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FUSION CENTERS AND FEDERALISM: EROSION OR ENHANCEMENT?

by

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March 2013

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The lines separating the levels and responsibilities of government, once clear and distinct, have now become ambiguous and confusing, thereby enabling states to reassert their power vis-à-vis the federal government. The decentralized nature of the overall homeland security apparatus and the growing complexity of the assigned tasks enables fusion centers, and thus the states themselves to rise in stature. Because each state is free to tailor its own security framework, fusion centers enjoy the kind of flexibility urgently needed in today's domestic security environment.

This thesis addresses the recent advances in federalism by exploring two pillars of fusion center characteristics. The first section can be construed to be the "hardware" piece; that is, the missions and structures under which they operate. The second section investigates the "software" side, or the databases and networks containing the information and intelligence.

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Submitted in partial fulfillment of the
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LIST OF ACRONYMS AND ABBREVIATIONS

CIA	Central Intelligence Agency
CIKR	Critical Infrastructure Key Resources
CRS	Congressional Research Service
DHS	Department of Homeland Security
DNI	Director of National Intelligence
DOJ	Department of Justice
EOC	Emergency Operations Centers
FBI	Federal Bureau of Investigation
HSIN	Homeland Security Information Network
HSINT	Homeland Security Intelligence
HS SLIC	Homeland Security State and Local Intelligence Community of Interest
ISE	Intelligence Sharing Environment
JRSA	Justice Research and Statistics Association
JTTF	Joint Terrorism Task Force
N-DEx	National Data Exchange
NOC	National Operations Center
NSA	National Security Agency
OIG	Office of the Inspector General
PNSR	Project on National Security Reform
QHSR	Quadrennial Homeland Security Review
STIC	Illinois Statewide Terrorism Intelligence Center

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I. INTRODUCTION

Much of the legal and political discussion of the broader homeland security response to national security threats since 9/11 focuses on the real, potential, and perceived threats to civil liberties and constitutional norms. Typically, such analysis, however it comes down on the debate, fails to consider the underlying convention of American legal thought and practice: federalism. Arguably, the whole framework of shared and exclusive rights and responsibilities among the states and localities and the national government and their respective institutions exists to preserve and promote civil liberties—as yet another check and balance on governmental power, even (or especially) in times of crisis. In other words, the framers of the Constitution purposely diffused the available authority among the nation's various organizational layers to further ensure the protection of the common citizen.

In declaring "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people," the Tenth Amendment assuaged the fears of a central government replete with innumerable controls.[1] States and localities thus retain considerable powers and prerogatives into which the federal government cannot intrude. While the national security—"provid[ing] for the common defense"—marks a national-level concern, law enforcement as most citizens conceive of the activity remains at the sub-federal level, that is, state or local. However, post-9/11 homeland security initiatives have come to symbolize a major change in American-style federalism. Powers initially reserved to the respective levels of government—federal, state, local, and tribal— are increasingly merging across long-established boundaries. Where there is chaos, there are dangers to normative governing doctrines.

Perhaps nowhere is this dynamic more evident than in the rise of fusion centers, state-run agencies tasked with melding intelligence from all levels of government. Defined as "a collaborative effort of two or more Federal, State, local, or tribal

[1] U.S. Constitution, Tenth Amendment.

government agencies that combines resources, expertise, or information with the goal of maximizing the ability of such agencies to detect, prevent, investigate, apprehend, and respond to criminal or terrorist activities," they represent a developing approach to homeland security.[2] They are well-established entities in many states, while in others, the centers are only beginning to open their doors for business. Thus, their lasting impact on American governance remains unresolved. If fusion centers do advance the interests and prerogatives of the state and local authorities vis-à-vis the federal government, do the hard-won checks and balances of procedure and law follow, preserving the structures and mechanisms that ensure basic civil liberties? Moreover, if fusion centers pose extensive questions the core federalism configuration, do they threaten national security in the long run, or do they buttress nationwide security efforts?

Typically after a disaster of national proportions, the executive branch and the federal government in general take more power. This assumption of greater responsibilities is not unexpected and has been seen as happening since 9/11, both with the Bush and Obama administrations. However, the establishment of a network of state and local intelligence fusion centers since 9/11 provides an important example in which the federal government has shared responsibilities with other levels of government instead of proceeding ahead on its own. This thesis examines how fusion centers fit within the American federalist system of government, and argues that when examined from this relatively little-used perspective, we can understand significant aspects of their development.

