

UNIVERSITY OF CALIFORNIA
SANTA CRUZ

American Federalism and National Security Policy in Cities

A dissertation submitted in partial satisfaction
of the requirements for the degree of

DOCTOR OF PHILOSOPHY

in

POLITICS

by

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December 2022

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TABLE OF CONTENTS

Table of Contents.....	iii
List of Interviews.....	vi
Abbreviations.....	viii
Abstract.....	xiv
Acknowledgements.....	xvi
Dedication.....	xviii
CHAPTER 1: A STUDY OF THE TRANSFORMATIVE EFFECTS OF POST-9/11 NATIONAL SECURITY FEDERALISM ON CITIES	1
1.1 Domestic Effects of the War on Terror on Federalism and Institutions	4
1.2 Theoretical and Empirical Perspectives on Post-9/11 National Security.....	10
1.3 Nuts and Bolts of the Project	17
CHAPTER 2: PRECURSORS TO POST-9/11 NATIONAL SECURITY FEDERALISM	24
2.1 What Was NSF Before 9/11?.....	24
2.2 Division of Labor between the Federal and the State Governments and How NSF Blurs the Lines	27
2.2.1 Police Powers	31
2.3 Cold War (1947 - 1991): A Selection of NSF Domestic Programs	40
2.3.1 1940s Readiness	42
2.3.2 War(s) as Public Policy.....	43
2.3.3 Counter Intelligence Program (1956–1971).....	54
2.4 Interwar Period (1991-2001): From the Fall of the Soviet Empire to the War on Terror.....	57
2.4.1 Emphasis on Information	60
2.4.2 Immigration Federalism: Its Impact on NSF Generally.....	64
2.4.3 Regional Security Production	67
2.5 Conclusion	69

CHAPTER 3: DEPARTMENT OF HOMELAND SECURITY AND PROMOTING THE PRACTICE OF NATIONAL SECURITY TO LOCALITIES	72
3.1 A Sprawling Endeavor.....	73
3.1.1 Circling the Wagons.....	74
3.1.2 The 22 Distinct Agencies and Units that Became DHS in 2003	75
3.2 Bush’s Proposition.....	78
3.2.1 Politics of Agency Design.....	79
3.2.2 Reprioritization of Local Preparedness	87
3.2.3 Fusion Centers Create a Hybrid Space between DHS and Localities	90
3.3 A Distinctive Policy of Preemption	93
3.4 Practical Integration of Local and State Actors.....	95
3.4.1 Nationalization of Law Enforcement Strategy via Funding.....	107
3.4.2 Intelligence Gathering, Top to Bottom.....	114
3.5 Conclusion	123
CHAPTER 4: NATIONALIZING (AND MILITARIZING) THE POLICE AND DHS PROGRAMS TO SUPPORT LOCAL LAW ENFORCEMENT	127
4.1 Legislation and Mandates Driving National Security Downward.....	137
4.2 DoD Connection through Program 1033 and Other Programs.....	143
4.3 The Difference Homeland Security Makes.....	148
4.3.1 Flow of DHS Dollars to Cities for Equipment.....	155
4.4 Local Decision-Making and Armored Vehicles.....	159
4.4.1 Standardizing Vehicles across Levels of Government.....	166
4.4.2 Who Applies for Armored Vehicles?	170
4.5 Conclusion	175
CHAPTER 5: INFORMATION SHARING AND INTEGRATING LOCAL INTELLIGENCE .	180
5.1 Reasons Why Local Intelligence Integration Transformed NSF	182
5.1.1 Private Sector Contracting: Influence, Conflict and Integration	187
5.1.2 Jurisdiction-shopping and Multi-Agency Partnerships.....	193
5.1.3 Normalization	196
5.1.4 Centrality of Bureaucratic Actors	197

5.1.5 Hybrid Institutions Influence Local Public Safety Intelligence Capabilities and Priorities	201
5.2 Components (Programs, Operations) of NSF Transformation	207
5.2.1 Grants as Insulators	212
5.2.2 Communications Platforms	220
5.2.3 Interoperable Sharing and Transferable Skills	222
5.3 Effects, Intentions and Consequences of NSF Transformation.....	226
5.3.1 Increased Level of Sophistication	230
5.3.2 Privacy Policy as a Consequence of Local Integration.....	238
5.4 Conclusion	240
CHAPTER 6: CONCLUSION	243
Bibliography	253

LIST OF INTERVIEWS

California State Assembly members

California State senators

Chief privacy officers at counties and cities

City council members

City council staff members

County ad hoc committee members on DHS grants

County supervisors

Cybersecurity scholars

Emergency management grant administrators (regional, county and state)

FBI personnel

FEMA officials (current and former)

Fusion centers directors

Homeland security state attorneys

Journalists and authors

Military intelligence personnel

Police chiefs

Police deputy chiefs

Privacy policy community advocates

Privacy professionals (private sector)

Regional FEMA coordinators

Regional working group directors and members

State emergency preparedness/ state homeland security heads

Technologists

Watchdog group directors

White House staffer

ABBREVIATIONS LIST

ADPPA	American Data and Privacy Protection Act
ALPR	Automated License Plate Reader
ATF	Alcohol, Tobacco, Firearms and Explosives
BAUASI	Bay Area Urban Areas Security Initiative
BJA	Bureau of Justice Assistance
Byrne JAG	Edward Byrne Memorial Justice Assistance Grant Program
Cal OES	California Governor's Office of Emergency Services
CBP	Customs and Border Protection
CBRN	Chemical, Biological, Radiological and Nuclear
CCPA	California Consumer Privacy Act of 2018
CEDAP	Commercial Equipment Direct Assistance Program
CIA	Central Intelligence Agency
CICC	Criminal Intelligence Coordinating Council
COINTELPRO	Counter Intelligence Program
CompStat	Comparative Statistics
COPS	Community Oriented Policing Services
CYA	Cover Your Ass
DEA	Drug Enforcement Administration
DHS	Department of Homeland Security
DNI	Director of National Intelligence
DoD	Department of Defense
DOJ	Departments of Justice

DOSP	Defense Open Source Program
DSCA	Defense Support of Civilian Law Enforcement Agencies
ECPA	California Electronic Communications Privacy Act
EPR	Emergency Preparedness and Response Directorate at DHS
ERO	Enforcement and Removal Operations
FBI	Federal Bureau of Investigation
FEMA	Federal Emergency Management Agency
FIG	Field Intelligence Groups
FISA	Foreign Intelligence Surveillance Act of 1978
FY	Fiscal Year
GAO	US Government Accountability
GSA	General Services Administration
GWOT	Global War on Terror
HHS	U.S. Department of Health & Human Services
HIDTA	High Intensity Drug Trafficking Area
HSAC	Homeland Security Advisory Council
HSC	Homeland Security Council
HSGP	Homeland Security Grant Program
HSI	Homeland Security Investigations
HSIN	Homeland Security Information Network
HSPD	Homeland Security Presidential Directive
HUAC	House Un-American Activities Committee
HUMINT	Human Intelligence
I&A	Office of Intelligence & Analysis in DHS

I/I	Intelligence / Investigations
IC	Intelligence Community
IC/UC	Incident Commander or Unified Command team
ICE	Immigration and Customs Enforcement
ICG	Major Cities Chiefs' Intelligence Commanders Group
ICS	Incident Command System
IJ	Investment Justification
ILP	intelligence-led policing
INA	Immigration and Nationality Act of 1952
INS	Immigration and Naturalization Service
JTTF	Joint Terrorism Task Forces
LAPD	Los Angeles Police Department
LASD	Los Angeles County Sheriff's Department
LEA	law enforcement agency
LEAA	Law Enforcement Assistance Administration
LEEP	Law Enforcement Enterprise Portal
LESO	Law Enforcement Support Office
LETPA	Law Enforcement Terrorism Prevention Activities
LETPP	Law Enforcement Terrorism Prevention Program
MCCA	Major Cities Chiefs' Association
MOU	memorandum of understanding
MRAP	Mine-Resistant Ambush Protected vehicles
MSA	Metropolitan Statistical Area
NAC	Nebraska Avenue Complex

NCHIDTA	Northern California High Intensity Drug Trafficking Area
NCISP	National Criminal Intelligence Sharing Plan
NCRIC	Northern California Regional Intelligence Center
NCTC	National Counterterrorism Center
NDA	non-disclosure agreement
NDAA	National Defense Authorization Act
NIC	National Integration Center
NIJ	National Institute of Justice
NIMS	National Incident Management System
NORAD	North American Aerospace Defense Command
NORTHCOM	Northern Command
NSA	National Security Agency
NSAM	National Security Action Memorandums
NSC	National Security Council
NSF	National Security Federalism
NSI	Nationwide Suspicious Activity Reporting (SAR) Initiative
NSM	National Security Memoranda
NSPD	National Security Presidential Directives
NSPM	National Security Presidential Memoranda
ODNI	Office of the Director of National Intelligence
ODP	Office for Domestic Preparedness
OHS	Office of Homeland Security
OLEA	Office of Law Enforcement Assistance in DOJ
ONA	Office of Net Assessment

ONDCP	Office of National Drug Control Policy
OPD	Oakland Police Department
OPSG	Operation Stonegarden
OSLLE	Office for State and Local Law Enforcement in DHS
PD	Presidential Directives
PPD	Presidential Policy Directive
PRM	Presidential Review Memorandums
RAC	Federal Resource Allocation Criteria
RISS	Regional Information Sharing Systems
RISSNET	Regional Information Sharing Systems Network
RMA	Revolution of Military Affairs
SAA	State Administrative Agencies
SAR	suspicious activity reporting
SDPD	San Diego police department
SHSGP	State Homeland Security Grant Program
SHSP	State Homeland Security Program
SLTT	state, local, tribal and territorial
SPR	State Preparedness Report
SWAT	Special Weapons Assault Team, later Special Weapons and Tactics
THIRA	Threat and Hazard Identification and Risk Assessment
TTIC	Terrorist Threat Integration Center
UASI	Urban Area Security Initiative

USA PATRIOT	Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001
USBP	United States Border Patrol
USC	United States Code
USNORTHCOM	United States Northern Command
USSR	Union of Soviet Socialist Republics
VALET	Visual Analytics Law Enforcement Toolkit

ABSTRACT

AMERICAN FEDERALISM AND NATIONAL SECURITY POLICY IN CITIES

Kitchitrina K. Barton

The emergency of 9/11 is gone. Terrorism is no longer front of mind for most Americans. Active shooter atrocities and white supremacist violence have become more salient as domestic threats. And yet, domestic counterterrorism programs and policies are business as usual. This dissertation examines those policies and the connections between the national and local governments in the aftermath of the attacks of September 11, 2001. It explores national policies in policing, law enforcement and emergency preparedness and whether their cumulative effects constitute a new relationship between the federal, state, and local governments, a relationship that marks a turn in an important area of American government and constitutionalism. The project argues that the symptom of domestic warfare, a result of Bush-era War on Terror policies, is a systemic shift in the power balance in the American state and its federalist governmental structure. The concept of national security federalism is used as a general framework for gauging institutional change with the federal government's push to centralize its prosecution of

the War. The empirical focus is on military equipment exchange and intelligence production, primarily driven by the Department of Homeland Security. Evidence suggests that counterterrorism preparedness and intelligence capabilities are high in the cities and counties examined as a result. Based on in-depth interviews with a wide range of officials, security experts and community stakeholders, the study offers insights into how bureaucratic, elected and private sector actors pursue their work and how they conceive of themselves and their organizations vis a vis the mandates they are given, as well as the ones they adopt. The study finds that local institutions and actors have indeed changed how they operate, both ceding local power to the central government and taking for themselves some federal authorities at the expense of public accountability. It also finds very few cities attempting to reclaim sovereignty through privacy policy, unearthing interesting activities and combinations in the process.

ACKNOWLEDGEMENTS

This dissertation would not have been possible without the tireless support and encouragement of my advisor and committee chair, Daniel Wirfs. His patience is unflappable and his suggestions indispensable. The brilliance and commitment of my committee members, Eleonora Passoti and Jackie Gehring, made this a better project and me a better scholar. Thanks goes to Ben Read for his tremendous and timely assistance during qualifying exams. My graduate cohort, their partners and families made academic life joyous: Alena Wolflink, Covina Kwan, Gabriel Filartiga, Jessica Whatcott, Joseph Lehnert, Martín Ordóñez, Sarah Almutairi, Scott Newsome and Xiaoping Yin. Wais Hassan, Jeff Sherman, Eric Crosbie, Juan Diego Prieto and Michael Wilson made the intellectual journey far more stimulating.

I extend a heartfelt thanks to the subjects interviewed for this study, all of whom were gracious and generous with their time and insights.

To my parents, Katherine and John, I owe a debt of gratitude. They taught me to be creative, curious and to question authority while providing their unwavering backing to these ends. They have also reviewed many chapter drafts, making astute amendments. My siblings Kayleena Pierce-Bohen and Jonathan Barton offered their feedback and

good humor all along the way. My late mentor, Hon. Ronald V. Dellums, provided early guidance and inspiration. His wisdom continues to pervade my pursuits, in politics and in life. Cynthia L. Dellums has been a source of strength throughout graduate school. Hon. Keith Carson placed immense faith in me and to whom I owe my career. Marisol Lopez, my sister from another mother, never failed to lift me up. LaNiece Jones showed me that graduate study was possible.

My love and appreciation to June Albertson who always believed I would accomplish what I set out to do. And to Meagan Schreiner for making our COVID bubble so much cozier. Rick and Paula Albertson have continually been in my corner. Scott Alfieri provided the reading lists and hilarity to keep me going.

DEDICATION

I dedicate this work to my partner in life, Dustin, who has never shied away from an adventure with me and to our precious son, Jean-Luc.

Your love is my guiding light. Every day with you two is inspired and delightful.

And to my best friend, Daisy, may she rest in power.

CHAPTER 1: A STUDY OF THE TRANSFORMATIVE EFFECTS OF POST-9/11 NATIONAL SECURITY FEDERALISM ON CITIES

"Huge overreaction post-9/11. Everything was a threat – everyone was convinced there'd be another attack and everything would get hit."

"We had internal trainings on every Muslim terrorist group folks could find online."

In late May 2020, the murder of George Floyd by members of the Minneapolis, Minnesota police set off protests around the country and around the world. The protests themselves were often met by aggressive police tactics, and in some places were supplemented by the National Guard. In at least 15 cities, the Department of Homeland Security used helicopters, drones, and other aircraft to monitor and surveil these protests. Data from that surveillance was entered into a database available to local law enforcement as well as other national agencies.¹ This widespread and protracted uprising was unprecedented in its scope and duration, but it had been preceded by years of events and protests that highlighted not only police violence, particularly against African-Americans, but also the so-called militarization of the police and the links

¹ <https://www.nytimes.com/2020/06/19/us/politics/george-floyd-protests-surveillance.html>

between public safety agencies and larger national policies. By President Obama's second term, in particular, social unrest over rising income inequality, police brutality and racially-motivated killings had sparked protests in urban centers. They were met with forces in cities like Ferguson, Missouri, Oakland, California, and Baltimore, Maryland, bearing equipment that at times resembled soldiers in a field of battle rather than officers of the law. Images of officers in tactical gear, armed with automatic weapons, riding in the turrets of armored vehicles, was new to many Americans but an old reality - possibly in new form - to many others.

This curiously high-tech symptom of domestic warfare appeared to be systemic, but was it? Focusing on the Department of Homeland Security, this dissertation examines the policies and programs that have connected the national government to local public safety in the aftermath of the attacks of September 11, 2001 (hereafter 9/11). It explores national policies in policing, law enforcement and emergency preparedness at the local level and whether the cumulative effect constitutes a new relationship between the federal, state, and local governments, a relationship that marks a turn in an important area of American government and constitutionalism. Did the years and policies that followed 9/11 create a qualitatively new set of relationships between the

national security establishment and localities, particularly urban centers, when compared to other periods, changes in what this dissertation will call National Security Federalism (NSF)?² The examination will take stock of the intents and consequences of the policies that have constituted post-9/11 NSF. For example, it will assess local public safety agencies that have adopted War on Terror tactics, funding priorities and an emphasis on private sector partnership. If the crisis of 9/11 changed domestic security production, it was a watershed moment or critical juncture³ setting a different course for relations between federal and local actors but also a series of ‘reactive sequences’⁴ that continue to morph and mature.

This chapter uses the concept of national security federalism as a general framework for gauging the institutional change in cities via the federal government’s push to centralize its prosecution of the War on Terror domestically. Chapter two initiates a discussion of the types of NSF that predated 9/11, to put the post-9/11 era in historical context by showing how NSF evolved prior to that crisis. Chapter three highlights the significance of the behemoth department that is Homeland Security, specifying the parts of DHS relevant to national security centralization

² Matthew C. Waxman, “National Security Federalism in the Age of Terror,” *Stanford Law Review* 64, no. 2 (February 2012): 289–350.

³ Ruth Berins Collier and David Collier, “Shaping the Political Arena: Critical Junctures, the Labor Movement, and Regime Dynamics in Latin America,” SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 2002), 28, <https://papers.ssrn.com/abstract=2769109>.

⁴ Sidney Tarrow, *Movements and Parties* (Cambridge University Press, 2021), 155.

and those that scoop up cities in the process. Chapter four examines the role of DHS in what is commonly referred to as the "militarization" of local law enforcement by focusing on the programs that facilitate the acquisition of such equipment by state and local agencies. Turning from the material acquisitions to the more digital and virtual world of national intelligence, chapter five looks at programs and policies that integrated state and local agencies into the national intelligence apparatus related to the war on terror. Chapter six concludes with a discussion of findings and the short and long term implications of these programs and changes.

1.1 Domestic Effects of the War on Terror on Federalism and Institutions

To approach post-9/11 War on Terror strategies in state and local law enforcement, we must first acknowledge that widespread domestic deployment of federal assets is predicated on a novel conception of war. While WWII consisted of intense mobilization and sacrifice, the rapid US demobilization ensured that the war itself came to a close at the cessation of fighting.⁵ In contrast, the War on Terror does not appear to have historical limits nor is there a formal and robust discourse on demobilization. The logic of the War on Terror is that of a continuing

⁵ Steven W. Hook and John Spanier, *American Foreign Policy Since World War II* (CQ Press, 2015), 34–35.

process rather than an event. The process appears to be a dynamic one, with transformative capabilities and one that constitutes itself through the continual practice of institutional actors involved in the war and national security.

The connection between war, national security, and local public safety invokes one of the central constitutional features of American government: federalism. In its most basic sense, federalism is the formal division of political power and authority between the national government and its parts, in this case, the states. Prior to its ratification, as The Federalist argued, “[t]he proposed Constitution, so far from implying an abolition of the State governments, makes them constituent parts of the national sovereignty, by allowing them a direct representation in the Senate, and leaves in their possession certain exclusive and very important portions of sovereign power.”⁶ While federalism is the “multifaceted political power relationships between governments within the same geographical setting,” it has evolved to frame “the ways that various governments simultaneously influence, depend upon, and push away from each other.”⁷ It is the paradoxical nature of a Constitution that is “neither a national nor a federal Constitution, but a composition of

⁶ Alexander Hamilton et al., *The Federalist Papers*, ed. Clinton Rossiter, 1st Edition edition (Signet, 2003), 71.

⁷ Larry N. Gerston, *American Federalism: A Concise Introduction* (Armonk, N.Y: Routledge, 2007), 5.

both,”⁸ a legal “separation of powers multiply[ing] the points of tension among agencies of control” and a system of “government purposely designed to keep order provisional, to insure it is routinely contested and off-balance.”⁹

While one of the dominant features of American political development has been the evolution of federalism toward greater national involvement and control in the realm of domestic policy, from welfare to civil rights, at least until 9/11, a fairly bright line existed between national security and state-level law enforcement. Symbolized by such things as the Insurrection Act of 1807 and Posse Comitatus Act of 1878, the reality has been a strict division of labor with very few overlaps or intersections. Here again, legal scholar and former National Security Council staffer, Matthew Waxman’s term ‘national security federalism’ (NSF) is useful to catalog, conceptualize and analyze the present relationship, what he argues accounts for changes along the “vertical axis [of power divisions] and the emergent, post-9/11 role of state and local government in American national security law and policy.”¹⁰

⁸ Hamilton et al., *The Federalist Papers*, 242.

⁹ Karen Orren and Stephen Skowronek, *The Search for American Political Development* (Cambridge University Press, 2004), 86.

¹⁰ Matthew C. Waxman, “National Security Federalism in the Age of Terror,” SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, August 30, 2011), 289, <http://papers.ssrn.com/abstract=1830312>.

An assessment of NSF allows us to question “whether integration of state and local institutions into intelligence programs and functions enhances or degrades the public’s ability to participate meaningfully in self-government through the political process.”¹¹ With “so much overlap between criminal justice and national security intelligence” it provides the framework to examine “processes of interlevel policy deliberation and validation.”¹² National security federalism scholarship acknowledges the degree to which “significant, tangible effects of security policies...take place at the local level as a result of actions by local government actors.”¹³ An attempt to understand the depth of the national security state’s reach into local affairs nation-wide is an attempt to assess changes in NSF. The national security state, after all, is the framework of institutions established by the 1947 National Security Act as the basis for fighting the Cold War.¹⁴ An institutional study of this framework also allows the analysis to push up against the assertion by federalism scholars that federalism creates a broader voice for the people in democratically checking the power of the central government.¹⁵

¹¹ Waxman, 324.

¹² Waxman, 325, 331.

¹³ Waxman, 291.

¹⁴ David Jablonsky, “The State of the National Security State,” *The US Army War College Quarterly: Parameters* 32, no. 4 (November 10, 2002): 4, <https://doi.org/10.55540/0031-1723.2122>.

¹⁵ Margaret H. Lemos, “State Enforcement of Federal Law,” SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, September 30, 2010), 745–46, <http://papers.ssrn.com/abstract=1685458>.

The constitutional system, at least the one designed in Philadelphia in 1787, is one suspicious of concentrated authority, but nonetheless a system that vested tremendous power in the hands of the President in wartime. The vertical relationship regarding national security shifted during the Civil War, against domestic insurgency, and again with the Second World War and the consolidation of security agencies through the National Security Act. What has notably changed with the War on Terror is the federal bureaucracy's tremendous technological capacity to gather, store and interpret data and intelligence, often through the use of new mechanisms of power located in US states and in localities. Thus, intelligence operations, a major tactical component of the federal government's execution of the War, is a significant component of post-9/11 NSF.

This dissertation asks not just whether urban policy has adjusted but how, why, and with what implications it has changed in response to the national security regime of the post-9/11 era, contributing to the process of centralization, amid a nominal federalist legal arrangement. Therefore, as discussed earlier, the frame of reference for examining this shift is Madisonian federalism (and its constituent components) as depicted in the US Constitution and the Federalist Papers, as well as Waxman's 'national security federalism' - the move away from a

separation of state police powers in the security domain.¹⁶ He posits that while we may have federalism, or the legal delineation of policy responsibilities between the national and state governments in some areas of domestic law, the process of centralization has dominated law enforcement policy since 9/11. From a historical perspective, the distribution of traditional police powers of the states has shifted little through time, re-inscribed in Supreme Court cases such as *New York v. United States* (1992), *Printz v. United States* (1997) and *Arizona v. United States* (2012). The 10th Amendment of the Constitution codified the notion that traditional health, welfare and safety operations of states in existence prior to the ratification of the Constitution and the conception of the United States government, would continue in effect and be controlled by local populations, so long as these operations were constitutional in other respects. However, from a practical perspective, any substantive change in the fundamental distribution of powers through the development and implementation of a centralized domestic security policy might effect change in the way states and the federal government do business.

¹⁶ Matthew C. Waxman, "National Security Federalism in the Age of Terror," *Stanford Law Review* 64, no. 2 (February 2012): 289–350.

1.2 Theoretical and Empirical Perspectives on Post-9/11 National Security

Some legal scholarship has explored the relationship between national security policy and urban democratic politics.¹⁷ As stated, a key ingredient of federalism is the push and pull of power struggles via oversight which keeps the ability to centralize power off-kilter. A general critique of national war policies in cities is that military and national security politics distort local policy functions and corrode civil liberties.¹⁸ It has been argued that local and state oversight mechanisms are atrophied, relative to federal oversight functions, and must change to meet the new demand.¹⁹ On the other hand, federal oversight is at times lax and this allows agencies operating within city jurisdictions, who have tighter controls on their own agents, to go jurisdiction “shopping” for the most lenient privacy regulation.²⁰ These actions and partnerships present challenging questions even in cities and counties specifically curtailing

¹⁷ Edward R. Maguire and William R. King, “Federal-Local Coordination in Homeland Security,” in *Criminologists on Terrorism and Homeland Security*, 2011, <http://dx.doi.org/10.1017/CBO9780511976384.015>; Samuel J. Rascoff, “The Law of Homegrown (Counter)Terrorism,” *Texas Law Review* 88, no. 7 (June 1, 2010): 1715; Daniel Richman, “The Past, Present, and Future of Violent Crime Federalism,” *Crime and Justice* 34, no. 1 (2006): 377–439, doi:10.1086/500056.

¹⁸ Waxman, “National Security Federalism in the Age of Terror,” 311.

¹⁹ Matthew C. Waxman, “Police and National Security: American Local Law Enforcement and Counter-Terrorism after 9/11,” *Journal of National Security Law & Policy* 3 (2009): 390, 397–98; Waxman, “National Security Federalism in the Age of Terror,” 296.

²⁰ Danielle Keats Citron and Frank A. Pasquale, “Network Accountability for the Domestic Intelligence Apparatus,” SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 2011), 1485, <http://papers.ssrn.com/abstract=1680390>.

surveillance through local law.²¹ One solution proposed is to adjust the relationship by empowering network accountability personnel and placing them in fusion centers (state-run intelligence hubs) in order to institutionalize a check on power. Professionals who are technologically capable of evaluating civil liberties violations against some metric are thought to make War on Terror counterterrorism practitioners more accountable to the publics they serve.²² This illustrates the complexities of such proposals which would need to identify a need for internal controls and evaluate compliance not to mention determine which laws apply from which jurisdiction and then transmit this back to local residents for debate.

Local democratic institutions, as a site where the tension between national and local plays out, can take the form of a ‘push-back’ on Executive powers and Homeland Security policy. While push-back is unlikely to inform presidential policy or Executive agencies writ large, active partnerships challenged by local populations can have ripple effects producing models for similar challenges. The federal government recognized the need for more robust input from local actors to address accountability issues and to relay public preferences, creating bodies such

²¹ “Santa Clara County: High-Tech Police Spying Rules Take Shape - San Jose Mercury News,” accessed April 21, 2016, http://www.mercurynews.com/crime-courts/ci_29778546/santa-clara-county-high-tech-police-spying-rules.

²² Citron and Pasquale, “Network Accountability for the Domestic Intelligence Apparatus,” 1443.

as an advisory council to the Department of Homeland Security and the Interagency Threat Assessment and Coordination Group at the National Counterterrorism Center. These federal entry points, and others like them, may expand local representative voice on federal investigatory guidelines but their meaningfulness, in terms of policy change or development based on feedback, is unknown.²³ Combined with expanded, local internal review and local oversight boards, more robust monitoring mechanisms and inter-level policy deliberation, these federal initiatives may alter communities' ability to influence national security, but the evidence is scattered and anecdotal.²⁴ The most sustained, organized local critique is through privacy boards and through ordinances regulating surveillance and other equipment acquisitions.

It has been hypothesized that a balance can be reached between federal accountability to cities and effective domestic war policies. On the other hand, some oversight redundancies built into the US constitutional system must be redefined or reimagined to recognize the real-world inconsistencies that exist. Here, the federal and local collaborations fall outside the bounds of their delineated constitutional powers, post-9/11, particularly with regard to intelligence.²⁵ Essentially, the civil-military

²³ Waxman, "National Security Federalism in the Age of Terror," 333.

²⁴ Waxman, 331, 334–35, 337, 349.

²⁵ Louise Stanton, *The Civilian-Military Divide: Obstacles to the Integration of Intelligence in the United States* (ABC-CLIO, 2009), 10.

divide has been breached and the waters muddied between what is emergency preparedness, terrorism prevention and regular crime control. In this regard, some lift up troubling patterns of accountability abuses and the need for reform.²⁶

The debate on whether divided authority in the Constitution does indeed give US society control of the military is at the heart of the matter.²⁷ On the affirmative, the Constitution “drives the law and the structure on separating the military from civilians and achieving civilian control at the national, state, local and citizen level of government” through diffusion of authority among states and across branches.²⁸ While there may be a constitutional and legal separation of the military sector from the civilian sector, some find a novel War on Terror paradigm, one which requires a political-military strategy rooted in the subjective combination of the two through the Executive’s indirect use of local personnel as a force multiplier. Herein lies the rub for the local actor, attuned to local costs and resources or the tension between local constituencies of a different political stripe than the occupant of the White House driving national security policy. Moves towards seamless integration between the national and sub-national obscure the very

²⁶ Citron and Pasquale, “Network Accountability for the Domestic Intelligence Apparatus.”

²⁷ Stanton, *The Civilian-Military Divide*, 66.

²⁸ Stanton, 77.

existence of tension. In effect, “the horizontal integration of civilian and military organization and the vertical integration of local, state, national, and multinational civilian and military sectors,” so crucial to US counterinsurgency policy since 9/11, has led to the “the integration of civilian and military efforts.”²⁹

It is possible to offer abstract assessments of the domestic War on Terror effects without offering systematic internal or institutional analysis of what is happening regarding democratic tensions, local autonomy and institutional effectiveness (whatever the goals and metrics might be).³⁰ A more robust examination of institutional changes and social ramifications exist as investigations of the UK, but its unitary government is not an apt comparison to the US system of shared, but separated powers.³¹ A look at particular manifestations of War on Terror policies in cities, especially the built environment, with its many social impacts does not provide a comparison of institutional approaches to

²⁹ Stanton, 101.

³⁰ Stephen Graham, *Cities, War, and Terrorism: Towards an Urban Geopolitics* (Malden, MA: Blackwell Publishing, 2004); Ryan Bishop, Gregory Clancey, and John W. Phillips, eds., *The City as Target* (Abingdon, Oxon ; New York, NY: Routledge, 2012); Joseph Masco, *The Theater of Operations: National Security Affect from the Cold War to the War on Terror*, 2014.

³¹ Jon Coaffee, David Murakami Wood, and Peter Rogers, *The Everyday Resilience of the City: How Cities Respond to Terrorism and Disaster* (Basingstoke [England]; New York: Palgrave Macmillan, 2009); Jon Coaffee, “Protecting Vulnerable Cities: The UK’s Resilience Response to Defending Everyday Urban Infrastructure,” *International Affairs* 86, no. 4 (July 1, 2010): 939–54, <https://doi.org/10.1111/j.1468-2346.2010.00921.x>.

decision-making nor the execution of resultant policy objectives.³² The resilience literature, in general, does not look at how broad national institutions are interpreted by and through city politics, urban institutions and social forces. There appears not to be a direct comparison of the various institutional interpretations of domestic war before and after 9/11 nor is there a study of the domestic forces pushing back or impacting its current operations (if push-back exists systemically).

New sites of power emerge in cities that are constituted relationally in response to, and in partnership with, the federal government. The prominent role of public-private partnerships in urban service delivery has become the new normal as well as a key mission of the Department of Homeland Security. The private sector is now a massive policy player in the security space, at every level of government, present via emissaries at any local debate on weaponry or surveillance tools and seated on advisory boards at state and federal levels. It is enough to say manifestations of Executive powers in wartime, meted out in urban settings, could constitute new “polarizing dynamics”³³ for already unevenly developed cities. However, federal policy development appears to rarely be conceptualized from the vantage of cities. The consequences of these

³² H. V Savitch, *Cities in a Time of Terror Space, Territory, and Local Resilience* (Armonk, N.Y.: M.E. Sharpe, 2008), <http://site.ebrary.com/id/10292186>.

³³ Kevin Fox Gotham and Miriam Greenberg, *Crisis Cities: Disaster and Redevelopment in New York and New Orleans* (Oxford University Press, 2014), viii.

policies may distort urban politics related to local regimes, racial tensions with police, class diversity, equity and other considerations, far removed from the execution of war. Whatever outcomes may arise in cities may not be of central concern for national war policy administrators who may be distant from the local ramifications of their decisions.

The nature of debate in local communities and the outcomes of the policies that have constituted post-9/11 national security federalism are also telling. There are social and opportunity costs to war. Since the War on Terror is not only international, but is conducted within the territorial boundaries of the US, is it worth examining its implementation along the typical dimensions of domestic social science and urban studies.

Police militarization, as a symptom of war policy, is the use of military equipment, training, protocols, communications systems, surveillance technologies, funds, personnel and legal justifications or protections to pursue missions related to war. Hall and Coyne simply state that the domestic War on Terror, “[l]ike any other war...utilize[s] military personnel, equipment, and tactics to combat and eradicate real and perceived enemies.”³⁴ Hypothetically, if incentives in federal funding, equipment, information access, training and personnel exist, local agency

³⁴ Abigail R. Hall-Blanco and Christopher J. Coyne, “The Militarization of U.S. Domestic Policing,” SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, August 2, 2012), 4, <http://papers.ssrn.com/abstract=2122384>.

priorities will tack towards increasingly militarized objectives and actions over time. The project acknowledges the reality that aspects of militarization have long been present in cities with high percentages of poor and minority residents and in areas already experiencing over-policing.

1.3 Nuts and Bolts of the Project

This project reaches into local security agencies and local governments in unique ways. Its approach is qualitative and the research is based on a collection of data gleaned primarily from the people doing the work. The actor-led understanding sheds light on NSF in ways a purely quantitative study would not because so much of the War's enactment is relationship-based, is trial-and-error and is re-combining in real time. Specific federal programs and funding streams constitute the nature of the relationship between levels of government and act as guideposts and enablers but the real work is heavily imbued with viewpoints, constraints, attitudes and innovations of those involved.

The project asks whether federal objectives associated with War programs are accepted and folded into local work by practitioners and why. First, it investigates the possible effects of subnational participation in collaborative public and quasi-public partnerships directly and

implicitly associated with national war policies. Second, it seeks to know whether local acceptance or rejection of these policy objectives is registered through changing institutional doctrine or regulatory bodies. Answers provided by subjects illuminate the War's impact on urban militarization, or the accumulation of national military powers and gear at the local level, and securitization, the normalization of a new security paradigm through speech and action.

City and county case selection was determined by independent variables such as level of participation in federal programs including acceptance of funding, notoriety of particular partnerships and geographic proximity. Oakland, Alameda County, Santa Clara County, Santa Cruz and Santa Cruz County are sites studied herein, with others scrutinized to a lesser extent and based on associations and suggestions of subjects. All are localities that have received material support from the Department of Justice Program 1033 and/or the Department of Homeland Security grant programs. While they are proximate to one another geographically, the qualifications and limits each jurisdiction has placed on their participation in War on Terror programs varies. Once Oakland was selected as a case, it was used to generate a preliminary theoretical construct which was further refined through the analysis of materials and interviews. This allowed the study to proceed heuristically as sub-

hypotheses were formed and conclusions were drawn. Once key information was ascertained, a stronger theoretical framework was formed.³⁵

Given my knowledge of Oakland politics, participation in crafting public safety documents of previous mayoral administrations, my presence and participation in police-crisis situations post-9/11 and my working relationships with past and present personnel, Oakland was my first choice. My inquiries were more specific and targeted there. Santa Cruz was likewise an important choice, having worked on policy there. Both cities have agencies implementing immigrant, transit, criminal and surveillance policies. The City of Santa Cruz is interesting due to its small size, relative isolation from other Bay Area cities, relative homogeneity and low levels of violent crime. Increased levels of militarization in Santa Cruz seemed to indicate the truly nationalized scope of War on Terror policies. Oakland, as a mid-sized city, one with a regional transit and commercial corridor and socio-economic and political diversity made for good contrast. The three Counties, on the other hand, represent collections of cities in regions with diverse constituencies (rural/ urban, class, race, topographical) agglomerated under one jurisdiction. Counties generally, and these three specifically, wield agencies and resources in ways well-

³⁵ Moses and Knutsen, 140–41.

suiting to reduce democratic debate, especially due to the federal government's organization of its War resource distribution. This level of government is often the site of emergency preparedness policy and funding and thus represents an important component of the blending of federal and local resources.

This project adds substance and meaning to the practical shift by digging deeply into the reasons. While the sampling is not random, it is also not cherry-picked for sameness in these criteria. The purpose and ways localities use counterterrorism resources is pre-determined and reflective of the distinctive national security policy post-9/11. With a small selection of cities and counties near one another, we can say a change has occurred in the systemic power balance because nothing suggests they are using war resources uniquely, rather the opposite that the requirements of the mission are uniform nation-wide. This may demonstrate favoritism towards the federal government over local control of local resources, and therefore a new distribution in the power sharing arrangement between states and the central government. Particularly when it comes to law enforcement, this could signal a more or less dramatic centralization process in the governing structure of the United States and an alteration of the Constitution, through practice, by practitioners of the security state rather than Americans' desire to lose independence at the local level.

The project considered the influence of city participation in the following federal programs: Homeland Security grants, Department of Defense Program 1033, fusion centers and Joint Terrorism Task Forces (JTTFs). It assessed local agency requests for funds for counterterrorism, military equipment inventories and personnel changes including acquisitions from (or transfers to) federal departments for similar tasks. Qualitative changes in descriptive law enforcement tactics, especially regarding intelligence-gathering in criminal interdiction, multi-agency situational response including surveillance and use of force were examined as well.

This author used a combination of methods to address empirical questions such as attendance at funding hearings, council and commission meetings and interviews. To support this study, this researcher collected information through confidential interviews with public safety professionals and key stakeholders. In all, 41 extensive interviews were conducted, with an additional 20 follow-up conversations, totaling over 100 hours of dialog. Documentary analysis is based on material obtained through open sources, regular inquiries and through Freedom of Information requests. The methodology contributed inductively to an understanding of the underlying commonalities among cities and counties,

their personnel, policies and objectives in the War on Terror context.³⁶

Primary sources included grant applications and project descriptions submitted by cities and counties to the federal government, transcripts of meetings, video of meetings and events, live talks and presentations by security and technology experts, budgets, contracts, memorandums of understanding (MOUs), annual reporting and the Congressional Record. Secondary sources included scholarly and professional publications on intelligence, policing, organizational history, organizational design, network science, congressional research and technological studies.

Interviews secured deep insights about motivations and processes with less of a focus on representativeness than on the relevance of the subject's work.³⁷ Political figures, bureaucratic officers, private sector professionals, technologists and community leaders were interviewed to achieve clarity on the security state from various angles. Questions asked were those that attempted to measure the underlying phenomena of NSF in local jurisdictions, primarily in an open-ended format. Free-flowing conversations also produced candid and astute evidence.

Through a focus on NSF, the project hones in on the micro, meso and macro transformations that combine to move the needle in power

³⁶ Jonathon Moses and Torbjørn Knutsen, *Ways of Knowing: Competing Methodologies in Social and Political Research*, Second Edition, Revised edition (Houndmills, Basingstoke, Hampshire : New York: Palgrave Macmillan, 2012), 111.

³⁷ Moses and Knutsen, 133.

distribution in ways perhaps not conceived of by the Constitution. A look into the structure and undertakings of agencies, some old and some new, reveals this. So too does the active participation of key players who bring a wealth of knowledge to the task of waging domestic war and who have now learned on-the-job these past twenty-plus years.

CHAPTER 2: PRECURSORS TO POST-9/11 NATIONAL SECURITY FEDERALISM

“From 1990 to 2001 we [police] were totally reactive, not pre-emptive.”

“9/11 caused a push, big-time, by the federal government towards [police/ public safety] regionalization.”

2.1 What Was NSF Before 9/11?

This chapter provides an account of programs and policies which laid the groundwork for the type and tenor of National Security Federalism (NSF), before the events of September 11, 2001 (hereafter 9/11). Recall that NSF is a term to describe vertical intergovernmental arrangements among central, state and local governments³⁸ to deal with national security. It is different from, say, a study of the horizontal arrangements of coordinate branches of the federal government, that is: the executive, legislative and judiciary. The compounding of the two, the vertical division between the states and central government, and the division among the three branches, provides the American system the all-important “double security” against tyranny.³⁹ National security

³⁸ “10 U.S. Code § 281 - Procurement of Equipment by State and Local Governments through the Department of Defense: Equipment for Counter-Drug, Homeland Security, and Emergency Response Activities,” LII / Legal Information Institute, accessed August 2, 2022, <https://www.law.cornell.edu/uscode/text/10/281>.

³⁹ Federalist 51 (Madison). Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (New York, N.Y: Signet, 1999).

federalism represents a consolidation of power, collapsing divisions enough so that it warrants our attention. Prior to 9/11, NSF was largely an ad hoc set of programs, policies and principles that forced vertical power concentration at specific times, for specific purposes often against specific populations. At times unethical, at other times benign, NSF was - and is - a slippery slope. The pre-9/11 legal regime generally kept expansive, intrusive or ostentatious shows of national domestic power either hidden or within the bounds of the programs implementing it. Post-9/11 examination reveals a deep “shared federal-local national security system”⁴⁰ discussed in other chapters. What came before may provide instructive clues as to why the now 21-year arrangements have stuck. That is, by examining changes in policy distribution from the national government to the local, or changes in federalism, we might see a shift in the balance of power between the states and the central government regarding national security as a domestic policy issue.⁴¹

By allocating powers and resources to further national security goals to lower levels of government, the lines demarcating separate roles and responsibilities between the jurisdictions, as outlined in the Constitution and described in the Federalist Papers, have blurred. Indeed,

⁴⁰ Matthew C. Waxman, “National Security Federalism in the Age of Terror,” *Stanford Law Review* 64, no. 2 (February 2012): 289.

⁴¹ *Ibid.*, 290.

federalism encompasses a wide range of legal and practical barriers which intentionally separate government functions and the powers necessary to perform them. When the national government pursues its aims, these aims must be incorporated into existing state and local goals and structures, or rejected by lower levels outright through democratic mechanisms. Post-9/11 NSF charts new relationships, both the ways in which national security production fosters new collaborations and the ways some policies push against limits to centralized policy-making power in the US system. However, harbingers to the current paradigm existed prior to 9/11, portending seemingly novel concentrations of power and the blurring of the bright lines dividing responsibilities in the federalist system in a post-9/11 world. Adopting the perspective of federalism to look at national security at different periods in American history shows a pattern of practice.

