CONG., A FAILURE OF INITIATIVE: THE FINAL REPORT OF THE SELECT BIPARTISAN COMMISSION TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, H.R. REP. 109-377, at 359 (2006) (“The preparation for and response to Hurricane Katrina should disturb all Americans . . . . We are left scratching our heads at the range of inefficiency and ineffectiveness that characterized government behavior right before and after this storm.”).

<sup>63</sup> *New York v. United States*, 505 U.S. 144 (1992).

<sup>64</sup> *Printz v. United States*, 521 U.S. 898 (1997).

<sup>65</sup> Presciently, Justice Stevens' dissent in *Printz* warned that this brand of federalism may prevent Congress from managing nationwide preparedness and response: “Matters such as the . . . mass inoculation of children to forestall an epidemic, or perhaps the threat of an international terrorist, may require a national response before federal personnel can be made available to respond.” *Printz*, 521 U.S. at 940 (1997) (Stevens, J., dissenting).

line “no commandeering” rule.<sup>66</sup> Any reform that smacked of commandeering might be challenged as unconstitutional, although this Supreme Court has been willing to give the Administration broader latitude to reshape traditional legal frameworks in response to the exigencies of the war on terror. In addition, some scholars suggest that the authority to respond to domestic emergencies is not completely reserved to the states under the Constitution.<sup>67</sup>

Regardless of whether the Supreme Court relaxes its anti-commandeering standards, the federal government could assume greater responsibility if it was willing to challenge some of the informal preferences for federalism. Other federal agencies, such as the Department of Commerce and the Department of Energy, project their influence through nationwide field offices. Federal employees in these departments work with state and local officials and private sector actors on a daily basis, encouraging voluntary adoption of agency priorities. After September 11, the FBI increased the size and capabilities of its Joint Terrorism Task Forces (JTTF), which are FBI-led field offices that facilitate counter-terrorism information sharing among state and local law enforcement officers, FBI Agents, and other federal agents.<sup>68</sup> Having a field office presence is particularly appropriate for a department like DHS, whose mission is focused on the particular needs of, and threats to, state and local communities. Stronger local, state, and regional field offices also might be able to reinforce regional plans such as state mutual assistance compacts, and facilitate the deployment of available regional resources to the affected areas in times of crisis.

Policy proposals that increase federal involvement in local preparedness and response may face resistance by those who believe in a “small government” model of DHS. There is a common misperception that the importance of local knowledge to a successful preparedness and response operation makes any increase in federal involvement bad policy. The recognition that local control is critical in this area should not prevent an honest reconsideration of whether the current federalism balance is the best for implementing the government’s goals. A better framework would retain the value of local input while relieving burdens on local actors by giving

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<sup>66</sup> *Printz*, 521 U.S. at 932. See also *New York*, 505 U.S. at 187.

<sup>67</sup> See Brian C. Brook, *Federalizing the First Responders to Acts of Terrorism Via the Military Clauses*, 54 DUKE L.J. 999, 1000–01 (2005) (arguing that the Constitution’s Militia Clauses grant the federal government the authority to direct the states and first responders in response to terrorist attacks, notwithstanding federalism restraints). But see Adam M. Giuliano, *Emergency Federalism: Calling on the States in Perilous Times*, 40 U. MICH. J.L. REFORM 341, 397–98 (2007) (arguing that the Militia Clauses require respect for federalism restrictions even during domestic emergencies, unless there exists an external threat of invasion).

<sup>68</sup> Headline Archives, Federal Bureau of Investigation, Protecting America Against Terrorist Attack: A Closer Look at the FBI’s Joint Terrorism Task Forces (Dec. 1, 2004), available at <http://www.fbi.gov/page2/dec04/jttf120114.htm>.

the federal government a greater capacity to implement the broader goals it has set.

Despite the increased funding and institutional resources that were provided after September 11, the current system remains sub par. As the disastrous response to Hurricane Katrina illustrated, a state-centered framework simply does not produce the level of governmental assistance that Americans expect or deserve in a crisis situation. The federal government should re-adjust the basic federal-state framework to reflect the new post-September 11 demands. To be better prepared for the next homeland security emergency, the federal government needs to do more than just channel funding through the existing flawed framework for crisis management: it needs to take the gloves off and remove outdated federalism restraints.