A. CHALLENGES FROM BOTH DIRECTIONS

Fusing various pieces of information to construct a clearer picture of threats or situations is a desirable goal for both intelligence and law enforcement. Acquiring and processing that information, however, can be fraught with peril for the civil libertarian or

2 *Implementing Recommendations of the 9/11 Commission Act of 2007,* Public Law 110-53, http://intelligence.senate.gov/laws/pl11053.pdf, 322.

the citizen under investigation. The implications of these relatively new fusion processes remain unresolved and stimulate broader questions about the general direction of American governance.

1. Federal Offensive…?

Critics of the current homeland security approach, including operators on both sides of the federal divide, complain that, for example, the numerous national strategies and standards compel state and local entities to adhere to an ever-increasing number of rules set forth by the Department of Homeland Security (DHS) and other federal agencies in the name of improving, if not perfecting, the nation's defense. Generally speaking, such measures as strict federal grant usage guidelines or exacting disaster preparedness checklists prompt wide-ranging concern that overbearing national control is replacing the long-standing balance of coordination and collaboration that state and local institutions had forged and enjoyed before September 11. Fusion centers thus possibly exemplify the breakdown of traditional state-federal law enforcement boundaries, persistent federal involvement and funding to state law enforcement initiatives, and what amounts to an expanding nationalized homeland security enterprise.

In the 2010 Quadrennial Homeland Security Review (QHSR), DHS defined that enterprise as "the collective efforts and shared responsibilities of federal, state, local, tribal, territorial, nongovernmental, and private-sector partners—as well as individuals, families, and communities—to maintain critical homeland security capabilities."[3] Though states retain fundamental jurisdiction of their fusion centers, there are indicators pointing to an overall lessening of control and, thus, a further diminution in federalism. Consequently, the federally led homeland security measures put in place in the past decade raise elemental questions about federalism and the power of state and local authorities.

[3] U.S. Department of Homeland Security, *Quadrennial Homeland Security Review Report*, February 2010, viii.

2. … or State Expansion?

On the other hand, despite significant constitutional concerns about fusion centers, the prospect exists that they actually represent a strengthening of state power, thereby enhancing federalism and reinforcing constitutional principles, not threatening them. Though the fusion concept pre-dated 9/11 as a means of boosting traditional state law enforcement capabilities, the attacks pushed states into either establishing new centers, or modifying existing ones to meet the new homeland security demands; consequently, conventional policing roles of the states expanded into entirely different areas.[4] Because homeland security at the non-federal levels evolved to include such priorities as Critical Infrastructure and Key Resources (CIKR) protection, public health, public safety, disaster preparedness, state and local bodies have assumed greater responsibilities and power.

Furthermore, states now possess an unparalleled level of access and integration into the national intelligence and law enforcement systems thereby enhancing their influence. Leveraging these national capabilities enables states to better protect their constituents and respond to threats without solely relying on federal intervention. In that sense, fusion centers represent a progression in federalism and showcase an elevation of state power vis-à-vis the national government.

B. OF FUSION AND FEDERALISM

While fusion centers elicit concerns about such democratic ideals as Fourth Amendment civil liberties, they also elicit questions about the very structure by which the democracy operates. The Tenth Amendment establishes limits on the central government's authorities by leaving the bulk of powers to the states, not the least of which is law enforcement. Madison, in *Federalist #4,* exhorts this with the pronouncement that state, not federal, responsibilities would "concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the

[4] U.S. Library of Congress, Congressional Research Service, *Fusion Centers: Issues and Options for Congress*, by Todd Masse, CRS Report RL34070 (Washington, DC: Office of Congressional Information and Publishing, July 6, 2007), 1.

State."[5] The premise behind these specifications came from the American distrust of an overpowering and intrusive central government like the British monarchy. Federalism was not simply intended as a better style of government, it was conceived of to protect the most fundamental rights and liberties of the American citizen.

So, after two centuries of federalism-based democracy, why should the United States be concerned with the ten-year evolution of fusion centers? The reason is that lines separating the levels and responsibilities of government, once clear and distinct, have now become ambiguous and confusing. For example, a local police officer sitting in a fusion center now enjoys access to federal level intelligence products, albeit partially sanitized versions. Conversely, federal agents co-located in the same center often find themselves sifting through routine level law enforcement complaints, ostensibly because they possibly involve potential terror activities. Because fusion centers remain firmly planted at the juncture of state, local, federal, and private interests, they must navigate their way through the maze of three vital operations: intelligence, law enforcement, and public safety. Performing just one of those critically important security functions is an arduous task. The larger question is can they successfully execute all three while preserving civil liberties and federalism?