The new relationships that constitute post-9/11 NSF rely on old referent points of legal authority, in some cases, and on old institutions in others. These anachronistic frameworks create factors which lead to the adoption of policies at the local and state level which can make little sense in those sites, save as contributing partners of the larger security landscape. Functionally, NSF can take the form of equipment acquisition, information sharing and intelligence production and immigration policy

implementation. The chapter starts with a discussion of federalism as a pillar of the American system. Next it highlights two time periods and a selection of programs illustrating the nature of pre-9/11 NSF: the Cold War and the “interwar” period between the fall of the Soviet empire and the dawning of the Global War on Terror (GWOT). The Chapter will examine several pre-9/11 programs that provide a blueprint for post-9/11 policy explored in later Chapters. It is argued here that programs and legal-policy packages constituting the War on Poverty, the Crime War and the Drug War represent initial and ad hoc forms of more centralized federalism in national security, forms that set the stage for the permanent, centrally-coordinated coercive policies to come.

2.2 Division of Labor between the Federal and the State Governments and How NSF Blurs the Lines

It has been said that the Constitution “distinguishes matters of internal order, where the protection of liberty demands dividing power, from the external matters of defense [and] where the defense of liberty requires unity of power.”⁴² The multiple, overlapping, and conflicting sources of authority in the federalist system typically are thought to

⁴² John S. Jr Baker, “Competing Paradigms of Constitutional Power in the War on Terrorism,” *Notre Dame Journal of Law, Ethics & Public Policy* 19 (2005): 8.

frustrate power. However, in times of crises, war powers coalesce in the executive branch, often with the President leading Congress in the pursuit of national victory abroad. In this pursuit, federalism does not typically⁴³ affect the management of international conflicts. With regard to the War on Terror, Congress played a role because the attack came from within, even if the US would also wage traditional war abroad. The parties largely aligned into consensus and the War became a “valence issue in which any dispute between the parties orientated towards technical detail rather than policy objective.”⁴⁴ Defense of the homeland was not a military operation per se, it was one of the intelligence community and law enforcement. Use of the term ‘homeland’ was even foreign to most Americans prior to 9/11, harkening to nationalist movements elsewhere, thus requiring bipartisan zeal for the new endeavor.⁴⁵ Hence national security federalism would be changed as never before.

Along the way, shifting discursive paradigms at the national level have provided local institutional actors a vocabulary to use in collective choice decision-making, institutional ‘intelligence’ and in gaining

⁴³ Baker argues *Rasul v. Bush* (2004) did just that when the Supreme Court determined Bush's Commander in Chief powers did not allow the military to hold prisoners indefinitely without trial and extended habeas corpus to Guantanamo Bay Naval Base. *Ibid.*, 7.

⁴⁴ Alastair Stark, “New Institutionalism, Critical Junctures and Post-Crisis Policy Reform,” *Australian Journal of Political Science* 53, no. 1 (January 2, 2018): 34, <https://doi.org/10.1080/10361146.2017.1409335>.

⁴⁵ Spencer Ackerman, *Reign of Terror: How the 9/11 Era Destabilized America and Produced Trump* (Penguin Books, 2021), 88.

autonomy to grow local and state security power through participation in NSF. Meanwhile, shifting policy paradigms at the federal level compete for prominence. At two far ends of the spectrum are those proponents of a consolidated state, “exemplified by a willingness to erode the distinction between internal law enforcement and military/war powers” and defenders of a liberty (or libertarian) paradigm emphasizing global human rights and would extend a judicial check on presidential power anywhere it is in violation of such rights.⁴⁶

Federalism provides a formal, legal sphere of power to localities, but not necessarily a robust sphere of influence to change national policy. The US constitutional system is one constituted through patterns of conflict spurred by foundational aspects of the state itself, specifically federalism. The complexity of the American system requires a multilevel analysis to tease out aspects of federalism: at the macro level, shifting policy paradigms in the Executive and Congress which affect the entire polity, at the meso level, congressional and presidential policies specifically devolving domestic War implementation to cities and at the micro level, actors’ practices and perspectives as they do the work.

It is possible that notions of Separation of Powers among the legislative executive and judicial branches have also shifted even though

⁴⁶ Baker, “Competing Paradigms of Constitutional Power in the War on Terrorism,” 6, 15.

divisions remain in the Constitution. The federal government has particular responsibilities enumerated in the Constitution such that Congress has the power to “collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States.”⁴⁷ Further, Congress possesses the power to coin money, declare war, raise and support armies, call forth state militias,⁴⁸ suppress insurrections and repel invasions. Whereas, the President directs the state militias as Commander-in-Chief, and with consent of the Senate, makes international treaties.⁴⁹ The modern trend towards ceding power to the President may be due to congressional deference in wartime,⁵⁰ to congressional gridlock⁵¹ or, in the case of Bush, to the invention of “alternative instrumentalities designed to work through the executive.”⁵²

⁴⁷ “Article I | Constitution | US Law | LII / Legal Information Institute,” accessed September 26, 2017, <https://www.law.cornell.edu/constitution/articlei>.

⁴⁸ “The militia of the United States consists of all able-bodied males at least 17 years of age and, except as provided in section 313 of title 32, under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard.” “10 USC Ch. 12: THE MILITIA,” accessed August 2, 2022, <https://uscode.house.gov/view.xhtml?path=/prelim@title10/subtitleA/part1/Chapter12&edition=prelim>.

⁴⁹ “Article II | Constitution | US Law | LII / Legal Information Institute,” accessed September 26, 2017, <https://www.law.cornell.edu/constitution/articleii>.

⁵⁰ William G. Howell, “Presidential Power in War,” *Annual Review of Political Science* 14, no. 1 (June 15, 2011): 93, <https://doi.org/10.1146/annurev-polisci-040609-155927>.

⁵¹ Kenneth Lowande and Jon C. Rogowski, “Presidential Unilateral Power,” *Annual Review of Political Science* 24, no. 1 (May 11, 2021): 25, 31, <https://doi.org/10.1146/annurev-polisci-041719-102043>.

⁵² Stephen Skowronek, “The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive,” *Harvard Law Review* 122, no. 8 (June 2009): 2073.

At any rate, states retain powers not enumerated in the Constitution, but traditionally interpreted to include police powers, or the ability to safeguard the well-being of state residents through health, education and welfare policies.⁵³ Individual liberties and protections from government are contained in the Bill of Rights. Certainly these technical elements are important legal ones, but fundamentally the founding logic remains persuasive: that federalism, in some ways, provides two competing avenues for US citizens to contest the government or to find remedy over a grievance, two audiences to plead one's cause and seek redress. Madison more eloquently summarized, “[t]he federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes.”⁵⁴ But the ultimate authority, over both of these, “resides with the people alone.”⁵⁵

2.2.1 Police Powers

One of the roots of the Madisonian republic is the division of power – the formal dispersal of central power by slicing it up by task. States are given police power defined simply as the “authority to act in the interests

⁵³ “Tenth Amendment | Constitution | US Law | LII / Legal Information Institute,” accessed September 26, 2017, https://www.law.cornell.edu/constitution/tenth_amendment.

⁵⁴ Hamilton, Madison, and Jay, *The Federalist Papers*, 291.

⁵⁵ *Ibid.*

of the public safety of their own citizens,” in other words, “[s]tates have broad authority to enact legislation for the public good,” [t]he Federal Government, by contrast, has no such authority.”⁵⁶ The federal government has the sole power to enact foreign policy. National security federalism blurs the lines between police and war powers through merging these distinct constitutional authorities when it enables the militarization of US public safety agencies. Here the term militarization is a short-hand for the accumulation of national military powers and gear at the local level. Bequeathing such powers to localities is a gift with hidden drawbacks. Officials seemingly gain the ability to pay for and utilize weaponry and technology but they become constituents of another master. Local populations and their governments may lose some measure of autonomy when it comes to controlling coercive policy, even while their agents gain greater access to power.

The tradeoffs must be judged subjectively then, with each community weighing what they know of their participation in “war” policies, often called something else, against the forfeited liberties, or other perceived costs. Constitutionally, local self-rule comes from the Supreme Court’s “abiding concern for state autonomy” through the

⁵⁶ “BOND v. UNITED STATES,” LII / Legal Information Institute, 212, accessed March 22, 2017, <https://www.law.cornell.edu/supremecourt/text/12-158>.

“recognition of traditional state police powers and its anticommandeering doctrine.”⁵⁷ This is laid out most recently in *Bond v. United States* (2014) and *Printz v. United States* (1997).⁵⁸ However, Article I and the Tenth Amendment of the Constitution “do not provide any simple referent for deciding how far federal power may extend, or whether the states truly have spheres of autonomy the federal government may not invade.”⁵⁹ Article I contains a “grant of powers to Congress and its limitation on the states, and the Tenth Amendment, reserving to ‘the states respectively or the people thereof’ the powers not conferred on the federal government.”⁶⁰ These considerations ensure the contemporary debate contributes to a long standing open question as to what balance of power constitutes American federalism.⁶¹ In *Printz*, after a lengthy journey through US constitutional history, Justice Antonin Scalia established the autonomy of local law enforcement in the modern era when he wrote:

“It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority....It is no more compatible with this independence and autonomy that their officers be ‘dragooned’...into

⁵⁷ Jon D. Michaels, “Separation of Powers and Centripetal Forces: Implications for the Institutional Design and Constitutionality of Our National Security State,” 2016, 212, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2778915.

⁵⁸ *Ibid.*; Bridget Stubblefield, “Development in the Executive Branch Sanctuary Cities: Balancing between National Security Directives, Local Law Enforcement Autonomy, and Immigrants’ Rights,” *Georgetown Immigration Law Journal* 29 (2015 2014): 3.

⁵⁹ Susan Herman, “Trager Symposium: Our New Federalism? National Authority and Local Autonomy in the War on Terror: Introduction,” *Brooklyn Law Review*, January 1, 2004, 1206.

⁶⁰ *Ibid.*, 1207.

⁶¹ *Ibid.*

administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws.”⁶²

Madison framed it thus: “[T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.”⁶³

An aspect of federalism, which allowed for the ratification of the Constitution, is the argument that the multitude of factions thwart one another from forming oppressive majorities. Equal and opposite is the notion that states possessed their own spheres of influence and an inherent right to govern themselves without interference, particularly with regard to the health and welfare of their populations. Community factions can then form alliances with other communities to organize outside the bounds of states, indeed forming majorities to protect such things as civil rights. Interestingly, the Constitution makes no distinction between state and local governments. The Supreme Court has favored cities over states in service to some other juridical goal.⁶⁴ It has largely viewed cities as legally subsumed under states and subservient. Yet cities

⁶² Scalia, Jay Printz, Sheriff/Coroner, Ravalli County, Montana, Petitioner 95-1478 v. United States Richard Mack, Petitioner 95-1503, U.S. (U.S. Supreme Court 1997).

⁶³ Federalist No. 39 (Madison). Hamilton, Madison, and Jay, *The Federalist Papers*.

⁶⁴ Richard Schragger, *City Power: Urban Governance in a Global Age*, 1 edition (New York, NY: Oxford University Press, 2016), 80.

generally possess administrative power and political autonomy and enjoy formal, legal authority especially under “home rule” arrangements or statutory grants of legal authority over land use, basic services and other issues.⁶⁵ The federal system “is formally two-tiered, but it is as a matter of practice three-tiered.”⁶⁶

United States law enforcement, understood today as “decentralized, fragmented, and local [in] nature” derives from a classic ‘states’ rights’ perspective in that it encompasses the ethos of a federalist system with spheres of responsibility belonging to the states. Acknowledging the diversity of political and social thought in each community protecting the well-being of citizens allows a range in types of police policy. At the same time, and it must be said, such fragmented policy can shelter practices that stifle the diversity internal to communities and lead to practices which produce inequity such as the tyranny of Jim Crow racism or the roll-back of voting rights protection.

Consolidated and centralized security policy can likewise cut both ways. It has been argued that the United States’ desire to win the Cold War challenged the national political elite’s ability to sustain formalized

⁶⁵ Ibid., 81.

⁶⁶ Ibid.

racial tyranny, particularly in the Southern states.⁶⁷ Yet once the President and Congress mobilized against communist states abroad, national policy left little room for a diversity of political viewpoints and affiliations in cities and towns. The Branches turned against communism and mobilized the apparatus available to them, including the FBI and CIA, to persecute American citizens.

In all wars but the Civil War, “a fairly discernable line has existed between external defense and internal police.”⁶⁸ The Supreme Court in *Ex Parte Milligan* (1866) established a boundary between the government's national security power and its criminal justice authority when it stated, “no usage of war could sanction a military trial [in Indiana] for any offense whatever of a citizen in civil life, in no wise connected with the military service....Congress could grant no such power.”⁶⁹ In response to the use of the military to uphold Reconstruction in southern states, Congress passed the 1878 Posse Comitatus Act which forbade its use in domestic law enforcement, except “as specifically provided.”⁷⁰

⁶⁷ Mary L. Dudziak, “Desegregation as a Cold War Imperative,” *Stanford Law Review* 41, no. 1 (November 1, 1988): 61–120, <https://doi.org/10.2307/1228836>; William M. Carter Jr., “The Thirteenth Amendment, Interest Convergence, and the Badges and Incidents of Slavery” 71 (2011): 4.

⁶⁸ Carter Jr., “The Thirteenth Amendment, Interest Convergence, and the Badges and Incidents of Slavery,” 17.

⁶⁹ “*Ex Parte Milligan*, 71 U.S. 2 (1866),” Justia Law, accessed May 24, 2022, <https://supreme.justia.com/cases/federal/us/71/2/>.

⁷⁰ “The War on Terrorism: Law Enforcement or National Security?,” 3, accessed May 20, 2022, <https://fedsoc.org/commentary/publications/the-war-on-terrorism-law-enforcement-or-national-security>.

As amended, the Posse Comitatus Act states: “Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.” Generally, it violates this law for the President to use the military as a domestic police force⁷¹ but it does not necessarily prevent the President from appropriating the police as a military force multiplier. Police agencies work with the military to conduct drug interdiction and counter-terrorism missions, on surveillance, gathering intelligence and to acquire equipment for domestic law enforcement.

Crisis politics may blur the boundaries of federalism so much so that the Congress reaffirmed the continued importance and applicability of the Posse Comitatus Act on Nov. 25, 2002 but emphasized both its limitations on the President and its loopholes. The ‘sense of the Congress’ resolution states that the Act “[n]evertheless, by its express terms...is not a complete barrier to the use of the Armed Forces for a range of domestic purposes, including law enforcement functions, when the use of the Armed Forces is authorized by an Act of Congress or the President determines

⁷¹ “The Posse Comitatus Act Explained | Brennan Center for Justice,” accessed April 13, 2022, <https://www.brennancenter.org/our-work/research-reports/posse-comitatus-act-explained>.

that the use of the Armed Forces is required to fulfill the President's obligations under the Constitution to respond promptly in time of war, insurrection, or other serious emergency."⁷² At least some exceptions to the Posse Comitatus that are Acts of Congress are the "Insurrection Act" and the Robert T. Stafford Disaster Relief and Emergency Assistance Act in addition to generally restoring public order.⁷³ The Stafford Act grants the Executive broad powers to respond to a terrorist attack under specific circumstances that meet requirements of the law.⁷⁴ However, while international terrorism became a larger focus of the federal government in the 1980s, there is still no consensus on the definition of terrorism. Multiple definitions are currently in use, differing by department.⁷⁵ It remains a policy question as to whether a presidentially-declared major disaster or emergency declaration is appropriate for most terrorism incidents or whether these are best handled by states and localities.

The Department of Defense (DoD) can be called upon in an emergency without the President's involvement. DoD Instruction 3025.21, Defense Support of Civilian Law Enforcement Agencies (DSCA), states "[f]ederal military commanders have the authority, in extraordinary

⁷² "6 U.S. Code § 466 - Sense of Congress Reaffirming the Continued Importance and Applicability of the Posse Comitatus Act," LII / Legal Information Institute, accessed April 27, 2022, <https://www.law.cornell.edu/uscode/text/6/466>.

⁷³ Ibid.

⁷⁴ Bruce R Lindsay, "Stafford Act Assistance and Acts of Terrorism," n.d., 4, 7, 11.

⁷⁵ Ibid., 19.

emergency circumstances where prior authorization by the President is impossible and duly constituted local authorities are unable to control the situation, to engage temporarily in activities that are necessary to quell large-scale, unexpected civil disturbances.”⁷⁶ DSCA also outlines a process for responding to calls for involvement by civil authorities⁷⁷ and civilian agencies, and officials can request the DoD to deploy military assets and personnel for missions normally carried out by non-military actors.⁷⁸ The National Guard, normally under the command of state governors, can operate for federal interests or for the President under a loophole, “Title 32 status,” not subject to the Posse Comitatus Act. In this status, National Guard straddles the line between purely state operations and purely federal priorities, in that they may perform missions requested by the President, paid with federal funds, while they remain nominally under state command and control.⁷⁹ For example, National Guard forces perform duties under Title 32 responding to requests for assistance for special events, domestic emergencies, designated law enforcement support, and

⁷⁶ “DoD Instruction 3025.21 Defense Support of Civilian Law Enforcement Agencies,” 17, accessed September 7, 2022,

<https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/302521p.pdf>.

⁷⁷ “DoD Instruction 3025.21 Defense Support of Civilian Law Enforcement Agencies | Public Intelligence,” April 11, 2013, <https://publicintelligence.net/dod-civilian-law-enforcement/>.

⁷⁸ Ibid.; “Director of Military Support (DOMS),” accessed May 18, 2022, <https://www.globalsecurity.org/military/agency/army/doms.htm>.

⁷⁹ FEMA, “Emergency Managers Overview of the Incident Response Process,” accessed May 18, 2022, <https://emilms.fema.gov/is0075/groups/175.html>; “The Posse Comitatus Act Explained | Brennan Center for Justice.”

other domestic activities.⁸⁰ In domestic operations, the Secretary of Defense has “designated the Secretary of the Army as the executive agent” for most support missions. During these operations, military support supplements, rather than replaces, civil agency responsibilities.”⁸¹ And yet even in emergencies, the division of labor can be called into question. Tradition and the founding documents put the enactment of any security policy on a spectrum of the distribution of divided powers.

2.3 Cold War (1947 - 1991): A Selection of NSF Domestic Programs

The start of the Cold War, in the wake of World War II, came with the dissolution of the alliance between the Union of Soviet Socialist Republics (USSR), the US and Britain. Each nation’s leader espoused rhetoric chronicled as declarations of “war” beginning with Stalin’s 1946 election speech deriding “monopoly capitalism,” driven by crisis, as the cause of the Second World War.⁸² Churchill’s “Iron Curtain” speech, given in the same year, condemned Russia’s supposed barrier between the western nations and communist Eastern Europe as a threat to “Christian

⁸⁰ FEMA, “Emergency Managers Overview of the Incident Response Process.”

⁸¹ “Army: Brief Historical Perspective and Concept of Army Domestic Support Operations; The Principles of Operations Other Than War Chapter 1 (FM 100-19),” accessed August 1, 2022, https://irp.fas.org/doddir/army/fm100-19/fm100-19_1.html.

⁸² Edward H. Judge and John W. Langdon, *The Cold War: A History Through Documents*, 1st edition (Upper Saddle River, NJ: Pearson, 1998), 13.

civilization”.⁸³ The Truman Doctrine arose as a response to Churchill’s warning. In a radio address to the American public in 1947, he characterized the communist threat as a global one with the urgent need to extend US aid to Greece and Turkey to stave off communist regimes in those countries, setting the stage for later US aid to governments confronted by communist insurgencies throughout the world. Truman posited the crisis as a choice for all nations “between alternative ways of life,” between majority rule and minority coercion.⁸⁴

The modern national security state was arguably born in 1947 when Truman signed the National Security Act formalizing and unifying bureaucratic operations already underway in intelligence gathering, espionage and federal law enforcement interdiction. The omnibus legislation coalesced all national defense elements under the National Military Establishment (in 1949 it became the Department of Defense). It created the Joint Chiefs of Staff to coordinate the military branches and the National Security Council to advise the President. The Act also created the Central Intelligence Agency (CIA).⁸⁵ This weaponized intelligence to serve the President and to a much lesser extent, Congress.

⁸³ Ibid., 16–17.

⁸⁴ Ibid., 24–25.

⁸⁵ Professor Gary Gerstle, *Liberty and Coercion: The Paradox of American Government from the Founding to the Present*, Revised edition (Princeton: Princeton University Press, 2015), 254.

As the national security state has matured, the various organizations also serve themselves: fiefdoms in a crowded field.

2.3.1 1940s Readiness

Post-WWII American politics, and the launching of the Cold War, did not allow for a full demobilization after fighting ceased.⁸⁶ Such a climate “entailed maintaining a constant state of military readiness,” which during the Cold War, fomented the continued expansion of the US federal government bureaucracy in what could be called the “momentum of bureaucratic statism.”⁸⁷ Yet, debate about the size and shape of the new national security state produced a reduction in both the size of the national defense workforce and spending on defense. The civilian defense workforce was 2.5 million and spending was over \$80 billion in 1945, but by 1949 both factors had declined with a reduction in the workforce to 900,000 personnel and with spending at less than \$20 billion annually.⁸⁸ Relieved of the logistical and production needs of war, the Cold War could operate in a more targeted fashion with a leaner profile.

As new capabilities proliferated and the Cold War waged on, the federal government simultaneously took great interest in domestic police,

⁸⁶ Ibid., 679.

⁸⁷ Matthew C. Waxman, “The Power to Wage War Successfully,” *Columbia Law Review* 117, no. 3 (April 2017): 671–72.

⁸⁸ Gerstle, *Liberty and Coercion*, 255.

reaching deeply into state and local policy on issues such as poverty, crime and drugs, at times using police partnerships to prosecute “wars” in each arena and at times linking each to national security. Presidents Kennedy, Johnson, Nixon and Reagan declared wars in these public policy areas, preemptively and reactively sending immense federal resources to combat the ills of society in their own presidential image, while simultaneously waging wars and proxy wars abroad in the name of combating communism. Their perceptions of the causes of crime, poverty and drug addiction varied, but all were convinced that race played a role in bringing these threats to the entire nation, concentrating police power in neighborhoods of color, of immigrants and of the poor. This targeted approach, largely towards specific domestic populations meant the security state would develop unevenly and be felt differently by different Americans. The pattern of NSF’s uneven institutional development in local communities is a topic for future inquiries.

2.3.2 War(s) as Public Policy

The war metaphor has been productively used by the White House and federal agencies as a “merger of some elements of national defense and law enforcement,” the Cold War being one example.⁸⁹ During this

⁸⁹ Baker, “Competing Paradigms of Constitutional Power in the War on Terrorism,” 20.

time period, Kennedy's Anti-Delinquency programs and Johnson's War on Poverty overlay federal policy upon state and city police and brought needed resources to the table. The Economic Opportunity Act of 1964 required its programs to create spaces for poor people themselves to formulate strategies to address poverty, a revolutionary move.⁹⁰ However, both the Kennedy and the Johnson Administrations characterized poverty in ways that led to the targeting of Black and urban communities for not only poverty programming but for increased police involvement in the daily lives of citizens and immigrants. Surveillance of citizens' activities characterized the type of police and social programming work that took place. Poverty programs were eventually cut short by nay-sayers but the police themselves remained, guided next by Nixon's executive-driven policy priorities and explicit racial animosity.

The War on Poverty was launched in 1964 under President Johnson during a tumultuous time in the social history of the United States. Organizations and individuals were fighting for political, social and economic equality and pressuring the government to respond in meaningful ways. While some saw value in poverty programs, depending on how they were implemented, others saw them as cooptive measures to

⁹⁰ Ronald V. Dellums and H. Lee Halterman, *Lying Down with the Lions: A Public Life from the Streets of Oakland to the Halls of Power* (Boston: Beacon Press, 2000), 31.

calm greater rebellion for substantive change.⁹¹ Prior to this, Kennedy's 1963 task force on Manpower Conservation made the argument that poverty was making men unfit for military service, constituting a threat to national security and justifying "urban intervention" by the federal government.⁹² Much War on Poverty policy in low-income communities resulted in a guiding discourse emanating from the White House which pathologized race as inherently related to poverty and crime. These notions and the resultant policy and law merged social anti-poverty programs with police surveillance to achieve a new level of top-down social control at the local level.

President Johnson called for a War on Crime in March 1965. In September of that year Congress unanimously passed the Law Enforcement Assistance Act to fund the War and give it substance.⁹³ It could be argued that the Kennedy and Johnson Administrations planted the seeds for a "shift from social prevention [of crime] toward repression and mass incarceration...paradigmatic of the way the state can use criminalization...to govern social problems."⁹⁴ Nixon's interpretation of

⁹¹ Ward Churchill and Jim Vander Wall, *The COINTELPRO Papers: Documents from the FBI's Secret Wars Against Dissent in the United States*, 2nd edition (Cambridge, MA: South End Press, 2001), 106.

⁹² Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America*, 1 edition (Cambridge, Massachusetts: Harvard University Press, 2016), 49, 58.

⁹³ *Ibid.*, 79.

⁹⁴ Simone Tulumello, "Toward a Critical Understanding of Urban Security within the Institutional Practice of Urban Planning: The Case of the Lisbon Metropolitan Area," *Journal of Planning Education and Research*, August 20, 2016, 2, <https://doi.org/10.1177/0739456X16664786>.

the War on Crime led to preemptive targeting of people by race and what he called New Federalism, in which the states acted as funding “middlemen” between the federal government and municipalities.⁹⁵ This led to the implementation of a skewed national law enforcement program. In the Department of Justice, the Office of Law Enforcement Assistance (OLEA) was established to provide weapons and surveillance technology to local police.⁹⁶ Programmatic elements of the War on Crime exemplified the dangers of NSF consolidation when left unchecked.

Nixon and his staff leveraged national security to further the War on Crime, claiming the “urban crisis” was on par with defending the nation and should be declared so with “righteous rhetoric.”⁹⁷ This law-and-order ethos provided Nixon the means to test punitive policies on urban communities and to create what he hoped to be national models.⁹⁸ Utilizing military metaphors, he instituted a top-down military hierarchy for waging the war using state criminal justice agencies as “state-level commanders” reporting up to the Law Enforcement Assistance Administration (LEAA). “Generals” at the LEAA guided the course of the War.⁹⁹ The LEAA bridged the divide between local and federal agencies,

⁹⁵ Hinton, *From the War on Poverty to the War on Crime*, 135.

⁹⁶ *Ibid.*, 81.

⁹⁷ *Ibid.*, 141.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*, 143.

leading the coordination of efforts on the ground. Defense Department and CIA officials provided seminars to local departments on street surveillance and record keeping.¹⁰⁰ Under Nixon, the War on Crime escalated the patterns of racial targeting established by War on Poverty programs. Key elements, such as programs for youth, involved police or were implemented by law enforcement. Federal grants played a large role in making the dissemination of a national crime policy possible.¹⁰¹ Nixon and J. Edgar Hoover, again invoking national security, launched a prolonged campaign against Black nationalists and Black Power organizations. With the assistance of the FBI and others, the Los Angeles Police Department deployed a Special Weapons Assault Team, later Special Weapons and Tactics, (SWAT) for the first time in 1969 on the Black Panthers,¹⁰² using weapons and technology transferred from the military via the LEAA.¹⁰³

Nixon next launched the War on Drugs in 1971 and created the Drug Enforcement Administration (DEA) in 1973. Nixon's own notions of the roots of crime and disorder led to prison expansion and increased incarceration of minorities and especially Black, poor and city-dwelling people. He and his advisors worked "to associate the hippies with

¹⁰⁰ *Ibid.*, 145.

¹⁰¹ *Ibid.*

¹⁰² "1969 SWAT Raid on Black Panthers Set Tone for Police Race Problems - Los Angeles Times," accessed July 31, 2022, <https://www.latimes.com/opinion/story/2019-12-08/50-years-swat-black-panthers-militarized-policinglos-angeles>.

¹⁰³ Hinton, *From the War on Poverty to the War on Crime*, 205–6.

marijuana and blacks with heroin....criminaliz[e] both heavily...disrupt those communities [and] vilify them night after night on the evening news.”¹⁰⁴ However, the Drug War had perhaps the most overt linkage between international and domestic policy forming a comprehensive regime of program overlap. The military and intelligence bureaucracies were crucial components of fighting the international drug trade but were also called upon to wage war within the US.

The War on Drugs at home was part and parcel to national security for President Reagan. The threat presented by the international drug trade officially became a component of domestic military policy during his tenure. The 1981 Military Cooperation with Civilian Law Enforcement Act¹⁰⁵ grew, in part, out of a desire to thwart civilians’ ability to challenge the legitimacy of law enforcement actions when coupled with military involvement, as was the case in trials stemming from the 1973 standoff with federal officials in Wounded Knee, South Dakota.¹⁰⁶ It was the first in a series of Drug War laws to enshrine local police access to military gear. The law's expansion of both the purpose and ease of weapons dispersal culminated in permanent access through the Law Enforcement

¹⁰⁴ Dan Baum, “Legalize It All,” *Harper’s Magazine*, April 1, 2016, <https://harpers.org/archive/2016/04/legalize-it-all/>.

¹⁰⁵ Nicholas S. Bolduc, “Global Insecurity: How Risk Theory Gave Rise to Global Police Militarization,” *Indiana Journal of Global Legal Studies* 23, no. 1 (Winter 2016): 281.

¹⁰⁶ U. S. Government Accountability Office, “Military Cooperation With Civilian Law Enforcement Agencies,” 4, accessed August 1, 2022, <https://www.gao.gov/products/122004>.

Support Office (LESO) which facilitates the 1033 Program named for section 1033 of the 1997 National Defense Authorization Act (NDAA).¹⁰⁷

As an amendment to Posse Comitatus, the Military Cooperation with Civilian Law Enforcement Act formalized and expanded exceptions to the law, calling for direct military collaboration with civilian agencies, dramatically expanding the Army's participation in counterdrug efforts¹⁰⁸ in addition to that of the Navy and Air Force.¹⁰⁹ Explicitly, the Act contains a grant of authority for military assistance to the police—federal, state, and local—in the form of intelligence sharing and equipment.¹¹⁰ It also states, “[t]he Secretary of Defense may...make available any equipment..., base facility, or research facility of the Department of Defense to any Federal, State, or local civilian law enforcement official for law enforcement purposes.”¹¹¹ Two years into the implementation of the amendment, the military had “become much more involved in drug interdiction,” on land, in the air and at sea.¹¹² Analysts had predicted improvements in the coordination between agencies and a further

¹⁰⁷ Emma O’Rourke-Friel, “Bring Out the Bearcat ![1] Reprioritizing the Transfer of DoD Property Under the 1033 Program,” *Public Contract Law Journal* 48, no. 1 (Fall 2018): 154.

¹⁰⁸ “Army: Brief Historical Perspective and Concept of Army Domestic Support Operations; The Principles of Operations Other Than War Chapter 1 (FM 100-19).”

¹⁰⁹ “Military Cooperation with Civilian Law Enforcement Agencies,” July 28, 1983, 4.

¹¹⁰ Jennifer K Elsea, “The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law,” n.d., 43.

¹¹¹ “10 U.S. Code § 272 - Use of Military Equipment and Facilities,” LII / Legal Information Institute, accessed August 2, 2022, <https://www.law.cornell.edu/uscode/text/10/272>.

¹¹² “Military Cooperation with Civilian Law Enforcement Agencies,” 4.

increase in military involvement in law enforcement. At the time, there was concern over whether disclosures to local authorities might compromise military operations and whether adjusting military activities to carry out local tasks might adversely affect military preparedness.¹¹³ Nothing in the law noted the potential for the converse effect, whether local activities might rise to become interoperable with the military through equipment exchange, training and information sharing. These and other elements of the War on Drugs provided the formal infrastructure from which to build institutions for federal, regional and local cooperation and coordination such as the High Intensity Drug Trafficking Areas (HIDTA) and Program 1033 for military weapons exchange.

Various entities sprung up to share information across federal and state jurisdictions during the Drug War with HIDTA being one example. The High Intensity Drug Trafficking Area program emerged as part of the Anti-Drug Abuse Act of 1988. It is funded by the Office of National Drug Control and Prevention in the Executive Office of the President under the DEA in the Department of Justice. The program has grown to include 33 HIDTAs covering all 50 states and territories.¹¹⁴ It was designed to bring

¹¹³ Ibid., 6; “10 U.S. Code § 272 - Use of Military Equipment and Facilities.”

¹¹⁴ Five were added from 2020-2022.

together the many agencies located in a region with “a significant center of illegal drug production, manufacturing, importation, or distribution.”¹¹⁵ It houses agents under one roof to facilitate the collaboration of resources, to share information across police agencies and to unite efforts with the central government where locals have demonstrated the “determination to respond aggressively.”¹¹⁶ Today’s fusion centers, or state-run information aggregating stations, sometimes leverage this existing infrastructure and may co-locate with HIDTA centers and personnel. The DEA commits more than 1,500 special agents to the program. At the local level, each HIDTA is controlled by Executive Boards consisting of “an equal number of regional Federal and non-Federal (state, local, and tribal) law enforcement leaders.”¹¹⁷

These organizations are aided by pre-9/11 data sharing platforms like the Regional Information Sharing Systems (RISS), sponsored by the Department of Justice.¹¹⁸ The platforms were originally narrow and targeted in scope because they were bound by Church-era evidentiary standards and legal requirements on collecting information on Americans. Still, the RISS, federally-funded as it was, sought to connect local and

¹¹⁵ “HIDTA,” accessed August 6, 2022, <https://www.dea.gov/operations/hidta>.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ David E. Lambert, “Addressing Challenges to Homeland Security Information Sharing in American Policing: Using Kotter’s Leading Change Model,” *Criminal Justice Policy Review* 30, no. 8 (October 1, 2019): 30, <https://doi.org/10.1177/0887403418786555>.

regional entities virtually, and after September 11, it became a key driver in information exchange with the national government. The DEA Intelligence Division works directly with the Department of Defense and “cooperates a great deal with state and local law enforcement” in intelligence and planning for “training for state, local, federal, and foreign agencies...to address the full spectrum of drug intelligence training needs.”¹¹⁹

The advent of HIDTA had brought what was then a new regional approach to law enforcement collaboration, and according to practitioners, the lack of flexibility at the federal level made it appealing. Agents could leverage different legal and administrative authorities and gain access to additional resources. While HIDTAs are an example of a Drug War program that broke down barriers to Federal coordination in intelligence and personnel, weapons sharing was formalized in 1990 by the National Defense Authorization Act (NDAA), section 1208, the precursor of Program 1033. This section in the NDAA of 1990 expanded the War on Drugs-era authorization to accelerate the military’s role in domestic drug interdiction with the ability to transfer weapons, but only on a temporary basis. Later in the 90s, program 1033 allowed the DoD to disperse military gear throughout the nation. Some authors conflate the Program

¹¹⁹ “Intelligence,” accessed August 6, 2022, <https://www.dea.gov/law-enforcement/intelligence>.

with post-9/11 Homeland Security funding for new equipment;¹²⁰ the two are distinct.

An intermingling of priorities between the military and civilian departments can occur with weapons transfers. The extraterritorial politics of far-flung war policy has its own effects on local police whose policies are related to, and sometimes contingent on, events outside of their state and even the country.¹²¹ The effect of dealing with international threats has a ‘global domino effect’ on domestic security policy.¹²² International conflicts of the Cold War generated a pattern in type and quantity of weapons transferred to local agencies. Program 1033 disbursements to police arsenals coincided with the timing of items used by US armed forces abroad.¹²³ Thus, from the Cold War-era, we can look at militarization on two axes, one of practical coercive power used by police-military actors and institutions through weapons exchange, and one of constitutional power through joint collaborations and expanded authorities used by federalized governmental actors and institutions at the local level.

¹²⁰ O’Rourke-Friel, “Bring Out the Bearcat ![1] Reprioritizing the Transfer of DoD Property Under the 1033 Program,” 154.

¹²¹ Derek S Denman, “The Logistics of Police Power: Armored Vehicles, Colonial Boomerangs, and Strategies of Circulation,” *Environment and Planning D: Society and Space* 38, no. 6 (December 1, 2020): 2, <https://doi.org/10.1177/0263775820929698>.

¹²² Bolduc, “Global Insecurity,” 270.

¹²³ Denman, “The Logistics of Police Power,” 5–6.

The wars on poverty, crime and drugs combined to usher in “an era whose primary demand upon government [was] no longer the protection of rights but the assurance of security.”¹²⁴ By framing the nation’s problems and the choices to address them in a way in which all options related to national security production, the inevitable response from institutions was to coalesce power in Executive and state agencies. This selection of executive-driven urban policies created the institutional infrastructure and a blueprint for sending masses of citizens to prison,¹²⁵ perhaps the most coercive output of national security federalism of the Cold War era.

2.3.3 Counter Intelligence Program (1956–1971)

The central government, along with corporate leaders, so feared a nationalized economy under communism that they merged the objectives of the several national security entities created by the National Security Act of 1947 with domestic agencies. The Counter Intelligence Program (COINTELPRO) coordinated intelligence offensives, in “a massive abuse of covert action.”¹²⁶ In the 1940s and 1950s, domestic Cold War agencies sought to neutralize communists and supposed sympathizers, including

¹²⁴ Waxman, “The Power to Wage War Successfully,” 677.

¹²⁵ Hinton, *From the War on Poverty to the War on Crime*, 16, 74.

¹²⁶ “The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States (9/11 Report),” July 22, 2004, 99, <https://www.gpo.gov/fdsys/pkg/GPO-911REPORT/content-detail.html>.

social justice activists, using a combination of Department of Justice resources like the Federal Bureau of Investigation (FBI) along with the larger intelligence apparatus led by the Central Intelligence Agency (CIA) and the Defense Department's military intelligence and National Security Agency (NSA).¹²⁷ Local law enforcement was folded into the task as boots-on-the-ground support. In the 1950's, both Congress and Executive agencies initiated these inquiries which were responded to in the infamous House Un-American Activities Committee (HUAC) under Senator McCarthy. This led to a strategy of 'pre-emptive detention' to detain anyone thought to participate in organizations associated with the New Left (racial equity, anti-Vietnam, and student power),¹²⁸ Black Liberation and other causes.¹²⁹

COINTELPRO was just one set of the FBI's counterintelligence programs in place formally from 1956-1971. Coordinating domestic intelligence gathering among levels of government, including citizens, is a pillar of post-9/11 national security, but the antecedent can be found in this 20th century program. Some have argued that covert domestic operations of COINTELPRO were not new; the tactic was already a permanent feature of US political institutions.¹³⁰ Nevertheless, the

¹²⁷ Churchill and Wall, *The COINTELPRO Papers*, 178.

¹²⁸ *Ibid.*, 176.

¹²⁹ *Ibid.*, 179.

¹³⁰ *Ibid.*, x.

program was unsettling when its scope came to light on March 8, 1971 after a group of citizens broke into the FBI's resident agency in Media, Pennsylvania, removing documents detailing the government's activities.¹³¹ A court battle ensued involving NBC journalist Carl Stern and the Department of Justice, resulting in the release of more evidence.¹³² The programs consisted of covert actions to discredit and divide political organizations seen as subversive, dissident or oppositional to the status quo or to US policy at home and abroad. These activities included infiltrating citizen organizations to disrupt them and using anonymous or falsely-attributed letters to damage individuals or organizations. COINTELPRO actors also employed media campaigns, cartoons, newsletters and pamphlets, informants, phone intercepts, embedding agent provocateurs inside organizations, physical surveillance and more to discredit social justice movements. The FBI was often successful. A wide range of political groups received such attention as did individuals working in the areas of socioeconomic equality, democracy and political freedom.

Although the programs ended formally, covert actions did not.

Under a new director in 1972, and in the aftermath of COINTELPRO's

¹³¹ *Ibid.*, 4.

¹³² *Ibid.*, 332–33.

demise for targeting political organizations exercising First Amendment rights, the FBI began a new discourse using terms such as urban guerilla extremists, insurgents and terrorists to describe some of the groups it had targeted in the past. By 1980, police and the FBI in New York formalized their coordination of amalgamated resources into what is called a Joint Terrorism Task Force (JTTF).¹³³ These partnerships exist in more than 200 localities and regions and are a key tool in the domestic counterterrorism operation of the War on Terror.¹³⁴

2.4 Interwar Period (1991-2001): From the Fall of the Soviet Empire to the War on Terror

The 10-year period between the Cold War's end in 1991 and the start of the War on Terror in 2001 was a period of continued Executive action in areas of information warfare, immigration federalism and military actions abroad which provided for Executive powers accumulation. However, in the vacuum created by the end of the Cold War, there was a search for an enemy. The image of the bi-polar world morphed to a multi-polar one. Some actors rejected the limits of such a

¹³³ Ibid., 306, 307, 309.

¹³⁴ "Joint Terrorism Task Forces," Page, Federal Bureau of Investigation, accessed June 29, 2020, <https://www.fbi.gov/investigate/terrorism/joint-terrorism-task-forces>.

paradigm, noting shifted alliances and regionalism as the most significant changes to international relations.

Counterterrorism under Reagan began to shift from a law enforcement issue, where individuals were indicted, to a military one where state assets were targeted with military air power. The CIA and the State department were tasked with pre-empting terrorist action. Reagan called for “reprogramming or adding new resources to effect the shift.”¹³⁵ He also labeled terrorism “an act of war” as early as 1985.¹³⁶ The Reagan Doctrine laid out a policy of “swift and effective retribution” against terrorism.¹³⁷ The Doctrine first took shape in 1981 after the Iranian Hostage Crisis with rhetoric that suggested the use of military and armed conflict against international terrorists and state-sponsors of terrorists as opposed to dealing with terrorism as a crime. After the attacks on the US embassy in Beirut, Lebanon and the Eighth US Marine Battalion in Lebanon in 1983, officials at Department of Defense included state-sponsored terrorism as “part of the spectrum of warfare.”¹³⁸

President Reagan’s signing of the National Security Decision Directive 138 and comments made by his Secretary of State George Shultz began to

¹³⁵ “The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States (9/11 Report),” 98.

¹³⁶ *Ibid.*, 99.

¹³⁷ Jackson Nyamuya Maogoto, *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror*, 1 edition (Routledge, 2016), 88.

¹³⁸ *Ibid.*, 89.

place the military in a position to be used for both preemptive and retaliatory measures against terrorism, “even before all the facts are known.”¹³⁹ The US policy of pre-emption and of armed response to terrorism had begun.

The question of how to address international terrorism against Americans abroad was one of presidential interpretation: was it a crime or an act of war? Was it strictly international or did it touch on the domestic as well? Clinton steered terrorism back to the courts given the timing and circumstances of his presidency and the ideas of those he chose to advise him. The timing and location of speeches by presidents and their advisors informed the type of National Security Federalism the White House and the DoD cultivated and how we would come to know counterterrorism.

By assuming a war footing, Reagan was able to justify transitioning tactical elements of counterterrorism, and the Drug War, to US cities. Clinton characterized terrorism as “a matter of national security and a crime,”¹⁴⁰ but stopped short of calling it war. Still his Administration augmented FBI, CIA and local police funding streams to implement counterterrorism strategies coming out of the White House under Richard Clarke, his national coordinator for security, infrastructure protection,

¹³⁹ *Ibid.*, 90.

¹⁴⁰ “The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States (9/11 Report),” 101.

and counterterrorism. Clinton issued Presidential Decision Directives, numbers 62 and 63, laying out ten program areas for counterterrorism¹⁴¹ which left the Justice Department and the FBI in charge domestically but terrorism abroad remained the avenues of the CIA, the State Department, and other agencies coordinated by Clinton's advisors.¹⁴²

2.4.1 Emphasis on Information

The militarization of information is perhaps best exemplified by the Revolution of Military Affairs (RMA), first implemented successfully in the 1991 Gulf War. RMA is a theoretical approach to military advancement emphasizing technological and organizational innovation to fight conventional battles.¹⁴³ It was developed by the DoD's internal think tank, the Nixon-era Office of Net Assessment (ONA) in response to Russia's theoretical approach to fighting wars. In practice, it resulted in net-centric warfare, the command of information to constrain opponents using technological superiority to achieve competitive advantage, or simply, having an information advantage. It reduced casualties in Desert Storm by using precision targeted airpower. However, RMA has come under fire for shifting the focus for large-scale conflict to technology rather

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ "The Counter-Revolution in Military Affairs," *Air Force Magazine* (blog), accessed June 11, 2022, <https://www.airforcemag.com/article/the-counter-revolution-in-military-affairs/>.

than ground troops. This shift, and the reaction to it, led to turf battles between the Army and Air Force causing RMA to be tabled. Post-9/11, elements of informational advantage and boots-on-the-ground counterterrorism strategies have resurrected an old debate.

Counterterrorism at home and abroad relies on the control of information in addition to boots-on-the-ground. The National Network of Fusion Centers, for example – the information sharing centers staffed by local, state and federal actors in 80 locations nation-wide - follow a netcentric model.¹⁴⁴ Organizationally, 90s-era RMA used “full-spectrum capability” or full-spectrum superiority to overwhelm opponents with a diversity of resources in land, aerial, maritime, subterranean, psychological, and bio- or cyber-technological warfare. Domestically, the 1033 Program and Homeland Security grants provide cities command and control stations, armored vehicles, drones, robots, tactical and camouflage gear, advanced weapons and training of all kinds to battle terrorism. Police technical capabilities on-site with full-spectrum units connected to regional, state and federal forces ensure they possess readiness and are as

¹⁴⁴ “Fusion Centers’ Support of National Strategies and Guidance | Homeland Security,” accessed July 16, 2022, <https://www.dhs.gov/topic/fusion-centers-support-national-strategies-and-guidance>; Dia Kayyali, “Why Fusion Centers Matter: FAQ,” Electronic Frontier Foundation, April 7, 2014, <https://www.eff.org/deeplinks/2014/04/why-fusion-centers-matter-faq>; Jason Barnosky, “Fusion Centers: What’s Working and What Isn’t,” *Brookings* (blog), November 30, 1AD, <https://www.brookings.edu/blog/fixgov/2015/03/17/fusion-centers-whats-working-and-what-isnt/>; James Moffat, “Complexity Theory and Network Centric Warfare:” (Fort Belvoir, VA: Defense Technical Information Center, September 1, 2003), <https://doi.org/10.21236/ADA457288>.

self-contained as military units abroad. How police agencies use the capabilities they have gained is subjective; a result of the national security inherent in the federalist system of fragmented powers.

The ability to converge vertically with the federal government and across agencies at the state and local level informs a level of uniformity regarding tactics and equipment. Making the same equipment available nation-wide also contributes to control of information and to overall readiness. Regional proximity influences the ability of professionals to exchange ideas and information on these matters. Regionalism may predict the volume of transfers, that is, when local agencies are clustered by region, together they organize to obtain more gear.¹⁴⁵

The 1997 National Defense Authorization Act (NDAA), section 1033, granted permanent authority to the Secretary of Defense to transfer defense material to federal and state agencies for law enforcement. The NDAA also added counterterrorism to the law, thereby creating a new purpose for the weapons acquired by police and new use-potential to be appropriated post-9/11. Program 1033, within the Department of Defense, was intended to “enhance the effectiveness of domestic law enforcement through direct or material support” in the areas of counter-drug and

¹⁴⁵ Steven M. Radil, Raymond J. Dezzani, and Lanny D. McAden, “Geographies of U.S. Police Militarization and the Role of the 1033 Program,” *Professional Geographer* 69, no. 2 (May 2017): 83, <https://doi.org/10.1080/00330124.2016.1212666>.

counter-terrorism activities.¹⁴⁶ The program fell under a part of US Code called “General Military Law”.¹⁴⁷ To obtain weapons, state governors must appoint coordinators to track and manage the equipment in their states. Riot shields and handcuffs are standard transfers, but “[s]ome of the equipment...such as weapons or tactical vehicles, possess[] significant military capabilities.”¹⁴⁸

National disbursement through Program 1033 has been uneven. Local politics, regional coordination and international war policy have impacted the type and tenor of weapons transfers. However, large population size is not necessarily a predictor of weapons acquisition nor is department size.¹⁴⁹ On the other hand, the geographical distribution of military equipment transfers has a racial component, with racial diversity being “the first indication of the location” of weapons requests and dispersal.¹⁵⁰ Police subculture, dictated by local politics and whether a locale is urban or rural, influences the variability of requests which can, in

¹⁴⁶ Daniel H Else, “The ‘1033 Program,’ Department of Defense Support to Law Enforcement,” n.d., i.

¹⁴⁷ “10 U.S. Code Chapter 15 - MILITARY SUPPORT FOR CIVILIAN LAW ENFORCEMENT AGENCIES,” LII / Legal Information Institute, accessed August 1, 2022, <https://www.law.cornell.edu/uscode/text/10/subtitle-A/part-I/Chapter-15>.

¹⁴⁸ Else, “The ‘1033 Program,’ Department of Defense Support to Law Enforcement,” 3.

¹⁴⁹ *Ibid.*, 209.

¹⁵⁰ *Ibid.*, 210.

turn, determine the usages of weapons and tactics.¹⁵¹

2.4.2 Immigration Federalism: Its Impact on NSF Generally

The interwar period saw an arrangement of national legal and organizational mechanisms to reach deep into localities in order to pursue immigrants. ‘Immigration federalism’ is the role of states and localities in immigration-related matters. In 1996, a new law enabled the Immigration and Naturalization Service (INS) to enter into agreements with state and local law enforcement agencies to exercise immigration enforcement authority for which the INS provided training. The INS used the Joint Terrorism Task Force (JTTF) as the main vehicle for state and local participation in expanding their jurisdiction into this avenue of law enforcement. As mentioned, JTTFs were pioneered in New York City in 1980 after a rash of events involving domestic terrorist organizations, keeping in mind that many of these groups were those targeted by COINTELPRO for constitutionally protected activities. The FBI grew the number of JTTFs throughout the 1990s, and there were 34 by 9/11.¹⁵² Post-9/11, there are hundreds.

¹⁵¹ Radil, Dezzani, and McAden, “Geographies of U.S. Police Militarization and the Role of the 1033 Program,” 204.

¹⁵² “The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States (9/11 Report),” 81.

In the 1990s, President Clinton and Congress began the militarization of the southern border with amendments to the 1952 Immigration and Nationality Act (INA), “enlarge[ing] the category of crimes which could count as aggravated felonies—a specific class of crimes committed by non-citizens, applicable only in the context of immigration law, and warranting deportation from the US.”¹⁵³ The category came to include non-violent and minor offenses and misdemeanors, all of which, even without a conviction, counted towards automatic deportation, no questions asked.¹⁵⁴ Legalized too was indefinite detention while awaiting deportation and limitations on due process restrictions for the accused.¹⁵⁵ Thus, the late-90s brought a conflation of the immigrant labor force and criminality.

Legal scholars have argued that the foreign affairs preemption allows the federal government to regulate immigration and alienage matters at the state level.¹⁵⁶ However, immigration law concerning “the admission and expulsion of aliens” is a shade distinct from alienage law relating to legal status.¹⁵⁷ Status issues overlap with state “police powers”

¹⁵³ Mathew Coleman, “Immigration Geopolitics Beyond the Mexico–US Border,” *Antipode* 39, no. 1 (February 1, 2007): 57–58, <https://doi.org/10.1111/j.1467-8330.2007.00506.x>.

¹⁵⁴ *Ibid.*, 58.

¹⁵⁵ *Ibid.*, 59.

¹⁵⁶ Hiroshi Motomura, “Immigration and Alienage, Federalism and Proposition 187 Symposium: Immigration Law and the New Century: The Developing Regime: Comment,” *Virginia Journal of International Law* 35, no. 1 (1995 1994): 201.

¹⁵⁷ *Ibid.*, 202.

regarding health and safety and access to public education, welfare benefits, and government employment.¹⁵⁸ Localities with sanctuary statutes using a states' rights argument may find purchase regarding the constitutional Reserved Powers of localities in the Tenth Amendment. However, there is also a federal argument to be had, protecting non-citizen immigrants using the equal protection model found in the Equal Protection Clause and the Fifth and Sixth Amendments (for criminal matters) as well as the Fourth Amendment relating to evidence.¹⁵⁹ Some have argued federal protection against discrimination based on alienage was determined in the Supreme Court's ruling on the Civil Rights Act of 1870.¹⁶⁰

Prior to 9/11, the set of activities categorized under "combatting terrorism" included domestic and overseas activities, but did not include border enforcement and the work of INS.¹⁶¹ Federal courts have instructed all law enforcement, federal or local to honor the Fourth Amendment – "establishing probable cause for detention, regardless of the defendant's

¹⁵⁸ Ibid.

¹⁵⁹ Carrie Rosenbaum, "The Role of Equality Principles in Preemption Analysis of Sub-Federal Immigration Laws: The California TRUST Act," *Chapman Law Review* 18, no. 2 (January 1, 2015): 499; Motomura, "Immigration and Alienage, Federalism and Proposition 187 Symposium," 203.

¹⁶⁰ Rosenbaum, "The Role of Equality Principles in Preemption Analysis of Sub-Federal Immigration Laws," 515.

¹⁶¹ "Federal Funding for Homeland Security April 2004," Congressional Budget Office, April 30, 2004, 3, https://www.cbo.gov/sites/default/files/108th-congress-2003-2004/reports/homeland_security.pdf.

citizenship status.”¹⁶² However, since the 1990s the immigration federalism has effectively bound “immigration control to criminal law enforcement” i.e. a criminal conviction is grounds for deportation.¹⁶³

2.4.3 Regional Security Production

Regionalism is a military and security framework of the Cold War and interwar periods. It is a way of conceiving of political and security arrangements among nations with the role of distance and proximity in mind.¹⁶⁴ A shift took place after the Cold War from systemic interplay in a bipolar, state-centric realist conception of world order to focus on the subsystem level due to the proximity of interactions. The language used to break up the US into components of security distribution by the Department of Homeland Security and other federal agencies is by regions. Jurisdictional or constitutional levels of power distribution can be viewed in this framework.¹⁶⁵ While the focus is on nations, sub-regions are included in this idea of power division within the US. The same logic can be applied to urban and county levels, sub-state regions.

¹⁶² Stubblefield, “Development in the Executive Branch Sanctuary Cities,” 3.

¹⁶³ Coleman, “Immigration Geopolitics Beyond the Mexico–US Border,” 56.

¹⁶⁴ Barry Buzan and Ole Wæver, *Regions and Powers: The Structure of International Security* (Cambridge University Press, 2003), xvi.

¹⁶⁵ *Ibid.*, xvii.

During the interwar period, domestic dynamics began intervening in military engagement and competition with other states in the absence of a focus on the USSR. This pulled politicians' attention away from external actors who had less of an influence on foreign policy than domestic politics.¹⁶⁶ Regionalism, significant in the Cold War era, allowed a "lower level" of analysis in this new multi-polar world. It territorialized military action, in a practical sense, to combat the drug trade and address state-sponsored terrorism. In some ways the military bureaus created a new mixture for militarized foreign policy by combining the open-ended war readiness of the Cold War with local or regional place-based urban battlefield tactics and a globalist tendency to 'deterritorialize' the borders and boundaries of sovereign nations with an overall national strategy. This has been called "conditional sovereignty",¹⁶⁷ a concept with elasticity and use potential across a wide variety of applications, whether it be in states with terrorist activity or US states and cities.

The United States Northern Command (USNORTHCOM) was created and operationalized in 2002 "to provide command and control of DoD homeland defense efforts and to coordinate defense support to civil

¹⁶⁶ Ibid., 11.

¹⁶⁷ Mariana Sousa, "Is There Anything New? A Comparison of Post-Cold War National Security Strategies," in *Conference Papers -- International Studies Association*, 2004, 27.

authorities” including local police.¹⁶⁸ NORTHCOM provides training and conducts joint exercises with civilian police agencies in addition to collecting intelligence information from them to combat “violent extremists.” This command treats the homeland as a battlespace, uniting the Americas (north and south) in a renewed understanding of the world as a competition among superpowers.¹⁶⁹ NORAD, the 1950’s era North American Aerospace Defense Command and NORTHCOM have “evolved well past [their] Cold War and 9/11 origins and are today inseparable.”¹⁷⁰ Post-9/11 NORAD’s purview encompasses the interior airspace of North America while NORTHCOM works on the ground with DHS, DOJ and local agencies to address both foreign invasion and domestic terrorism as well as natural disasters.

2.5 Conclusion

This chapter cataloged a selection of the pre-9/11 legal, organizational and theoretical elements that, when coupled with timing, transformed National Security Federalism. Using federalism as a vantage

¹⁶⁸ “Joint Task Force North > About Us,” accessed July 10, 2022, <https://www.jtfn.northcom.mil/About-Us/>.

¹⁶⁹ “Northcom’s First Priority Is ‘No-Fail’ Homeland Defense, Commander Says,” U.S. Department of Defense, accessed July 10, 2022, <https://www.defense.gov/News/News-Stories/Article/Article/691975/northcoms-first-priority-is-no-fail-homeland-defense-commander-says/>.

¹⁷⁰ *Ibid.*

point from which to examine institutional change in wartime and in peacetime provides a productive baseline because we continue to use the Constitution, the Federalist and key juridical interpretations of both as important reference points. The thread that binds this discussion is presidential use of the war theme, likening social ills to a quest for national security on the homefront.

The Cold War was a tense time of brinkmanship between the Soviet Union and the US. Constant readiness was an ethos that pervaded national agencies and focused practitioners' efforts on technological advancement and public diplomacy. It was also a divisive time when the nation waged an ideological war against communism and "subversives" internally while waging hot wars in Korea, Vietnam and war via proxy elsewhere. The wars on poverty, crime and drugs allowed the national government to train its awesome capabilities and resources on domestic localities. Working with police agencies on innovations in surveillance and special operations, the Department of Justice, Department of Defense and the Central Intelligence Agency implemented presidential national security priorities by coalescing their powers.

Interwar NSF placed an emphasis on control of information in warfare and the technologies that allowed for it. The same logic for winning battles could be applied to domestic criminal interdiction and

later counterterrorism. Immigration became a fraught political issue causing US politicians to change the laws in ways that allowed greater flexibility to persecute non-citizens for even minor offenses. Significantly, there was a systematic collaboration between local police and the INS extending powers of the central government to law enforcement in new ways. The idea of regional clusters of law enforcement bureaucrats tasked with implementing national security came out of the Reagan-era War on Drugs policy and resembled the new foreign policy of a multi-polar world. In this way, local boundaries are traversed, resources streamlined and powers merged in ways that made policy dissemination easier, faster and more flexible.

The next chapter explores the significant role of the Department of Homeland Security itself in creating a national security mission focus at the state and local level through grant funding, training and certification. This streamlining and compounding altered national security federalism in the ways local institutions and actors engage in the War on Terror. Through instilling a strong counterterrorism mindset, DHS linked apparatuses and venues that move local agencies while compelling cooperation through law. The chapter will highlight how it was, and is, done.

CHAPTER 3: DEPARTMENT OF HOMELAND SECURITY AND PROMOTING THE PRACTICE OF NATIONAL SECURITY TO LOCALITIES

"The way counterterrorism is defined can provide lots of useful things – emergency response. Capacity building. Built-in constituencies."

"Accountability for grants spent? Scrutiny for agencies isn't a thing – can't win taking on the police. They're sacrosanct."

"The proliferation of regional partnerships was surprising and scary."

"Homeland Security Investigations told the local cops to just let it ride, they'll get over it, referring to the community."

The preceding chapter drew attention to harbingers of the current national security federalism (NSF) paradigm, policies that foreshadowed more concentrated forms of NSF, blurring the lines dividing responsibilities in the federalist system. Through the lens of federalism one can look closer at national security at different periods in history, and in the present moment, to identify a pattern of practice. This chapter focuses on the promotion of such a practice by a massive bureaucratic institution, one whose mission depends on nationalized participation of state and local actors and institutions.

3.1 A Sprawling Endeavor

It will take a lot of cubicles to house many of the 240,000 Department of Homeland Security (DHS) employees at their future headquarters. The sprawling 176 acre St. Elizabeths Campus is in the Anacostia neighborhood of southeast Washington, DC, a former Government-run hospital for the insane.¹⁷¹ The security collapse of 9/11 resulted in the creation of one of the largest federal agencies, quilted of many preexisting federal agencies and subunits and merged into one Cold War-style behemoth. A massive organization, DHS is ranked only after the Department of Defense and Veterans Affairs in the number of federal employees.¹⁷² As with all cabinet-level agencies, control of the Department rests with a single Secretary serving at the pleasure of the President. Its new headquarters will be the largest federal construction project since the Pentagon in the 1940s.¹⁷³ Although the ribbon cutting on the Consolidated Headquarters St. Elizabeths campus happened in 2013, most of its agencies remain dispersed in 40 office locations in the Washington area

¹⁷¹ "GSA Development of St. Elizabeths Campus," accessed February 4, 2018, <http://stelizabethsdevelopment.com/index.html>.

¹⁷² "What Are the Largest Federal Agencies? - OPM.Gov," U.S. Office of Personnel Management, accessed February 4, 2018, <https://www.opm.gov/FAQs/QA.aspx?fid=56538f91-625a-4333-84ba-28b3574b7942&pid=013be2c9-8ae5-455d-889c-6e74063441ba>.

¹⁷³ "Homeland Security's New \$3.9 Billion Headquarters," *Bloomberg.Com*, April 12, 2013, <https://www.bloomberg.com/news/articles/2013-04-12/homeland-securitys-new-3-dot-9-billion-headquarters>.

during construction¹⁷⁴ until at least 2026.¹⁷⁵ Until then, DHS operates from the Nebraska Avenue Complex (NAC) in DC. Some DHS employees, however, are dispersed far and wide, spread throughout the nation and across the globe. All this is to say, tremendous effort and resources are required to restructure agencies of the central government, especially ones of this size. It is an indication of the Department's breadth, significance and staying power.

3.1.1 Circling the Wagons

The Department of Homeland Security opened its doors on March 1, 2003,¹⁷⁶ (though it had been operating at the Nebraska Avenue Complex since January 27, 2003).¹⁷⁷ The early days were bumpy, between the time of the 9/11 attacks and the moment the Department took shape. DHS was conceived as part of Bush's "national effort to safeguard the United States against terrorism."¹⁷⁸ Part of what made DHS clunky from the outset was its design. Congress had voted in 2002 to consolidate the

¹⁷⁴ "GSA Development of St. Elizabeths Campus."

¹⁷⁵ "DHS Opens New Headquarters on St. Elizabeths Campus," Department of Homeland Security, July 29, 2013, <https://www.dhs.gov/news/2013/07/29/dhs-opens-new-headquarters-st-elizabeths-campus>.

¹⁷⁶ "Creation of the Department of Homeland Security | Homeland Security," accessed November 9, 2016, <https://www.dhs.gov/creation-department-homeland-security#>.

¹⁷⁷ "History of the NAC," Department of Homeland Security, November 2, 2015, <https://www.dhs.gov/history-nac>.

¹⁷⁸ "Mission | Homeland Security," accessed September 30, 2016, <https://www.dhs.gov/mission>.

22 distinct, fully operational and mostly autonomous federal agencies into the one unified department. However, “each of those agencies and their dozens of subunits was overseen by different congressional committees and subcommittees.”¹⁷⁹ Not only that, but these agencies had internal politics and external constituencies that did not incline them to rapidly reorient to a single, shared mission. Indeed some of the institutional priorities of existing entities were in conflict with Bush’s focus on terrorism prevention, at the expense of disaster preparedness, with the Federal Emergency Management Agency (FEMA) being a notable example.

3.1.2 The 22 Distinct Agencies and Units that Became DHS in 2003

1. US Customs Service (Treasury)
2. Immigration and Naturalization Service (Justice)
3. Federal Protective Service
4. Transportation Security Administration (Transportation)
5. Federal Law Enforcement Training Center (Treasury)
6. Animal and Plant Health Inspection Service (part)(Agriculture)
7. Office for Domestic Preparedness (Justice)
8. Federal Emergency Management Agency (FEMA)
9. Strategic National Stockpile and the National Disaster Medical System (HHS)

¹⁷⁹ Steven Brill, “15 Years After 9/11, Is America Any Safer? - The Atlantic,” accessed September 29, 2016, <http://www.theatlantic.com/magazine/archive/2016/09/are-we-any-safer/492761/>.

10. Nuclear Incident Response Team (Energy)
11. Domestic Emergency Support Teams (Justice)
12. National Domestic Preparedness Office (FBI)
13. Chemical, Biological, Radiological and Nuclear (CBRN)
Countermeasures Programs (Energy)
14. Environmental Measurements Laboratory (Energy)
15. National Biological Weapons Defense Analysis Center (Defense)
16. Plum Island Animal Disease Center (Agriculture)
17. Federal Computer Incident Response Center (GSA)
18. National Communications System (Defense)
19. National Infrastructure Protection Center (FBI)
20. Energy Security and Assurance Program (Energy)
21. US Coast Guard
22. US Secret Service

DHS, as cobbled together of competing agencies as it was, was ill-suited as a nimble domestic terrorism-fighting force of the Bush Administration and Congress. In fact, the Department's overall mission was, and is, difficult to pin down. Very broadly, the agency will, "[w]ith honor and integrity,...safeguard the American people, our homeland, and our values."¹⁸⁰ Its objectives can be understood functionally: "to secure the nation from the many threats we face...from aviation and border security to emergency response," from cyber-attacks to chemical weapons of mass

¹⁸⁰ "Mission | Homeland Security."

destruction.¹⁸¹ The doctrine of strategic preemption permeated its stated goals emphasizing an “all hands on deck” approach, requiring implementation by all actors involved in, “enhancing security; managing our borders; administering immigration laws; securing cyberspace; and ensuring disaster resilience.”¹⁸² DHS has broad, ambitious, and perhaps vague goals which have also proven to be amorphous across time.¹⁸³ However, its mission has also been imbued with meaning through practice, over two decades, by the everyday bureaucrats and officials of the national security state as the War on Terror wages on.

Notably, the forced coalescing around a preemptive approach to domestic terrorism required operational readiness at every level of government, sweeping up states, regions and localities in national security. Some elements of the strategy were more coercive than others in order to achieve a level of law enforcement centralization leveraged through statute, executive order, presidential directive and administrative law. DHS induced mission-focus at the state and local level through grant funding, training and professional certification requirements while compelling cooperation through law.

¹⁸¹ “About DHS | Homeland Security,” accessed September 30, 2016, <https://www.dhs.gov/about-dhs>.

¹⁸² “Mission | Homeland Security.”

¹⁸³ Brill, “15 Years After 9/11, Is America Any Safer?”

3.2 Bush's Proposition

On October 8, 2001, “using the maximum legal authority available,”¹⁸⁴ President Bush issued Executive Order 13228 to create the precursor to DHS, the Office of Homeland Security (OHS). OHS was to coordinate the response to 9/11, in the White House, with fifty executive agencies.¹⁸⁵ Several efforts in Congress, underway pre- and post-9/11, offered similar, smaller reorganizations of domestic national security agencies.¹⁸⁶ However, Bush and his team wanted to buy time to formulate a different and larger plan and preemptively cut off legislative moves in order to insulate the OHS from congressional control.¹⁸⁷ Generally speaking, the desire to secure high-stakes public policy outputs makes controlling the administrative state more important in the modern era than ever before.¹⁸⁸ After 9/11, the very legitimacy of the government seemed at stake due to its massive failure to keep Americans safe and so by June 2002, President Bush put forward a proposal to reconfigure 100 agencies responsible for homeland security into the behemoth department, under one primary mission.¹⁸⁹ Institutionally, with regard to

¹⁸⁴ George W. Bush, “The Department of Homeland Security” (The White House, June 2002), https://www.dhs.gov/sites/default/files/publications/book_0.pdf.

¹⁸⁵ David E. Lewis, *Presidents and the Politics of Agency Design*, 1 edition (Stanford, Calif: Stanford Univ Press, 2003), 77.

¹⁸⁶ Lewis, 77.

¹⁸⁷ Lewis, 78.

¹⁸⁸ Lewis, 167.

¹⁸⁹ Bush, “The Department of Homeland Security,” 2.

the War on Terror, as with all conflicts, “Congress [was] more likely to defer to the president, since the president is strategically the strongest when acting in foreign affairs and Congress has the fewest incentives to take the lead.”¹⁹⁰ This left framing the design of DHS in the hands of an Administration proposing to reinvent a Cold War defensive and offensive structure. In his proposal to Congress, Bush mused:

The United States faced an enormous threat during the Cold War. We created a national security strategy to deter and defeat the organized military forces of the Soviet bloc. We emerged victorious from this dangerous period in our history because we organized our national security institutions and prepared ourselves to meet the threat arrayed against us.¹⁹¹

He projected that this massive reorganization should model Cold War philosophy because “[t]he United States is under attack from a new kind of enemy – one that hopes to employ terror against innocent civilians to undermine their confidence in our institutions and our way of life” and that “[o]nce again we must organize and prepare ourselves to meet a new and dangerous threat.”¹⁹²

3.2.1 Politics of Agency Design

Agency creation and reorganization is inherently political in that “‘political motivations’ best explain the choice of organizational

¹⁹⁰ Lewis, *Presidents and the Politics of Agency Design*, 166.

¹⁹¹ Bush, “The Department of Homeland Security,” 13.

¹⁹² Bush, 13.

structure.”¹⁹³ In fact, politics overrides other considerations, including effective policy implementation and delivery.¹⁹⁴ Political players include not only presidents and legislators, at the national level, but the bureaucrats themselves. When it comes to national security in particular, presidents must delegate authority to agencies with parochial self-interests (which may or may not include overall national security), all the while amassing a congressional majority for weighty policies and working under stark time constraints.¹⁹⁵ This pattern holds true for the design of DHS. Given the structural elements initially desired by the Bush Administration at inception: insulated presidential control over a new Cold War-sized infrastructure, with a broad mission against an undefined enemy, it would be unsurprising if politics were not a major factor in how the Agency’s development was to unfold.

At the outset, Bush’s team put the Department’s congressional stewarding in the hands of a true partisan. Rep. Dick Armey (R-TX) introduced H.R. 5005, the Homeland Security Act of 2002 on June 24, 2002 as Chair of the House of Representatives Select Committee on Homeland Security. Many additional committees had their say and marked up the bill in the House including Agriculture; Appropriations;

¹⁹³ Lewis, *Presidents and the Politics of Agency Design*, 11.

¹⁹⁴ Lewis, 6.

¹⁹⁵ Amy Zegart, *Flawed by Design: The Evolution of the CIA, JCS, and NSC*, 1 edition (Stanford, Calif: Stanford University Press, 2000), 47–48.

Armed Services; Energy and Commerce; Financial Services; Government Reform; Intelligence; International Relations; Judiciary; Science; Transportation and Infrastructure and Ways and Means. A significant goal of the base bill was to “give the President and this new department the kind of [managerial, budget, and personnel] flexibilities they need to manage this new agency.”¹⁹⁶ The bill codified the Homeland Security Council (HSC) and the Assistant (or Advisor) to the President who chaired this body – both established in the same executive order that created the predecessor OHS. In parallel operation with DHS, the HSC would be the official counterpart to the National Security Council inside the Executive Office of the President.¹⁹⁷ The staff of the two councils were subsequently merged in 2009 to achieve “full integration of White House staff supporting national security and homeland security.”¹⁹⁸ In other words, this ended the “artificial divide between...national security and homeland security.”¹⁹⁹ The design of both bodies, cloistered close to the Executive and his national security agenda, would pull the nation’s local law

¹⁹⁶ “Congressional Record,” legislation, accessed December 21, 2017,

<https://www.congress.gov/congressional-record/2002/7/26/house-section/article/H5793-6>.

¹⁹⁷ “Congressional Record.”

¹⁹⁸ “Statement by the President on the White House Organization for Homeland Security and Counterterrorism,” whitehouse.gov, May 26, 2009, <https://obamawhitehouse.archives.gov/the-press-office/statement-president-white-house-organization-homeland-security-and-counterterrorism>.

¹⁹⁹ “NSC Staff, the Name Is Back! So Long, NSS,” whitehouse.gov, February 10, 2014, <https://obamawhitehouse.archives.gov/blog/2014/02/10/nsc-staff-name-back-so-long-nss>.

enforcement closer to national priorities in ways that will be demonstrated in subsequent chapters. For now, in 2002, the HSC Advisor did not require Senate confirmation, and therefore was not responsible to testify before Congress; this person instead reported directly to the President.

Accountability was a point of contention for Congressman Henry Waxman (D-CA). Pelosi, Waxman and others heeded the advice of Brookings Institution whose scholars predicted a massive new agency would be clunky, unmanageable and unaccountable for immediate security needs – a Frankenstein of divergent missions. A modern structure, instead, would be more nimble and do a better job of coordinating agencies that touched security through closely controlling those agencies' budgets with the oversight of Congress and the help of the Office of Management and Budget. They predicted a Cold War-style bureaucracy would take a decade to provide additional security against terrorism, if ever. Waxman envisioned a lean coordinating operation in the President's office, essentially he proposed co-opting the apparatus Bush had installed himself through executive order – with the addition of congressional oversight.

On July 26, 2002, Congressman Waxman offered an amendment to Bush's DHS proposal which was a stark alternative to the president's

design structure. Merging agencies of such dissimilar missions into one, with over 170,000 employees (in 2002) - larger than many cities - as Rep. Pelosi pointed out, would add no value. Waxman's amendment, "No. 3", proposed to bolster the OHS, make its Director subject to Senate confirmation, give the HSC power to review and de-certify agency budgets if they did not conform to national security objectives and be subject to congressional oversight. In short, it would have created a White House-led coordinating effort with congressional input, without growing the government. When it came before legislators, Republicans defeated the Waxman amendment 248-175 stating that Bush needed both a cabinet-level agency and his own advisory council, that "telling agencies how to prioritize budgets" would fail because the HSC would have "no teeth".²⁰⁰ In the end Bush got both: the new department and his own advisory council on domestic national security. Yet guaranteeing Senate confirmation of the new Secretary continued to be a sticky issue, causing forceful debate in that body in the month of September 2002 which eventually led to the inclusion of advice and consent in the Act.²⁰¹

²⁰⁰ "VoterPunch : H.R. 5005. Creation of a Department of Homeland Security/Vote to Strengthen Congressional Oversight of Department Activities. : Brown, Corrine," VoterPunch, accessed November 8, 2016, <http://www.voterpunch.org/vote.htm;jsessionid=166DB411A6EC9A6C272F4C663714A7F8?vote=12973&topic=M0&member=400048>.

²⁰¹ *Congressional Record: Proceedings and Debates of the 107th Congress Second Session: Vol.148 Part 12* (Government Printing Office, n.d.), 16829, 16691-93, 17039.

Authors of the bill's minority report asked the simple question, "Do the actions we take make the American people safer"? Their conclusion: "Regrettably, we do not believe that the bill passed by the House Select Committee on Homeland Security sufficiently meets that test."²⁰² While the Act was signed by the President and became public law on November 25, 2002, its detractors in the House predicted it would "create a huge, costly, and inefficient 1950s style government bureaucracy that will likely take years before it functions properly" to provide "meaningful and sustainable results."²⁰³ Significant to the point of this chapter, Pelosi and colleagues noted that one effect of H.R. 5005 would be to create secrecy at the local level, regardless of local or state law demanding sunshine. The new law provided an Executive-branch shield against state disclosure laws, stating that "information submitted under this section 'shall not, if provided to a state or local government or government agency...be made available pursuant to any state or local law requiring disclosure of information or records.'"²⁰⁴ The forethought with regard to local law was a nod to the potential scrutiny DHS policies would receive²⁰⁵ once state and

²⁰² "H. Rept. 107-609 - HOMELAND SECURITY ACT OF 2002," webpage, accessed November 8, 2016, <https://www.congress.gov/congressional-report/107th-congress/house-report/609/1>.

²⁰³ "H. Rept. 107-609 - HOMELAND SECURITY ACT OF 2002."

²⁰⁴ Richard Armev, "Text - H.R.5005 - 107th Congress (2001-2002): Homeland Security Act of 2002," legislation, November 25, 2002, <https://www.congress.gov/bill/107th-congress/house-bill/5005/text/pl>; "H. Rept. 107-609 - HOMELAND SECURITY ACT OF 2002."

²⁰⁵ Joe D. Whitley and Lynne K. Zusman, *Homeland Security: Legal and Policy Issues* (American Bar Association, 2009), 120.

local governments and citizens realized that their resources would be used to implement the Department's mission, whatever that meant in practical terms for communities.²⁰⁶

Aside from the political opportunities these policies opened up, the reality that incidents such as acts of terrorism (and other disasters) occur locally facilitated a federally-led local protocol as a design requirement.²⁰⁷ The sense that opportunities for future terrorism permeating the domestic landscape meant that local law enforcement resources had to be brought under one mission in the emotional aftermath of 9/11. In fact, there was support in Congress for centralizing the nation's law enforcement through a new domestic security agency.²⁰⁸ Some policymakers had even proposed a smaller-scale consolidation prior to 9/11, in the January 2001 Hart-Rudman Commission/US Commission on National Security recommendations.²⁰⁹ Like all partisans, Bush was interested in controlling the agenda - defining the scope and purpose of such a massive undertaking given the various actors involved.

206 Candice Bernd, "Cities Fight Domestic Dragnet, Demand Local Police Disclose Use of Spy Gear," Truthout, accessed December 14, 2016, <http://www.truth-out.org/news/item/37724-cities-fight-domestic-drag-net-demand-local-police-disclose-use-of-spy-gear>.

207 "The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States (9/11 Report)," 399–400, accessed January 11, 2018, <https://www.gpo.gov/fdsys/pkg/GPO-911REPORT/content-detail.html>.

208 Lewis, *Presidents and the Politics of Agency Design*, 28.

209 Lewis, 77; "U.S. Commission on National Security/21st Century, Hart-Rudman Commission," accessed February 5, 2018, <http://www.au.af.mil/au/awc/awcgate/nssg/>.

The impetus for establishing DHS was to move beyond merely coordinating policy out of the White House to an authoritative, agency-level mechanism “for managing consolidated programs concerned with border security and effective response to domestic terrorism incidents.”²¹⁰ As constitutionally enumerated in Article II, Section 2, the principals of Executive departments are significant policy implementers and their agencies are powerful administrative arms of the President.²¹¹ However, while the span of the President’s control over each agency can be maximized in some ways merely by keeping the number of cabinet agencies small, and therefore more manageable, an agency may still grow beyond a president’s reach by exercising its practical autonomy, extending power to bureaucrats and subject-matter experts.

The move to departmentalize “homeland security” – with all its attendant power - could only happen with the political support of relevant interest groups who regarded this change as beneficial “in terms of proximity to the President and national prestige.”²¹² Under the auspices of DHS, local stakeholders and local congressional delegations are brought closer to Executive resources, including funding for their public and

210 Harold C. Relyea, “Homeland Security: Department Organization and Management” (DTIC Document, 2002), 2, <http://oai.dtic.mil/oai/oai?verb=getRecord&metadataPrefix=html&identifier=ADA467771>.

211 Relyea, 2.

212 Relyea, 4.

private sector constituencies. Critics have been concerned that the “politics of fear” led to an overly-broad, sweeping and ever-expanding image of DHS,²¹³ creating legitimacy and competency issues.²¹⁴ Regardless, the doctrine of preemption permeated investigative law enforcement practices at the local level²¹⁵ and DHS was designed to be the primary connective node between local and federal security agencies. By integrating states’ police powers with Executive national security powers to achieve post-9/11 Executive and congressional directives, a form of de-federalization could be possible.

3.2.2 Reprioritization of Local Preparedness

The PATRIOT Act of 2001 noted that “[c]oordination of Federal, State, and local terrorism research, preparedness, and response programs must be improved.”²¹⁶ The Act granted “broad ‘general federal assistance’ authority to the President, empowering him [sic.] to ‘direct any Federal agency, with or without reimbursement, to utilize its authorities and the

²¹³ Bennie G. Thompson, “A Legislative Prescription for Confronting 21st-Century Risks to the Homeland,” *Harvard Journal on Legislation* 47 (2010): 2.

²¹⁴ “Key Issues: DHS Management - High Risk Issue,” accessed December 13, 2016, http://www.gao.gov/key_issues/dhs_implementation_and_transformation/issue_summary; Andrew Lakoff and Eric Klinenberg, “Of Risk and Pork: Urban Security and the Politics of Objectivity,” *Theory and Society* 39, no. 5 (September 1, 2010): 20, <https://doi.org/10.1007/s11186-010-9123-3>.

²¹⁵ Personal communication with local-level law enforcement executive

²¹⁶ “H.R.3162 - 107th Congress (2001-2002): Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001 | Congress.Gov | Library of Congress,” accessed December 13, 2016, <https://www.congress.gov/bill/107th-congress/house-bill/3162>.

resources granted to it under Federal law...in support of State and local assistance response and recovery efforts,' and to 'coordinate all disaster relief assistance provided by Federal agencies, private organizations, and State and local governments.'"²¹⁷ While during the Cold War "civil defense was a priority and emergency management centered on the threat of nuclear weapons,"²¹⁸ terrorism supplanted this concern after 9/11. The Homeland Security Act elevated terrorism concerns over emergency and disaster preparedness and created new tools that codified this approach. The Emergency Preparedness and Response (EPR) Directorate at DHS, outlined in Title V of the Homeland Security Act "transferred the functions and personnel of six existing entities, the largest of which was FEMA, to DHS."²¹⁹ It also separated out FEMA's preparedness functions, decoupling it from response and recovery functions.²²⁰ Regarding funding, the reorganization of FEMA under DHS shifted focus and monies away from disasters to focus almost exclusively on terrorism. Then hurricane Katrina hit New Orleans in 2005. Katrina was a wake-up call, prompting the Emergency Reform Act of 2006 that made "FEMA a distinct agency within DHS and placed restrictions on the Secretary's authority to

²¹⁷ Thompson, "A Legislative Prescription for Confronting 21st-Century Risks to the Homeland," 1.

²¹⁸ Thompson, 11.

²¹⁹ Thompson, 12.

²²⁰ Thompson, 12.

reorganize it.”²²¹ Bureaucratic in-fighting between the Office of Domestic Preparedness and FEMA, inside of DHS, had resulted in some level of “morale decay in FEMA as a result of preparedness functions transferring over to ODP.”²²² The arrangement did not last. An autonomous FEMA, focused on disasters, had Congressional and organizational allies within the Beltway.²²³ Former Secretary Ridge even “let FEMA keep its name” in the end, despite efforts to change it.²²⁴ In 2006, the ODP disappeared. Allocations for preparedness through Urban Area Security Initiative (UASI) are now handled through FEMA in DHS.²²⁵

The “all-hazards” approach most local emergency preparedness professionals implement emphasizes preparation for any emergency or disaster without privileging terrorism.²²⁶ The Homeland Security mandate had to accommodate this later. In fact, local professionals were hostile to the first national response plan DHS authored, including some interviewed for this project, for the fact that it did not take into

²²¹ Thompson, 13.

²²² Susan B. Glasser and Michael Grunwald, “Prelude to Disaster : The Making of DHS,” *The Washington Post*, December 23, 2005, sec. Live Q&As, <http://www.washingtonpost.com/wp-dyn/content/discussion/2005/12/22/DI2005122201378.html>.

²²³ “The Disaster after 9/11: The Department of Homeland Security and the Intelligence Reorganization,” *HOMELAND SECURITY AFFAIRS* (blog), April 1, 2006, <https://www.hsaj.org/articles/174>.

²²⁴ “Department’s Mission Was Undermined From Start,” *The Washington Post*, December 22, 2005, sec. Nation, http://www.washingtonpost.com/wp-dyn/content/article/2005/12/21/AR2005122102327_5.html.

²²⁵ “Urban Areas Security Initiative (UASI).”

²²⁶ Kettl, 100.

consideration their on-the-ground knowledge and expertise and that the sources of authority in the document removed their own.²²⁷ While tremendous burdens of implementing the DHS mission fell upon them, local officials could see a skewed prioritization of police over fire departments, terrorism prevention over disaster preparedness and political over risk-related considerations.²²⁸

An apparent pattern emerges with regard to pressures on the autonomy of jurisdictions within the US system of federalism. DHS' mission is one that simplifies, reprioritizes and streamlines local strategies into a sometimes arbitrary set of Executive-defined goals. The tension to prioritize terrorism prevention is at odds with how professionals understand risk, as one commenter to the DHS' national plan indicated, “[w]e know that the possibility for natural disasters and emergencies to occur far exceeds the possibility for terrorist events.”²²⁹

3.2.3 Fusion Centers Create a Hybrid Space between DHS and Localities

There are 80 state and major urban area fusion centers employing over 3,000 public safety workers. The initial few were created by state and local governments in the aftermath of 9/11 to prevent and mitigate

²²⁷ Kettl, 101.