One of the principal controversies surrounding fusion center evolution involves the merging and overlap of previously separate responsibilities. For these state-run entities, the dividing line between national intelligence and law enforcement efforts often meanders, or is erased altogether. In addition, traditional boundaries continue to disappear with fusion center funding and manning. The continued presence of national agency (DHS, Federal Bureau of Investigation [FBI], etc.) liaisons and a steady stream of federal subsidization invariably leads to questions on just how state-centric these centers are. Likewise, efforts to link these state bodies into what is becoming known as the National Network of Fusion Centers yields still greater questions as to the future composition of federalism. These categories clearly represent more typical law enforcement concerns at the state and local level.

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[5] James Madison, *Federalist #45*, Library of Congress, http://thomas.loc.gov/home/histdox/fedpapers.html.

Concurrently, states also initiated the rise of fusion centers to serve their own intelligence needs better. Though counterterrorism provided the main impetus for fusion center development, states now utilize the construct for a variety of their own law enforcement purposes that potentially fall below the federal threshold. Case in point is the Illinois Statewide Terrorism Intelligence Center (STIC), which commenced its operations in 2003. Its name bespeaks a heavy concentration of federally-focused homeland security needs, but yet the center also maintains "units specializing in other categories of criminal activity, including narcotics, violent crimes, sex offenses, and motor vehicle theft."[6]

With responsibilities as diverse as auto theft and terrorism, it is no wonder a fusion centers must walk a thin line between serving the needs of the municipality, state, or the nation. As a Congressional Research Service (CRS) report indicates, "the rise of fusion centers is representative of a recognition that non-traditional actors—state and local law enforcement and public safety agencies—have an important role to play in homeland defense and security."[7] But how much of a role and who decides? Serious federalism and constitutional concerns arise when normal state and local policing activities take place within the guise of counterterrorism, such as surveillance and investigations of suspicious individuals. These police actions end up shaping national-level counterterror decisions.

To further complicate matters, the 2006 Fusion Center Guidelines published by the Department of Justice (DOJ) and DHS stipulate, "[the ideal] fusion center involves every level and discipline of government, private sector entities, and the public."[8] If these state-run bodies are supposed to incorporate everybody (including the federal liaison officers assigned to them), does this not threaten long-cherished separation of powers? However, the opposite may be true. State involvement in non-traditional aspects involving national security may signify advancing power for the sub-federal levels of

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[6] National Governors Association Center for Best Practices, "Establishing State Intelligence Fusion Centers," July 2005, https://www.hsdl.org/?view&did=455819, 9.

[7] Masse and Rollins, *A Summary of Fusion Centers: Core Issues and Options for Congress* (CRS Report RL 34177), 2.

[8] U.S. Department of Homeland Security, *Fusion Center Guidelines: Developing and Sharing Information in a New Era*, August 2006, 3.

government. The merging and subsequent overlap of the domestic intelligence problem potentially offers states enhanced leverage in ways that were unimaginable in the days before 9/11. If the states actively embrace the new responsibilities brought on by the advent of homeland security, does this represent a significant alteration to federalism? After all, the Constitution does not specify exactly what the states can do, only that they (and their citizens) will be able to possess powers *not* designated for the national government.

C. THESIS OVERVIEW

Chapter II provides details of the intellectual and organizational underpinnings of both fusion centers and federalism. The surprising aspect of the fusion center model—here, the extent to which fusion centers did not toll the end of local law enforcement or state protections of citizens' rights—derives from the theory and the practice of American democracy, especially as regards Constitutional civil liberties. The fluctuations in the exercise of federalism through American history reveals much both about the strengths and potential pitfalls of the system.

Chapter III examines how the designated missions and structures of fusion centers offer show states advancing powers their powers in the homeland security realm. The ability for states to tweak fusion center task parameters while creating flexible organizational configurations provides substantial opportunities to enhance sub-federal strengths. Because fusion centers are exclusively state-run entities, they benefit, in turn, from the individualities of the 50 separate components of the Union. Just as citizens derive identities based on where they live, so too do fusion centers achieve their own unique characteristics while still operating under the broader homeland security umbrella.