²²⁸ Kettl, 102–3.

²²⁹ Kettl, 108.

terrorist acts and other major threats. The rise of fusion centers, “came about in part because the federal government placed much of the responsibility for homeland security on state governments.”²³⁰ They are the hubs of “the two-way intelligence and information flow between the federal government and...State, Local, Tribal and Territorial (SLTT) and private sector partners.”²³¹ Fusion centers are a financial commitment to states and cities, on top of their regular public safety costs which are substantial. The National Fusion Center Association contends that while funding varies, over two-thirds “of all funding that supports fusion centers comes from state and local budgets.”²³² However, according to the GAO, a nationwide survey conducted by DHS in 2010 found that 52 of 72 fusion centers that responded, over half of their budgets were supported by federal funding and that federal grants accounted for 61 percent of their total budgets whereas state or local funds provided 39 percent.²³³ Some centers are almost entirely grant-funded through the Urban Area Security

²³⁰ “Fusion Centers,” Council on Foreign Relations, accessed October 29, 2022, <https://www.cfr.org/background/fusion-centers>.

²³¹ “Statement of Mike Sena President, National Fusion Center Association Director, Northern California Regional Intelligence Center (NCRIC) to the US Senate Committee on Homeland Security and Governmental Affairs ‘Examining the Role of the Department of Homeland Security’s Office of Intelligence and Analysis’ May 18, 2021,” 2, accessed October 26, 2022, <https://www.hsgac.senate.gov/imo/media/doc/Testimony-Sena-2021-05-18.pdf>.

²³² *Ibid.*, 4.

²³³ “GAO: Federal Agencies Are Helping Fusion Centers Build and Sustain Capabilities and Protect Privacy, but Could Better Measure Results September 2010 United States Government Accountability Office Report to Congressional Requesters,” 15, accessed October 29, 2022, <https://www.gao.gov/assets/gao-10-972.pdf>.

Initiative (UASI) and/or the State Homeland Security Grant Program (SHSGP) and others receive far less in federal funds. If federal funding was revoked, some fusion centers would continue to operate, “albeit with less staff and possibly with a more limited scope” while others would close their doors.²³⁴ If communities chose to do away with their center, some would survive even a “drastic decline in state and local funding” because “states and localities would be in a difficult position to officially dismantle these centers.”²³⁵ Regardless of where the dollars are derived from, funds and personnel are displaced from local endeavors.

Officially, counterterrorism was, and is, the cause for fusion centers. As early as 2007, however, police departments and public sector agencies were “more concerned with issues such as gangs, narcotics, and street crime, which are more relevant to their communities.”²³⁶ The centers could not motivate local support if counterterrorism was their sole focus. And yet, full integration with federal agencies remains the goal. Sixty-five centers have an assigned DHS analyst who brings the authority “to collect and share raw information to include release authority, execute joint production, and effectively share information across all classification

²³⁴ Todd Masse, Siobhan O’Neil, and John Rollins, “Fusion Centers: Issues and Options for Congress,” n.d., 15.

²³⁵ *Ibid.*

²³⁶ *Ibid.*, 20.

levels.”²³⁷ They represent a total linkage from the smallest local agency to the Attorney General’s Global Justice Information Sharing Initiative (Global) which keeps the AG abreast of information sharing progress²³⁸ and the Criminal Intelligence Coordinating Council (CICC), working towards the “continued implementation of intelligence-led policing.”²³⁹ Centers receive direct planning support from the Office of the Director of National Intelligence (ODNI) and the FBI.²⁴⁰ They function quietly in the background as hybrid institutions, operating in the space between the federal government and the states.

3.3 A Distinctive Policy of Preemption

The vision of DHS incorporates key concepts: security, resilience, and customs and exchange – all driving “broad areas of activity that...[define]...homeland security missions.”²⁴¹ Accordingly, this broad

²³⁷ “Statement of Mike Sena President, National Fusion Center Association Director, Northern California Regional Intelligence Center (NCRIC) to the US Senate Committee on Homeland Security and Governmental Affairs ‘Examining the Role of the Department of Homeland Security’s Office of Intelligence and Analysis’ May 18, 2021,” 3.

²³⁸ “Global Justice Information Sharing Initiative (Global),” Bureau of Justice Assistance, accessed October 28, 2022, <https://bja.ojp.gov/program/it/global>.

²³⁹ “Criminal Intelligence Coordinating Council (CICC),” Bureau of Justice Assistance, accessed October 28, 2022, <https://bja.ojp.gov/program/it/global/groups/cicc>.

²⁴⁰ “Statement of Mike Sena President, National Fusion Center Association Director, Northern California Regional Intelligence Center (NCRIC) to the US Senate Committee on Homeland Security and Governmental Affairs ‘Examining the Role of the Department of Homeland Security’s Office of Intelligence and Analysis’ May 18, 2021,” 7.

²⁴¹ “Our Mission | Homeland Security,” accessed September 30, 2016, <https://www.dhs.gov/our-mission>.

and ambiguous vision is said to be “enterprise-wide,” not limited to the DHS but encompassing elements of the intelligence community.²⁴² One could surmise that the Bush Doctrine of preventive action embedded in the Department’s mandate makes a definitive mission for the agency not only elusive to articulate, but predictability impossible to define success, if and when it comes. Success is a moving target mirroring the idea of the War as a process rather than an event.

Employees at DHS are charged with preventing any and all attacks that may or may not befall the United States. After 9/11 federal agencies were critiqued for their “failure of imagination.”²⁴³ However, managing and foretelling unlimited possibilities of danger, with finite resources, is unrealistic. In fact, the Obama Administration began using public relations and repeated rhetoric to temper the public’s expectation regarding the likelihood of terrorist attacks, attempting to make Americans more comfortable with the level of risk they must accept for the foreseeable future.²⁴⁴ Rosa Brooks, former counselor to the Under Secretary of Defense Policy, suggests that “[t]he events of recent decades should undermine everyone’s confidence in our collective ability to predict

²⁴² “Our Mission | Homeland Security.”

²⁴³ Brill, “15 Years After 9/11, Is America Any Safer?”

²⁴⁴ Brill.

geopolitical change.”²⁴⁵ Whether attempting to predict and prevent unknown criminal acts or large-scale political threats, is folly or wisdom, the creation of DHS set in motion millions of local, state and federal actors with that as their goal. Many practitioners stake their careers on implementing this mission.

3.4 Practical Integration of Local and State Actors

The 2002 Act creating the newly designed DHS had a two-pronged mandate as an Executive department: (1) generally preventing terrorist attacks (2) designating the primary responsibility for investigating and prosecuting terrorism, “not in the Department, but rather in Federal, State, and local law enforcement agencies with jurisdiction over the acts in question,”²⁴⁶ thereby subsuming local agents under the Executive branch for purposes defined as relating to terrorism. According to the Bush Administration proposal, “the Department would set national policy and establish guidelines for state and local governments” to deal with a “full range of terrorist threats.”²⁴⁷

²⁴⁵ Rosa Brooks, *How Everything Became War and the Military Became Everything: Tales from the Pentagon*, First Printing edition (New York: Simon & Schuster, 2016), 265.

²⁴⁶ “H. Rept. 107-609 - HOMELAND SECURITY ACT OF 2002.”

²⁴⁷ Bush, “The Department of Homeland Security,” 3.

The bill also created the National Council of First Responders (police, fire etc.) and amended Section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)) to create and add the DHS Office of Intelligence and Analysis,²⁴⁸ to the U.S. Intelligence Community (IC) - the only “IC element statutorily charged with delivering intelligence to our state, local, tribal, territorial and private sector partners, and developing intelligence from those partners for the Department and the IC.”²⁴⁹ In other words, this is the mechanism that creates the two-way street, channeling intelligence into regional law enforcement centers, such as fusion centers, and out of local communities by way of local personnel gathering information from suspicious activity reports (SARs), license plate readers, biometric surveillance, drones and more. Domestic agents implementing the federal War on Terror are force-multiplied by local police and various local resources which provides on-the-ground intelligence gathering support for the regionalized effort.

DHS was therefore created to evolve a system of security policy based on bureaucratic practice and through a “consistent nationwide approach for Federal, State, and local governments.”²⁵⁰ Bush proposed

²⁴⁸ “H. Rept. 107-609 - HOMELAND SECURITY ACT OF 2002.”

²⁴⁹ Homeland Security, Office of Intelligence and Analysis, “UASI Risk Formula,” accessed November 8, 2016, <https://www.dhs.gov/office-intelligence-and-analysis>.

²⁵⁰ “Homeland Security Presidential Directive 5.Pdf,” 3, accessed February 3, 2018, <https://www.dhs.gov/sites/default/files/publications/Homeland%20Security%20Presidential%20Directive%205.pdf>.

guidelines that would be the practical “systematic, proactive approach to guide departments and agencies at all levels of government, nongovernmental organizations, and the private sector to work seamlessly to prevent, protect against, respond to, recover from, and mitigate the effects of incidents.”²⁵¹ On February 28, 2003, the President issued a directive called, Homeland Security Presidential Directive 5 (HSPD–5), Management of Domestic Incidents. Homeland Security Presidential Directives are similar to executive orders, but are not published in the Federal Register.²⁵² Directives play a central role in DHS. In the Trump Administration they were called National Security Presidential Memoranda (NSPMs) and under Biden they are National Security Memoranda (NSMs). PDs remain in force until rescinded by a president, by lawsuit or by Congress.

Thus, many of Bush’s policy documents are still being implemented by the agency. These national security policy documents are products of the National Security Council (NSC) and have been variously named since the centralization of the national security state with the NSC’s creation in 1947 under Truman. For example, under Eisenhower they were called National Security Action Memorandums (NSAMs), under Carter:

²⁵¹ “NIMS Doctrine Supporting Guides & Tools, Background and Overview,” accessed December 7, 2016, https://www.fema.gov/pdf/emergency/nims/NIMS_core.pdf.

²⁵² Relyea, “Homeland Security,” 2.

Presidential Review Memorandums (PRMs) for topics under study and finalized as Presidential Directives (PDs).²⁵³ The Bush Administration, used National Security Presidential Directives (NSPDs) to disseminate Presidential decisions on national security matters, but launched a new series, or subset, of these to promulgate homeland security policy called Homeland Security Presidential Directives (HSPDs) in October of 2001.²⁵⁴

HSPD-5 required “DHS to establish a mechanism for ongoing coordination to provide strategic direction for, and oversight of the new system.”²⁵⁵ Federal preparedness assistance would be conditioned on whether a department or organization at the local, state or tribal level had adopted the forthcoming protocols.²⁵⁶ While noncompliance would threaten future federal funding, one official shared that there is little incentive to hold up money for disaster victims and FEMA would, in practice, work with entities to meet the requirements.

The Directive 5 positioned the Secretary of Homeland Security as the principal federal official for domestic incident management, instructing them “to develop and administer a National Incident

²⁵³ “National Security Presidential Directives [NSPD] George W. Bush Administration,” accessed February 3, 2018, <https://fas.org/irp/offdocs/nspd/index.html>.

²⁵⁴ “National Security Presidential Directives [NSPD] George W. Bush Administration.”

²⁵⁵ “NIMS Doctrine Supporting Guides & Tools, Background and Overview.”

²⁵⁶ Brian Michael Jenkins and Frances Edwards-Winslow, “Saving City Lifelines: Lessons Learned in the 9-11 Terrorist Attacks” (Mineta Transportation Institute, College of Business, San José State University, 2003), 5, No. 20.

Management System (NIMS).”²⁵⁷ NIMS is the protocol that broadly dictates a “core set of doctrines,” new goals for preparedness (though preparedness has since been moved), incident command structures and more, in an effort to guide domestic operations in response to 9/11. HSPD-5 stated that “beginning in Fiscal Year 2005, Federal departments and agencies shall make adoption of the NIMS a requirement, to the extent permitted by law, for providing Federal preparedness assistance through grants, contracts, or other activities” and that the DHS Secretary “shall develop standards and guidelines for determining whether a State or local entity has adopted the NIMS.”²⁵⁸ Generally, funding would constitute an inducement; in an emergency planning scenario, the prospect of withholding it could be read as coercive. DHS released NIMS on March 1, 2004 under then-Secretary Tom Ridge.

Though the lead actor on local, regional and state management, the Secretary of Homeland Security was commanded to “establish appropriate relationships and mechanisms for cooperation and coordination” between themselves and the Attorney General, the Secretary of Defense and the Secretary of State thereby linking local, national - and notably, international - policies.²⁵⁹ NIMS mandated interoperability and

²⁵⁷ “NIMS Doctrine Supporting Guides & Tools, Background and Overview.”

²⁵⁸ “National Security Presidential Directives [NSPD] George W. Bush Administration.”

²⁵⁹ “Homeland Security Presidential Directive 5.Pdf,” No. 10.

communicative capacity across ground-level agencies and up through the ranks of the federal bureaucracy. NIMS blended best practices from existing local, regional and state approaches to emergency response. By pegging federal funding for state, local, tribal and territorial (SLTT) preparedness grants to compliance with the NIMS, the feds were deeply involved in how states handle crises.

One of the 'best practices' incorporated into NIMS is the Incident Command System (ICS), “a standard, on-scene, all-hazards incident management system already in use by firefighters, hazardous materials teams, rescuers and emergency medical teams.”²⁶⁰ The ICS is now the NIMS standardized organizational structure for the management of all incidents. What was different about NIMS ICS was the sixth component added to the five major functions of the ICS organization: command, operations, planning, logistics, and finance and administration. The sixth functional area covers intelligence, that is, to gather and share incident related information and intelligence. This includes details which may be related to national security and classified information in addition to risk assessment, building structural design and other components.²⁶¹ Since the ICS is universal for crisis management, in practice it applies to disasters,

²⁶⁰ “NIMS and the Incident Command System,” Nov. 23, 2004II, https://www.fema.gov/txt/nims/nims_ics_position_paper.txt.

²⁶¹ “NIMS and the Incident Command System.”

terrorism and protests. During the mass protests in Ferguson, Missouri in 2014, four intelligence units from regional and state agencies augmented the work of the local police department which did not have an intelligence unit. They used the network of state and major urban area fusion centers for information exchange throughout the incident, “sharing significant information with the Illinois Statewide Terrorism and Intelligence Center,” located 100 miles away.²⁶² The St. Louis Fusion Center analyzed “broader issues” and the “special-interest groups arriving in Ferguson or giving support to those in Ferguson.”²⁶³ After the protests, the DOJ’s after-action assessment faulted the City for not fully implementing NIMS and specifically for not maximizing the intelligence function in the incident command structure.²⁶⁴

To be deemed ‘NIMS ICS Compliant’, states and local governments must undergo training - as taught by Homeland Security – “to institutionalize the use of ICS...across the entire response system.”²⁶⁵ Compliance and training is controlled by the National Integration Center (NIC). The addition of the intelligence function to existing local response

²⁶² “After-Action Assessment of the Police Response to the August 2014 Demonstrations in Ferguson, Missouri” (Department of Justice, Office of Community Policing Services, 2016), 82, <https://project-labs.bitbucket.io/18-ronaldo-corkery-dds/1523730501-after-action-assessment-of-the-police-response-t.pdf>.

²⁶³ *Ibid.*

²⁶⁴ *Ibid.*, 85.

²⁶⁵ “NIMS and the Incident Command System.”

models, for example, links them directly to federal command centers, mandating coordination with information sharing entities such as “state or major urban area fusion centers, Regional Intelligence Sharing Systems (RISS) Centers, High Intensity Drug Trafficking Area Investigative Support Centers, Joint Terrorism Task Forces, and other analytic and investigative entities as applicable.”²⁶⁶

An Incident Commander (or Unified Command team) (IC/UC) may integrate the Intelligence / Investigations (I/I) function once they determine whether the incident is the result of criminal acts or terrorism adjusting operational decisions accordingly.²⁶⁷ The I/I function enables federal agencies to interpret the information for future action, determine whether data gathered by local and other personnel is “the most accurate” and how to translate it into useful intelligence²⁶⁸ or store it for future use. One official said, “Information goes in but doesn’t come out.” While Command may institute I/I post-event, the first purpose listed for the Function is to “[p]revent and/or deter potential unlawful activity,

²⁶⁶ “NATIONAL INCIDENT MANAGEMENT SYSTEM Intelligence/Investigations Function Guidance and Field Operations Guide October 2013,” 5, accessed February 3, 2018, https://www.fema.gov/media-library-data/1382093786350-411d33add2602da9c867a4fbcc7ff20e/NIMS_Intel_Invest_Function_Guidance_FINAL.pdf.

²⁶⁷ “NATIONAL INCIDENT MANAGEMENT SYSTEM Intelligence/Investigations Function Guidance and Field Operations Guide October 2013,” 6.

²⁶⁸ “National Incident Management System Third Edition October 2017,” 23, accessed February 3, 2018, https://www.fema.gov/media-library-data/1508151197225-ced8c60378c3936adb92c1a3ee6f6564/FINAL_NIMS_2017.pdf.

incidents, and/or attacks.”²⁶⁹ The use of pre-event I/I function and the possibilities for its use is a subject for further investigation.

After criticism for initially focusing too heavily on terrorism, NIMS shifted to emphasize an all-hazards approach to incidents, that is, “all threats and hazards—regardless of cause, size, location, or complexity.”²⁷⁰ The implications for localities were clear: assigned to localities are federal responsibilities and roles directed by Executive agencies of the President. NIMS’ policy purpose was “to prevent, prepare for, respond to, and recover from terrorist attacks, major disasters, and other emergencies” through the establishment of “a single, comprehensive approach to domestic incident management.”²⁷¹ It ensured “that all levels of government across the Nation have the capability to work efficiently and effectively together, using a national approach to domestic incident management.”²⁷²

For cities, a considerable obstacle to becoming compliant with and actively integrated into NIMS, and other national systems, is money. Funding for this purpose can be used both as an inducement and, once given, as a mode of maintaining some level of access, accountability and

²⁶⁹ “National Incident Management System Third Edition October 2017,” 30.

²⁷⁰ Jared T. Brown, “Congressional Primer on Responding to Major Disasters and Emergencies,” Congressional Research Service, September 8, 2017, 3, file:///C:/Users/trina/Downloads/804217.pdf.

²⁷¹ Jane Bullock, George Haddow, and Damon P. Coppola, *Introduction to Homeland Security: Principles of All-Hazards Risk Management* (Butterworth-Heinemann, 2011), 53.

²⁷² George W. Bush, “Homeland Security Presidential Directive/HSPD-5,” *Office of the Press Secretary The White House* (blog), February 28, 2003, <https://fas.org/>.

control over how state and locally-owned resources are used. Federal funding can allow local agencies to acquire goods or training without the necessity of community and public debate and, in some cases, without official public approval.²⁷³ Post-9/11 federal monies may also allow the local public and their governments an easier time of accepting mandates or approving changes to local policies that ultimately shift costs to the local taxpayer indirectly.

Homeland Security Presidential Directive 8 (HSPD-8) is a companion to HSPD-5 in that it addressed national preparedness directly. It identified steps for improved coordination in response to incidents, particularly the ways federal departments and agencies will prepare, including prevention activities, prior to a terrorism incident.²⁷⁴ It established readiness priorities and targets, funding guidelines and a single point of access to federal preparedness assistance programs. Local funding passed through states and the highest priority would be given to terrorism preemption, mitigation and resilience from an attack. Indeed, this funding was not designed to augment existing local first responder operations capabilities but to create new capabilities to predict and absorb terrorism, specifically the “planning, training, exercises, interoperability,

²⁷³ Nicky Woolf, “Stingray Documents Offer Rare Insight into Police and FBI Surveillance,” the Guardian, August 26, 2016, <http://www.theguardian.com/us-news/2016/aug/26/stingray-oakland-police-fbi-surveillance>.

²⁷⁴ “National Security Presidential Directives [NSPD] George W. Bush Administration.”

and equipment acquisition for major events...[and] for prevention activities such as information gathering, detection, deterrence, and collaboration related to terrorist attacks.”²⁷⁵ The Directive mandated support to states for the purchase of first responder equipment that conformed to national standards (now a separate mandated National Preparedness Goal) to be coordinated through DHS. Standards and needs would be determined by the DHS Secretary in coordination with secretaries of other Executive departments based on their combined assessment of current and future national security threats.²⁷⁶ The Secretary, in conjunction with the HSC, would judge local and state readiness and report directly to the President.

As the War has matured, “[t]he notion that police are responsible for homeland security is treated by most [policing and security scholars] as common knowledge.”²⁷⁷ Law enforcement professionals understand that “today’s law enforcement personnel bear responsibility for both preventing and responding to terrorist attacks.”²⁷⁸ In fact, policing executives take Executive directives seriously, looking for ways to “enhance police departments’ investigative capabilities” and push for more – not less – nationalized protocols to meet DHS obligations more

²⁷⁵ “National Security Presidential Directives [NSPD] George W. Bush Administration.”

²⁷⁶ “National Security Presidential Directives [NSPD] George W. Bush Administration.”

²⁷⁷ Green, “A Different Shade of Blue,” 10.

²⁷⁸ Green, 10.

efficiently, amid budgetary constraints at the local level.²⁷⁹ Since both Presidential Directives HSPD-5 and HSPD-8 under Bush ascribed homeland security responsibilities to local governments,²⁸⁰ they continue to be a reference point for professionals in the field. A practitioner indicated their approach to disasters is Directive 8, which assigned the lead for “who’s responsible and who and how [the federal government] sends money and the military.” Disasters are managed differently than before 9/11, but NIMS is a framework, not a plan. The federal government is flexible with local implementation, bringing resources, templates, policy-making and plan writing. This individual stated that Executive agencies bring the authority to make decisions and the money to operationalize them.

Obama’s Presidential Policy Directive (PPD-8) rescinded much of HSPD-8 although it reinscribed the aim of facilitating an “integrated, all-of-Nation, capabilities-based approach” setting national goals informed by regional variations of risk.²⁸¹ The focus remained on terrorism and the ‘prevention framework’, maintaining the “systematic preparation for the

²⁷⁹ Homeland Security Committee, *State of Homeland Security Address*, 2016, <https://www.youtube.com/watch?v=oMoJoMLx6kk&feature=youtu.be>; Green, “A Different Shade of Blue,” 36.

²⁸⁰ David B. Green, “A Different Shade of Blue: An Evaluation of the Civilian Detective Concept and Its Impact on Police Capabilities” (Monterey, California: Naval Postgraduate School, 2016), 10, <http://calhoun.nps.edu/handle/10945/48528>.

²⁸¹ “Presidential Policy Directive 8: National Preparedness | Homeland Security,” accessed December 1, 2016, <https://www.dhs.gov/presidential-policy-directive-8-national-preparedness>.

threats that pose the greatest risk to the security of the nation.”²⁸² Given the level of responsibility assigned to city staff, funding controversies (to be discussed later) arose due to the vast diversity of urban landscapes and local interests which now were closer to Executive branch security policy than ever before.

3.4.1 Nationalization of Law Enforcement Strategy via Funding

At inception, DHS was tasked with streamlining the funding programs of the previously separate agencies meaning that DHS was to bring states and localities under new single-mission protocols and priorities. It administers “grant programs for firefighters, police, and emergency personnel [previously] managed by FEMA, the Department of Justice, and the Department of Health and Human Services.”²⁸³ Between 2002 and 2005, the Office for Domestic Preparedness (ODP) offered subnational governments assistance through six distinct grant programs. Fragmentation and confusion in homeland security grant-making led DHS to consolidate the separate grant programs into a single Homeland Security Grant Program (HSGP).²⁸⁴

²⁸² “HSPD 8 Annex 1,” Department of Homeland Security, January 15, 2014, <https://www.dhs.gov/hspd-8-annex-1>.

²⁸³ Bush, “The Department of Homeland Security,” 3.

²⁸⁴ “Fiscal Year 2005 Homeland Security Grant Program: State Allocations and Issues for Congressional Oversight - PolicyArchive,” ii, accessed December 1, 2016, <http://www.policyarchive.org/handle/10207/183>.

HSGP provides funding under three subcategorical programs: the State Homeland Security Program (SHSP), the Urban Area Security Initiative (UASI) and Operation Stonegarden (OPSG). The SHSP funds state, tribal, territorial, and local preparedness activities addressing “high-priority preparedness gaps across all core capabilities where a nexus to terrorism exists.”²⁸⁵ The capability targets and gaps identified during the Threat and Hazard Identification and Risk Assessment (THIRA) process, and assessed in the State Preparedness Report (SPR) are supported by these grants. The UASI Program helps high-threat, high-density Urban Areas to build, sustain, and deliver the capabilities “necessary to prevent, protect against, mitigate, respond to, and recover from acts of terrorism.”²⁸⁶ The OPSG Program focuses funds on the borders supporting joint efforts to secure “routes of ingress from international borders to include travel corridors in states bordering Mexico and Canada, as well as states and territories with international water borders.”²⁸⁷ It finances enhanced cooperation and coordination among Customs and Border Protection (CBP), United States Border

²⁸⁵ “FY 2016 Homeland Security Grant Program NOFO - FY_2016_HSGP_NOFO_FINAL.Pdf,” accessed December 11, 2016, https://www.fema.gov/media-library-data/1455569937218-3daa3552913b8affe0c6b5bc3b448635/FY_2016_HSGP_NOFO_FINAL.pdf.

²⁸⁶ *Ibid.*

²⁸⁷ *Ibid.*

Patrol (USBP), and Federal, state, local, tribal, and territorial law enforcement agencies.²⁸⁸

As mentioned, the main mode of influence over public safety agencies would not only be increased operational flexibility, and the power that comes with proximity to national security agencies, but money. Cities and towns are cash-strapped and exist in a competitive funding environment. In the experience of this author, they are often pitted against one another when it comes to attracting businesses, tax revenue and support from major philanthropic foundations. Urban competition can be blamed, in part, on President Reagan's use of federal block grants in the 1980s. Block grants, as opposed to general revenue sharing, consolidated aid to cities as a means of reducing the total number of federal programs and the total amount of spending for cities as early as 1981.²⁸⁹ As a share of Gross Domestic Product, the steady attrition of stable (non-healthcare related) aid to cities that began under Reagan²⁹⁰ continues to the present.²⁹¹ However, block grants are also used when the

²⁸⁸ "FY 2016 Homeland Security Grant Program NOFO - FY_2016_HSGP_NOFO_FINAL.Pdf," accessed December 12, 2016, https://www.fema.gov/media-library-data/1455569937218-3daa3552913b8affe0c6b5bc3b448635/FY_2016_HSGP_NOFO_FINAL.pdf.

²⁸⁹ Timothy J. Conlan, "The Politics of Federal Block Grants: From Nixon to Reagan," *Political Science Quarterly* 99, no. 2 (1984): 260, <https://doi.org/10.2307/2150404>.

²⁹⁰ Robert Jay Dilger and Eugene Boyd, "Block Grants: Perspectives and Controversies" (Congressional Research Service, Library of Congress, 2009), 10, http://digital.library.unt.edu/ark:/67531/metadc462574/m1/1/high_res_d/R40486_2014Jul15.pdf.

²⁹¹ "Federal Grants to State and Local Governments," Congressional Budget Office, March 5, 2013, <https://www.cbo.gov/publication/43967>.

federal government “seeks to establish nationwide minimum levels of service” in a particular policy area.²⁹² In fact, UASI grants are considered block grants, though they are highly targeted to specific national goals. Grants totaling \$580,000,000 in FY 2017 outline allowable costs as those related only to anti-terrorism objectives.²⁹³ Small cities like Santa Cruz can justify use of terrorism dollars because they are now part of unified regional authority groups, as the grants require. Funds are allotted regionally, to the 100 most populous Metropolitan Statistical Areas (MSAs). These are areas that cross or subsume jurisdictions.

At the local level, offsetting public safety costs through grants is essential. Police alone can exceed any other city expenditure by category, sometimes costing as much as 42% of the general fund,²⁹⁴ making security personnel and programs a target for local cuts in lean times. Even though “DHS funding only represents a small portion of overall state and local government expenditures, estimated at a little more than one percent of total public safety spending,”²⁹⁵ changes in any funding stream has a major impact and triggers cost-balancing decisions from local leaders.

²⁹² Dilger and Boyd, “Block Grants,” 10.

²⁹³ “Fiscal Year 2017 Homeland Security Grant Program | FEMA.Gov,” accessed February 3, 2018, <https://www.fema.gov/fiscal-year-2017-homeland-security-grant-program>.

²⁹⁴ Craig Mohar, “Assessing Grant Allocation Methods For Federal Homeland Security Urban Area Assistance Funding,” *HOMELAND SECURITY AFFAIRS* (blog), December 1, 2015, 8–9, <https://www.hsaj.org/articles/9289>.

²⁹⁵ Mohar, 8.

Block grants, while a welcome source of income, reward dominant local political coalitions and do not streamline data collection for local scrutiny or provide an accountability mechanism for how the money is spent.²⁹⁶

DHS grants are no different.

The three HSGP subprograms, State Homeland Security Program, the Urban Areas Security Initiative and Operation Stonegarden, are interconnected.²⁹⁷ However, Urban Areas Security Initiative (UASI) grants are the main source of preparedness funding for communities. They provide for equipment and training dollars that were originally channeled through DHS' Office of Domestic Preparedness (ODP). Through departmental evolution, FEMA now has the administering authority for these funds.²⁹⁸ The allocation of UASI funding has not been without controversy, including condemnation over its distribution methodology and, what some consider, wasteful spending in cities. Between 2002 and 2003 (before UASI) Congress gave a disproportionate amount of funding to small states due to the influence of powerful senators.

²⁹⁶ Dilger and Boyd, "Block Grants," 9; Mohar, "Assessing Grant Allocation Methods For Federal Homeland Security Urban Area Assistance Funding," 24.

²⁹⁷ "Review: Federal Support for Local Law Enforcement Equipment Acquisition" (Executive Office of the President, December 2014), https://www.whitehouse.gov/sites/default/files/docs/federal_support_for_local_law_enforcement_equipment_acquisition.pdf.

²⁹⁸ "Urban Areas Security Initiative (UASI)," accessed November 8, 2016, <http://GrantDetails.aspx?gid=17162>.

In fact, 40% of the homeland security budget was equally divided among the fifty states, to the chagrin of politicians in large, vulnerable cities, leading one critic to characterize the formula as dispersing money in the “reverse order of the threat.”²⁹⁹ In April 2003, in response to the funding kerfuffle among its members, Congress rolled out UASI to “supplement the security budgets of the most vulnerable cities.”³⁰⁰ It emphasized planning and equipment for anti-terrorism objectives and put aside \$96 million for direct assistance to a small subset of big cities. Complaints followed. The program was broadened in scope and the available funding increased the same year.³⁰¹

Issues remained, however, and the 9/11 Commission Report in 2005 gave DHS an “F” in its methods of national funding allocation to cities.³⁰² In response, DHS introduced its new system of “risk-based” methodology for calculating UASI grants. However, the process was opaque and the criteria unclear.³⁰³ The 2006 applicable-cities list was generated using a “robust risk formula that consider[ed] three primary variables: consequence, vulnerability, and threat” and got rid of the automatic

²⁹⁹ Lakoff and Klinenberg, “Of Risk and Pork,” 7.

³⁰⁰ Lakoff and Klinenberg, 7.

³⁰¹ Lakoff and Klinenberg, 9.

³⁰² Lakoff and Klinenberg, 11.

³⁰³ Mohar, “Assessing Grant Allocation Methods For Federal Homeland Security Urban Area Assistance Funding,” 34, 38, 54.

allotment to states; cities now had to submit justification for funding.³⁰⁴ Cities were required to show that specific initiatives paralleled the Urban Area Homeland Security Strategy and the National Preparedness Goal, a separate mandate from NIMS. This created another linkage to the overall homeland security strategy by “[e]stablishing national performance standards for preparedness...essential to evaluating readiness, determining priorities, and targeting investments.”³⁰⁵

Successful grantees could not use UASI funds for normal urban security or infrastructure costs and could not offset budget deficits or regular operating costs through their use. These grants ramped up the national security strategy - they were not a supplement to local strategies already in place. Investments were intended for capacity-building: new equipment purchases, certification and training and emergency exercises.³⁰⁶ Funding for major urban areas was cut if it emphasized routine personnel costs, like police overtime in its application, as was the case in New York City. Push back from congressmembers and mayors led to an easing of the overtime restriction.³⁰⁷ By FY 2007, the UASI grant

³⁰⁴ Lakoff and Klinenberg, “Of Risk and Pork,” 11.

³⁰⁵ Lakoff and Klinenberg, 9.

³⁰⁶ Lakoff and Klinenberg, 14.

³⁰⁷ “FY 2008 NYC Urban Areas Security Initiative (UASI),” 6, 7, accessed February 4, 2018, http://www.dhSES.ny.gov/grants/hsgp/FY08_UASI_Program_Guidance.pdf.

allocation model was revised again to use a risk-based allocation model.³⁰⁸ Cities were sorted into two tiers and ranked by size. Top tier, large urban areas could now use 25% of funds for personnel costs.³⁰⁹ However, DHS did not and still “does not provide the specific details of analyses to local decision makers” regarding how the UASI formula is implemented in order to determine the relative risk-ranking of high-risk urban areas.³¹⁰

3.4.2 Intelligence Gathering, Top to Bottom

Counterterrorism preparedness through UASI privileged a bureaucratic sector that was developing its skills in this area. Information sharing was also an important new function of emergency management and crisis response. Professional intelligence officers are powerful in the sense that security expertise insulates their work from scrutiny and, according to subjects of this study, they wield immense discretion. They have evolved an organizational culture which “over time...encourages a deep commitment to the [agencies’] mission and emphasizes support to a limited number of clients.”³¹¹ Congress is reticent to provide oversight or

³⁰⁸ Mohar, “Assessing Grant Allocation Methods For Federal Homeland Security Urban Area Assistance Funding.”

³⁰⁹ Lakoff and Klinenberg, “Of Risk and Pork,” 19.

³¹⁰ Mohar, “Assessing Grant Allocation Methods For Federal Homeland Security Urban Area Assistance Funding,” 3, 11.

³¹¹ Richard A. Best Jr, *Intelligence Information: Need-to-Know vs. Need-to-Share* (DIANE Publishing, 2011), 1.

attract blame if terrorism strikes. They therefore extend some of their own political power to agencies of the intelligence community, rarely questioning ever-increasing national security budgets. The intelligence sector further insulated itself from legislative oversight, consolidating Executive branch power in the process. It advocated removal of the requirement (section 504(a)(1) of the National Security Act of 1947) to notify Congress when it uses funds pegged for an approved purpose, for something else entirely.³¹²

Post-9/11, local intelligence officers gain access to federal resources and the skill-sets to leverage them, along with perhaps an increased level of discretion to apply these skills to counterterrorism. According to subjects, weapons that were once classified, under the purview of military intelligence, are now in the hands of local law enforcement. Few subject-matter experts are available to adequately advise city councils, boards of supervisors and other elected bodies to determine the best use of this technology or whether such items are appropriate in a particular community. That is, increased officer discretion in a post-9/11 security

³¹² “Rules Committee Text of Extension of Continuing Appropriations Act H.J. Res. 125,” accessed January 22, 2018, <http://docs.house.gov/billsthisweek/20180115/BILLS-115SAHR195-RCP115-55.pdf>; Ryan Grim, “House Spending Bill Changes Law to Let Trump Administration Secretly Shift Intelligence Money,” *The Intercept* (blog), January 18, 2018, <https://theintercept.com/2018/01/17/section-504-house-spending-bill-changes-law-to-let-trump-administration-secretly-shift-intelligence-money/>.

environment has been raised as a concern, only when a local elected body becomes aware of it.

The depth and breadth of lateral and vertical integration of the intelligence community has been a sea change. New approaches to organizational management could explain the successes in this area, and one approach is the netcentric model. Network models are thought to be dynamic, flexible, adaptive and relationship-based. To institute such a model, the Terrorist Threat Integration Center (TTIC) was established on May 1, 2003 by President Bush through Executive Order 13354 and announced in his 2003 State of the Union Address. TTIC policy relied on the Bush-era terrorism preemption principle, guiding the coordination and collaboration of the Intelligence Community (IC) and its “netcentric”³¹³ transformation. The TTIC was renamed the National Counterterrorism Center (NCTC) by the Intelligence Reform and Terrorism Prevention Act of 2004 and subsumed under the United States Director of National Intelligence (DNI). Executive Order 13354 expressly commanded the IC give the highest priority to the detection, prevention, disruption and preemption of possible terrorist activities, including the

³¹³ Stephen Goldsmith and Donald F. Kettl, eds., *Unlocking the Power of Networks: Keys to High-Performance Government* (Cambridge, MA : Washington, D.C: Brookings Institution Press/Ash Center, 2009), 139–40.

collection and dissemination of locally-culled data, supporting DHS and other agencies in that dissemination.³¹⁴

Netcentricity is a way to organize government to meet post-9/11 goals by prescribing a collapsed intelligence gathering operation across agency and geographic boundaries. It is a method of creating a new atmosphere that leverages existing social and professional networks, within agencies, while building new ones across them.³¹⁵ It adopts a less rigid hierarchy in favor of a dynamic, flexible horizontal structure to meet the needs of new and constantly emerging (and similarly networked) threats. It takes a novel approach to formal authority in that netcentric intelligence professionals “give and take authority as necessary” in a highly decentralized environment with a common mission merged of law enforcement and intelligence agencies.³¹⁶ This principle is meant to deal with the contemporary and consistent pattern created when a terrorist leader is captured or killed and another arises to take their place. When a vacuum emerges in the leadership of terrorists’ ‘dark’ netcentric organizations, as the theory goes, there should be an adaptable

³¹⁴ “George W. Bush: Executive Order 13354—National Counterterrorism Center,” accessed February 4, 2018, <http://www.presidency.ucsb.edu/ws/index.php?pid=61448>.

³¹⁵ Goldsmith and Kettl, *Unlocking the Power of Networks*, 129, 138.

³¹⁶ Goldsmith and Kettl, 136, 142.

corresponding response from a 'bright' (or legal, state-centered) intelligence network.³¹⁷

Guided by the Executive Order creating the National Counterterrorism Center, a pre-criminal act/ pre-event doctrine demanded the “interchange of terrorism information among agencies,...between agencies and appropriate authorities of States and local governments” and the “protection of the ability of agencies to acquire additional such information.”³¹⁸ While netcentricity is worthwhile for some purposes, “[f]or many years, the sharing of intelligence and law enforcement information was circumscribed by administrative policies and statutory prohibitions.”³¹⁹ These divisions were meant as firewalls to protect individuals from federal intrusion and targeting in the wake of abuses in the 1960s and 1970s discussed in chapter two. However, the USA PATRIOT Act (2001) and other legislation cleared the legal hurdles, removing much of the “wall” of separation. The DOJ also changed the Federal Rules of Criminal Procedure allowing the release of counterintelligence or foreign intelligence information from grand jury investigations to other government agencies.³²⁰ Sharing was further

³¹⁷ Goldsmith and Kettl, 168.

³¹⁸ “Executive Order National Counterterrorism Center (Text Only),” accessed December 1, 2016, <https://georgewbush-whitehouse.archives.gov/news/releases/2004/08/text/20040827-5.html>.

³¹⁹ Best, “Homeland Security: Intelligence Support.”

³²⁰ Best Jr, Intelligence Information, 4.

“institutionalized in routine agency practice” through the 2004 Intelligence Reform and Terrorism Prevention Act.³²¹ In 2006, DHS made revisions to NIMS based on “best practices” and lessons learned which expanded the intelligence and investigations function,³²² to include the I/I function referenced in earlier pages. Nationalization of intelligence sharing across agency silos has been a slow process at times and not as effective as some would like, though officials note the dramatic difference since 9/11.³²³ It is a work in progress.

On the local front, the DHS Office for State and Local Law Enforcement (OSLLE) was created in 2007 by Congress on the recommendation of the 9/11 Commission to lead “coordination of DHS-wide policies related to state, local, tribal, and territorial law enforcement’s role in preventing, preparing for, protecting against, and responding to natural disasters, acts of terrorism, and other man-made disaster within the United States” and operate as the “primary liaison between DHS and non-Federal law enforcement agencies across the country.”³²⁴ OSLLE advises the Secretary of DHS on the issues, concerns, and recommendations of state, local, tribal, and territorial law

³²¹ Best Jr, 5.

³²² “NIMS Doctrine Supporting Guides & Tools, Background and Overview.”

³²³ Personal communication with fusion center official

³²⁴ “The Office for State and Local Law Enforcement | Homeland Security,” accessed December 1, 2016, <https://www.dhs.gov/office-state-and-local-law-enforcement>.

enforcement.”³²⁵ The OSLLE communicates with local law enforcement on DHS activities and initiatives including: “If You See Something, Say Something™”, the Blue Campaign (fights human trafficking),³²⁶ the Nationwide Suspicious Activity Reporting (SAR) Initiative (NSI), and the Countering Violent Extremism campaign (to identify root causes and generate counter-narratives).³²⁷ It interfaces with the DHS Office of Intelligence and Analysis (I&A) to coordinate intelligence gathering and sharing and with FEMA to gauge the appropriateness of terrorism-focused grants to state, local, tribal, and territorial law enforcement.³²⁸

All federal-local intelligence channels are routed to I&A. Fusion centers are one such channel and connect with DHS as the “primary conduit between frontline personnel, state and local leadership, and the rest of the Homeland Security Enterprise, filling a significant security gap identified by the 9/11 Commission.”³²⁹ Fusion centers differ from Joint Terrorism Task Forces (DOJ) in that they are typically, though not always, owned and operated by state and local authorities whereas JTTFs

³²⁵ “The Office for State and Local Law Enforcement | Homeland Security.”

³²⁶ “DHS State and Local Law Enforcement Resource Catalog - Osle-Resource-Catalog-Volumeiv-2-24-2016_1.Pdf,” accessed December 13, 2016, https://www.dhs.gov/sites/default/files/publications/osle-resource-catalog-volumeiv-2-24-2016_1.pdf.

³²⁷ “Countering Violent Extremism | Homeland Security,” accessed December 1, 2016, <https://www.dhs.gov/countering-violent-extremism>.

³²⁸ “The Office for State and Local Law Enforcement | Homeland Security.”