Chapter IV assesses the intelligence and information processes used by fusion centers. For example, the burgeoning information sharing frameworks offers ample debate as to whether or not states can maintain their well-established public safety standing in the face of an expanding federal presence. The technological advances of the database arrangements enable unprecedented connectivity between previously isolated sections of the government. The networking phenomenon breaks down barriers and leads

to greater distribution of information and intelligence, but questions remains as to how this affects state roles and state powers.

Chapter V concludes the thesis with a determination of how significantly fusion centers affect American federalism. In his book, *In the Common Defens*e, James E. Baker states: "Liberty is a security value because where national security puts exceptional stress on constitutional values…the rule of law helps regulate that stress through the faithful execution of the constitutional structure and statutory procedure."[9] Fusion centers are a microcosm of those stresses and represent a valid test of the state of American federalism. Thus far, they appear to be a achieving a passing grade and continue to further cement themselves into the framework of American governance. More importantly, they have altered the very calculus of federalism.

Instead of viewing powers gained by one level as simultaneous losses by the other, fusion centers demonstrate the concept of mutual advances. Each level of government gains something from their establishment. The federalism discussion remains a deeply rooted concept in American government. It, like the nation itself, endures constant alterations and fluctuates according to the prevailing sentiments of leadership from all levels of government.

[9] James E. Baker, *In The Common Defense: National Security Law for Perilous Times* (Cambridge University Press: New York, 2007), 31.

II. DEFINING THE UNDEFINABLE

Fusion centers represent a notable element of an evolving homeland security strategy. The ability for these centers to piece together disparate pieces of data while working within a national network holds great potential for counterterrorism and public safety requirements. But what exactly are these state-run bodies and why do they matter? And how do they implicate the past, present, and future of American federalism?

A. FUSION CENTERS: AN OVERVIEW

Some fusion centers provide a regional focus within a single state while others concentrate solely on a major urban area that may or may not spill over the border of an adjacent state. There is no single jurisdictional model.

Additionally, because they "incorporate law enforcement officers, other emergency response providers, and, as appropriate, the private sector, into all relevant phases of the intelligence and fusion process," fusion centers do not possess a common organizational model either; consequently, they also symbolize a fundamental transformation of traditional government roles and responsibilities.[10] Instead of operating from a strictly reactive stance, these law enforcement conglomerations have shifted to a more proactive posture, using domestic intelligence as a means to thwart even mundane criminal acts. The quest for greater overall safety and security obliges the nation's law enforcement intelligence to become more anticipatory.

Fusion centers matter because they stand squarely at the crossroads of federal, state, law enforcement, and intelligence concerns. Although the idea of collating law enforcement information among the states existed prior to 9/11, the growing linkage with a *national* homeland security mission spawns an entirely new set of issues. Defending the United States previously fell neatly within the confines of the federal government, but now the country has expanded protection responsibilities down to state and local

10 *Implementing Recommendations of the 9/11 Commission Act*, 322.

authorities. Empowering state fusion centers to assist with national obligations raises substantial questions about the continued legitimacy of individual liberties and American federalism.

B. FEDERALISM: AN OVERVIEW

In a basic sense, federalism itself focuses on an arrangement where "sovereignty in federal political orders is non-centralized, often constitutionally, between at least two levels so that units at each level have final authority and can be self-governing in some issue area. Citizens thus have political obligations to, or have their rights secured by, two authorities."[11] In the United States, these two bodies in question generally are the national government and the states. However, the progression of American federalism now also involves other subnational elements such as local and regional authorities that, in turn, comprise the manning of the various fusion centers scattered throughout the states. These fusion centers operate at the bidding of their particular state and, because of the unique requirements of the individual states, are exceedingly non-standard in their composition, let alone their mission. It is a difficult, if not impossible, task to adequately characterize these bodies. The same can be said of the all-encompassing national defense initiative after 9/11: homeland security.

The advent of homeland security (the entire endeavor, not just DHS) fundamentally altered the federalism discourse and the two have been inextricably linked ever since. As with federalism, the strict definition of homeland security evades scholars, public officials, and practitioners. Though significant efforts have been made to neatly characterize its meaning and clearly demarcate its frontiers, homeland security continues to be a vague backdrop within all levels of government. Even at the very top level of government, the experiences of a decade have done little to shore up a coherent understanding of what it truly means.