³²⁹ “About Fusion Centers | Homeland Security,” accessed December 1, 2016, <https://www.dhs.gov/state-and-major-urban-area-fusion-centers>.

are multi-jurisdictional partnerships managed by the FBI.³³⁰ Fusion centers appear to have a greater “responsibly to provide” information than JTTFs since their personnel have fewer security clearances, and they incorporate general public safety activities into their work, whereas JTTFs focus on terrorism and related investigations, in part, using data from localities. While fusion centers give information up the food chain, subjects indicate they do not receive as much in return.

At the top, the director of national intelligence (DNI) relies on intelligence agencies at all governmental levels, but is also authorized to buy intelligence from private data-mining companies.³³¹ In other words, DNI has the authority to transfer funds to “non–intelligence agencies that maintain systems to store and disseminate intelligence information.”³³² Public agency responsibly-to-provide data represents the doctrinal shift from the Cold War era “need to know” intelligence model which guided the IC’s work for more than 50 years and evidently kept agencies in problematic silos.³³³ Responsibly-to-provide is the implementation of a more collaborative, connect-the-dots, top-to-bottom and “netcentric”

³³⁰ “Fusion Centers and Joint Terrorism Task Forces | Homeland Security,” accessed December 1, 2016, <https://www.dhs.gov/fusion-centers-and-joint-terrorism-task-forces>.

³³¹ “Peter Thiel Turns Down a Senior Intelligence Role - The Atlantic,” accessed February 4, 2018, <https://www.theatlantic.com/politics/archive/2017/11/peter-thiel-doesnt-want-intelligence-advisory-post/547100/>.

³³² Best Jr, *Intelligence Information*, 8.

³³³ Goldsmith and Kettl, *Unlocking the Power of Networks*, 126.

intelligence work of the post-9/11 era. It is the sharing of information based on participants' "attribute-based access", project affiliation and clearance level – across agencies - truly a cultural sea change.³³⁴ Indeed, the Bush Administration sought to institute a new structure that ensured "information sharing was not just legally possible but institutionalized in routine agency practice."³³⁵

Thus localities are connected to the IC through regional fusion center collaborations, through JTTFs and directly to I&A, to which they provide pieces of local intelligence. However, cities also host another enforcement/ intelligence sub-agency, Homeland Security Investigations (HSI), which was formed within Immigration and Customs Enforcement (ICE) in 2010. It combined elements of ICE's previous Offices of Investigations, Intelligence and International Affairs.³³⁶ Significantly, its agents often work within local police departments, including in Santa Cruz, and are "assigned to cities throughout the United States and to offices around the world."³³⁷ HSI has broad legal authority to enforce federal statutes, addressing cybercrime, financial and narcotics violations,

³³⁴ Personal communication, January 4, 2018

³³⁵ Best Jr, *Intelligence Information*, 5.

³³⁶ "Homeland Security Investigations," accessed December 1, 2016, <https://www.ice.gov/hsi>.

³³⁷ "Homeland Security Investigations."

transnational crime and public safety matters generally.³³⁸ As one officer put it, “they chase the head, we chase the tail.”

3.5 Conclusion

Everyday bureaucrats and officials of the national security state, from the cop on the beat to the Secretary of Homeland Security, give meaning to American society’s understanding of security. Through practice, rhetoric and policymaking, the post-9/11 regime has evolved largely as predicted, into a vast amorphous operation.

While not all approaches to centralized domestic security in the face of terrorism survived the early days of the post-9/11 era, such as the color-coded terror alerts of the Bush Administration,³³⁹ a more nuanced strategy has evolved to effectively integrate agencies across the federalist spectrum through national policy. These include weaponizing local departments according to national objectives through anti-terror funding opportunities and forming state and federal information hubs which harness technologies to track and target potential suspects and aggregate locally-derived information into readily accessible and searchable data

³³⁸ “Homeland Security Investigations.”

³³⁹ Taylor Grossman and Amy B. Zegart, “The Problem of Warning: Homeland Security and the Evolution of Terrorism Advisory Systems,” 2015, 6, 19, <http://cisac.fsi.stanford.edu/file/219417/download?token=Q4uHkRTH>.

points. Information is accessed by the federal government, including by agencies such as ICE, the FBI and the NSA, with relatively little resistance from local agencies and, as this study finds, with little knowledge of local community members. Connecting-the-dots remains a guiding principle and continues to be considered the primary failure contributing to 9/11, including among intelligence practitioners. However, chapter five will address some ambiguity and resistance among citizenry to breaking the vertical barriers between domestic and federal public safety work.

The pre-existing autonomous agencies ultimately engulfed by DHS to formulate the one agency, under “one” mission to prevent terrorism, were already rife with turf wars, distinct cultures and traditions. Agency old-guard were more interested in holding onto their existing stature and missions. Redundancies remain in the agency, controls are lacking and morale is the lowest of federally ranked departments.³⁴⁰ The gaps include reluctant information sharing among DHS agencies and clearance denials to local law enforcement agencies that prevent their full use of federally aggregated information.³⁴¹ Funding shortfalls for effectively predicting

³⁴⁰ “Key Issues: DHS Management - High Risk Issue,” accessed December 13, 2016, http://www.gao.gov/key_issues/dhs_implementation_and_transformation/issue_summary.”

³⁴¹ Homeland Security Committee, *State of Homeland Security Address*.

and preventing all terrorism exist as well. For DHS, instituting a seamless and consolidated plan is a work in progress.

Yet, the recombination and reorientation of Agency structures has made game-changing departures from the pre-9/11 era. One is the push for a nationalization of law enforcement policy which has gradually weaponized departments with equipment such as armored personal carriers and provided the linking apparatuses and venues that move local police agencies towards deeper engagement in the War on Terror. Professional training of federal agents and local police in the use of War resources is also significant and academia is another driver, streamlining a new mindset and mission for police officers nation-wide. The national strategy of connect-the-dots is considered “common knowledge” among law enforcement academics and practitioners, from those attending FBI National Academy in Quantico, Virginia³⁴² to police-scholars at the Naval Postgraduate School in Monterey, California. By now, police have internalized that they are responsible to the federal government for not only responding to terrorism disasters, but preventing them through investigation and intelligence gathering.³⁴³

³⁴² Scott W. Phillips, “FBI -- Police Militarization,” *FBI Law Enforcement Bulletin*, August 2017, 2.

³⁴³ Green, “A Different Shade of Blue,” 10.

While police militarization was not created by 9/11, specific task “responsibilization”³⁴⁴ from the feds to police has made these actors and their constituents less locally-autonomous. Key decisions about militarization are thereby flattened in the federalist structure of government accountability. Former FBI Director Jim Comey characterized the shift in multiagency collaboration: “[t]he way we use local police is probably the biggest single change. All in all, I think we really are a well-oiled anti-terror machine.”³⁴⁵ The next chapter will explore the weaponization of local departments through armored vehicle distribution and the significance of this equipment to the process of formulating post-9/11 national security federalism.

³⁴⁴ Jon Coaffee, “Rescaling and Responsibilising the Politics of Urban Resilience: From National Security to Local Place-Making,” *Politics* 33, no. 4 (December 1, 2013): 243, <https://doi.org/10.1111/1467-9256.12011>.

³⁴⁵ Brill, “15 Years After 9/11, Is America Any Safer?”

CHAPTER 4: NATIONALIZING (AND MILITARIZING) THE POLICE AND DHS PROGRAMS TO SUPPORT LOCAL LAW ENFORCEMENT

"Our department got all the UASI grants – 10s of millions of dollars to get militarized – department spending was an enormous overreaction."

"Locals could get prolific amounts of equipment from the federal government but couldn't control [track] it."

"The [DHS] source [for the BearCat] allowed more closed-door dealings between the police department, the feds and state."

By 2002, the George W. Bush Administration had boldly demarcated a new set of priorities for domestic law enforcement, defining homeland security as “a concerted national effort to prevent terrorist attacks within the United States, reduce America’s vulnerability to terrorism, and minimize the damage and recover from attacks that do occur.”³⁴⁶ The October 2001 USA Patriot Act had already placed state and local police at the frontlines of this effort, though no one knew at the time exactly what it would entail or how these aims would translate into local policy.³⁴⁷ In the first post-9/11 budget document issued in 2003 by the Department of Homeland Security, the Bush Administration proposed,

³⁴⁶ “National Strategy for Homeland Security July 2002,” 2, accessed October 14, 2018, <https://www.dhs.gov/sites/default/files/publications/nat-strat-hls-2002.pdf>.

³⁴⁷ Peter Eisinger, “Imperfect Federalism: The Intergovernmental Partnership for Homeland Security,” *Public Administration Review* 66, no. 4 (August 7, 2006): 539, 541, <https://doi.org/10.1111/j.1540-6210.2006.00614.x>.

“[w]e will consider new organizational models for governing that are appropriate for the new century.”³⁴⁸ Building first-responder capability through equipment resources³⁴⁹ would constitute such a shift in what some have called “a partial federalization of local law enforcement.”³⁵⁰ A former Police lieutenant commander also recognized the phenomenon as a “federalization” through distribution of law enforcement agency resources.³⁵¹

Homeland security policies after 9/11 created a new front in the War on Terror, a confrontation fought on city streets and in local communities in the name of ‘counterterrorism’. The War, though rarely about arming to fight actual terrorism, became visible to ordinary Americans through the proliferation of new military-style vehicles. These were indeed new – not used - military gear, specifically developed for police. They made cameo appearances even in very small cities from Santa Barbara, California to Keene, New Hampshire³⁵² and just about

³⁴⁸ “2003 Securing the Homeland Strengthening the Nation,” 3, accessed April 19, 2018, https://www.dhs.gov/sites/default/files/publications/homeland_security_book.pdf.

³⁴⁹ “2003 Securing the Homeland Strengthening the Nation,” 11.

³⁵⁰ Keri Blakinger/Houston Chronicle, “Military Surplus for U.S. Cops ‘Saved Lives’ after Hurricane: Houston Chief,” The Crime Report, January 12, 2018, <https://thecrimereport.org/2018/01/12/military-surplus-for-u-s-cops-saved-lives-after-hurricane-says-houston-chief/>.

³⁵¹ “War Comes Home,” American Civil Liberties Union, 18, accessed May 30, 2018, <https://www.aclu.org/issues/criminal-law-reform/reforming-police-practices/war-comes-home>.

³⁵² Jenna Tico, “Unleash the Beast,” accessed March 26, 2018, <https://www.independent.com/news/2010/jul/15/unleash-beast/>; “Man Arrested after Hours-Long Keene Incident to Be Arraigned Today | Local News | SentinelSource.Com,” accessed September 14, 2018, <https://www.sentinelsource.com/news/local/man-arrested-after-hours-long-keene-incident->

everywhere in between. Through an analysis of public announcements, cities and counties continue to acquire them (or replace them) at a rate of about two per month. Other equipment began to fill the preparedness arsenal too: unmanned aerial vehicles (drones), remote-controlled robots and much more.³⁵³ As the domestic policies of the War on Terror continue to mature and take shape, citizens are asked to consider military policy through a domestically-centered lens, beyond the traditional internationally-located battlefield, a lens filtered and mediated through American laws and institutions. Albeit so much more than a local crime, the collective response to the horrific event of September 11, appears to provide clear cause to question the domestic versus international distinction in the formation of war and national security policy. Domestic application of martial force in the name of counterterrorism is carried out by local law enforcement; it is nonetheless a warfighting action under the Bush Doctrine of preemptive war.³⁵⁴

to-be-arraigned/article_63aff9af-61e8-5a37-8ba4-9c9cc06a5ee8.html; "John Oliver Says Keene, N.H., Officials Wanted Armored Vehicle to Thwart Terrorism at Pumpkin Fest | PolitiFact New Hampshire," accessed September 14, 2018, <https://www.politifact.com/new-hampshire/statements/2014/aug/20/john-oliver/right-there-application/>.

³⁵³ "Fiscal Year 2008-2015 Law Enforcement Terrorism Prevention Activity Funding," n.d., 221.

³⁵⁴ This, in terms of pre-emptive action, required Americans to be forward-looking towards threats that had not yet materialized.

As the product of a post-9/11 policy regime, used here to mean “governing arrangements for addressing policy problems,”³⁵⁵ the proliferation of new armored personnel carriers in towns and cities emanated from a bias towards certain assumptions about the nature of the War. First, was the idea that terrorists lurked among us, second, that providing military equipment to localities was an effective way to fight terrorism (if it existed) nationally, third, that every state and locality should participate in the War and receive funding to do so. In harnessing the political chaos after the attacks, the Bush Administration capitalized on its agenda-setting power to guide the federal government to act. Using rhetorical speech acts – repeated language, material practices and policy implementation³⁵⁶ - novel legal principles, and a framing of the terrorism problem as one of national scope, the federal government (led by the Executive) operated as a social force for change in nation-wide security policy formation. This chapter will claim executive-led security policy acts as an external force on policy at the local level, introducing wide-spread use of new heavy machinery. The alignment of biases towards militarization³⁵⁷ and the adoption of the assumptions mentioned above at

³⁵⁵ Peter J. May and Ashley E. Jochim, “Policy Regime Perspectives: Policies, Politics, and Governing,” *Policy Studies Journal* 41, no. 3 (2013): 428, <https://doi.org/10.1111/psj.12024>.

³⁵⁶ Lauren Martin, “Security,” *Wiley-Blackwell Companion to Political Geography*, Ed.s John Agnew, Virginie Mamadouh, Anna Secor, Joanne Sharp. Wiley and Sons: West Sussex, UK., 2015, 6, <https://www.academia.edu/15238399/Security>.

³⁵⁷ Daniel Wirls, “Military Policy as an Arena of Public Policy” (2015), 5, 11, 27, Note 9.

both federal and local agencies ensured the institutional changes stuck and have endured.

Likeminded local leaders readily embraced participation in a greater, national counterterrorism regime because it meant more resources to their departments' arsenal and personnel. Legal gaps emerged, however, where the wholesale logistical linking of federal and local "war" strategy resulted in curious heavy equipment and a reorientation of personnel to use it for terrorism. These legal gaps left accountability wanting as no cities had the permanent infrastructure to critically examine the new gear and funds. Decisions were largely left to bureaucratic officials in a vacuum. In addition, no complete federal record of funds distribution for new armored vehicles is available, for example, nor an accounting of whether these were used to fight terrorism rather than simply deal with routine criminality.

Armored personnel carriers seem evermore integral to the modern battlespace in US cities and they are specifically tailored to urban warfare internationally. This chapter examines the decision-making process of local and regional governments when they pull the trigger on acquiring an armored vehicle and the pre- and post-9/11 programmatic funding available to do just that. The chapter singles out armored law enforcement vehicles because they are expensive, at over a quarter of a million dollars

each, and represent a dramatic budgetary decision. This is a significant purchase for any city or county and a weighty taxpayer expense, whether it is born by local residents, paid for directly by them, or received through a federal agency and therefore paid indirectly by the larger pool of American taxpayers. Vehicles are also symbolic for several reasons; they carry social meaning for community members, both visually conveying the power of the state's coercive capacity, and posing a potential physical threat to individuals or crowds being dispersed, corralled or confronted by them. These vehicles carry significant meaning for the users of the apparatus too. Having access to, and the certified ability to operate armored vehicles as a tactical response tool, operators have a particular connection to the US military as domestic force-multipliers in a unique field of battle. That is, police officers themselves view this coercive tool as militaristic.

Certainly, this is not to say that military and military-style equipment had not been available to the nation's police departments pre-9/11. Before 9/11, police could apply for and receive items the Defense Department's logistics agency calls "high visibility property" such as High Mobility Multipurpose Wheeled Vehicles or "Humvees" and Mine-

Resistant Ambush Protected vehicles or MRAPs.³⁵⁸ Other equipment such as small arms, body armor and gas masks are readily available in addition to sand bags and first aid kits. Since 1997, the Department of Defense's Law Enforcement Support Office has facilitated the transfer of more than \$6.8 billion worth of such property. In 2017 alone, \$504 million in materials was passed down to law enforcement agencies.³⁵⁹ But Defense is not the sole supplier of vehicles, artillery, drones and much more. The Department of Justice and Treasury have contributed as well. What was new after 9/11 was the wholesale addition of funding to localities to purchase new vehicles directly from private companies.

While the chapter will discuss other pre-9/11 programs and legislation animating equipment transfers, Department of Homeland Security (DHS) grants are highlighted. Grants illustrate the post-9/11 relationship between national and subnational governments – centered on national security – due to the timing and the post-9/11 inception of DHS itself (as explored in chapter 3) complete with the agency's bag of incentives to comply with its national mandate.

³⁵⁸ "Tactical Vehicles," accessed October 16, 2018, <http://www.dla.mil/DispositionServices/Offers/Reutilization/LawEnforcement/Vehicles.aspx>.

³⁵⁹ "Defense Logistics Agency's Law Enforcement Support Office Transfers Excess Department of Defense Property to Federal, State, and Local Law Enforcement Agencies within the United States and Its Territories," accessed October 15, 2018, <http://www.dla.mil/DispositionServices/Offers/Reutilization/LawEnforcement/PublicInformation/>.

This chapter will proceed in seven parts. First, it will examine the legislation and mandates driving the dynamic, altered relationship between cities and the federal government. Some contours of the new relationship were formed prior to 9/11 while other linkages and programs have been re-purposed for the War on Terror. Other laws and mandates are completely new, reflecting the militarized footing of a post-9/11 national security federalism. Next, I will review Defense Department programs and other federal agencies contributing to local arsenals. Contrasted with these, a look at DHS' role demonstrates the significance of its contribution to cities. Honing in on the grants, I will trace a vehicle's purchase through a federal agency to the hands of local actors. Next, consideration of decision-points and other factors show why a city procures an armored vehicle. Following this discussion, the vehicles themselves will be examined: their capabilities and the role of standardization for the ease of sharing equipment among localities, per funding mandates. The chapter briefly explores the demand for armored vehicles, including the types of law enforcement agencies who apply and the mechanisms available to them to acquire federal funding for acquisition. Finally, the chapter concludes with a discussion of the post-9/11 relationship between the Executive branch and its agencies, specifically, and localities across the US. It argues that the connection has

grown closer at the expense of local residents' consent for use of their police.

The chapter will unpack elements of what makes vehicles significant to cities and regions. It will map this meaning onto the geopolitical distribution of vehicles which is regionally conceived by the federal government for organizational and strategic reasons. Federal programs contextualize state and local law enforcement agencies (LEAs) as part of regionally grouped command units, aligning with economic and demographic understandings of these sites as places to be securitized. The Urban Area Security Initiative (UASI) program, for example, provides funding for high-threat, high-density urban areas and not merely to cities or towns.

Several case cities and counties were reviewed regarding their vehicle acquisitions to build an understanding of how and why these armored vehicles are added to police inventory. A central claim here is that these have become part of the urban landscape in ways they were not before the 9/11 War on Terror nation-wide strategy took shape. The information that textures this inquiry is derived from documents, public meetings and background conversations with law enforcement executives, state, local and national bureaucrats in the field of emergency management and with policymakers who took part in (or currently take

part in) these debates or who have been in a position to vote to bring funds and vehicles to their communities.

The emerging ubiquity of new vehicles may be explained by a number of factors. The impetus for vehicles specifically, and the sources of money to obtain them, seem to vary little. Sub-national governments including states, counties, cities and towns acquire them formally³⁶⁰ in accordance with national priorities for national security. Access to data about vehicles is limited, including their specific capabilities and costs. Laws authorizing this particular method of weaponizing cities falls under federal guidelines but some cities' ordinances attempt to dictate reporting and deployment. What emerges is an image of post-9/11 national policy implementation whereby the practice of armored vehicle procurement constitutes a new relationship between local actors, federal agencies and weapons purveyors. A broader security environment appears, one that connects the mere purchase of heavy armaments, at the local level, to a larger trend of Executive-centered power consolidation at the disposal of the President and agencies under their control.

In the urban context, vehicles are interesting for three reasons. First, they appear to be available to virtually all cities and counties who apply and express a need for them, in the context of regional pressures

³⁶⁰ Applicants must identify a "nexus to terrorism" even if departments give other reasons publicly.

and security partnerships. In terms of vehicle distribution, there does not appear to be a serious distinction between large and small localities, rural or urban communities or between those with high or low crime rates. Secondly, the hardware is truly expensive. At upwards of \$350K a piece, they represent an expense to the taxpayer with very little debate about the opportunity costs of the acquisition. At first glance, it fits the pattern of federal budgetary outlays to police and the government's socio-economic shift from a welfare to a warfare state since the 1970s,³⁶¹ but at the local level the premium on heavy, high-tech weapons without obvious need is notable. A look at the agendas of city and county meetings at which vehicle acquisitions reside reveals a number of other locally-driven priorities could substitute for such expensive gear. Thirdly, and perhaps most significantly, armored vehicles represent a shift in practitioners' understanding of their own power vis-a-vis their communities.

4.1 Legislation and Mandates Driving National Security Downward

The Homeland Security Act of 2002 established the Department of Homeland Security (DHS); it simultaneously devolved responsibility for fighting terrorism, in large part, to local governments stating the

³⁶¹ Joy James, ed., *Warfare in the American Homeland: Policing and Prison in a Penal Democracy*, 1st Edition edition (Durham: Duke University Press Books, 2007), 208.

“primary responsibility for investigating and prosecuting acts of terrorism shall be vested not in the Department, but rather in federal, state, and local law enforcement agencies with jurisdiction over the acts in question.”³⁶² It created the Office for State and Local Government Coordination, mandating a closer relationship between local, state and national governments to “ensure adequate planning, equipment, training, and exercise activities,” to prevent terrorism and reduce domestic vulnerability to it.³⁶³ Initially, the ability for local agencies to fulfil these mandates was funded through a stand-alone grant called the Law Enforcement Terrorism Prevention Program (LETPP). Passage of the Implementing Recommendations of the 9/11 Commission Act of 2007 later amended the Homeland Security Act, folding LETPP into a set of grants called the Homeland Security Grant Program. The combined grants linked terrorism prevention and interdiction with emergency preparedness, as explored in the previous chapter.

From these broad counterterrorism mandates, states and local governments developed variations in their interpretation of the responsibility to fight terrorism. However, all have moved in the general

³⁶² “Homeland Security Act of 2002,” SEC. 101. EXECUTIVE DEPARTMENT; MISSION., accessed October 17, 2018, https://www.dhs.gov/sites/default/files/publications/hr_5005_enr.pdf.

³⁶³ “Homeland Security Act of 2002,” SEC. 102. SECRETARY; FUNCTIONS.

direction of fortification through target hardening³⁶⁴ - or embedding protective security into the built fabric of cities³⁶⁵ – with the assumption that any given city has defensive borders or is somehow the frontlines³⁶⁶ of an ill-defined war. It could include permanent structures, temporary barriers, entry check-points, new machinery such as drones and robots, high-definition aerial cameras to track urban residents’ movement, gear or personnel to direct traffic flow and prevent pedestrian access to critical infrastructure. National preparedness guidelines recommending such measures function as a stick, as well as a carrot. One of the pressures on cities to adopt local anti-terror policies and obtain capabilities-enhancing equipment is a threat to their emergency management funding. In 2003, the Bush Administration began to flesh out the 2002 Act in real terms, issuing Presidential Directive 8³⁶⁷ requiring DHS to “establish a mechanism for ongoing coordination to provide strategic direction for, and oversight of [a] new system” of federal preparedness.³⁶⁸ Adoption of

³⁶⁴ As opposed to Soft Targets and Crowded Places (ST-CP) which FEMA defines as “those locations or environments that are easily accessible to large numbers of people on a predictable or semi-predictable basis that have limited security or protective measures in place” (FEMA Preparedness Grants Manual, February 2021).

³⁶⁵ Jon Coaffee, “Protecting Vulnerable Cities: The UK’s Resilience Response to Defending Everyday Urban Infrastructure,” *International Affairs* 86, no. 4 (July 1, 2010): 947, <https://doi.org/10.1111/j.1468-2346.2010.00921.x>.

³⁶⁶ Ryan Bishop, Gregory Clancey, and John W. Phillips, eds., *The City as Target* (Abingdon, Oxon ; New York, NY: Routledge, 2012), 7.

³⁶⁷ “National Security Presidential Directives [NSPD] George W. Bush Administration,” accessed February 2, 2018, <https://fas.org/irp/offdocs/nspd/index.html>.

³⁶⁸ “NIMS Doctrine Supporting Guides & Tools, Background and Overview,” accessed December 6, 2016, https://www.fema.gov/pdf/emergency/nims/NIMS_core.pdf.

federal protocols would determine whether a state or local department or organization would receive funding.³⁶⁹ The implications for local governments' to fortify anti-terrorism capacity came with the suggestion that their general emergency and disaster preparedness funding could be jeopardized. By 2004, the federal National Incident Management System (NIMS) was promulgated throughout the nation as a streamlining incident-management protocol for states and localities to follow. It was the first-ever standardized approach to incident management containing requirements for total national "institutionalization" by sub-national governments. Among its many functions, NIMS provides for equipment acquisition and certification standards in personnel training.³⁷⁰ Its purpose was to unify federal, state, territorial, tribal and local agencies into one coordinated terrorism response effort. Also linked to the NIMS were new preparedness standards for natural and national disasters.³⁷¹ Governors, not wanting to jeopardize funding, formally adopted NIMS by

³⁶⁹ Brian Michael Jenkins and Frances Edwards-Winslow, "Saving City Lifelines: Lessons Learned in the 9-11 Terrorist Attacks" (Mineta Transportation Institute, College of Business, San José State University, 2003), 5, No. 20.

³⁷⁰ "NIMS Compliance State of South Carolina," accessed March 23, 2018, <http://www.scemd.org/resources/courses-and-conferences>.

³⁷¹ Beyond Bush's Directive, Homeland Security Presidential Directive (HSPD)-5 which commanded the creation of NIMS, compliance by cities was further codified into law in the Intelligence Reform and Terrorism Prevention Act signed by President Bush on December 17, 2004.

issuing Executive Orders of their own directing its implementation throughout their states.³⁷²

NIMS incentivized a standardization of the “command and control” function of states, but it also forced a national evaluation of local capabilities and pegged federal funding for such things as highways on the full adoption of NIMS standards.³⁷³ Gaps in terrorism prevention preparedness could be isolated through the NIMS adoption process and attendant funding opportunities targeted at resolving them. Funding sources like Homeland Security grants could be sought and used to address cities’ capacity gaps with armored vehicles, specialized federal training and other tools and equipment made available by the very same federal authorities.³⁷⁴

In all US states, the State Administrative Agencies (SAAs) are the designated point of contact presiding over both the state’s full adoption of the National Incident Management System and the implementation of War on Terror policies in the form of requirements for use of funds. SAAs are the agencies, usually state offices of emergency preparedness,

³⁷² “NIMS Compliance State of South Carolina.”

³⁷³ “NIMS or NIIMS?,” accessed March 2, 2018, <http://www.firerescuemagazine.com/articles/print/volume-1/issue-3/command-leadership/nims-or-niims.html>.

³⁷⁴ “Senate Oversight of Federal Programs for Equipping State and Local Law Enforcement Agencies,” accessed March 25, 2018, <https://www.mccaskill.senate.gov/imo/media/doc/EquippingPoliceHearingBackground.pdf>.

responsible for managing DHS preparedness grant funds and are the official Federal Emergency Management Agency (FEMA) grantee.³⁷⁵ Since 2007, these agencies must pass-through at least 80% of the money to cities and must prove that at least 25% of the 80% of combined Homeland Security Grant Program funds allocated under SHSP and UASI are “dedicated to law enforcement terrorism prevention activities, as defined in the Homeland Security Act of 2002.”³⁷⁶ In practical terms, these terrorism prevention activities³⁷⁷ are “information sharing and analysis, target hardening, forensics and attribution activities, screening, search and detection efforts, as well as the interdiction and disruption of potential terrorist events.”³⁷⁸ Thus, states are tasked with management and implementation of War on Terror policies inside the homeland, a unique battlespace colored by a federalist legal structure. They do this by partnering closely with the federal government, its agencies and its contractors, including for pre-emptive interdiction. Funding for vehicles,

³⁷⁵ Spencer Ackerman, “US Police given Billions from Homeland Security for ‘tactical’ Equipment,” the Guardian, August 20, 2014, <http://www.theguardian.com/world/2014/aug/20/police-billions-homeland-security-military-equipment>.

³⁷⁶ “Law Enforcement Terrorism Prevention Activities Bulletin 2016,” 1, accessed March 18, 2018, [https://www.fema.gov/media-library-data/1469797432968-a7663216b7c644f1b9c890a8294aae68/IB_412_\(LETPA\)_3.pdf](https://www.fema.gov/media-library-data/1469797432968-a7663216b7c644f1b9c890a8294aae68/IB_412_(LETPA)_3.pdf).

³⁷⁷ “6 U.S. Code § 607 - Terrorism Prevention,” LII / Legal Information Institute, accessed March 9, 2018, <https://www.law.cornell.edu/uscode/text/6/607>. “Homeland Security Organization, Terrorism prevention, Homeland Security Grants”. Authorized per 6 U.S.C. §607 [terrorism prevention]

³⁷⁸ “Written Testimony of FEMA for a House Oversight and Government Reform Subcommittee on Transportation Security, and Subcommittee on National Security Hearing Titled ‘Oversight of the Urban Area Security Initiative Grant Program.’”

therefore, comes directly from the national government to cities who are induced to participate in the War on Terror with the aid of state middlemen. This occurs when cities pull down funds for this purpose, through competitive grant proposals, contingent on local compliance with national security-based standards, training, tactics and practices.

4.2 DoD Connection through Program 1033 and Other Programs

Facilitating the transfer or procurement of weapons to states and localities to fill gaps in a national strategy is not new. However, the purpose –to fight the War on Terror– was novel. Other programs and the legislation that allowed for weapons transfers existed pre-9/11. Most relate to the Drug War or general public safety and continue today. Thus, DHS is not the only source of equipment and funding from the federal government to law enforcement agencies as several sources pre-date its creation. Programs administered by the Departments of Justice (DOJ), Defense (DoD), Treasury, and the Office of National Drug Control Policy (ONDCP) provided almost \$18 billion in funding and other resources for equipment to local and state agencies between 2009 and 2014.³⁷⁹ The

³⁷⁹ “Obama 2015 Review Federal Support for Local Law Enforcement Equipment Acquisition,” 3, accessed March 25, 2018, https://obamawhitehouse.archives.gov/sites/default/files/docs/federal_support_for_local_law_enforcement_equipment_acquisition.pdf.

Department of Justice, Homeland Security and the ONDCP have funded new equipment purchases directly, the Department of Defense coordinated excess, old military equipment transfers as well as some new equipment purchases at bulk prices through the Defense Logistics Agency and the 1033 Program. Justice and Treasury also funded equipment through the “equitable sharing” component of federal asset forfeiture programs,³⁸⁰ repurposing proceeds gained through or used to facilitate federal crimes.³⁸¹

The federal government has also granted money to local police departments for hiring and training law enforcement personnel. To encapsulate from chapter two, President Johnson created the Office of Law Enforcement Assistance in 1965 to fund police training and experimental surveillance techniques in low-income communities.³⁸² This became the Law Enforcement Assistance Administration (LEAA) in 1968 after he launched the War on Crime. Building on this, Nixon - with help of Congress - used his “law-and-order” campaigns to champion New Federalism and expand the carceral state through the nation-wide use of “preventative detention” starting in 1970.³⁸³ Reagan embraced War on

³⁸⁰ “Obama 2015 Review Federal Support for Local Law Enforcement Equipment Acquisition,” 3.

³⁸¹ “Asset Forfeiture Program,” February 5, 2015, <https://www.justice.gov/afp>.

³⁸² Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America*, 1 edition (Cambridge, Massachusetts: Harvard University Press, 2016), 56.

³⁸³ Hinton, 157.

Crime policies, taking them a step further with the War on Drugs. Under Reagan, the Pentagon first began training and transferring surplus weapons to police, facilitated by the Military Cooperation with Law Enforcement Act of 1981. The Act amended the Posse Comitatus Act of 1878, allowing the Pentagon to share information on the availability of weapons and equipment with local police.³⁸⁴ In 1990, this became section 1208 of the National Defense Authorization Act (NDAA), accelerating the military's role in domestic drug interdiction with the ability to transfer weapons, but only on a temporary basis.

Then in 1997, section 1033 of that year's NDAA bestowed permanent authority on the Secretary of Defense to transfer materials to other federal and state agencies for law enforcement. Gear for arrests and crowd control were sent in addition to weapons and tactical vehicles with "significant military capabilities."³⁸⁵ From 2013 to 2017, roughly half a billion dollars in equipment has been transferred to localities each year under this program.³⁸⁶ While 11,000 agencies registered with the Law Enforcement Support Office (LESO), giving them access to Program 1033 equipment, roughly 8,000 localities actually procured equipment through

³⁸⁴ Stephen P. Halbrook, "The Posse Comitatus Act, the Constitution, and Military Enforcement of Drug Laws," 1984, 3, http://www.stephenhalbrook.com/law_review_articles/posse-comitatus.pdf.

³⁸⁵ Else, "The '1033 Program,' Department of Defense Support to Law Enforcement," 3. NDAA 1990, section 1208 became 1997 section 1033.

³⁸⁶ Joe D. Manous, "Critical Infrastructure—Preparing for the 'Long Haul'" (American Society of Civil Engineers, 2015), 24, <https://doi.org/10.1061/9780784479162.226>.

LESO, spanning all 50 states and US territories.³⁸⁷ Some of the gear is mundane such as office accessories, however other items are considered ‘controlled’ like weaponized (or weapon-ready) aircraft and vehicles. The Defense Logistics Agency, which administers the program, maintains a database of equipment transfers dating back to 1991 accounting for every state and US territory, queryable to a single item of gear such as a first-aid kit worth \$17.14.³⁸⁸ Yet a 2017 GAO study found lax practices by the LESO, including approving a fictitious agency to participate in the 1033 program, making no effort “to verify the legitimacy of [the GAO’s] application or to discuss establishing a MOU with [the GAO’s] agency.”³⁸⁹ Accounting practices had shifted in 2013, devolving responsibility to identify and track which agencies receive gear to state coordinators and law enforcement agencies. Inquiries by this researcher to state agencies resulted in non-queryable, inconsistent and incomplete records.

The Department of Justice (DOJ) is a reliable source of federal funding for local police agencies and one they commonly turn to for personnel and other grants amid limited city budgets. The DOJ supports

³⁸⁷ Else, “The ‘1033 Program,’ Department of Defense Support to Law Enforcement,” 3; “1033 Program FAQs,” accessed October 17, 2018, <http://www.dla.mil/DispositionServices/Offers/Reutilization/LawEnforcement/ProgramFAQs.aspx>.

³⁸⁸ “Public Information,” accessed October 15, 2018, <http://www.dla.mil/DispositionServices/Offers/Reutilization/LawEnforcement/PublicInformation/>.

³⁸⁹ “DOD EXCESS PROPERTY: Enhanced Controls Needed for Access to Excess Controlled Property July 2017,” 20, accessed October 15, 2021, <https://www.gao.gov/assets/gao-17-532.pdf>.

the Edward Byrne Memorial Justice Assistance Grant Program (JAG). Byrne JAG was established by the Consolidated Appropriations Act of 2005 and is administered by the Bureau of Justice Assistance (BJA).³⁹⁰ Cities receive Byrne JAG grants for officer hiring and innovative projects related to reducing crime. The program also approved the funding of seven armored vehicles from 2005 to 2014.³⁹¹ Heavy vehicles are “controlled property” on the Department of State Munitions Control List (or Department of Commerce Control List) for “military-designed” equipment. These particular purchases required a waiver which calls upon the requesting agencies to cite major safety concerns in a specific local area to warrant an armored vehicle.³⁹² Waivers such as these have the potential to provide a mechanism of accountability and a way to track armament transfers. However, it is unclear which entity: Congress, the DOJ, Executive watch-dog groups, or non-profit organizations at the state or local level provides, or would provide, such oversight.

Illustrations of accountability may be found in the level of transparency in legislated programs themselves and in the administration of the funding application processes. All Byrne JAG applications for vehicles and other types of equipment such as small arms, night vision

³⁹⁰ “Obama 2015 Review Federal Support for Local Law Enforcement Equipment Acquisition,” 10.

³⁹¹ *Ibid.*, 11.

³⁹² *Ibid.*, 11.

goggles and grenades must be made viewable to local or state elected, or designated bodies, but approval from those democratic bodies is not required, “nor is any type of public hearing unless state/local law requires one.”³⁹³ The Community Oriented Policing Services (COPS) program, another major source of hiring and training funds, is also located in the Justice Department. In 2015, all COPS programs had disallowed funding requests for tactical vehicles and non-standard issue weapons.³⁹⁴ Such considerations and restrictions were loosened for both programs under the Trump Administration, just as they had been for Program 1033, with an immediate impact on urban policy.³⁹⁵

4.3 The Difference Homeland Security Makes

Homeland Security grants differ in the sense that these relatively new funds for law enforcement can be interpreted and used broadly by local agencies, to address broad project areas, aimed at developing anti-terrorism capacity. The funding via DHS grants is only loosely tied to performance, is plagued with redundancy and lacks publicly-available

³⁹³ “Obama 2015 Review Federal Support for Local Law Enforcement Equipment Acquisition,” 10.

³⁹⁴ “Obama 2015 Review Federal Support for Local Law Enforcement Equipment Acquisition,” 12.

³⁹⁵ “A Closer Look at What President Trump’s Military Surplus Executive Order Does,” Congressman Anthony Brown, September 2, 2017, <https://anthonybrown.house.gov/media/in-the-news/closer-look-what-president-trump-s-military-surplus-executive-order-does>.

reporting mechanisms for tracking and accountability.³⁹⁶ One effect of this difference appears to be the flexibility it affords local agencies in terms of allowable activities and equipment. Given the expansiveness of the DHS remit under the rubric of the War on Terror and the malleable requirements for these grants, cities and states use these funds in significantly different ways in response to national and international events. Connections among federal staff become important in facilitating grants, including the linkage between Homeland Security and Defense with regards to weapons procurement and distribution inside the US.

The Secretary of Homeland Security is now part of the list of individuals the Defense Secretary must consult, as appropriate, to implement weapons transfer provisions.³⁹⁷ Greater synergy among Secretaries regarding weapons transfers to cities via Homeland Security, Defense and Justice is significant because the degree of separation

³⁹⁶ U. S. Government Accountability GAO, "Urban Area Security Initiative: FEMA Lacks Measures to Assess How Regional Collaboration Efforts Build Preparedness Capabilities," no. GAO-09-651 (July 2, 2009), <https://www.gao.gov/products/GAO-09-651>; U. S. Government Accountability GAO, "National Preparedness: FEMA Has Taken Steps to Strengthen Grant Management, But Challenges Remain in Assessing Capabilities," no. GAO-18-512T (April 23, 2018), <https://www.gao.gov/products/GAO-18-512T>; U. S. Government Accountability Office, "Homeland Security Grant Program: Additional Actions Could Further Enhance FEMA's Risk-Based Grant Assessment Model," no. GAO-18-354 (September 6, 2018), <https://www.gao.gov/products/GAO-18-354>.

³⁹⁷ "10 U.S. Code § 2576a - Excess Personal Property: Sale or Donation for Law Enforcement Activities | US Law | LII / Legal Information Institute," accessed March 29, 2018, https://www.law.cornell.edu/uscode/text/10/2576a?qt-us_code_temp_noupdates=0#qt-us_code_temp_noupdates. Subsection (a)(1)(A). Pub. L. 114-92, § 1052(1)(A), border security was added. Others on the list are: Director of National Drug Control Policy - a position created by the Anti-Drug Abuse Act of 1988 and High Intensity Drug Trafficking Areas (HIDTA) program - and the Attorney General.

between Executive top brass and local personnel is made closer as it is mediated through old and new funding streams. By weaving together a variety of funding sources, the federal and local police agencies can pick and choose the most accessible and politically feasible streams, to achieve their shared tactical goals. In 2014, while much attention was paid to Program 1033 transfers to the police department in Ferguson, Missouri³⁹⁸ (including Ferguson's possession of two High Mobility Multipurpose Wheeled Vehicles or "Humvees") less scrutiny was directed at its DHS-facilitated purchases of a Lenco Ballistic Engineered Armored Response Counter Attack Truck (BearCat) by that department.³⁹⁹ The Humvees were clawed back by Defense under pressure from the public and the Obama Administration, but no mention was made of removing the BearCat.

The programmatic and funding flexibility, combined with the purpose of the laws and the types of equipment and training provided by Homeland Security make these military transfers less public than the federal programs under Defense and even Justice. The Homeland Security Grant Program (HSGP) hosts a suite of interconnected emergency management programs intended for disaster mitigation, and facilitates

³⁹⁸ Manous, "Critical Infrastructure—Preparing for the 'Long Haul,'" 25.

³⁹⁹ Jon Swaine et al., "Ferguson Forced to Return Humvees as US Military Gear Still Flows to Local Police," August 11, 2015, <https://www.theguardian.com/us-news/2015/aug/11/ferguson-protests-police-militarization-humvees>.

what is broadly known in the industry as ‘resilience’.⁴⁰⁰ DHS grants are the most terrorism-focused grants of all the granting agencies, supporting sub-national efforts to prevent terrorism and other catastrophic events through preparedness for incidents that “pose the greatest risk to the security” of the US.⁴⁰¹ The three subcomponents of HSGP are the State Homeland Security Program (SHSP), Urban Area Security Initiative (UASI) and Operation Stonegarden (OPSG). Of the three programs, the State Homeland Security Program and UASI provide tactical vehicles to the nation’s interior, while Stonegarden functions at the nation’s borders. It should be noted that many border cities are already under quasi-federal control given the expansiveness of current immigration law. SHSP supports the implementation of “risk-driven, capabilities-based State Homeland Security Strategies to address capability targets set in Urban Area, state, and regional Threat and Hazard Identification and Risk Assessments (THIRAs).”⁴⁰² The capability targets act as markers to identify goals and gaps in anti-terrorism functions and major incident

⁴⁰⁰ A post-9/11 national security policy “rearticulated in terms of the need to respond proactively, developing pre-emptive solutions...into both the physical design of structures and the associated management systems”: Jon Coaffee, “Protecting Vulnerable Cities: The UK’s Resilience Response to Defending Everyday Urban Infrastructure,” *International Affairs* 86, no. 4 (July 5, 2010): 943, <https://doi.org/10.1111/j.1468-2346.2010.00921.x>.

⁴⁰¹ “Fiscal Year 2017 Homeland Security Grant Program | FEMA.Gov,” accessed February 3, 2018, <https://www.fema.gov/fiscal-year-2017-homeland-security-grant-program>.

⁴⁰² “Grants Management Homeland Security Program,” accessed March 27, 2018, <http://www.caloes.ca.gov/cal-oes-divisions/grants-management/homeland-security-prop-1b-grant-programs>.

response. These gaps shake out in the THIRA process and are subsequently put forth in the State Preparedness Report (SPR). Each state generates these reports to “inform planning, organization, equipment, training, and exercise needs to prevent, protect against, mitigate, respond to, and recover from acts of terrorism and other catastrophic events.”⁴⁰³ They are also a benchmark to judge future federal funding requests.

As the assessment proceeds, the gaps cities identify to build out their anti-terror incident management capability flows up to the governors’ designated State Administrative Agencies (SAAs). While law enforcement agencies have discretion in how they deploy funding, they can only purchase items allowable per Homeland Security Grant Program’s authorizing statute⁴⁰⁴ and its annual Funding Opportunity Announcement.⁴⁰⁵ In addition, the 9/11 Commission Act of 2007 required regional collaboration⁴⁰⁶ and therefore Urban Area Working Groups administer UASI funding to regional clusters of cities based on

⁴⁰³ “Grants Management Homeland Security Grants Program,” accessed March 8, 2018, <http://www.caloes.ca.gov/cal-oes-divisions/grants-management/homeland-security-prop-1b-grant-programs/homeland-security-grants-program>.

⁴⁰⁴ The Homeland Security Act of 2002. “Fiscal Year (FY) 2017 Homeland Security Grant Program (HSGP) Frequently Asked Questions (FAQs),” 2017, 5.

⁴⁰⁵ “Obama 2015 Review Federal Support for Local Law Enforcement Equipment Acquisition,” 16.

⁴⁰⁶ GAO, “Urban Area Security Initiative.”

predetermined needs.⁴⁰⁷ The number goes up or down each year, but in 2014, there were 39 “Urban Areas” across the country including the Bay Area Urban Area Security Initiative. Regional funding calculation, similar to state criteria, is based on “risk driven and capabilities-based planning, organization, equipment, training, and exercise needs of high-threat, high-density Urban Areas based on the capability targets.”⁴⁰⁸ The comprehensive risk methodology is focused on three principal elements: Threat – likelihood of an attack being attempted by an adversary; Vulnerability – likelihood that an attack is successful, given that it is attempted; and Consequence – effect of an event, incident, or occurrence.⁴⁰⁹

In 2014, there was a shift in application standards for localities seeking UASI funds. Prior to that year, police departments could submit wide-ranging narratives of their agency’s activities and the purpose intended for funds requested. After some scrutiny by Congress, the

⁴⁰⁷ Needs are determined when communities describe the gaps between the capability target they set in THIRA and the capability required by the state along with how they plan to address those gaps. A FEMA approved Local Hazard Mitigation Plan (LHMP) is then adopted. “Comprehensive Preparedness Guide (CPG) 201, 3rd Edition,” n.d., 34; Robert Solick, “CITY OF S ANTA C RUZ Emergency Operations Plan 2018,” 2018, 4, file:///C:/Users/trina/Documents/2022%20Summer/City%20of%20Santa%20Cruz%20Emergency%20Response%20Plan_Robert%20Solick_2018%20EOP%20Master.pdf.

⁴⁰⁸ “Fiscal Year 2016 Homeland Security Grant Program | FEMA.Gov,” accessed March 27, 2018, <https://www.fema.gov/fiscal-year-2016-homeland-security-grant-program>. HSGP is authorized by Section 2002 of the Homeland Security Act of 2002, as amended (Pub. L. No. 107-296), (6 U.S.C. § 603). Targets are identified during the THIRA process and associated assessment efforts.

⁴⁰⁹ “Fiscal Year (FY) 2017 Homeland Security Grant Program (HSGP) Frequently Asked Questions (FAQs).”

standard was changed to require a “project-level”, more technical description for the use of funds. However, applications are still narrative-based and they do not itemize equipment, making the improvement in accountability and tracking negligible. The project-level requirement necessitated a formal Investment Justification (IJ) demonstrating “alignment to the urban area, state, and/or regional [THIRAs], national priorities, and applicable guidance provided by [Federal Emergency Management Agency].”⁴¹⁰ It is via these particular mechanisms that local police departments must make the case regarding the need for apparatus such as Lenco BearCats as well as other vehicles and equipment. They must identify and explain the acquisition’s “nexus to terrorism” preparedness, aligning with both state and federal goals.

Given the delegation of legal authority in the United States, a federalist notion of policing at the state-level would “give police flexibility to choose the best practices in their jurisdictions,”⁴¹¹ recognizing the traditional understanding of police powers given to states in the Constitution.⁴¹² However, law enforcement agency grant-writers applying for UASI grants have been encouraged to demonstrate commitment to the

⁴¹⁰ “Obama 2015 Review Federal Support for Local Law Enforcement Equipment Acquisition,” 15.

⁴¹¹ “How the Federal Government Can Reshape Law Enforcement | Brennan Center for Justice,” accessed March 25, 2018, <https://www.brennancenter.org/blog/how-federal-government-can-reshape-law-enforcement>.

⁴¹² It cannot go without stating: state law enforcement policies must be constitutional in other respects, relating to civil rights and liberties, to be legitimate.

‘national mission’ by showing the local agency’s past focus on combatting terrorism and “great passion for this pursuit,” even if “counterterrorism measures are a new arena for [the] organization.”⁴¹³ Agency personnel voice a resounding commitment to the national mission in public hearings of regional bodies to allocate funds, as observed over the course of this study.

4.3.1 Flow of DHS Dollars to Cities for Equipment

It is important to understand the budgetary path of equipment funding and how funds trickle down to small and large cities from the federal government. To begin, the whole of spending for the Department of Homeland Security since 2001 equals roughly \$848 billion.⁴¹⁴ Vehicles fall into the terrorism “incident prevention” and management strategy of the federal government. Congress has granted over \$47 billion specifically towards preparedness as part of this strategy. This funding has been distributed to state, local, tribal, territorial, and non-profit partners through DHS since 2002, a figure within its total funding.⁴¹⁵ To capture

⁴¹³ Mission Manager, “Tips for Applying for UASI Grants,” *Mission Manager* (blog), February 7, 2017, <https://www.missionmanager.com/tips-for-applying-for-urban-areas-security-initiative-uasi-grants/>.

⁴¹⁴ “Historical Tables,” The White House, accessed October 18, 2018, <https://www.whitehouse.gov/omb/historical-tables/>.

⁴¹⁵ “Written Testimony of FEMA for a House Oversight and Government Reform Subcommittee on Transportation Security, and Subcommittee on National Security Hearing Titled ‘Oversight of the Urban Area Security Initiative Grant Program,’” Department of Homeland Security, July 15, 2016,

an annual snapshot of DHS funds, Congress appropriated a yearly total of \$44.3 billion in DHS discretionary funding for fiscal 2018.⁴¹⁶ Of that, \$1.6 billion went to preparedness grant funds for responding to and recovering from natural disasters and terrorist attacks. From this money, more than \$1 billion went specifically to states and localities through the Homeland Security Grant Program (HSGP) for things such as transit and port security and to secure “critical infrastructure” like key buildings, roads, bridges and transportation corridors.⁴¹⁷ Nested in this \$1 billion is the Urban Area Security Initiative’s \$580 million, a program which makes grants based upon yearly risk assessments of the nation’s 100 most populous metropolitan statistical areas. In 2018, the federal government determined there were 33 of these “high-threat, high-density urban areas.”⁴¹⁸ Carved from this grant, in addition to the State Homeland Security Program’s \$402 million and Operation Stonegarden’s \$55 million are Law Enforcement Terrorism Prevention Activities. These are

<https://www.dhs.gov/news/2016/07/15/written-testimony-fema-house-oversight-and-government-reform-subcommittee>.

⁴¹⁶ “Appropriations Committee Releases Fiscal Year 2018 Homeland Security Bill | Committee on Appropriations, U.S. House of Representatives,” accessed September 14, 2018, <https://appropriations.house.gov/news/documentsingle.aspx?DocumentID=394983>.

⁴¹⁷ “Written Testimony of FEMA for a House Oversight and Government Reform Subcommittee on Transportation Security, and Subcommittee on National Security Hearing Titled ‘Oversight of the Urban Area Security Initiative Grant Program.’”

⁴¹⁸ “Written Testimony of FEMA for a House Homeland Security Subcommittee on Emergency Preparedness, Response & Communications Hearing Titled ‘Securing Our Communities: Federal Support to High-Risk Urban Areas,’” Department of Homeland Security, April 23, 2018, <https://www.dhs.gov/news/2018/04/23/written-testimony-fema-house-homeland-security-subcommittee-emergency-preparedness>.

allowable costs aimed directly at terrorism averaging about 40% of total preparedness grants awarded⁴¹⁹ or roughly \$415 million for 2018. From this \$415 million, tactical equipment, including armored vehicles, can be secured by cities on an annual basis.

Although disbursements for emergency preparedness are combined with anti-terrorism funding, in terms of specific Law Enforcement Terrorism Prevention Activities (LETPA), local governments used 39.87% of their total preparedness funds for counter-terrorism, well exceeding the 25% requirement.⁴²⁰ Out of \$10.5 billion appropriated by Congress between 2008 and 2015 for the three components of the HSGP, State Administrative Agencies (SAAs) and tribal governments, the reported recipients dedicated \$4.2 billion to terrorism prevention. In 2007, DHS created the Commercial Equipment Direct Assistance Program (CEDAP) to transfer “specialized commercial equipment, equipment training, and equipment technical assistance directly to smaller jurisdictions and eligible metropolitan areas” with an eye towards aggregated regional terrorism response capabilities.⁴²¹ Since police agencies apply for these funds on a project basis, they describe the context and need for equipment

⁴¹⁹ “Fiscal Year 2008-2015 Law Enforcement Terrorism Prevention Activity Funding,” 3.

⁴²⁰ “Fiscal Year 2008-2015 Law Enforcement Terrorism Prevention Activity Funding,” 3.

⁴²¹ “FY 2007 Commercial Equipment Direct Assistance Program (CEDAP) | FEMA.Gov,” accessed October 17, 2018, <https://www.fema.gov/news-release/2007/04/19/fy-2007-commercial-equipment-direct-assistance-program-cedap>.

to combat terrorism, often embedding specific equipment requests in the technical narrative. FEMA does not categorize equipment purchased with its funds by type, unlike the Defense Logistics Agency. Rather it catalogs the entire narrative, requiring the researcher to shift through entire projects.⁴²²

Public availability of project narratives is very limited simply because they may not exist in an organized, centralized catalog. In 2016, FEMA reported Law Enforcement Terrorism Prevention Activity Funding for the fiscal years 2008-2015 in a queryable document. Twenty-three specialized and/or armored vehicles were mentioned in project narratives. Typically these were specified as armored and in other instances, the type of vehicle could be determined based on funding amount combined with the source of funding (UASI, HSGP and combined grants), project context and purpose. Other vehicles were standard, in that they were not armored. These were vans, transport, off-road, patrol, covert and other vehicles. There were 23 standard vehicles mentioned in project narratives, not including aerial drones. However, during this time frame, personnel confirmed to this researcher the purchase of seven armored vehicles with

⁴²² In response to a Freedom of Information Act (FOIA) request for data, FEMA's Grant Programs Directorate stated, "Homeland Security Grant Program (HSGP) allows for the purchase of all types of equipment used by first responders to include armored vehicles. GPD does not require a line item budget. Rather recipients report in the Grant Reporting Tool projects and in some cases identify a specific equipment item."

DHS grants in a region in which the FEMA documents list the distribution of funds for only two. Thus, FEMA's accounting system for the equipment it funds must be supplemented with other sources, this includes individual regional personnel, news reporting on instances of use, acquisition or instances of public debate. Here the visibility (or formal invisibility) of armored vehicles lifts them into the spotlight and draws attention to the local connection to national security.

4.4 Local Decision-Making and Armored Vehicles

In news reports, accounts of community meetings and interviews by this researcher, local residents and their elected officials are sometimes divided on the actual need for armored vehicles as a means to solve local public safety problems, let alone to combat terrorism. Communities have sought accountability and questioned federal policies at various times since 2001, including regarding police tactics, targeting and profiling.⁴²³ At times, opponents to militarization muster robust and organized resistance when federal policies manifest locally.⁴²⁴ This suggests that, all

⁴²³ David A Harris, "The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America," n.d., 51.

⁴²⁴ "Santa Cruz Vice Mayor, Activists Question City Funding for Homeless Services Center," [santacruzsentinel.com](http://www.santacruzsentinel.com), accessed June 13, 2014, http://www.santacruzsentinel.com/ci_22807781/santa-cruz-vice-mayor-activists-question-city-funding; Jessica A. York and Santa Cruz Sentinel, "U.S. Rep. Sam Farr Elaborates on Concerns over Santa Cruz BearCat Purchase," accessed December 28, 2017, <http://www.santacruzsentinel.com/article/NE/20150311/NEWS/150319919>; Mary Papenfuss, "Santa

things being equal, normal democratic wrangling about public safety policy prescriptions have an added ingredient when it comes to acquiring an armored vehicle in the post-9/11 paradigm. That ingredient is the incentive of “free”, loosely accounted for money from the federal government and an articulated nationalized strategy, one that presumes terrorism can, and might, strike anywhere within the United States.⁴²⁵ For communities on the fence about weaponizing their police forces, the powerful rhetoric of the unencumbered terror threat often tips the scales in favor of equipment acquisition. However, in making appeals to localities, police officials tailor their claims to their individual geographic and demographic situations.

One argument used by police to purchase an armored vehicle – even in small, relatively safe communities like Santa Barbara and Santa Cruz - is to provide preventative measures. The purpose of the grant is preparedness and the prevention of terrorism, harkening back to the Bush doctrine of ‘anticipatory self-defense’ through preemptive aggression⁴²⁶ at the time of the Department of Homeland Security’s inception. Police chiefs

Cruz Police Accuse Homeland Security Of Lying To Cover Up Immigrant Sweep,” *Huffington Post*, February 26, 2017, sec. Politics, http://www.huffingtonpost.com/entry/santa-cruz-ice_us_58b21722e4b060480e089046.

⁴²⁵ High level background interviewee indicated they would never have considered an armored vehicle without DHS funds, challenging the notion that the policy development was inevitable or spurred by pressing local factors. Other cities’ officials have indicated the same.

⁴²⁶ Jackson Nyamuya Maogoto, *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror*, 1 edition (Routledge, 2016), 125.

in both Santa Barbara and Santa Cruz, among others, have stated they hoped to never use the BearCats they purchased with post-9/11 funding, for crime or terrorism.⁴²⁷ The items are generally debated as rescue vehicles only, or to save officers' lives.

Chiefs in small cities also point to the fact that neighboring communities either have, or lack, armored vehicles as justification for why their locality needed one. It suggests peer influence and regional pressures on individual departments' capacity to contribute to an aggregated terrorism interdiction force.⁴²⁸ Pressure among professionals also cascades from local or regional contexts. Radil et al. noted a pattern in Program 1033 equipment distribution between 2006 and 2013 suggesting socio-political context of regionally-positioned local agencies, clustered together, impacts the volume of equipment acquired.⁴²⁹ That is, equipment transfers were highly concentrated in a few counties in the US; some forty-two counties were the destination of more than 10,000 transfers during this period. Ten counties with the most transfers,

⁴²⁷ Jenna Tico, "Unleash the Beast," accessed March 16, 2018, <https://www.independent.com/news/2010/jul/15/unleash-beast/>.

⁴²⁸ "Santa Cruz Staff BearCat Presentation March 24, 2015," accessed December 28, 2017, <http://scsire.cityofsantacruz.com/sirepub/cache/2/vlb5mdt3se0ggqqw1rdedi5x/423985612282017032614523.PDF>; "Santa Cruz Regular Meeting on BearCart," March 24, 2015, <http://scsire.cityofsantacruz.com/sirepub/mtgviewer.aspx?meetid=631&doctype=AGENDA>; Tico, "Unleash the Beast."

⁴²⁹ Steven M. Radil, Raymond J. Dezzani, and Lanny D. McAden, "Geographies of U.S. Police Militarization and the Role of the 1033 Program," *Professional Geographer* 69, no. 2 (May 2017): 204, <https://doi.org/10.1080/00330124.2016.1212666>.

particularly in Southeastern states, accounted for 40 percent of the total.⁴³⁰ While FEMA had also pushed for expanded regional capacity it “acknowledged a lack of specific measures that define how or whether national priorities--including expanding regional collaboration--are achieved.”⁴³¹ The FEMA method of calculating risk caused the size of regional and jurisdictional make-up to increase in 27 out of the 49 regions the Government Accountability Office surveyed in 2009. These 27 “reported that additional jurisdictions were included within the geographical area FEMA used to assess risk that were not included in the region's membership.”⁴³² Perhaps the precise tenor of preparedness capacity is self-determined by clustered agencies and is therefore subject to intra-regional professional culture and standards, even if the membership of regional partnerships for risk assessment purposes and the national capacities goal is ultimately set by FEMA.

Proximity and the influence of regional security practitioners has been cited in city meetings as a factor in the decision to acquire a vehicle. In City Council meetings, the anti-terrorism focus of the funding (and of the BearCat) was played down in favor of the rescue and medical evacuation potential as a regional partner. This talking point is used

⁴³⁰ Radil, Dezzani, and McAden, 208–9.

⁴³¹ GAO, “Urban Area Security Initiative,” Highlights.

⁴³² GAO, Highlights.

effectively in towns, cities and counties including those surveyed by this researcher. However, the examples cited by pro-BearCat officials drawn from neighboring jurisdictions in California emphasized how those other communities utilized similar vehicles for crime fighting rather than their purported anti-terrorism capabilities.⁴³³ Crime, however, could not be an empirical reason as much as an emotional one in one case studied since crime rates have remained steady for decades and policymakers interviewed shared that crime was not a serious consideration for their vote in favor of the purchase.

In these instances, individual local actors also play a role by lobbying local officials. In cases examined, organized or vocal internal actors and sets of actors push for vehicles inside departments.⁴³⁴ Since they must orchestrate the application process, meet the federal requirements and deadlines (and local ones, if they exist) and create a plan to interface with community opposition, internal staff support is a necessary condition. Officials have indicated appeals to their offices from specific officers are effective in changing votes. As city and county staff, police lay claims to their qualified knowledge and expertise beyond that of elected leaders, coupling this with assertions about their ability to make

⁴³³ "City Staff BearCat Presentation March 4, 2015."

⁴³⁴ Background interviews

autonomous assessments as to their own needs on the job. Legislative deference to bureaucratic expertise is particularly given to security professionals,⁴³⁵ and a Cover Your Ass (CYA)⁴³⁶ or ‘what-if’ disposition overtakes policymakers who hedge against political blame if/when disaster strikes and they voted against preparedness, of any kind.

The example of small cities acquiring armored vehicles by way of federal money available for use in terrorism prevention –even in the absence of an obvious need– highlights how local actors regard these grant opportunities as worth a great deal of effort, often in the context of shrinking public safety budgets locally. While the factors driving armored vehicle purchases in cities are diverse, none have arisen more frequently in background interviews and media reports than the presence of non-general fund money. From elected officials’ point of view, whether an armored vehicle becomes a local priority may depend on how much money is available and if any associated costs subtract from other immediate community priorities. The fact that the costs did not displace local funds was the principal reason policymakers’ voted to acquire the vehicle in one case.⁴³⁷

⁴³⁵ Daniel Wirls, “U.S. National Security as a Policy Regime,” 24, accessed June 17, 2015, https://www.academia.edu/13025213/U.S._National_Security_as_a_Policy_Regime.

⁴³⁶ “CYA Security - Schneier on Security,” accessed March 28, 2018, https://www.schneier.com/blog/archives/2007/02/cya_security_1.html.

⁴³⁷ Background interviews

Another factor is the active role of the private sector in assisting local agencies to pull down federal funds as well one company positioning itself as the brand of choice.⁴³⁸ Police departments can purchase specialty vehicles from a number of companies. These include Alpine Armoring, The Armored Group, Mohawk, Odyssey Automotive Specialty, Oshkosh Defense and at least ten others.⁴³⁹ Yet in the context of DHS grants, the brand name that is mentioned frequently is Lenco. It is mentioned in Agency documents, by cities in their project narratives and in media accounts of towns and cities using Homeland Security grants across the nation. Why the company is popular is not as important for this inquiry as the fact that because it is so popular, a pattern of procurement is easier to detect. It is easier to recognize Lenco vehicles in photos and to understand their components and capabilities across cities. It is also possible that DHS, with its emphasis on standardization and interoperability, would eventually privilege one set of products over another. That being said, Lenco provides federal, state and local agencies with its signature vehicle, the BearCat.⁴⁴⁰ A closer look at this popular brand is to follow.

⁴³⁸ Justin Hyde, "Why Do America's Police Need an Armored Tank?," msnbc.com, March 4, 2011, http://www.nbcnews.com/id/41912754/ns/technology_and_science-tech_and_gadgets/t/why-do-americas-police-need-armored-tank/.

⁴³⁹ "How to Find Funding for Specialty Vehicles," accessed October 14, 2018, <http://www.policemag.com/channel/vehicles/articles/2012/08/how-to-find-funding-for-specialty-vehicles.aspx>.

⁴⁴⁰ "Police and Government," *Lenco Armored Vehicles* (blog), accessed March 26, 2018, <http://www.lencoarmor.com/police-government/>.

4.4.1 Standardizing Vehicles across Levels of Government

The Ballistic Engineered Armored Response Counter Attack Truck (BearCat) made by the American company Lenco Industries, is a wheeled armored personnel carrier created for military and law enforcement use and is a popular law enforcement vehicle in the US and abroad. The company has built and sold almost 6,000 BearCats to local, state and federal law enforcement agencies and 40 foreign governments.⁴⁴¹ This brand of armored vehicle is beginning to standardize local and regional battlespaces, or spaces that fall within a unified state strategy, signified by multi-jurisdictional operability,⁴⁴² within the United States. Media reporting confirms the company's assertion that many BearCats have been purchased with grants from the Department of Homeland Security and it is named by brand in applicants' narratives from 2008-2015. The company offers on- and off-road models⁴⁴³ for a variety of urban and rural

⁴⁴¹ "Controversial Armored Police Vehicle Factory Expands Production to Meet Demand | Fox News," accessed April 9, 2019, <https://www.foxnews.com/us/controversial-armored-police-vehicle-factory-expands-production-to-meet-demand>.

⁴⁴² Jamison Jo Medby and Russell W. Glenn, *Street Smart: Intelligence Preparation of the Battlefield for Urban Operations* (Santa Monica, CA: Rand, 2002), 16; Stephen Graham, "The Urban 'Battlespace,'" *Theory, Culture & Society* 26, no. 7–8 (December 2009): 278–79, <https://doi.org/10.1177/0263276409349280>; Todd South, "Drone Swarm Tactics Get Tryout for Infantry to Use in Urban Battlespace," *Army Times*, January 8, 2018, <https://www.armytimes.com/news/your-army/2018/01/08/drone-swarm-tactics-get-tryout-for-infantry-to-use-in-urban-battlespace/>; "DARPA At Work: Military Targets Urban Battlespace To Test Drone Swarm Tactics," accessed September 13, 2018, <https://www.technocracy.news/military-targets-urban-battlespace-test-drone-swarm-tactics/>.

⁴⁴³ The model names for these are on-road "G2" and off-road "G3"

settings.⁴⁴⁴ Each vehicle is customizable, but begins with an all-steel armor construction, high ballistic protection, a V8 turbo diesel engine and four-wheel drive. The commonality of parts make BearCats ideal due to their interoperability, fully configurable among an array of models based on policing needs or the operational demands of the US military abroad. Indeed, military and police/fire BearCats are largely identical, save specifications which are custom-ordered by purchasing agencies.

Interoperability is a significant feature that the security community seeks in armored vehicles. For both the military and civilian practitioners, their designation of hardware specifications and components communicate expectations to manufacturers, regarding the needs of security professionals in order to do their jobs and the level of training these public institutions can afford. That is, both sets of professionals must be trained to use these machines to their fullest capacity, should the need arise. Therefore, the uniformity of components on Lenco's products allows for streamlined user training. Training is a funding category for DHS preparedness grants and was a focus of law enforcement project funding in approximately 530 narratives reviewed for the years 2008 to 2015.⁴⁴⁵

⁴⁴⁴ "BearCat G2," *Lenco Armored Vehicles* (blog), accessed March 26, 2018, <http://www.lencoarmor.com/model/bearcat-g2-police-government/>.

⁴⁴⁵ "Fiscal Year 2008-2015 Law Enforcement Terrorism Prevention Activity Funding."

Most of the training listed was in relation to equipment and National Incident Management System (NIMS) compliance.

Lenco's intimate knowledge of federal government requirements, as well as the government's push to bolster aggregate regional capacity, is reflected in the company's assertion that "teams operating regionally are already trained on armor capabilities and critical vehicle features."⁴⁴⁶

Ease-of-use is aided by the fact that BearCats are built on a familiar Ford chassis, and then specialized with gunports, roof hatches, and multiple ingress/egress doors.⁴⁴⁷ Internationally, the US Army is able to use the same vehicle, fitted with additional components for urban warfare.⁴⁴⁸ Law enforcement project narratives for FEMA grant applications indicate the acquisition of BearCat parts: hydraulic ram bars, cameras and chemical, biological, radiological and nuclear and explosive detection systems. Media reports have confirmed the usage of some of these components in the field.⁴⁴⁹

While it appears logical that police and military professionals would appreciate standardization and that it appeals to the federal government

⁴⁴⁶ "Police and Government."

⁴⁴⁷ "Beyond the Patrol Car," accessed March 26, 2018, <http://www.policemag.com/channel/vehicles/articles/2010/02/beyond-the-patrol-car.aspx>.

⁴⁴⁸ "Lenco BearCat G3 Armoured Response and Rescue Vehicle," *Army Technology* (blog), accessed March 26, 2018, <http://www.army-technology.com/projects/lenco-bearcat-g3-armoured-response-and-rescue-vehicle/>.

⁴⁴⁹ John Doyle, "Five Arrested after Somersworth Standoff," *fosters.com*, accessed May 11, 2018, <http://www.fosters.com/news/20180504/five-arrested-after-somersworth-standoff>.

too, the notion of standardization with regard to military and law enforcement equipment has its critics. If the practicality of standardization denotes a level of efficiency for state actors, the shared capabilities of military and civilian armored vehicles renders them, generally speaking, the same weapon. This fact is not lost on the public nor on some within the federal government responding to public pressure. The White House noted, the “increase in technology sharing, cross-training and increased operational relationships between [law enforcement agencies] and the military can foster an environment at the local level in which it is difficult to distinguish between the appropriate military use and the appropriate [law enforcement agency] use of the same equipment.”⁴⁵⁰ The presence of the vehicles in cities with small populations and little chance of terrorism as well as their presence in large cities like Los Angeles and New York City, with more opportunity to use them, again suggests a flexibility behind the government’s grant-making approach, regardless of critique.⁴⁵¹

⁴⁵⁰ “Obama 2015 Review Federal Support for Local Law Enforcement Equipment Acquisition,” 4.

⁴⁵¹ Hyde, “Why Do America’s Police Need an Armored Tank?”

4.4.2 Who Applies for Armored Vehicles?

As mentioned, the types of communities who acquire armored vehicles for law enforcement vary widely in population size, geography and demographics. Again, the local agencies' purpose for acquisition informs who they are as an agency in addition to the way they deploy the weapon once they possess it. Department of Homeland Security grants have funded police purchases of armored vehicles - specifically Lenco Bearcats - in Fargo, North Dakota; Syracuse, New York; Manchester, New Hampshire and Clovis, California.⁴⁵² DHS has also funded them in Bloomington, Indiana; Bossier City, Louisiana; Madison, Wisconsin; Sammamish City, Washington; Somersworth, New Hampshire and Garfield County, Colorado. In Keene, New Hampshire, population 23,409, the Mayor characterized the purchase in this way: "The original reason for filing the grant application was to acquire the piece of equipment in case there was some kind of crisis -- some kind of emergency that required the use of that type of equipment."⁴⁵³ The police chief, however, cited his concerns about "fringe groups that want to make a statement," not

⁴⁵² "Coburn 2012 Safety at Any Price Assessing the Impact of HS Spending in US Cities," 38, accessed March 25, 2018, http://coburn.library.okstate.edu/pdf/safety_at_any_price.pdf; Ackerman, "US Police given Billions from Homeland Security for 'tactical' Equipment."

⁴⁵³ "John Oliver Says Keene, N.H., Officials Wanted Armored Vehicle to Thwart Terrorism at Pumpkin Fest | PolitiFact New Hampshire."

terrorists.⁴⁵⁴ A city council person reflected further, “the danger of domestic terrorism...[is] just something you put in the grant application to get the money.”⁴⁵⁵ In practice, Keene’s department recently rolled out its two armored vehicles when someone was suspected of gun possession. During the 2018 incident, the stand-off was ultimately resolved by means of pepper spray inside the suspect’s home.⁴⁵⁶ In Somersworth, New Hampshire, population 11,766, police used a BearCat outfitted with a battering ram (to push in the door of a home), along with officers in gas masks, a small bomb-disposal robot, a K-9 unit, and a camouflaged sharpshooter to serve warrants for violating probation/parole and drug possession.⁴⁵⁷ In Garfield County, Colorado nine out of ten times the BearCat was used between 2008 (when the vehicle was acquired) and 2009 was to serve drug-related warrants.⁴⁵⁸ The tenth usage was to respond to a man, barricaded in a home, threatening suicide. He was later peacefully talked into submission.⁴⁵⁹

⁴⁵⁴ “John Oliver Says Keene, N.H., Officials Wanted Armored Vehicle to Thwart Terrorism at Pumpkin Fest | PolitiFact New Hampshire.”

⁴⁵⁵ Ibid.

⁴⁵⁶ “Man Arrested after Hours-Long Keene Incident to Be Arraigned Today | Local News | Sentinelsource.Com.”

⁴⁵⁷ Doyle, “Five Arrested after Somersworth Standoff.”

⁴⁵⁸ Garfield County’s vehicle was purchased with county money, but the Northwest Homeland Security Region, All Hazards Response Team who uses it is partly funded by DHS grants. “Sheriff of Garfield County ‘The BearCat What It Is and What It Is Not!’” 1, 3, accessed October 20, 2018, http://www.garcosheriff.com/just_the_facts/jtf_bearcat.pdf.

⁴⁵⁹ All |, “Garfield County Defends Use of Armored Vehicle,” accessed October 20, 2018, <https://www.aspentimes.com/news/garfield-county-defends-use-of-armored-vehicle/>.

Perhaps there is a misalignment regarding terrorism prevention grants in places like Keene, but Lenco Industries makes available a “[n]o cost and no obligation grant writing service” including grants research and notification, which would ease the burden of applying for any agency.⁴⁶⁰ In 2012, when Lenco had provided over 300 local law enforcement agencies with BearCats, some elected leaders began to notice.⁴⁶¹ It did not stop the flow of money, however. In the San Francisco Bay Area alone, seven departments added an armored vehicle to their inventory between 2008 and 2015 using Homeland Security grants.⁴⁶² The Bay Area Urban Area Security Initiative (BAUASI) has helped the City/County of San Francisco, San Mateo County, Sonoma County, Marin County, City of Berkeley, Santa Cruz County and the City of Oakland apply for, and obtain, armored vehicles using federal anti-terror grants.⁴⁶³ The San Francisco Emergency Management Department projected that an armored van would also be purchased by the City of Berkeley.⁴⁶⁴

⁴⁶⁰ “Grant Help,” *Lenco Armored Vehicles* (blog), accessed March 26, 2018, <http://www.lencoarmor.com/grant-help/>.

⁴⁶¹ “Coburn 2012 Safety at Any Price Assessing the Impact of HS Spending in US Cities,” 39.

⁴⁶² In correspondence with staff, it was noted additional vehicles may have been purchased using UASI funds prior to FY2008, but the San Francisco Emergency Management Department (SFDEM), who handles the funds, did not have “responsive records” to determine this. They cited the Bay Area UASI’s 3-year records retention policy.

⁴⁶³ San Francisco Department of Emergency Management, “Armored Vehicle Grants,” December 19, 2017.

⁴⁶⁴ San Francisco Department of Emergency Management.

With its acquisition in 2015, the Santa Cruz BearCat did not remain idle. In its first six months with the department, the Santa Cruz BearCat was used to serve one search warrant and for training 13 times.⁴⁶⁵ Its usage for regular police work began to tick up. It was used six times in 2016 to serve search warrants, respond to an arson call, to gather evidence, to engage in negotiations with suspects and to assist in an arrest.⁴⁶⁶ Training took place 19 times throughout 2016. In 2017, it was deployed seven times to serve warrants, make an arrest, to respond to a burglary call and to respond to a suicide call. It was used for training 18 times throughout the year.⁴⁶⁷ The Santa Cruz police department and others tied the acquisition of an urban assault vehicle to the prevention of officer deaths such as the killing of two police officers in 2013. City officials interviewed were uncertain the vehicle would have prevented the tragedy. Cities like Oakland did not formally track BearCat usage or purpose-of-use at all though the department estimated it was deployed 150 times per year. As a medium-sized city, the officer's perspective revealed that it is their sense they are responding to public demand by using such equipment. They believe the public expectation of a large,

⁴⁶⁵ "BearCat Six Month Usage Report SCPD 2015," accessed October 21, 2018, <http://www.cityofsantacruz.com/home/showdocument?id=50407>.

⁴⁶⁶ "BearCat Used by SCPD on April 16, 2016," accessed October 21, 2018, <http://www.cityofsantacruz.com/home/showdocument?id=51815>.

⁴⁶⁷ "BearCat Annual Usage Report SCPD 2017," accessed October 21, 2018, <http://www.cityofsantacruz.com/home/showdocument?id=68066>.

modern department is to deploy the latest in technology and machinery, in part, to prevent the use of force. In Oakland's case however the BearCat became controversial when it was used offensively in a use-of-deadly-force scenario (as a "shooting platform"⁴⁶⁸) and not defensively or preventatively. Reporting requirements thus changed with the passage of a popular ordinance titled Acquisition and Use of Military and Militaristic Equipment which prompted specific use policies, impact reports and annual oversight reports.⁴⁶⁹

Thus, cities can interpret how broadly or narrowly their policies on armored vehicle procedures will be. Regions can implement anti-terrorism capacity goals with flexibility, manifest in the number of vehicle procurements they facilitate. Outcomes such as these begin to define what type of police departments will be apt to acquire a vehicle and why, as the Homeland Security grants program matures with time. DHS establishes relationships with communities sometimes via their regions, sometimes with Lenco acting as middleman and sometimes with individual agencies and actors. The prevalence of small versus large cities in the US may

⁴⁶⁸ "Robert Warshaw's Addendum to Joshua Pawlik Cast - DocumentCloud," 2, accessed February 2, 2022, <https://www.documentcloud.org/documents/5762175-021919-Compliance-Director-EFRB-18F-0067.html>.

⁴⁶⁹ "City of Oakland - Meeting of * Concurrent Meeting of the Oakland Redevelopment Successor Agency and the City Council on 7/6/2021 at 1:30 PM," accessed February 2, 2022, <https://oakland.legistar.com/MeetingDetail.aspx?ID=872226&GUID=3FAB8141-A3DA-4EB6-B588-CD9869363911&Options=&Search=>.

predict their overrepresentation in the small sample discussed in this section. However, small cities' continued success in pulling down funds for vehicles may simply be indicative of the uniformity of terror prevention coverage sought in the War on Terror and the politics of such a strategy. Five of the small cities discussed in this section procured their BearCats from DHS in 2018 alone, but public sources point to a distribution rate of roughly two per month.

4.5 Conclusion

The flow of money to cities and towns to procure equipment, including armored vehicles to prosecute the War on Terror at home, continues without interruption. The decision-making process of local and county governments when they “pull the trigger” on acquiring an armored vehicle is aided by pre- and post-9/11 programmatic funding available to do just that. But armored law enforcement vehicles are expensive to the taxpayer, averaging a quarter million dollars each. This is a significant purchase for any city or county, whether the cost is borne by local residents through their general fund or paid by them through more diffuse means, by the federal government.

This chapter unpacked elements of what makes vehicles significant to cities and regions. It mapped some of the geopolitical distribution of

vehicles, regionally conceived by the federal government for organizational and strategic reasons. Federal programs contextualize state and local law enforcement agencies as part of regionally grouped command units, aligning with economic and demographic understandings of these sites as places to be securitized. Animated by post-9/11 legislation, DHS categorized regions as aggregated metropolitan areas, deeming some high-threat, high-density places as potential terrorist targets. Because of this, armored vehicles are becoming part of the urban landscape in ways they were not before the 9/11 War on Terror nationwide strategy took shape. Federal flexibility in granting appears to make them available to virtually any type of locality that applies. In terms of vehicle distribution, there does not appear to be a serious distinction between large, medium and small localities, rural or urban communities or high or low crime rates. This occurs in the context of top-down as well as lateral pressures to expand regional capability.

Sub-national governments including states, counties, cities and towns acquire vehicles in accordance with national priorities for national security, but the reasons police give to local elected officials, to residents and to the media are tailored to those constituencies. The relationship between the national government and the states is thus premised on a practice of procurement influenced by an inducement to adopt a national

frame and the mandates of federal agencies tasked with combatting the ethereal tactic of terrorism. Also, the relationship between the federal government and private purveyors of vehicles has been extended to cities and their regions.⁴⁷⁰ Expansion of private sector involvement in domestic security is part of the Department of Homeland Security's mission, dating to its inception.⁴⁷¹

These vehicles carry significant meaning for the users of the apparatus. They convey the state's coercive power and pose a potential physical threat to residents. Perhaps most significantly, armored vehicles represent a shift in local security practitioners' understanding of their own power. FBI scholar Scott Phillips noted "a sizable number" of police in leadership positions, of the 370 he asked in a 2015 survey, "agreed that some tactical characteristics of policing, such as the use of armored vehicles...contribute to a militarized appearance unacceptable for much of the public."⁴⁷² Specifically, "[n]early 60 percent agreed or strongly agreed that a police department becomes more militarized when possessing an armored vehicle."⁴⁷³ In this interaction, machine and practitioner co-constitute new policy in a way which may be the very definition of the process of militarization. Even amid the heightened attention and outrage

⁴⁷⁰ "USAspending.Gov."

⁴⁷¹ "About the Private Sector Office"; "Our Mission."

⁴⁷² Scott W. Phillips, "FBI -- Police Militarization," *FBI Law Enforcement Bulletin*, August 2017, 5.

⁴⁷³ Phillips, 4.

sparked by police practices post-Ferguson and the murder of Michael Brown, 70% of police respondents indicated they had no plans to change their tactical deployment policies. Phillips found that all police agencies he surveyed held similar views on militarization, regardless of their department's size. Agglomerations of purposeful actors, relations and networks are sometimes called urban policy assemblages. These interactions of human and non-human agents can at once be structured hierarchically, creating internal narratives about unequal power relations and the distributions of resources and knowledge, and open up spaces of critique and counteraction aimed at the same social inequalities reinforced or created by the new relationships and policies.⁴⁷⁴ That is, the trajectory of militarization, as a process, is not inevitable, though it is sticky. By examining vehicles as a case, the assumptions hidden in the process can be laid bare for inquiry.

What emerges is an image of post-9/11 national policy implementation whereby the widespread practice of armored vehicle procurement constitutes a new relationship between local actors, federal agencies and weapons purveyors. A broader security environment shines through, one that connects the mere purchase of heavy armaments, at the

⁴⁷⁴ Colin McFarlane, "Assemblage and Critical Urbanism," *City* 15, no. 2 (April 2011): 208, 210, <https://doi.org/10.1080/13604813.2011.568715>.

local level, to a larger trend of Executive-centered power to lead Congress in domestic military policy, in addition to foreign policy. But the shift may be explained as the degree to which, or the speed at which, post-9/11 consolidation of national security resources occurs within the Executive branch, mapping this speed onto the target of policies: the homeland. Federal agencies, sensing the imperative from elected officials, are bent on implementing their priorities within, and upon, the country – at the lowest levels.

Although delegation of legal authority in the United States federalist system ensures police policy flexibility at the state level to “choose the best practices in their jurisdictions,”⁴⁷⁵ it cannot go without saying: policies must be constitutional in other respects, relating to civil rights and liberties, to be legitimate. National security policy implemented by the federal government at the state and local level must also be judged in this regard. The next chapter will examine the substantive case of information sharing and highlight the changing nature of the relationship between federal and local actors in developing domestic intelligence including a critical look at the normalization of NSF consolidation in practice.

⁴⁷⁵ “How the Federal Government Can Reshape Law Enforcement | Brennan Center for Justice.”

CHAPTER 5: INFORMATION SHARING AND INTEGRATING LOCAL INTELLIGENCE

"Ideally the department would get more data from the feds. On cartels, white supremacists, and radicals at [the university]."

"There's too much data. Officers are hyper-sensitive about all the crime data and white noise from all over the country. Paranoid about the data, but officer safety is off limits. It's a morale thing. You can't touch it. They're all scared."

"We don't even touch HSI anymore. Can't do it. It's the first time we've been lied to by another law enforcement agency. They came in with white vans after we left and took 11 people."

The previous chapter explored the local procurement of equipment, particularly armored vehicles, used to implement national security policy. The changing relationship between federal and local actors in the larger trend toward Executive-centered domestic security policy development and dissemination (read: police and emergency policy) now systematically incorporates intelligence work. This chapter will show how national security federalism (NSF) was transformed by the integration of state and local law enforcement into the national intelligence apparatus after 9/11. In a federalist arrangement, states and localities determine public safety policy based on their own needs. What is distinct post-9/11 is the nationwide mission to involve every state and locality in counterterrorism, a mission that is widely accepted by most citizens and elected leaders as the

new normal. Each and every local police agency is on the spectrum of integrating intelligence work into everyday policing. While there is well-organized push-back in the opposite direction towards data privacy rights (local, state and federal), the technologies used to collect and integrate intelligence are beyond the scope and ability of Congress, and many state and local leaders, to regulate or even understand. Therefore, agency administrators and officials negotiate largely amongst themselves. Institutional transformation thus continues apace when it comes to implementing a post-9/11 form of NSF.