In January 2013, the CRS published a report addressing this very issue that laid bare these difficulties. Included in the report was a separate table with no less than seven

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[11] Andreas Føllesdal, "Federalism," *The Stanford Encyclopedia of Philosophy* (Spring 2010 Edition), Edward N. Zalta (ed.), March 9, 2010, http://plato.stanford.edu/archives/spr2010/entries/federalism/.

varying definitions of homeland security, all of which were derived from multiple federal publications published since 2007.[12] One could possibly expect such a wide variance if they had been derived from the earliest attempts at corralling the issue after 9/11, but as the report duly notes, "the competing and varied definitions in these documents may indicate there is no succinct homeland security concept."[13] This observation begs the question: if the originators of homeland security have yet to narrow down a strong refinement of the phrase by 2012, can anybody actually do it? Or, perhaps, should anybody?

Christopher Bellavita touches on this notion of potentially futile efforts at setting out to codify homeland security by stating experts engage in "long and occasionally contentious conversations about the details…and only rarely mention what that word means."[14] He goes further to stipulate that perhaps the lack of absolutes serves a greater purpose because "the absence of agreement can be seen as grist for the continued evolution of homeland security as a practice and as an idea."[15]

1. Madison to Maturation: Federalism Before 2001

The American debate over federalism existed long before homeland security became a priority. Controversy existed at the very beginning of the debates over the Constitution and the *Federalist Papers*, the series of texts written by James Madison, Alexander Hamilton, and John Jay, were designed to ensure its ratification. Though a comprehensive review involving the nuances of these works is far beyond the scope of this thesis, the impassioned pleas of the Federalists to appease those who feared a domineering national government also resonate when viewed in the context of today's homeland security's debates.

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12 U.S. Library of Congress, Congressional Research Service, *Defining Homeland Security: Analysis and Congressional Considerations*, by Shawn Reese, CRS Report R42462 (Washington, DC: Office of Congressional Information and Publishing, January 8, 2013), 8.

13 Reese, *Defining Homeland Security: Analysis and Congressional Considerations* (CRS Report 42462), 10.

14 Christoper Bellavita, "Changing Homeland Security: What is Homeland Security?," *Homeland Security Affairs,* Vol. 4, No. 2 (June 2008), https://www.hsdl.org/?view&did=487086, 1.

15 Bellavita, "Changing Homeland Security: What is Homeland Security?," 20.

For example, James Madison in *Federalist No. 46* appealed to his audience, "that the members of the federal will be more dependent on the members of the State governments, than the latter will be on the former."[16] The framers of the Constitution (and implementers of the subsequent Bill of Rights) refrained from over-specifying what authorities the central government would maintain. By denoting the *limits* of national power, the Tenth Amendment made federalism a guiding principle of American government that stood "as a bulwark against federal intrusion on state authority and individual liberty."[17]

As the country evolved into the 19th century, so, too, did the understanding and interpretation of federalism, especially from a judicial perspective. For example, the landmark 1819 Supreme Court case of *McCulloch v. Maryland*, established the validity of implied federal government powers, not just those exclusively specified in the Constitution.[18] The slow shifts in federalism would gain momentum in the coming decades as the nation witnessed a growing divide from the contentious and threatening issues of slavery and states' rights. When the Civil War started in 1861, it spawned perhaps the most influential moment in American history and fundamentally changed the nation's concept of federalism. The Civil War permanently cemented the supremacy of the nation over the states; moreover, it also demonstrated the extraordinary powers the federal government could deploy against the states (and the population) in such exigent circumstances. As evidenced by the suspension of habeas corpus, military tribunals, and other emergency powers, "President Lincoln had massive and nearly unchecked authority to suppress an insurrection and that it was at least largely under this aegis that he undertook most of his actions (and that his actions should be sustained). But the reason Lincoln had such power was just as clear: Congress, not the Constitution, had given it to

16 James Madison, *Federalist #46*, Library of Congress, http://thomas.loc.gov/home/histdox/fed_46.html.

17 Charles Cooper, "The Constitution in One Sentence: Understanding the Tenth Amendment," *Heritage Foundation First Principles Series*, No. 3 (January 10, 2011), https://www.hsdl.org/?view&did=11118, 1.

18 *McCulloch v. Maryland*, 17 S. Ct. 320 (1819), in LexisNexis Academic.

him."[19] In order to preserve the country, the federal government had arguably violated the Constitution by repudiating many cherished principles of federalism and liberty. Would this model always predominate when the government experienced a deep, domestic crisis?

A century and a half later, the United States faced another critical domestic challenge when the 9/11 terror attacks galvanized the country into a homeland security-centric model. The preliminary rhetoric from the government indicated a significant change from what had been demonstrated in the past. In the initial National Homeland Security Strategy of 2002, not only was there an entire section devoted to federalism, but also it also explicitly intoned that "the federal government must look to state governments to facilitate close coordination and cooperation among all levels of government."[20] Despite the terrorism crisis reaching a national-level threshold, American leadership still felt compelled to invoke the time-honored concept of federalism by stating the country needed all levels of its government to do the job. Why? Perhaps it was that, on some intrinsic level, Americans still believe those who govern closest to them can better protect their rights and liberties. This intellectual insistence on federalism may or may not be operationally correct in the homeland security realm.

However, although the 2002 Homeland Security Strategy cautiously references the powers of the states, an academic review of government policy in the decades leading up to 9/11 reveals a different arrangement that, instead, showcased a greater distribution of power to the federal side. For one thing, instituting the federal income tax through 1913's Sixteenth Amendment produced a significant revenue stream. Not only did this extra funding expand government capabilities, Samuel Clovis also found, but "the inevitable swing of the pendulum of power…moved decidedly toward the central government, with virtually no chance of returning to anything resembling the dual

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[19] Stephen I. Vladeck, "Emergency Power and the Militia Acts," *Yale Law Journal* (October 2004), Vol.114, No.149, https://www.hsdl.org/?view&did=456868, 180.

[20] White House, *National Strategy for Homeland Security* (Washington, DC: White House, 2002), 3.

federalism…[prior to the] national personal income tax."[21] Clovis, in this work and others, postulates that the federal government's power has increased because the size of its purse has grown. But it was not just the accumulation of revenue that altered federalism, it was the downward flow that fundamentally altered the game. The promulgation of money back to the states in the form of grants acts as "the primary mechanism[s] for influencing behaviors at the state and local level" and, ultimately, exemplifies the framework of coercive federalism.[22]

Other scholarship further expounds on the changed landscape of state and national governmental relationships by the time 9/11 occurred. The vast majority of actions executed by the different levels of government were anything but related to national security needs and, in fact, the federal-to-state homeland security-funding still remains a paltry percentage of the overall distribution of funds given by the federal government. However, Judge Richard Posner notes the contemporary federalism alignment by stating, "[homeland security] epitomizes what we've done in some ways with the rest of domestic government…there are very few local functions anymore that have been left untouched by the centralization and nationalization of policy in the past sixty years."[23] Accordingly, as the national government expanded its reach to many subnational areas as disparate as education and disaster relief, the overall trend gravitated towards a coercive style of federalism. This model, whereby national mandates strain state capabilities to meet them, is highlighted by Clovis and echoed by Posner as being "less preferable, but…more inevitable."[24] Thus, as the United States approached the end of the 20th century, the pattern had been set for ever-expanding government centralization and an entrenchment of coercive federalism.

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[21] Samuel H. Clovis, Jr., "Federalism, Homeland Security, and National Preparedness: A Case Study in the Development of Public Policy," *Homeland Security Affairs*, Vol. 2, no. 3 (October 2006), http://www.hsaj.org/?article=2.3.4, 4.

[22] Samuel H. Clovis, Jr.,"Promises Unfulfilled: The Suboptimization of Homeland Security National Preparedness," *Homeland Security Affairs,* Vol. 4, no. 3 (October 2008). https://www.hsdl.org/?view&did=234514., 3.

[23] Richard A. Posner, *Role of "Home" in Homeland Security: The Challenge for State and Local Government: Symposium Series Number 2: The Federalism Challenge*, Nelson A. Rockefeller Institute of Government (March 24, 2003), https://www.hsdl.org/?view&did=441119, 19.

[24] Posner, *Role of "Home" in Homeland Security*, 27.