The chapter will proceed by showing that NSF was transformed by full state and local integration into the intelligence community, with largely no questions asked. It will show how agencies responsible for implementing policy often make policy as they go. In fact, post-9/11 NSF is a multi-decade transformation run by bureaucrats and the private sector. Second, it will describe the component programs and operations of the transformation including the laws, grants, platforms and skills necessary to make it happen. Finally, the chapter will examine the effects, intentions and consequences of the integration of state and local actors including changed policing doctrine at the agency level, increased local sophistication and privacy policy. Overall, this chapter argues that information sharing is a key driver in the expansion of sub-federal roles in

the post-9/11 national counterterrorism policy regime, fundamentally altering the balance in the federalist system.

The bulk of what follows seeks to contextualize interviews with local, state and federal practitioners of national security policy. Some pages contain few or no citations specifically because the information has been given by one or more interviewees on the particular topic. Over the course of the project, this researcher conducted 41 confidential interviews. These conversations have guided the inquiry and are leveraged to make characterizations throughout this chapter. Many examples, anecdotes, documents and key references come from these interviews or from follow-up with individuals who were interviewed. Participants were not randomly selected and cannot be considered statistically representative of law enforcement, government or communities in the United States. They were selected to provide a diversity of perspectives and insights into particular aspects and roles of intelligence work or oversight of that work at the local, county, state and federal levels.

5.1 Reasons Why Local Intelligence Integration Transformed NSF

The first reason is the full integration of local efforts with the national intelligence community (IC). Prior to 9/11, the Federal Bureau of Investigation (FBI) was vested with sole responsibility for domestic

intelligence gathering on terrorism. Their authority to gather information through surveillance and physical searches for criminal investigations was regulated through the Foreign Intelligence Surveillance Act of 1978 (FISA) and the special court the Act created. The Department of Justice's guidelines and procedures to implement the 1978 law became known as "the wall" or the intentional legal barriers prohibiting the comingling of domestic and foreign intelligence collection. The wall meant that prosecutors and agents had to abide by traditional criminal warrant requirements to surveil or search Americans but could get FISA court approval if the primary purpose of these activities was to obtain foreign intelligence. Post-9/11 data sharing – or joint operations data pooling - among the 17 members of the intelligence community including the Central Intelligence Agency, the Federal Bureau of Investigations, the State Department, the military, and later the Department of Homeland Security, was intended to break down legal barriers curtailing domestic intelligence gathering on American citizens by tearing down this wall to prevent future terrorist attacks in the 21st century.

However, the Executive branch and a collection of bi-partisan legislative allies extended operations data-pooling to the state and local level. According to some practitioners in the field, even those who support the changes, the constant "noise" created by the volume of data available

to law enforcement (especially poorly managed data) can be a distraction. At worst, it has led to rank-in-file police paranoia and sometimes to reactions towards individuals and groups based on inaccurate information. The increased access to personal and private data shared across security agencies and among actors working in counterterrorism has benefited some local police departments while putting others at odds with elected officials and residents. While there are benefits to increased fluidity of data exchange such as communication efficiency there are also drawbacks. Based on interviews, this chapter explores some of both, revealing the hybrid counterterrorism regime complicated by US legal and cultural understandings of federalism.

In 2002, Attorney General Ashcroft turned local and state law enforcement agencies into an extension of the intelligence community “[b]y raising cooperation and communication among local, state and federal partners to an unprecedented level, [to] strengthen the abilities of the justice community to detect threats” of terrorism and crime.⁴⁷⁶ He did this with administrative tools, providing a blueprint for information sharing called the National Criminal Intelligence Sharing Plan (NCISP), a first-of-its-kind strategy for linking federal, state, and local law

⁴⁷⁶ “Attorney General Ashcroft Announces Implementation of the National Criminal Intelligence Sharing Plan,” FBI, accessed May 12, 2020, <https://www.fbi.gov/news/pressrel/press-releases/attorney-general-ashcroft-announces-implementation-of-the-national-criminal-intelligence-sharing-plan>.

enforcement agencies.⁴⁷⁷ Through the NCISP, the Department of Justice created a national mandate (of sorts) to move state and local agencies into the business of domestic intelligence production, regardless of an agency's size.⁴⁷⁸ These early moves, along with other building blocks of law and policy, reveal how War on Terror policies could be embedded at the local level. The NCISP and its spinoff initiatives highlight the continued significance of Executive branch influence in local and state security politics.

While the Bush Administration could not order states to perform certain security functions, it did apply pressure through Ashcroft's NCISP, a variety of Executive Orders and Directives and through prognerating organizations which would serve as models for other entities created by Congress. The Administration took action during a political climate of wide-spread public fear in addition to wide-spread feelings of guilt among agents tasked with preventing the atrocities of 9/11. The Administration worked to create allegiance among law enforcement experts arguing the intelligence reforms of the 1970s were outdated and partly responsible for September 11. This ethos guides actors to the present. Now, the bureaucracy of the national security state

⁴⁷⁷ "National Criminal Intelligence Sharing Plan," Bureau of Justice Assistance, accessed August 31, 2022, <https://bja.ojp.gov/library/publications/national-criminal-intelligence-sharing-plan>.

⁴⁷⁸ "National Criminal Intelligence Sharing Plan," *United States Department of Justice*, October 2003, 10.

professionals has grown tremendously in both the private and public sectors to accommodate old mandates and practices held over from the Bush era and new ones based on its logic. The emphatic push to blur the lines of the separated domains between state and national police powers is due to the fact that the entire homeland security enterprise, one that aims to preemptively collect information on domestic and international terrorists, assumes local level actors are prime information gatherers. This is the case whether or not local agencies view it as their job to take on such tasks in addition to traditional crime fighting and whether or not the citizens who control local resources see themselves and their governments as part of the federal homeland security enterprise.

Given that, the full integration of intelligence work across federal and local is a major reason for the transformation of NSF and one that is a work in progress. The integration has been unevenly implemented across 18,000 state and local policing agencies, but the monumental task is on-going. The door is open and the training and funding tools are available to support the political and logistical alignment of local and state agencies toward this mission. Agencies continue to walk through that door. While impediments to on-going integration exist, like agency leadership

resistance and slow cultural change,⁴⁷⁹ constitutional and statutory federalism is not seriously recognized as one. There are also the rare instances of conflict at the local level which are interesting for their ability to lift up aspects of the integration for examination.

5.1.1 Private Sector Contracting: Influence, Conflict and Integration

Public safety agencies purchase myriad products, including predictive, analytical and data agglomeration software to aid in fighting crime and counterterrorism. Contractors' proprietary information comes with its own requirements which can limit public accountability.

Contracts held by federal, state and local agencies are also not consistently regulated on the use of personal data points. This leaves questions unanswered as to how companies and governments use the information they collect on individuals. Individuals leave digital traces as they go about their lives. Social media activities and use of smartphones ensures that our preferences, associations and locations are known by the companies we use. This allows companies to conduct behavioral modeling to profile individuals and create personas that the public sector has

⁴⁷⁹ David E. Lambert, "Addressing Challenges to Homeland Security Information Sharing in American Policing: Using Kotter's Leading Change Model," *Criminal Justice Policy Review* 30, no. 8 (October 1, 2019): 1254, <https://doi.org/10.1177/0887403418786555>; Jeremy G. Carter and Scott W. Phillips, "Intelligence-Led Policing and Forces of Organisational Change in the USA," *Policing and Society* 25, no. 4 (July 4, 2015): 14, 15, <https://doi.org/10.1080/10439463.2013.865738>.

harnessed from purveyors of these products. For example, proprietary predictive algorithms built into threat analysis software merge commercial and criminal data points which officers can then use in the field to make arrests. These data produce an instant threat score on an individual making the basis for arrests, a highly discretionary act, doubly difficult to understand in the context of oversight.

Additionally, while law enforcement officials confirm jurisdiction-shopping (discussed later) occurs in large and small agencies, legal loopholes leveraging proprietary and contract law create flexible accountability for things such as multijurisdictional arrests. Mobile identification devices with this capability are widely used in California including in Oakland, prompting scrutiny from the privacy oversight body in that city. A private vendor's non-disclosure agreement (NDA) with one jurisdiction, whether in a regional collaboration among local agencies or in a local-state-federal partnership, may cover all agencies involved from the necessity to disclose. NDAs may even prohibit government customers from sharing details of an incident with the public or elected leaders.

Procurement policy can be a site of contention where public officials collide with this shift in Oakland, Santa Clara and Santa Cruz.

The police department in Oakland, California contracts with a company called Forensic Logic (founded in 2003) which integrates the

City's data collection, providing search and retrieval capabilities and consolidating the data for internal and external use.⁴⁸⁰ It is essentially one of several search engine software companies that arose after 9/11 for cities to begin to compile their own internal data. They upload this information to a larger network and data-store used to query the wider universe of information. Private companies provide the internal technology for agencies to gather up disparate pieces of information they have collected to make them usable in what is now a cloud-based system. Contracts like these have come under greater scrutiny in Oakland and key privacy demands have been placed on the Oakland police department in order to renew the agreements, including the Forensic Logic contract. The resistance to public oversight has fomented an ongoing showdown between police and the Privacy Advisory Commission over their use of this software and their federal partnership through a Joint Terrorism Task Force (JTTF).

In another instance, public transparency and private contract law were at odds. In Santa Clara County, such a conflict triggered the Surveillance-Technology and Community-Safety Ordinance of 2016. Public officials advocated transparency and accountability in regard to large purchases made by public safety agencies, whose budgets they

⁴⁸⁰ "2018-2020 Forensic Logic Contract.Pdf," n.d., 8.

control. The Ordinance was drafted as a pragmatic and fiscally-centered set of procedures to gain access to information and provide public debate on expenditures. Violation of the Ordinance was a criminal misdemeanor, drawing the attention of the district attorney employees union, who sued the County, and lost. The catalyst for the conversation was the purchase of a StingRay, a \$502,889 mobile phone triangulation system. The Sheriff wished to procure it through acceptance of a federal grant from the State Homeland Security Grant Program (SHSGP),⁴⁸¹ but she needed the County Board of Supervisors' approval to do so.⁴⁸² The Sheriff indicated in a public meeting that she could not reveal the name of the item (though it was known to key supervisors), share the model, the specifications or answer virtually any question about its use because the company required a strong non-disclosure agreement.

Since Santa Clara's surveillance ordinance was not yet in place, supervisors could not require a use-policy or gain a better sense of the gear itself or its actual need in the County. When supervisors pressed the financial questions, the Sheriff contended that the funding was a federal

⁴⁸¹ "2015/02/24 09:00 AM Board of Supervisors Regular Meeting - Web Outline - The County of Santa Clara, California," accessed July 1, 2020, http://sccgov.iqm2.com/Citizens/Detail_Meeting.aspx?ID=6051.

⁴⁸² "California Government Code Section 25303. Budgetary Authority of the Board of Supervisors over the District Attorney or Sheriff.," accessed July 1, 2020, http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=25303&lawCode=GOV.

source and therefore a debate was unnecessary. The phenomenon of justifying procuring equipment because it is “free money”, is common across this study. In Santa Clara, supervisors emphasized that taxpayers were still footing the bill regardless of the governmental agency providing funds. The Board passed the grant acceptance by a vote of 4-1 on the condition that a use policy would be forthcoming at the time of purchase. The Board action went to the County Counsel and the County Administrator and the purchase was denied. After review, the Sheriff's participation in the strict non-disclosure agreement with Harris Corporation (maker of the StingRay) was deemed to be in conflict with the state's Sunshine Ordinance and therefore, in the end, they could not accept the federal government's grant to purchase the StingRay.

Intelligence-producing software products develop at a rate that can surpass the ability of Congress and many state and local leaders to regulate or even understand them. The City of Santa Cruz surveillance ordinance is one example. The ordinance was billed as a ban on facial recognition and predictive policing technology. However, what was passed by the City Council of Santa Cruz on June 23, 2020, with changes by its police department, created a set of criteria which allows the use of such

technology.⁴⁸³ Whether a technology’s outcomes “perpetuate bias” or “safeguard[] the civil rights and liberties of all people” are determinations subjective depending on the opinions of office-holders who are rarely subject-matter experts and can be heavily influenced by private sector professionals. The law does not require independent review of technologies, reporting on their usage nor does it list any standards for compliance. Due to its vagueness, one practitioner asserted that it could not be litigated in court. The law does not empanel a body of subject-matter experts to advise the Council in its decision-making or require a use policy for when and how the devices or software should be employed. The ordinance did not create a stringent prohibition like other Bay Area cities including Oakland and San Francisco. These stricter laws contain no conditions for the use of biometric or predictive technologies and can, in fact, be considered bans.⁴⁸⁴ While the Santa Cruz ordinance has been

⁴⁸³ “Chapter 9.85 SURVEILLANCE TECHNOLOGY ORDINANCE,” accessed August 27, 2022, <https://www.codepublishing.com/CA/SantaCruz/#!/SantaCruz09/SantaCruz0985.html#9.85>.

⁴⁸⁴ “Chapter 9.64 - REGULATIONS ON CITY’S ACQUISITION AND USE OF SURVEILLANCE TECHNOLOGY | Code of Ordinances | Oakland, CA | Municode Library,” accessed August 27, 2022, https://library.municode.com/ca/oakland/codes/code_of_ordinances?nodeId=TIT9PUPEMOWE_CH9.64REACUSSUTE_9.64.045PRACUSBISUTEPRPOTE; Vins, “Oakland, California Extends Protections against Predictive Policing and Biometric Surveillance - Validated Independent News,” Project Censored, April 23, 2021, <https://www.projectcensored.org/oakland-california-extends-protections-against-predictive-policing-and-biometric-surveillance/>.

called a ban it is a conditional use policy that has been endorsed by software companies it would ostensibly prohibit.⁴⁸⁵

Private companies play a central role in amassing databanks of individuals' personal information from which the government, and companies themselves, can draw. The Bush mandate to privatize as much of the War on Terror as possible created a glut of contracts available for the work. The complex and innovative ways contracts compound NSF, with some conflict along the way, can be coupled with new and important conglomerations of agencies. How those partnerships and contracts are implemented helps shape the contours of the post-9/11 image of federal and local law enforcement.

5.1.2 Jurisdiction-shopping and Multi-Agency Partnerships

This section discusses the partnerships that bring connect-the-dots to life and the tools at their disposal. For example, many local agencies partner with federal agencies in Joint Terrorism Task Forces (JTTFs) addressed in chapter two. However, the legal authorities guiding the insulated work of national security bureaucrats and contractors can conflict with local oversight bodies. These task forces receive information

⁴⁸⁵ Sturgill, Kristi. L. A. Now et al., "Santa Cruz Becomes the First U.S. City to Ban Predictive Policing," Los Angeles Times, June 26, 2020, <https://www.latimes.com/california/story/2020-06-26/santa-cruz-becomes-first-u-s-city-to-ban-predictive-policing>.

harvested through local policing via state-run fusion centers, among other sources, to conduct counterterrorism and criminal investigations. The memorandums of understanding (MOUs) animating these partnerships come under scrutiny in cities like Oakland. The City Council there passed complimentary laws creating a Privacy Advisory Commission in early 2016, a nine-member, citizen-led advisory body, and the Surveillance Technology Ordinance in 2018. The Ordinance requires Allowable Use Policies for all existing technologies and vetting of new purchases. It provides whistleblower protections and prohibits non-disclosure agreements with private purveyors. The Oakland MOU between its police department and the FBI is a frequent topic of debate at the Privacy Commission because federal laws offer greater access to information and tools than the local ordinance permits.

In all 50 states, subnational JTTF members are federally deputized while assigned to the JTTF allowing them the ability to exercise investigatory powers in compliance with applicable federal statutes, leveraging federal law enforcement authority. Oakland Police Department (OPD) employees are specifically assigned to work with the FBI as part of the JTTF partnership and the JTTF operates under the legal authority of the Attorney General of the United States. OPD employees must adhere to Attorney General Guidelines and directives. Far removed from

localities, these directives do not account for municipal legal guidance in place or Privacy Commission oversight requirements. Where a conflict in standards or requirements arises between the police department's governing rules and those of the FBI, the standards that provide the greatest organizational protection or benefit to the FBI will apply. The protection of the privacy rights of Oakland residents, as they themselves have defined them, does not fall within this scope. This redistribution of police powers in intelligence gathering and surveillance, when applied at the local level, has come into conflict with the letter and spirit of Oakland law, shielding OPD officers - a locally-controlled asset - from scrutiny when they participate in such a partnership.

The opposite outcome can occur if federal actors use local laws, or the absence of them, to accomplish their goals. Different agencies working on investigations "jurisdiction shop" to leverage the loosest language of the law for specific actions a multi-agency working group wishes to take. An agent provided an example from the San Diego police department involving its intelligence team scrutinizing a Somali hotel in Tijuana, a border city with porous connections to San Diego. Law enforcement deemed the hotel a congregation point for nefarious individuals. US Attorney General Eric Holder had issued a federal license plate reader policy stating that law enforcement could run plates only on individuals

associated with existing cases. However, the SDPD had no such limit on the use of their plate reader technology, so they ran plates for the FBI. The same was true for forensic phone downloading devices. The local agency, sans a privacy policy or surveillance ordinance, could extract data from suspects' phones; this was a task the FBI and others found useful. The relationships between local and federal actors representing different jurisdictions were key tools when federal policy was an obstacle to overcome.

5.1.3 Normalization

Aside from the anomalous conflictual examples highlighted in this chapter, the transformation of NSF through the absorption of local actors and institutions has elicited little attention from scholars, elected leaders and casual observers alike. September 11 was sufficiently dramatic to prompt strong action, and overreaction according to more than several subjects of this study. It has also elicited few questions.

Indeed, official scrutiny of the incursion of private vendors into policing in the last half decade is incredibly late to the game. Several officials and technologists have confirmed the rate of change in technological innovation and the acquisition of that innovation through contracting has outpaced the government's ability to regulate it. But the

pressure on agencies to adopt these changes is great. The climb towards transparency and accountability – even where the desire exists - is steep, both in the slow development of case law to regulate the private sector in the security space and in correcting any errors in the clandestine tactics of public sector law enforcement and others.

The resultant “big” data revolution in policing has four characteristics: its vast quantity of information, the speed at which data is processed, its aggregation of disparate elements from a wide-range of sources merged together and lastly, its digital form.⁴⁸⁶ The move to digitize records for consumer marketing, credit, and counterterrorism has made sharing, searching and re-contextualizing information easier, faster and less costly – both financially and politically. Sharing is, in effect, normalized.

5.1.4 Centrality of Bureaucratic Actors

The national government uses a network configuration model to share information, reliant on relationships among actors (the nodes or connectors), their organizations (at the mid-level) and the national network as a whole. The network of actors forms the “decentralized and

⁴⁸⁶ Sarah Brayne, “The Criminal Law and Law Enforcement Implications of Big Data,” *Annual Review of Law and Social Science* 14, no. 1 (2018): 294, <https://doi.org/10.1146/annurev-lawsocsci-101317-030839>.

distributed homeland security and counterterrorism architecture.”⁴⁸⁷

Relationships and incentives remain important in the transactions of data exchange in terms of how quickly (and whether) agencies adopt the changes and to what degree they implement the connect-the-dots strategy. There are a variety of ways the central government promotes relationship building: mandates and guidelines, administrative rules and procedures, funding, and the logistical regionalization of force multipliers who expand the reach of national security agencies. Interviews and observations revealed that the overall fluidity of exchange of information inside security state institutions, particularly subnational ones, diminishes the opportunity to incorporate the input of local residents by the sheer speed and momentum of the movement towards coalesced work on the national mission. A flattening across constitutional and historical distributions of police powers between nation and the states occurs at the micro level.

Institutional actors have varying perspectives on the legal authorities guiding and enabling this shift with regard to US law enforcement organizations, but each subject has stated that the role subnational actors, such as cities and counties, now play an outsized part. Each institutional participant develops NSF along jurisdictional and

⁴⁸⁷ “Department of Homeland Security Fusion Center Engagement and Information Sharing Strategy for 2022–2026 | Homeland Security,” accessed August 28, 2022, <https://www.dhs.gov/publication/department-homeland-security-fusion-center-engagement-and-information-sharing-strategy>.

goals-oriented lines. Actors, and forces surrounding them, enact change and operationalize the specifics of a more abstract War on Terror policy in unique ways. By and large, however, interviews reveal that they accept more domestic surveillance for the purpose of counterterrorism and therefore cooperation ensues, rather than organizational competition (in the federalist sense) in the sharing of information.

Most local law enforcement officials interviewed slid easily between criminal investigation and domestic intelligence work in conversation, though some in leadership choose not to exercise this ability in practice. The discretion was theirs. Police partnered in using data analytics to sort through, and add to, data stores and to facilitate the production of new information points by bubbling-up intelligence. Individual actors are a significant part of the systemic surveillance operation housed at the federal level and shared throughout the national intelligence community (IC). Oversight of the practices they choose in the field remains rare and typically occurs after discovery. Local practitioners thus drive the implementation of federally-funded intelligence-led policing (ILP), the gold standard in post-9/11 policing.⁴⁸⁸ Organizationally, this has led to a wide-spread “philosophical shift in practice” for police agencies in their

⁴⁸⁸ Carter and Phillips, “Intelligence-Led Policing and Forces of Organisational Change in the USA,” 1.

use of integrated intelligence tools previously unavailable to them.⁴⁸⁹ The overall shift at the micro level is, at least in part, one towards homeland security prerogatives and away from traditional police work.

As one policymaker painstakingly conveyed, emergency management and law enforcement personnel are mission-driven with little time for public debate about what they do. In the practitioner's mind, operational mandates may supersede local debate about privacy or cost concerns related to their work. The understanding of success for actors in security organizations involves internally-derived benchmarks, a reliance on their own expertise above others and central forces driving streamlined counterterrorism practices believed to save lives. These forces include the 2003 Presidential Directive 5 that established a "single, comprehensive national incident management system" operationally linked to the intelligence community via a combination of other directives and the Homeland Security Act of 2002.⁴⁹⁰ National directives and priorities have positioned local emergency and law enforcement professionals in a difficult place. While they fall further in line with national security priorities, they run the risk of falling further out-of-touch with the residents they serve.

⁴⁸⁹ Ibid.

⁴⁹⁰ "Homeland Security Presidential Directive 5," n.d., 1, 7; "Homeland Security Act of 2002, PUBLIC LAW 107-296—NOV. 25, 2002," 2147, accessed August 28, 2022, https://www.dhs.gov/sites/default/files/publications/hr_5005_enr.pdf.

5.1.5 Hybrid Institutions Influence Local Public Safety Intelligence Capabilities and Priorities

Since 9/11, the United States government has helped create hybrid institutions to execute the implementation of counterterrorism policy. In a similar way it has institutionalized a set of legal arguments to address terrorism cases when they come before a court of law.⁴⁹¹ Hybrid entities take the form of large national departments, regional boards, institutional practices and resource-sharing initiatives. Fusion centers are also hybrid creations, operating in the middle ground, between federal and subnational governments, as discussed in chapter three. All of these amalgam entities have in common the ability to merge local-national security work in new ways.

The boards created to distribute Homeland Security funds for software and hardware to do intelligence work (and other tasks) are hybrid because they meet locally and are made up of regional bureaucrats who are the gatekeepers of federal funds. In other cases, the institutions are not the boards themselves but the practices enshrining a new relationship between the national and local governments to facilitate the

⁴⁹¹ Benjamin Wittes, *Legislating the War on Terror: An Agenda for Reform* (Washington DC, UNITED STATES: Brookings Institution Press, 2009), 2, <http://ebookcentral.proquest.com/lib/ucsc/detail.action?docID=472745>.

movement of goods, training and funding. Both types may exhibit resistance to scrutiny or contradiction by the public or elected officials. National emergency management directives and funding encourage regional organization of assets with geographical boundaries that cross city and county borders. These institutions straddle the national-local divide in the federalist division of labor and may obscure decision points for policy adoption from local oversight. In Alameda County, for example, the regional board empaneled to distribute Homeland Security grants penalized the County's concern over certain federal policies by removing its funding and diminishing the critique of local elected leaders.

Policies interpreted and implemented at the local level, mediated through federal agencies and regional boards, co-constitute a state-federal influence that belies traditional notions of separate authority giving way to a "blended interpretive regime."⁴⁹² By some accounts, this may strengthen federal power by entrenching "the statutory regime and invest[ing] more political actors in its success."⁴⁹³ In multiple cities it was noted, police and other agency actors work directly with state liaisons who control the distribution of federal grants through FEMA. In Santa Cruz, the public process for accepting a national grant was muted when it was

⁴⁹² Heather K. Gerken, "Federalism as the New Nationalism: An Overview," *Yale Law Journal* 123, no. 6 (April 2014): 1900.

⁴⁹³ *Ibid.*, 1905.

placed on the consent calendar for easy passage, without discussion. The process was subsequently amended to avoid this. Several cities surveyed accepted grants in this manner. Intelligence-led policing relies on the legal removal of firewalls between domestic and international surveillance and federal agency policies, practices, funding and moral interpretations to further the shift of ILP implementation in day-to-day operations in the field at the local level, as is the case in Oakland. The federal government can thereby ‘field claim’, further extending its legal turf bit by bit.⁴⁹⁴ Field claiming occurs when the central government delegates power to state agencies which “eases federal entry ‘into a field of lawmaking traditionally governed by the states,’” thus extending its reach.⁴⁹⁵ In other cases, the Bush doctrine – reinforced by legislation like the Patriot Act – that pushed for security privatization after the 9/11 crisis, has allowed local agencies to find autonomy in proprietary contracts, as discussed earlier. Local relationships with private vendors are sometimes enabled by federal counterterrorism funding as was the case in Santa Clara. Actor-led workarounds aimed at streamlining funding to local agencies, leveraging federal hierarchical influence or using private sector tools are often

⁴⁹⁴ *Ibid.*

⁴⁹⁵ *Ibid.*, 1905.

framed in terms of efficiency. For mission-oriented practitioners, seeking gains in efficiency is a rational goal.

Beyond the locally operated hybrid institutions are much larger national resources built to fulfill the laws that compel centralized intelligence work. While some pre-9/11 subnational and national assets were re-tooled to accommodate a homeland security mission after 9/11, entire agencies and sub-agencies were created at the federal level. These national-local hybrids are tasked with shepherding the transition to domestic intelligence production. The behemoth Department of Homeland Security itself is charged with integrating states and the private sector into counterterrorism by bolstering intelligence capability through its Office of Intelligence & Analysis (I&A). It does this also by funding a fusion center network and installing Homeland Security Investigations (HSI) personnel in local police departments in cities like Santa Cruz.

The Homeland Security Advisory Council (HSAC) is an advisory body to the DHS Secretary consisting of local public safety and private sector leaders which still holds terrorism prevention as a first order concern. The DOJ-led Criminal Intelligence Coordinating Council (CICC) on the other hand effectively broadens the terrorism-related mandate for “every chief, sheriff, and law enforcement executive” to include criminal intelligence production to prevent criminal activity. CICC was a spinoff of

the National Criminal Intelligence Sharing Plan.⁴⁹⁶ In 2004, the HSAC linked local police executives directly to federal intelligence officers from the Office of the Director of National Intelligence (ODNI), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), High Intensity Drug Trafficking Area (HIDTA), I&A, Regional Information Sharing Systems (RISS), Federal Bureau of Investigation and others. The CICC is chaired by the Director of the Northern California Regional Intelligence Center (based in San Francisco) who wears multiple hats as Executive Director of the Northern California High Intensity Drug Trafficking Area and the Executive Board President of the National Fusion Center Association. HIDTA provided a model regional approach to collaboration, and according to practitioners, increased flexibility to leverage different legal and administrative authorities in a collaborative configuration with access to more resources.

The HIDTA collaborative arrangement is an example of a re-tooled institution, merging its resources with fusion centers or sharing personnel and information. It has jurisdictional autonomy provided by the regional geographic distributions of law enforcement resources. HIDTA boundaries overlap both counties and the boundaries of other agencies, such as

⁴⁹⁶ "U.S. Department of Justice's Global Justice Information Sharing Initiative June 2011," III, accessed May 26, 2020, https://www.ncjrs.gov/pdffiles1/bja/criminal_intelligence_resources_guide.pdf.

Federal Emergency Management Agency (FEMA) regions, to create their own policy goals and accountability. Increased regionalization, has been one tool in challenging the strictures of federalism and local control of resources, and has been used to integrate federal mandates. Time and again, practitioners indicate regional partnerships provide a sort of middle gateway between federal and local authority, blurring the distinction and creating space for bureaucratic autonomy towards a favored practice, policy direction or mindset along with the possibility of jurisdiction-shopping for the most flexible legal authorities to achieve an objective and to enable a policy shift. One agent offered that at the regional level there is “no true authority, no legality so no one can make you do something.”

This autonomy opens space for private vendors to directly partner with agencies in ways to accomplish heightened levels of information sharing and intelligence generation. The negotiation among federal and state officials to choose laws that work best opens up paths for collaboration.⁴⁹⁷ According to legal scholar Elizabeth Joh, the latest extent of blending private software and equipment vendors’ influence with police policy-making is new, in and of itself, and poses novel challenges for

⁴⁹⁷ Jessica Bulman-Pozen, “Executive Federalism Comes to America - Virginia Law Review,” November 30, 1AD, 955, <https://www.virginialawreview.org/articles/executive-federalism-comes-america/>.

public oversight as it is currently configured.⁴⁹⁸ She argues Fourth Amendment case law has not yet caught up to this new synergy in order to provide the parameters and definitions of unconstitutional searches and seizures in light of the new methods for performing these actions.

5.2 Components (Programs, Operations) of NSF Transformation

Laws, grants and platforms enable an NSF transformation through intelligence work. The conflict in Santa Clara that spurred the creation of their surveillance ordinance lifts up the intersection of federal national security policy at the local level. At its heart the Ordinance represents a desire to control local assets on behalf of local taxpayers and more generally to provide a legal observance of Fourth Amendment rights in policing. If StingRay cell site simulators, or false cell phone towers, locate the user of a cell phone in their own home, must local law enforcement have a warrant to obtain this information? Did an unreasonable search occur if it did? When the FBI holds a contract with the Harris Corporation, a major US defense contractor, the partnering police agency cannot discuss use of the technology as part of the FBI's non-disclosure agreement. Police coordination with the FBI has at times been used to

⁴⁹⁸ Elizabeth E. Joh, "The Influence of Surveillance Tech Companies on Democratic Policing" (Center for Applied Data Ethics (CADE) Tech Policy Workshop, University of San Francisco, November 16, 2019).

shield disclosure to local elected officials and oversight bodies.⁴⁹⁹ US Senator Rand Paul noted, it was the USA PATRIOT Act of 2001 that changed the constitutional standard by which law enforcement can surveil or search one’s belongings, shifting it from Fourth Amendment probable cause “that you have either committed a crime or are in the act of committing a crime to a standard we now call relevance.”⁵⁰⁰ The new standard functionally lowered the threshold for surveillance or a physical search by changing the words of the Foreign Intelligence Surveillance Act from “the [sole] purpose for the surveillance is to obtain foreign intelligence information,”⁵⁰¹ to Patriot Act Section 218 language that foreign intelligence gathering be a “significant” purpose.⁵⁰²

“[E]nsur[ing] that no presidential or governmental official misused their authority to direct federal resources towards the abridgment of an individual’s fourth amendment constitutional right”⁵⁰³ was the impetus for the Church Committee leading to the Foreign Intelligence Surveillance Act of 1978. Post-9/11, the government’s desire to gather and use personal

⁴⁹⁹ Ibid.

⁵⁰⁰ “Congressional Record,” May 25, 2011, S3312.

⁵⁰¹ 50 U.S.C. 1804(a)(7)(B)

⁵⁰² “50 U.S. Code § 1804 - Applications for Court Orders,” LII / Legal Information Institute, accessed August 17, 2020, <https://www.law.cornell.edu/uscode/text/50/1804>.

⁵⁰³ Anastasia Pyrinis, “To Spy or Not to Spy: Questions Raised by the Foreign Intelligence Surveillance Act – Berkeley Political Review,” accessed November 20, 2019, <https://bpr.berkeley.edu/2018/04/23/to-spy-or-not-to-spy-questions-raised-by-the-foreign-intelligence-surveillance-act/>.

data domestically, combined with the Patriot Act of 2001, marked what some have called the “beginning of unprecedented intrusion into American life.”⁵⁰⁴ Immediately after 9/11, the Bush Administration, through the DOJ, spearheaded use of enhancements in the law to track and intercept communications for both foreign intelligence and for domestic law enforcement.⁵⁰⁵ Most members of Congress vote to renew Patriot Act provisions without knowing its scope.⁵⁰⁶ Few of the 357 House members and 99 senators who had voted in favor of the original bill had read it and there was little debate in the lower chamber and none in the Senate.

The extent of the Executive branch’s power is not publicly understood in part because official legal interpretations the federal government uses to implement the Patriot Act remain secret. In 2011, senators put forward an amendment to compel the Attorney General to “fully describe the legal interpretation and analysis necessary to understand the United States Government’s official interpretation” of the Patriot Act.⁵⁰⁷ It is known that the Act provides presidential administrations greater authority both legally and practically by

⁵⁰⁴ Robert O’Harrow, *No Place to Hide*, First Edition (New York: Free Press, 2005), 32.

⁵⁰⁵ Charles Doyle, “The USA PATRIOT Act: A Legal Analysis,” n.d., 1.

⁵⁰⁶ Senator Ron Wyden, “How Can Congress Debate a Secret Law? | U.S. Senator Ron Wyden of Oregon,” accessed April 1, 2019, <https://www.wyden.senate.gov/news/blog/post/how-can-congress-debate-a-secret-law>.

⁵⁰⁷ “In Speech, Wyden Says Official Interpretations of Patriot Act Must Be Made Public | U.S. Senator Ron Wyden of Oregon,” accessed April 1, 2019, <https://www.wyden.senate.gov/news/press-releases/in-speech-wyden-says-official-interpretations-of-patriot-act-must-be-made-public>.

increasing institutional capacities. For example, it liberalized the authority of the FBI director in hiring decisions to expand in certain areas, allocate resources and to employ new technologies in coordination with the intelligence community.⁵⁰⁸ In public debate of the PATRIOT Sunsets Extension Act of 2011, US Senator Mark Udall offered an amendment to extend the Act for several months in order to deliberate the ten-year-old law.⁵⁰⁹ The Senator waded into the details, adding to his amendment a sunset clause for national security letters, or administrative subpoenas which the FBI can issue with a court order. He cited a March 2007 Department of Justice report by the inspector general which “concluded that the FBI engaged in serious misuse of [national security letter] authority.”⁵¹⁰ He assessed that the Act’s “most enduring legacy is this: It gave the Federal Government the power to undermine the constitutional right to privacy of law-abiding citizens.”⁵¹¹ His amendment went nowhere.⁵¹²

Part of the Intelligence Authorization Act for Fiscal Year 2013 asserted the powerful functions and access of the Homeland Security Intelligence Program in DHS. It established the intelligence activities of

⁵⁰⁸ Doyle, “The USA PATRIOT Act: A Legal Analysis,” 24.

⁵⁰⁹ “Congressional Record,” S3311.

⁵¹⁰ *Ibid.*, S3292.

⁵¹¹ *Ibid.*

⁵¹² Patrick J. Leahy, “S.193 - 112th Congress (2011-2012): USA PATRIOT Act Sunset Extension Act of 2011,” legislation, April 5, 2011, 2011/2012, <http://www.congress.gov/>.

the Office of Intelligence and Analysis serving, predominantly, departmental missions. The codification of the program was not the Homeland Security Act of 2002 but the 2013 Authorization Act because the work of compounding NSF is on-going. In it, the DHS Secretary's power was articulated and expanded. They obtained bureaucratic parity with the Director of National Intelligence and are given the same access to all information from law enforcement agencies. The DHS Secretary is a "[f]ederal law enforcement, intelligence, protective, national defense, immigration, or national security official" with authority to such information through the PATRIOT Act, Section 2517(6) of title 18 "Authorization for disclosure and use of intercepted wire, oral, or electronic communications" and Rule 6(e)(3)(C) of the Federal Rules of Criminal Procedure that "[a]n attorney for the government may disclose any grand-jury matter to another federal grand jury."⁵¹³

Domestically, the Secretary of DHS has wider jurisdiction and legal authorities in a broader scope of areas than the FBI, the CIA and other agencies. As stated in the 9/11 Commission Report, "terrorism against American interests 'over there'...terrorism against America 'over here'....

⁵¹³ "18 U.S. Code § 2517 - Authorization for Disclosure and Use of Intercepted Wire, Oral, or Electronic Communications," LII / Legal Information Institute, accessed July 22, 2020, <https://www.law.cornell.edu/uscode/text/18/2517>; "Fed. R. Crim. P. 6 - The Grand Jury," Justia, April 25, 2018, <https://www.justia.com/criminal/docs/frcrimp/rule6/>; "[USC02] 6 USC Ch. 1: HOMELAND SECURITY ORGANIZATION," accessed July 22, 2020, <https://uscode.house.gov/view.xhtml?path=/prelim@title6/chapter1&edition=prelim>.

the American homeland is the planet.”⁵¹⁴ This broadened DHS’ zone of security to other countries to stop immigration into the US from various parts of the world increasingly involving DHS transnationally. A regional UASI official confirmed the far reaches of their work, stating that while the local DHS funding considerations were one aspect of their job, the international meetings carried more significance. Here the DHS Secretary’s global counterterrorism efforts jump several jurisdictions to reach deep into a local arm of DHS funding, connecting the hybrid regional body to international counterterrorism and intelligence. The official indicated that the business they were conducting with international partners was their priority at that time.

5.2.1 Grants as Insulators

Officers and chiefs have affirmed they have re-organized towards regional partnerships in response to federal laws, guidelines and funding requirements since 2001. The shift is a redirection of resources in response to policies outside their previous scope of duties. Redirection is also spurred by the amount of funding and the number of grants available for technology which have increased tremendously, especially in the Bay Area where governing costs are high often due to high labor costs and

⁵¹⁴ “The 9/11 Commission Report,” n.d., 362.

costs of living. One officer indicated there is in fact immense pressure to leverage technology through federal one-time purchase grants because technology is moving rapidly, it “multiplies too quickly.” While the technology was once used to bring about better safety, now it “plays politically well” for chiefs to acquire the latest, greatest gear coming out of private sector security firms through federal grants. With the speed of development and change in the sector, combined with the pressure to procure technology, departments are “not taking time to think it through.”

The national government provides incentives through grants for cities and states to change course in public safety and adopt the Homeland Security mission. The effects of new revenue streams are varied but tend to infuse budgets of cash-strapped cities willing to adjust their policies to fit the national security priorities of the Executive branch and the laws it initiates in Congress. Such financial dependence of states on federal windfalls invites the President and Congress “to extract concessions from the states” while the Supreme Court has not yet provided “workable constitutional limits on the conditions” they may place on grants.⁵¹⁵ Thus while commandeering local police resources to uphold federal law is not constitutional under the precedent established in *Printz*

⁵¹⁵ Thomas R. McCoy and Barry Friedman, “Conditional Spending: Federalism’s Trojan Horse,” *The Supreme Court Review* 1988 (1988): 86.

v. United States (1997),⁵¹⁶ the federal government can mandate state and local agencies comply with federal agency requirements when they have received federal funds. In a case involving the Secretary of Transportation and their attempt to institute a uniform national drinking age upon states per legislation, she made highway funds conditional on state cooperation. *Dole v. South Dakota* (1987) held that a “perceived Tenth Amendment limitation on congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately placed on federal grants.”⁵¹⁷ Accordingly, it held the Constitution “empowers Congress to ‘lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States’” under Article I, Section 8, clause 1.

Therefore, Congress “may attach conditions on the receipt of federal funds...‘to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.’”⁵¹⁸ The tasks associated with the funding provided by Homeland Security grants are extra or optional, on top of

⁵¹⁶ Brian D. Galle, “Does Federal Spending ‘Coerce’ States? Evidence from State Budgets,” *SSRN Electronic Journal*, 2012, 991, <https://doi.org/10.2139/ssrn.2150721>; Samuel James Rascoff, “The Law of Homegrown (Counter) Terrorism,” *SSRN Scholarly Paper* (Rochester, NY: Social Science Research Network, 2010), 1715, <https://papers.ssrn.com/abstract=1996715>.

⁵¹⁷ “FindLaw’s United States Supreme Court Case and Opinions.,” *Findlaw*, accessed August 4, 2020, <https://caselaw.findlaw.com/us-supreme-court/483/203.html>.

⁵¹⁸ *Ibid.* 483 U.S.

traditional policing and investigations. However, the partnerships and coordination mandated by the President, Attorney General and Congress citing national security could suggest otherwise. Additional significant pressure upon entities and individual actors comes from regional public safety and emergency management organizations at the federal, state and local levels, multiple Executive agencies and their professional peers.

UASI approval authorities, region emergency preparedness councils, and entities by other names, jointly administer funds. Their authority overlaps city and county boundaries and therefore have no corresponding direct democratic structures of accountability in and of themselves. This appears to be the case, especially in regional clusters of counties when the geographical designation comes from DHS and state emergency management agencies. These clusters can each contain a dozen or more counties. They function in ways that insulate discussion about grants distribution to bodies of bureaucratically-appointed stakeholder groups concerned with top-level operational objectives. This corresponds with UASI regional bodies which host working group meetings. These meetings have been characterized by local actors as inhospitable to consideration of local (including county-wide) concerns about resource distribution and allocation based on citizen input. Internal security actors confirmed that, by design, regional working groups are inappropriate for

debates about single county issues. This would be considered “political”. DHS operators talk of moving towards ‘super regions’ which continue the trajectory upward. A logical result may be further insulation from resource and policy debates.

The Department of Homeland Security funding programs, including federally-funded training and equipment, was intended to directly support the development of enhanced state and local counterterrorism and intelligence capabilities post-9/11, and they worked as intended.⁵¹⁹ Police chiefs surveyed readily acknowledged this notable shift. In 2011, noting the sea change in the role of state and local law enforcement in national security from minimal pre-9/11 to significant, the Major Cities Chiefs’ Association (MCCA) began an initiative called the National Criminal Intelligence Enterprise to address the remaining “deficiencies of standardizing connectivity, integration, and intelligence collection practices within the state and local environment.”⁵²⁰ The project was aimed at creating a seamless linkage among state and local counterterrorism and intelligence elements, fusion centers and federally-led operations like Joint Terrorism Task Forces (JTTFs) and Field

⁵¹⁹ “National Criminal Intelligence Enterprise,” 3, accessed June 3, 2020, https://www.majorcitieschiefs.com/pdf/news/mcca_criminal_intelligence_enterprise_initiative_2012_0329.pdf.

⁵²⁰ “Major Cities Chiefs Criminal Intelligence Enterprise (CIE) - PDF Free Download,” 2, accessed August 30, 2022, <https://docplayer.net/54992527-Major-cities-chiefs-criminal-intelligence-enterprise-cie.html>.

Intelligence Groups (FIGs) using a social media styled platform.⁵²¹ MCCA leveraged local skills enhanced by DHS funding programs and federally-funded training and equipment to close a gap in implementing Ashcroft's National Criminal Intelligence Sharing Plan (NCISP) from 2003. The Major Cities Chiefs' Intelligence Commanders Group (ICG) had helped to craft the NCISP. ICG represents 69 of the major city police departments' "intelligence and/or national security mission" units who advise chiefs and sheriffs on security matters, exchange intelligence among MCCA's 78 member agencies in the US and Canada and "develop[] programs for combatting crime and terrorism globally."⁵²²

According to chiefs in the field, the National Criminal Intelligence Enterprise is an important organizational tool to share information among major cities. It relies on community trust and community policing for its data collection of identified threats. The tools for transferring this information to one another, however, are federal assets including those at the NSA and the Defense Department. Membership organizations like ICG, combine with post-9/11 hybrid regional funding bodies and information sharing organizations, to creatively collapse geographical and

⁵²¹ "Police Chiefs Creating Domestic Criminal Intelligence Enterprise | Public Intelligence," August 9, 2013, <https://publicintelligence.net/criminal-intelligence-enterprise/>.

⁵²² "MCCA-Report-on-the-2020-Protest-and-Civil-Unrest.Pdf," i, accessed August 31, 2022, <https://majorcitieschiefs.com/wp-content/uploads/2021/01/MCCA-Report-on-the-2020-Protest-and-Civil-Unrest.pdf>.

perhaps legal boundaries. In federations with multi-level government powers distribution along the vertical axis, novel security arrangements then act as a centralizing factor⁵²³ contributing to characteristics more associated with unitary states.

State and major urban area fusion centers collect and aggregate local information yet receive a majority of their funding from the federal government.⁵²⁴ Every one of the roughly 18,000 police departments across the US has access to one of 80 state-sponsored fusion centers to share and receive information. They also leverage help from data analysts housed at these centers, or in some cases, station DHS personnel remotely inside the local departments themselves. In California, there are six recognized fusion centers: Mathers, Sacramento, Los Angeles, San Francisco, Orange County and San Diego.⁵²⁵ The center in Mathers is the primary liaison with the feds and is the location of the business offices of the Governor's cabinet-level Homeland Security Advisor, the state's homeland security Office of Legal Affairs and other top-level officials. These Executive staff

⁵²³ Simon Parker and Michael Harloe, "What Place For The Region? Reflections on the Regional Question and the International Journal of Urban and Regional Research," *International Journal of Urban and Regional Research* 39, no. 2 (March 1, 2015): 367, <https://doi.org/10.1111/1468-2427.12175>.

⁵²⁴ U. S. Government Accountability Office, "Information Sharing: Federal Agencies Are Helping Fusion Centers Build and Sustain Capabilities and Protect Privacy, but Could Better Measure Results," 15, accessed June 15, 2021, <https://www.gao.gov/products/gao-10-972>.

⁵²⁵ "Fusion Center Locations and Contact Information," Department of Homeland Security, April 1, 2011, <https://www.dhs.gov/fusion-center-locations-and-contact-information>.

coordinate and deploy comprehensive emergency-service resources throughout the state based on the data coming in from localities and other state agencies. The Advisor since 2013 leads both counter-terrorism and intelligence gathering efforts but is also the Director of the California Governor's Office of Emergency Services (Cal OES) for all hazards.

While fusion centers elevate information from local sources and broadcast resultant intelligence products across governmental jurisdictions, federal grants have been integral to increased local intelligence capabilities to accomplish this. Conversely, intelligence is supposed to flow from federal sources down to states and localities, but this does not always happen. The Boston marathon bombing was an egregious example of federal data not being distributed to states to prevent terrorism. Indeed federal funds allow the national government to, in part, dictate the flow of information. The Federal Resource Allocation Criteria (RAC) specifies federal goals must be furthered in the way it allocates to state fusion centers. These include streamlined coordination standards and the execution of a statewide fusion process at the primary fusion center in each state - the main point of contact for the federal government.⁵²⁶ Maintenance of baseline capabilities in reporting and

⁵²⁶ "Federal Resource Allocation Criteria (RAC) Policy for Fusion Centers 2011," 2, accessed May 4, 2020, https://www.dni.gov/files/ISE/documents/DocumentLibrary/RAC_final.pdf.

dissemination is assessed by the Justice Department annually.⁵²⁷

Needless to say, fusion centers play a large role in sharing newly gathered information, especially upwards, through Executive agencies and personnel. Federal agencies rely on sophisticated local partners, even if locals are not treated as equals.

5.2.2 Communications Platforms

One Bay Area agency grappling with pressures to attain the newest technologies acquired a “big system” for evaluating the various other systems and platforms they now utilize. They have Palantir to do this. Palo Alto-based Palantir Technologies has its roots in counterterrorism making its business in integrating the multitude of software that houses the silos of data used by security professionals. In 2003, Palantir secured its initial investment from In-Q-Tel, the CIA’s venture capital firm, in addition to its larger infusion of start-up cash from PayPal’s co-founder, Peter Thiel. The firm specializes in linking formerly separate databases, across federal agencies like the CIA, FBI and the military branches as well as states, regions and localities. According to limited specifics kept at DHS, we know the Utah Department of Public Safety and state fusion center spent \$200K in UASI funding between 2008-2015 on a system-wide

⁵²⁷ “Baseline Capabilities for State and Major Urban Area Fusion Centers,” 2008, 20.

upgrade of their Palantir platform “to allow integration...[and] sharing of real-time information and monitoring of potential terrorist events by all communities enabling the core capabilities of Intelligence and Information Sharing, Operational Communication and Coordination.”⁵²⁸ This was part of Utah’s larger \$1.8M funding package mostly consisting of UASI grants along with some State Homeland Security Grants aimed at regionalization efforts.

The Los Angeles fire department pulled down \$171K in UASI monies to renew their Palantir license in 2015 for data fusion and synthesis. The LAPD obtained a \$2.9M sole source contract for a new “next generation regional [Automatic License Plate Reader] [i]nvestigation module that includes integration of ALPR data from selected host sites and integration of [Los Angeles County Sheriff’s Department] County booking photos into the three Palantir deployments at LAPD, LASD and [Long Beach Police Department].”⁵²⁹ The Los Angeles Joint Regional Intelligence Center used \$2.8M in UASI on Palantir software maintenance for terrorism incident prevention equipment in 2015-2016.⁵³⁰ The Long Beach Fire Department and the San Diego Law Enforcement Coordination Center (fusion center) are also using UASI-

⁵²⁸ “Fiscal Year 2008-2015 Law Enforcement Terrorism Prevention Activity Funding,” n.d., 207.

⁵²⁹ “Public Records Request to California Governor’s Office of Emergency Services (Cal OES)” (Senior Counsel, Office of Legal Affairs, January 3, 2020).

⁵³⁰ Ibid.

funded Palantir software.⁵³¹ Local law enforcement officials indicate that the federal government pushes the use of Palantir through grants directly to local agencies because ATF, DEA and DHS are all using Palantir making it easier to seamlessly stitch together jurisdictions in all-source data integration. DHS' use of the company's products in "extreme vetting" to isolate individuals for immigration enforcement in cities through data mining, threat modeling, predictive risk analysis and analytics has caused the City of Oakland to prohibit future contracts with the company.⁵³²

5.2.3 Interoperable Sharing and Transferable Skills

The intelligence-driven federal push toward interoperable communications among agencies has not always led to more or better communication. Safety was compromised when a university police head responded to an active shooter call in 2010 only to discover, for the first time, that the Department of Homeland Security had its own armed, uniformed officers when they showed up on his scene. At times, information is used for unwarranted action in local law enforcement operations. When a federal "police" force is deployed locally, communication is key. In the summer of 2017, the spike in numbers of

⁵³¹ Ibid.

⁵³² "SANCTUARY STATE CONTRACTING AND INVESTMENT ACT," City of Oakland, accessed July 30, 2020, <https://www.oaklandca.gov/resources/vendors-debarred-for-general-reasons>.

white-nationalist hate groups and hate crimes represented a major concern across California. The deployment of federal Immigration Customs Enforcement (ICE) officers to California sanctuary cities also posed challenges to the Cal OES. The office was focused on ‘deconfliction’, a method of avoiding escalation among armed law enforcement jurisdictions when they come into contact in the field. In California, ICE officials were working at cross purposes with local and state officials thus necessitating deconfliction efforts. Different priorities between California and federal immigrant policies posed a difficult security threat to officials implementing state laws such as local sanctuary ordinances, not to mention the potential threat to the immigrants themselves and other residents. In this instance, DHS and California homeland security policies were at odds due to the politics of the White House, leaving officials to work it out amongst themselves.

While the 9/11 disaster stemmed from a failure of communication across federal agencies, in handling so much data from so many sources, local agencies have come under new scrutiny for their policies and practices. Today there is virtually no limit to exchanges of domestic and foreign intelligence among levels of government when it comes to security, broadly defined. However, organizational turf-guarding and forms of resistance are still evident in some corners of the sector. These are

arguments for interoperability and the transition to a common information exchange approach continues. The dimensions of interoperability involve “common data structures and formats, common transport/messaging protocols, common search and information request service calls, and network and communications interconnectivity.”⁵³³

Data sharing platforms existed before 9/11 like the Regional Information Sharing Systems (RISS), sponsored by the Department of Justice⁵³⁴ but their scope was narrowly targeted and they were bound by Church-era evidentiary standards and legal requirements on collecting information on Americans. RISS was designed to connect local and regional entities, and after September 11, became a key tool in federal information sharing. The DOJ officially connected the regional network, RISSNET, to both the FBI’s data sharing platform, the Law Enforcement Enterprise Portal (LEEP), a secure platform accessed by local, regional, state and federal entities intelligence groups and others,⁵³⁵ and the Department of Homeland Security’s network: the Homeland Security Information Network (HSIN). These linkages were specified in Attorney General Ashcroft’s National Criminal Intelligence Sharing Plan. In the

⁵³³ Daniel P Syed, “Approach for Developing an Interoperable Information Sharing Framework,” n.d., 3.

⁵³⁴ Lambert, “Addressing Challenges to Homeland Security Information Sharing in American Policing,” 1254.

⁵³⁵ “Law Enforcement Enterprise Portal (LEEP),” Page, Law Enforcement, accessed August 31, 2022, <https://le.fbi.gov/informational-tools/leep>.

winter of 2020, a collaborative multi-jurisdictional effort was used to confront graduate student worker protests in Santa Cruz over fair pay. Police employed LEEP to coordinate a multi-agency, multi-jurisdictional suppression. They shared and received intelligence about student activities online and on the ground.

Structurally, one Bay Area department's efforts to regionalize resulted in SWAT's use of UASI funding for equipment such as armored vehicles but also for doing the work of combining the databases of Alameda County with Contra Costa County. Another pressure to regionalize and nationalize comes from the regional fusion center, the Northern California Regional Intelligence Center (NCRIC) which operates in partnership with the High Intensity Drug Trafficking Area (NCHIDTA). These are public safety government programs that continuously seek data from this particular local agency. The incentive to provide that data is reciprocity; the department gives data to receive assistance from federal technicians housed at NCRIC who help them to access the vast network of information available under federal authority. Working towards interoperability manifests for this agency in the many local-federal task forces they have joined since 9/11.

But some local law enforcement have been reluctant to say the success of information sharing is a two-way street. For some officers, how

the information they provide is used remains secret and they have had difficulty accessing the information from federal agencies' after they supply it; formal clearances are required. Even so, big-city police chiefs continue to advocate an integrated national intelligence capability. Large agencies tend to benefit more from resources that fund and train a greater number of specialized officers capable of accessing legal tools and capabilities to gather information from a variety of sources such as commercially-collected private platforms.⁵³⁶

5.3 Effects, Intentions and Consequences of NSF Transformation

One effect is changing policing doctrine at the agency level. The expectation that police would become intelligence officers came from the federal government immediately after 9/11 through the laws already discussed, followed by the findings of the 9/11 Commission in 2004. But few local agencies knew how to make this happen. While intelligence-led policing (ILP) is still driven by post-9/11 homeland security priorities and is a result of funding incentives, its impetus harbors other interesting factors. Notably, due to uneven applications or differing understandings of federalism, ILP remains in search of a uniform standard, enforceable

⁵³⁶ E Boustead, "Small Towns, Big Companies: How Surveillance Intermediaries Affect Small and Midsize Law Enforcement Agencies," *Stanford University*, n.d., 4, 6, 9.

across all levels of law enforcement. In fact, this has led to the push for special conditions as part of grants which explicitly spell out a requirement for local standards, making them federally-enforceable through the grants' guidelines.

Post-9/11 style ILP represents an innovation in policing because of the volume of ready data, the connectivity to multi-level agencies and to commercial vendors. These resources in combination with federal training and funding require “a shift in police management, organisational structure and even day-to-day operations.”⁵³⁷ Every law enforcement agency, regardless of size, is expected to “fulfill its role in the greater law enforcement intelligence landscape” with a set process to send and receive information.⁵³⁸ A comparable philosophic paradigm shift occurred in the 1990s. It was the move to use Comparative Statistics (CompStat) as a policing strategy reliant on data to prioritize limited resources and reduce crime. It has been cited by agency professionals interviewed by this researcher as an effective tool. The shift to CompStat was similar to the present shift to intelligence-led policing, however, while CompStat relied on an exchange between the police and public to amass evidence of a crime through tips and leads, ILP relies on a pre-crime orientation

⁵³⁷ Carter and Phillips, “Intelligence-Led Policing and Forces of Organisational Change in the USA,” 5.

⁵³⁸ *Ibid.*, 4.

towards prevention and mitigation. It is necessary for departments to obtain a “strategic integration of intelligence analysis into the overall mission of the organization.”⁵³⁹ This is a dramatic shift in tactics since 9/11 by all accounts. While CompStat is used to deploy resources based on crimes that have occurred, ILP focused on threats of potential crime, and “pre-operational behaviors of concern”⁵⁴⁰ therefore relies on methods of constant surveillance.

Agencies at all levels of government are tasked with intelligence work, starting with the pieces of data they collect and now all local departments have developed at least a minimum capacity for the task.⁵⁴¹ If we begin at the most granular level, local police officers have turned at least some of their focus to becoming intelligence agents and processing and sharing information they gather to contribute a preemption of crime – not just terrorism. Intelligence production has become normalized as an organization-wide responsibility for local police agencies, a new philosophy of practice. My research indicates that not all agencies fully embrace the shift to prioritize intelligence nor do they all support it with direct resources or internal policies. Most have suspicious activity

⁵³⁹ Carter and Phillips, “Intelligence-Led Policing and Forces of Organisational Change in the USA,” 2, 3.

⁵⁴⁰ Priscilla M. Regan and Torin Monahan, “Fusion Center Accountability and Intergovernmental Information Sharing,” *Publius: The Journal of Federalism* 44, no. 3 (2014): 478, <https://doi.org/10.1093/publius/pju016>.

⁵⁴¹ Carter and Phillips, “Intelligence-Led Policing and Forces of Organisational Change in the USA,” 7.

reporting (SAR) policies,⁵⁴² and have some level of internal information analysis to predict crime based on information gleaned from citizens, historical crime data and fusion centers. The bulk of the shift towards intelligence-led policing comes from Homeland Security directives tied to training funding or counterterrorism training curriculum from other federal partners.

However, even lacking formal training in the state of the art, local agencies use intelligence easily derived from free open sources like social media in order to track individuals and groups. While a congressional study group called for greater use of open source data integration in intelligence analysis pre-9/11,⁵⁴³ federal agencies began transferring information collected from open sources using an initiative in the DoD. In 2005, the National Open Source Enterprise was created under the Director of National Intelligence to operate alongside the Defense Open Source Program (DOSP) in the Defense Intelligence Agency. Homeland Security developed its own Domestic Open Source Enterprise relying on fusion centers to bubble up information gathered by local law enforcement as well as to disseminate it through tools at their disposal.

⁵⁴² Carter and Phillips, "Intelligence-Led Policing and Forces of Organisational Change in the USA," 14, 15.

⁵⁴³ United States Commission on National Security for the 21st Century, *Road Map for National Security: Imperative for Change* (Wilkes-Barre, Pa: Kallisti Pub, 2002), 23, 84.

Former DHS Secretary Chertoff summed up the importance of linking mundane domestic intelligence to tell a story: “Intelligence is about the thousands and thousands of routine, everyday observations and activities. Surveillance, interactions—each of which may be taken in isolation as not a particularly meaningful piece of information, but when fused together, gives us a sense of the patterns and the flow that really is at the core of what intelligence analysis is all about.”⁵⁴⁴ Harvesting from publicly available sources (including verbal e.g. community policing) may occur in similar fashion in most agencies. But linking collection and dissemination of data across the foreign and domestic divide to detect foreign and domestic terror threats loops local actors into new expectations of their role both externally from state, federal and private sector partners and internally, at the departmental level.

5.3.1 Increased Level of Sophistication

The Department of Homeland Security Urban Area Security Initiative (UASI) provides funds for smartphone crackers, license plate readers, data aggregation tools and search and storage software. DOJ’s Smart Policing Initiative is a data-driven law enforcement program

⁵⁴⁴ Mark A Randol, “The Department of Homeland Security Intelligence Enterprise: Operational Overview and Oversight Challenges for Congress,” n.d., 5.

promoting tactics and strategies like predictive policing technologies using tools like PredPol (headquartered in Santa Cruz, CA), ShotSpotter (Fremont, CA) and HunchLab, produced by Philadelphia-based Azavea.⁵⁴⁵ Targeted predictive policing ostensibly used to prevent violent crime was an element of Operation Ceasefire “[o]ne of the first networked interventions...sponsored by the National Institute of Justice (NIJ)”⁵⁴⁶ a program pioneered in Boston and later implemented in cities such as Oakland. Police use field interview cards or police contact cards as intelligence tools, feeding information into predictive systems. The cards “were one of the first data sources the LAPD integrated into the Palantir platform.”⁵⁴⁷ Today, federal and local predictive capabilities make CompStat’s philosophy look outmoded. Technology developed by DHS like the Visual Analytics Law Enforcement Toolkit (VALET) integrates large volumes of criminal, traffic and civil incident data “into a single, interactive user interface.”⁵⁴⁸ It is used by law enforcement decision makers, analysts and officers to sort crime trends, patterns and crime anomalies so that they may use predictive crime analytics to allocate law enforcement resources. Beat cops can access integrated intelligence from

⁵⁴⁵ Brayne, “The Criminal Law and Law Enforcement Implications of Big Data,” 296.

⁵⁴⁶ *Ibid.*, 298.

⁵⁴⁷ *Ibid.*, 299.

⁵⁴⁸ “Law Enforcement Partnerships,” Department of Homeland Security, accessed May 4, 2020, <https://www.dhs.gov/publications-library/law-enforcement-partnerships>.

their phones including data from “social media, street light locations, law enforcement records, census data, zoning tracts, community events calendars, weather reports, civil court data, and bus routes.”⁵⁴⁹

Community policing is another source added to this. A focus on developing deeper citizen relationships to solve crimes was an innovation in the 1990s alongside CompStat but now these tactics routinely leverage citizen informants not to solve neighborhood problems, the purpose for which community policing was developed, but to feed the larger transition to pre-emptive intelligence-led policing. Information sharing, as part of this work, emphasizes public–private partnerships with commercial entities and operational relationships with fusion centers to aggregate, store and mine the data. Large agencies also use license plate readers, social network analysis, social media mining in addition to remote surveillance, online undercover operations, cell phone tracking, drone operations and virtual Human Intelligence (HUMINT) gathered through human-led digital communications.⁵⁵⁰ Suffice it to say, elevated

⁵⁴⁹ “Visual Analytics Law Enforcement Toolkit: Helping Law Enforcement Stay Ahead of Crime,” accessed May 4, 2020, https://www.dhs.gov/sites/default/files/publications/cvada_visual-analytic-law-enf-coe-factsheet_1604-508.pdf.

⁵⁵⁰ “Critical Issues for Intelligence Commanders, Intelligence Commanders Group (ICG), Major Cities Chiefs Association (MCCA) and Major County Sheriffs of America (MCSA),” 2018, 9, file:///C:/Users/trina/Downloads/MCCA%20Intelligence%20Commander%20Group%20Critical%20Issues%20Series_%20FINAL.pdf.

sophistication is due to increased integration and not merely the passage of time.

For illustration, let us take the information collected from a license plate, using an automatic reader. Intelligence developed from big data analysis is merged with other pieces of information from a variety of federal and state sources and then re-contextualized to meet the needs of law enforcement in the field. While practical, the volume of data these produce can get unwieldy if it is not well-maintained.

In 2018, two Bay Area residents – one, a prominent member of an oversight organization - were riding along Interstate 80. They passed through the small city of Hercules on their way south. The car in which they rode was a rental. A stationary Automated License Plate Reader (ALPR) in Hercules picked up the images of the passing car and signaled to police a stolen vehicle was on the road. After a few miles, Contra Costa County Sheriff's deputies pulled the car over and ordered the occupants out of the vehicle, weapons drawn. One rider was injured in the engagement. As it happened, the rental car was at one time registered stolen, but it was never actually stolen. There had been a disagreement regarding the car between private parties and the issue was resolved. The data available to police was never updated. The private vendor providing the ALPRs, and the data collected from it, is a Livermore company,

Vigilant Solutions. Since the data was never corrected or updated by Vigilant, or any of the police departments as far south as San Jose, any officer with access might have responded the same way. State of the art data collection methods and the ability to query its output has its limitations in application.

Automated license plate readers are a form of pre-warrant dragnet surveillance. They “are high-speed, computer-controlled camera systems that are typically mounted on street poles, streetlights, highway overpasses, mobile trailers, or attached to police squad cars.”⁵⁵¹ They collect millions of images per month and the national database stores billions of these images. The NYPD partnered with Microsoft to create a Domain Awareness System to collect information from ALPRs, closed-circuit surveillance cameras, radiation sensors, and other sensors to match with police databases.⁵⁵² Oakland residents decided to close their Domain Awareness Center in 2015. The volume of data and inconsistent oversight make it difficult to control the data’s integrity.

The Department of Homeland Security Immigration and Customs Enforcement (ICE) uses data collected by private contractors to compile “records from at least 25 states and 24 of the top 30 most populous

⁵⁵¹ “Automated License Plate Readers (ALPRs),” Electronic Frontier Foundation, August 28, 2017, <https://www.eff.org/pages/automated-license-plate-readers-alpr>.

⁵⁵² Brayne, “The Criminal Law and Law Enforcement Implications of Big Data,” 300–301.

metropolitan statistical areas within the United States.”⁵⁵³ The commercial database receives data from governmental and private sources, ranging from toll road cameras, parking lot cameras, vehicle repossession companies and local law enforcement agencies. DHS then shares the trove with the Department’s Enforcement and Removal Operations (ERO) and Homeland Security Investigations (HSI) as well as the FBI, US Marshals Service, and indeed state and local police departments participating in multi-agency task forces with any or all of these entities.⁵⁵⁴ While the DOJ also funds ALPRs, the DHS Urban Area Security Initiative (UASI) has directly funded ALPRs in, at minimum, 14 local departments across California since at least 2015.⁵⁵⁵ DHS grants to states and cities have paid for these in, at the lowest number, 10 additional states since at least 2014.⁵⁵⁶

Due to the entrepreneurial zeal of corporations in what Shoshana Zuboff calls ‘surveillance capitalism’ - a new economic framework reliant on commercial techniques to normalize collective expectations of total certainty⁵⁵⁷ - ALPRs are increasingly available to private citizens to track

⁵⁵³ Amber Smith, “Acquisition and Use of License Plate Reader (LPR) Data from a Commercial Service: Privacy Impact Assessment Update,” December 27, 2017, 3, <https://www.dhs.gov/sites/default/files/publications/privacy-pia-ice-lpr-january2018.pdf>.

⁵⁵⁴ *Ibid.*, 15.

⁵⁵⁵ “Public Records Request to California Governor’s Office of Emergency Services (Cal OES).”

⁵⁵⁶ “Fiscal Year 2008-2015 Law Enforcement Terrorism Prevention Activity Funding.”

⁵⁵⁷ Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*, Reprint edition (New York: PublicAffairs, 2020).

neighbors or passersby.⁵⁵⁸ They can then be linked up with law enforcement who may share information upwards. US cities and counties solicit their own private vendors (though often agencies use the same one: Vigilant Solutions) to gather images of all of the license plates of all the cars driving in that city, in a neighborhood or in a region of that city. In Oakland, police commanders request that some of their 35 mounted ALPR cameras be used in particular areas for periods of time to address crime patterns.⁵⁵⁹ Each system runs continuously, photographing vehicles until it is turned off manually, typically recording hundreds of license plates each hour.⁵⁶⁰ In California, 230 police and sheriff departments currently use ALPRs.⁵⁶¹ Oakland, Santa Clara County and Santa Cruz County have used them in the past or currently do. Agencies using the CalGang database, containing individuals with suspected gang ties, operate with Palantir's product called Gotham. The product links various datasets for agency data-mining purposes from sources like ALPRs, criminal histories

⁵⁵⁸ Elizabeth Joh, "The Rise of Networked Vigilante Surveillance," *Slate Magazine*, September 24, 2019, <https://slate.com/technology/2019/09/flock-automatic-license-plate-readers-neighborhood-surveillance.html>.

⁵⁵⁹ OAKLAND POLICE DEPARTMENT, "Surveillance Impact Use Report for the Automated License Plate Reader," March 2019, 2, 3.

⁵⁶⁰ *Ibid.*, 1.

⁵⁶¹ ELAINE M. HOWLE, "Automated License Plate Readers CA State Audit: To Better Protect Individuals' Privacy, Law Enforcement Must Increase Its Safeguards for the Data It Collects," February 13, 2020, 7, <https://www.auditor.ca.gov/reports/2019-118/index.html>.

and telephone records.⁵⁶² Agencies lacking oversight in their use of ALPRs, like LAPD, failed to add controls limiting access and usage to their contract with Palantir, allowing employees full entrée to the private data it managed which they could then exploit for unauthorized ends.⁵⁶³

Police can combine criminal and dragnet data they collect with non-law enforcement personal data sold by brokerage companies like Acxiom, CoreLogic, and Datalogix or by any company that collects social media history for example, a tactic which sweeps individuals into police data sets.⁵⁶⁴ Police can use these to produce a threat score on individuals and locations in real-time during stops, arrests and interactions, as mentioned. Oakland uses mobile identification devices to run a person's fingerprints when officers make stops in the field. Such identification constitutes a search and must be consented to yet there is concern about what metadata is available through the device and which metadata it produces for access by which agencies.

⁵⁶² "Documents Show CalGang Uses Error-Prone Facial Recognition," *Reveal* (blog), accessed August 18, 2020, <https://www.revealnews.org/article/documents-show-calgang-uses-error-prone-facial-recognition/>.

⁵⁶³ HOWLE, "Automated License Plate Readers CA State Audit: To Better Protect Individuals' Privacy, Law Enforcement Must Increase Its Safeguards for the Data It Collects," 23.

⁵⁶⁴ Brayne, "The Criminal Law and Law Enforcement Implications of Big Data," 301.

5.3.2 Privacy Policy as a Consequence of Local Integration

The most sustained, organized and effective form of opposition to the War on Terror policy regime and the consolidation of NSF has been in realm of privacy policy. The Supreme Court has defined privacy as "the right to be left alone,"⁵⁶⁵ and as an "individual interest in avoiding disclosure of personal matters" as well as an "interest in independence in making certain kinds of important decisions."⁵⁶⁶ Privacy can mean both consumer data protection and a political and personal 'inalienable' right⁵⁶⁷ necessary for the functioning of democracy. Most people are consumers, so the two notions of privacy are linked. The things one buys and what one does are core understandings of an individual's persona or profile. Profiles have predictive power as well as the potential to be exploited for financial and other reasons. Privacy policy therefore is fundamentally an attempt to understand how governments and companies use individuals' data and to have greater control over its usage. Personal data is protected through a variety of means but this study examined surveillance technology ordinances which provide a vetting framework for all technology that collects personal information and

⁵⁶⁵ "Olmstead v. United States, 277 U.S. 438 (1928)," Justia Law, Page 277 U. S. 478, accessed October 27, 2022, <https://supreme.justia.com/cases/federal/us/277/438/>.

⁵⁶⁶ "Whalen v. Roe, 429 U.S. 589 (1977)," Justia Law, Page 429 U. S. 599-600, accessed October 27, 2022, <https://supreme.justia.com/cases/federal/us/429/589/>.

⁵⁶⁷ "Privacy Laws," State of California - Department of Justice - Office of the Attorney General, March 22, 2013, <https://oag.ca.gov/privacy/privacy-laws>.

privacy advisory commissions, made up of subject-matter experts who advise voting bodies on these acquisitions.

Under the privacy policy umbrella of issues is mass and individual surveillance, policing practices, equipment acquisition, transparency in spending, biometric algorithm and artificial intelligence regulation, contract evaluation, government structure and more. Through this work, mostly at the local level, one can see an impression of the security state much like a seashell pressed into the sand then lifted and carried away. The image is temporal and disappears just in time for the next set of considerations to arise. The work is national but piecemeal and does not keep up with the changes in practices and technologies.

There is a debate about the meaning of privacy and a burgeoning movement to slow and regulate information sharing, data storage and mass collection. This is exemplified through privacy laws, legal scholarship and community organizing around the issue. Conversely, law enforcement offers a caution that “advocates for enhanced privacy now seek to impose further barriers and restrictions that prevent law enforcement from obtaining historically lawfully accessible information, even when it’s needed to stop violent criminals and to save lives.”⁵⁶⁸ What

⁵⁶⁸ “Critical Issues for Intelligence Commanders, Intelligence Commanders Group (ICG), Major Cities Chiefs Association (MCCA) and Major County Sheriffs of America (MCSA),” 42.

are the government's obligations with regard to the information it collects and what distinctions do institutions make regarding who deserves privacy and who does not?

Citizen groups and non-profits at the local level have attempted to answer this question making regulation a priority. Two privacy advisory boards with broad oversight powers exist in the nation: San Diego and Oakland, California. Eighteen other cities and counties have less-powerful commissions or surveillance technology ordinances without an oversight body. Fiscally-minded groups seek proof of efficacy in surveillance technology purchases with public funds. Other organizations address the absence of guardrails when using these tools or the data they collect.

5.4 Conclusion

Post-9/11, information sharing has been productively and broadly defined in terms of its forms: multi-jurisdictional partnerships, public-private partnerships, fusion centers and more, in an effort to promote one shared national vision across the federalist system of divided power, as “[t]he common stewardship of information through the acts of partnering, dissemination, and fusion, with the objectives of shared understanding, consistent decision-making, and coordinated action to achieve

collaborative goals.”⁵⁶⁹ In other words, it is more than simply data movement but a complex effort at relationship and capabilities building which happens in a coordinated way across organizations and levels of government and in close coordination with the private sector. It embraces one understanding of public and private objectives in this space. At issue is the connect-the-dots strategy central to the post-9/11 approach, where the dots are trillions of bits of data amassed each day, some redundant, used to piece together probabilities of crime or risk assessments on individuals, groups, organizations and states related to terrorism, broadly defined. A trend emerges consistent with the seamless nation-wide information sharing the Bush Administration and allies engineered immediately following September 11, 2001. Consistent with their philosophy of Executive power and the ability to accumulate that power in the President in crisis, the Bush legacy continues to breathe life into new cohorts of security experts both public and private.

Post-9/11 there is a much larger role for the private sector. On the one hand policymakers must consider new legal and practical relationships with vendors such as balancing their proprietary secrets with public transparency. Simultaneously some local governments are attempting to reclaim authority through privacy laws and re-organization

⁵⁶⁹ *Ibid.*, 136.

in the form of privacy commissions, ordinances and privacy offices inside the government in places like Oakland and Santa Clara.

CHAPTER 6: CONCLUSION

“Centralizing the police, centralizing them nationally. That would be good.”

“Important debates are occurring [on law enforcement surveillance] that exclude an interest in what’s actually happening on the ground.”

This dissertation has examined the transformation of National Security Federalism after 9/11. It focused on four dimensions: pre-9/11 precedents, 9/11 and the Department of Homeland Security, material aid to cities (especially vehicles) and local intelligence work. Chapter two took stock of the Cold War and interwar programs and policies that consolidated NSF in ways foreshadowing the post-9/11 paradigm. Chapter three considered the design and creation of DHS with its unique methods of enveloping localities in pursuit of its mission. Armored vehicles were used in chapter four as an illustration of the distinctive new relationship between DHS and cities and counties. Through DHS funding and pressures, these military-style machines are now ubiquitous, part of national counterterrorism and preparedness strategies in communities large and small. Chapter five demonstrated the modes by which cities have become sites of domestic intelligence production as well as the sites of push-back, however rare, as a consequence of this move.

The emergency of 9/11 is gone. Terrorism is no longer front of mind for most citizens. Active shooter atrocities and white supremacist violence have become more salient as domestic threats. And yet, counterterrorism programs and policies are business as usual. In the cities and counties examined, evidence exists that the national security state has expanded, and continues to expand, to encompass more domestic geography than it did prior to 9/11. Those doing the work to collapse the distance between the central government and localities have indicated as much, in a variety of ways. Others are pushing back, re-claiming sovereignty at the local level using government arrangements including surveillance ordinances and privacy advisory boards and commissions.

A theme carried through the chapters is testing the idea in the Federalist theory that the division of labor between the central and state governments creates additional avenues for citizens to hold their government to account democratically. At the outset, this dissertation hypothesized that distortion to the local democratic process was possible if federal preparedness and intelligence priorities supplanted local ones. By this, it is meant that local voting publics might get more than they bargained for with the War on Terror when subnational assets are used to implement national security strategy. That perhaps voters may not have much of a choice as to the ways their local public safety agencies merge

crime fighting and counterterrorism in this environment. Alternatively, elected members of a body who control local public safety strategy and budgets may vote in ways they would not have otherwise, in the absence of post-9/11 counterterrorism funding. Another distortion may be that locally-funded bureaucratic agents act and react to new pressures stemming from post-9/11 domestic war policies in ways consistent with national strategy and inconsistent with community wishes. Through concrete observation over the course of this study, all of these scenarios have occurred. While examples of distortion in the communities examined here are small in number (due to the limitations of this researcher), that they happened at all suggests a pattern and a potential for recurrence in these sites and in cities across this nation. The Bay Area cities and counties scrutinized for this project are distinct from one another in terms of constituency, topography, economic drivers, population size and other factors. There is no reason, other than a response to national strategy, that they should behave similarly.

Other symptoms of consolidated NSF emerged. An infrastructure for sharing information and generating metadata has developed over time in the case communities studied here. All use software, hardware and partnerships to connect to the national intelligence community in ways they had not previously. From subjects it is learned that the War's

domestic applications rely on the wide discretion of its practitioners. Intelligence professionals are in control of the data they gather and the data they receive from other agencies, including local ones. Some officials have found themselves in possession of information even they feel they should not have.

In the name of homeland security, the cases examined in this study are involved in gathering data, providing data, training officials, seeking funds, succumbing to regional pressures to buy equipment with DHS and city funds and participating in, and appealing to, regional working groups. Police and sheriff's departments continue to seek out the latest surveillance technology and sign NDAs that challenge public scrutiny. Significantly, federal partnerships and data sharing in Oakland allow for greater flexibility in crime fighting, counterterrorism or crowd control. These are consistently challenged by their oversight body. In Santa Cruz and Santa Cruz County the absence of terrorism and the low crime rate has not been a reason to forego War on Terror funding. In Alameda County, elected representatives could not influence their agency's use of DHS funds.

It also came to light that DHS maintains few robust, queryable and accessible records regarding grants disbursement, and the same is true of the State of California. A former FEMA official pointed out that

there is little incentive to keep such records. DHS provides funding to states who pass the money through to localities, minus a percentage for administrative costs. States thus control and distribute grants and accountability is with the state. It is unlikely the administrative percentage is adequate to hold all agencies accountable. It serves no one to question a law enforcement agency's use of funds, for example, because it jeopardizes the state's ability to receive money in the future. There is, in fact, a disincentive to learn the specifics. The federal government likewise lacks an incentive to proactively determine whether programmatic dollars are used as intended, to demand accountability or to produce such information.

Through project research, I discovered a small but growing contingent of privacy professionals working in each of the communities examined here but also nation-wide. While the American Civil Liberties Union has produced a template surveillance ordinance, residents on the ground in cities and counties, along with the elected officials, are effective in obtaining these checking mechanisms. For the purposes of this study, privacy policy is defined as an attempt to understand how governments and companies use individuals' data and to have greater control over its usage. The continued pressure to produce a top-to-bottom connect-the-dots intelligence phalanx to prevent terrorism has been successful in folding

states and cities into the national intelligence community. But surveillance and technology accumulation is largely unregulated. Privacy policy, in its post-9/11 form, is in a critical, nascent stage. The state and local privacy movement is an organized, consistent and effective push-back on War on Terror era surveillance, on technology acquisitions generally and on local-state-federal partnerships. Cities, about 20 nationally, have passed surveillance ordinances and two have advisory bodies who must review all technology purchases by their cities with the potential to be used for surveillance. Such small scale challenges are nonetheless an affront to the entire national security state in the sense that the connect-the-dots strategy has been one of directly linking local agencies to federal intelligence agencies while privacy oversight will cause some de-linking. While connect-the-dots continues to evolve, its practitioners accept their role in its continued success. So too have privacy advocates taken a position in opposition to unregulated surveillance.

The findings discussed above indicate a broader national security state. Its reach has furthered the participation of state and local governments in new tasks associated with counterterrorism. The project has attempted to show that localities have been used to fight the War on Terror in ways that challenge our notions of federalism. Federalism by its nature is changeable, malleable and represents different things at

different times in American history and to different citizens. Even with a National Security Federalism that had morphed substantially, at least since the 1947 National Security Act and the various domestic “wars” presidents waged to effect change in their own image (e.g. poverty, crime and drugs), there still was a strong division of labor between the central government and states, until 9/11. Since the cataclysmic events of September 11, the Executive branch devolved responsibilities, policy priorities and tasks of implementation to localities to produce a particular brand of security. Post-9/11 NSF is preemptive security in that it calls for anticipating terrorism, criminality and emergencies in a way that alters the focus of public safety staff, even if only to write grant applications that meet the requirements of regional and national bodies dolling out the funds. As one official put it: “Money institutionalizes.”

September 11 was not only a catastrophe with human casualties but a crucial turning point in the way we think about federalism when it comes to national security. The political moment generated a monstrous bureaucracy called the Department of Homeland Security in the image of the Bush Administration. With regional spin-offs that decide grants distribution, it was all but guaranteed that the ethos and impetus of the War on Terror would be with us long after terrorism became a buzzword and was replaced by other pressing needs. Through this study, this

researcher has induced that NSF altered institutions at the local and state level and has changed the American state in fundamental ways. These changes appear to be sticky and unlikely to reverse course. The new shape of the security state is normalized. Privacy policy is one of the main countervailing forces to post-9/11 NSF, but its limited breadth only highlights the enormity of the broader shift.

This study opened with a reference to Minneapolis. In that city, the Mayor and City Council are actively scrutinizing their public safety departments. Internally, restructuring is underway to achieve political accountability and community trust. However, DHS grants are not a part of the discussion. Through an office of community safety, led by a commissioner, the City will integrate five offices including police and fire departments, 911 dispatch and the offices of emergency management and neighborhood safety to reflect a holistic approach to public safety. The Mayor will become a purely administrative power – able to hire and fire the chief of police -- and the Council will be designated a purely legislative body. Political finger-pointing has caused a push for brighter lines to designate these roles. With a strong-mayor form of government, the Mayor will be held to account through elections and the Council will have less involvement in policing decisions, aside from departmental budgets. Even with attention being paid to the police department, drone purchases,

surveillance and ‘smart’ technology through a specific federal partnership was a conversation that happened late in the legislative process. The City has no surveillance ordinance to dictate anything beyond notification to Council. If, and when, the council learns about acquisitions only during a Request for Committee Action, it becomes a trust issue between it and the law enforcement agency. The month the agency purchased the technology in question, they accepted a grant from the state’s Homeland Security and Emergency Management for \$904,500.

Because the War on Terror is a process evolving in real time, the most telling evidence of the shift in NSF is the reflections and the perspectives of the actors doing the work. Interviews have shed light on the ways that officials apply new technologies and tactics in the field and how they may do so in the future. Indicative in these conversations is a glimpse into how bureaucratic, elected and private sector actors will train those workers who come after. In hindsight, I would add more color to these chapters, incorporating more of the incredible accounts and events relayed to me in conversations with subject-matter experts. Their lived experiences and observations brought this material to life in ways I could not have imagined and I do not always do justice to this fact.

A richer discussion of the data I gleaned from public announcements on equipment obtained in cities and counties would have

given texture to the types of communities gaining access to preparedness dollars. A full accounting of the uneven targeting of post-9/11 NSF technologies and practices on communities of color would make this a better project.

In the final analysis, NSF is the most significant legal and political space to watch for its outsized impact on local institutions. The War on Terror drags on perpetually, even though the wars in Afghanistan and Iraq have ended. The blanket authority contained in the Authorizations for Use of Military Force (AUMF) in 2001 and 2002 have been sufficient for presidents to expand the War on Terrorism and to deploy military personnel in a minimum of 19 countries. The AUMFs have contributed to the malleability and scope of the ongoing War on Terror. An assessment of counterterrorism policies, at home and abroad, must include these authorizations in the conversation. In the meantime, a few cities will attempt to reclaim sovereignty through privacy policy, unearthing interesting activities and combinations until, perhaps, these new local regulations are tested in the Supreme Court. On the policy front, therefore, federalism is alive and well, but exists in a changed state along the vertical axis of national security.

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