2. 9/11's Federalism Hangover

Even eleven years removed from that fateful September day, the long-term effects on the American system of governance continue to be debated—much like the debate in the immediate aftermath of the terror attacks. Because 9/11 ushered in a frenzied combination of introspection (how could we have allowed ourselves to be attacked from within?) and outrage (how are we going to avenge our losses?), the prevailing discourse focused on the potential to alter the national government's calculus in meeting these unprecedented challenges.

a. Pros and Cons

On the one-year anniversary of the crucible event, Charles Wise and Rania Nader wrote an article foreshadowing the distinctions of what eventually became the homeland security "enterprise." They articulated that the country would evolve into two governing frameworks, one with a broad nationwide strategy and the other becoming a system of networks linking all levels.[25] In addition, they rejected the assumption that tweaking the governance system because of homeland security would result in a hierarchical scheme; therefore, the sense of federalism would endure and the states would maintain their strong commitment to maintaining their own special commitments.[26] In a similar theme, and around the same timeframe, Dale Krane addressed the trend toward heightened federalism in 2002 by noting "a new realization that without the participation of state and local governments, no strategy requiring nationwide efforts would succeed."[27]

Wise, Nader, and Krane all subscribed to the concept that the change in American federalism would steer toward decentralization and not toward a further

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[25] Charles R Wise. and Rania Nader, "Organizing the Federal System for Homeland Security: Problems, Issues, and Dilemmas," *Public Administration Review* Vol. 62, Special Issue: Democratic Governance in the Aftermath of September 11, 2001. (September 2002), http://www.jstor.org/stable/3110169, 54.

[26] Wise and Nader, "Organizing the Federal System for Homeland Security: Problems, Issues, and Dilemmas," 54.

[27] Dale A. Krane, "The State of American Federalism, 2001–2002: Resilience in Response to Crisis," *Publius: The Journal of Federalism* , Vol. 32, No. 4 (Autumn 2002), http://www.jstor.org/stable/3331024, 3.

consolidation of national power. Despite the substantial growth of federal government visibility in the months after 9/11 (e.g., armed soldiers guarding airports), some scholars were not apt to accept that this would become the norm. Another pair of voices with concurrent views, John Kincaid and Richard Cole, looked specifically at the pending counterterrorism response to federalism. From their vantage point, they believed it "should revitalize federalism" and "[not] have a significant impact on U.S. federalism and intergovernmental relations."[28] However, not all scholars agreed. Furthermore, as homeland security progressed into an era when terrorism ceased to exist as the sole worry, academic considerations shifted to a broader examination of intergovernmental relationships.

Conversely, Peter Eisinger advanced the notion of subnational elements not being proactive enough in the new homeland security realm. Written in 2006, "Imperfect Federalism" lays out the governmental arrangements after five years of posturing and maturation. As he states, "although the prevailing federalism template normally predicts a highly decentralized approach to any new concern, states and localities did not respond to the challenge of homeland security by proclaiming states' rights … instead states and communities looked to Washington to enlist, lead, and support them."[29] But the federal government was not there to lead. Why? Eisinger opines that devolution, or the shifting of power down to the states, was the main culprit of deficient federalism. Consequently, when the rigors of homeland security actually demanded a centralized response, the American federalism system could not adequately meet the new challenges.[30] The debate over too much or too little centralization garners a significant amount of attention and produces stark divisions.

One notable voice preaching against over-centralization is Matt Mayer. In his 2009 book, *Homeland Security and Federalism: Protecting America from Outside the*

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[28] John Kincaid and Richard L. Cole, "Issues of Federalism in Response to Terrorism," *Public Administration Review, Special Issue: Democratic Governance in the Aftermath of September 11, 2001*, (September 2002), http://www.jstor.org/stable/3110189, 182.

[29] Peter Eisinger, "Imperfect Federalism: The Intergovernmental Partnership for Homeland Security," *Public Administration Review*, Vol. 66, No. 4 (August 2006), http://www.jstor.org/stable/3843939, 542.

[30] Eisinger, "Imperfect Federalism: The Intergovernmental Partnership for Homeland Security," 538.

Beltway, Mayer stresses the critical implications of an intrusive federal government in homeland security and its negative, long-lasting effects. In advocating a more collaborative rather than directive approach, Mayer stresses, "a more constitutional distribution of work between the federal government and states and localities must be reached. In some areas, the current federal government lead is simply unjustified, unsustainable, and constitutionally weakest."[31]

b. Intelligence Matters

Although the academic dispute over American federalism is a seemingly perpetual exercise, framing the discussion within a post-9/11 environment generates unique questions, such as how best to proceed with transforming intelligence. Given the amount of attention to widespread intelligence failures (e.g., 9/11 Commission Report) and subsequent attempts at reform such as the creation of Director of National Intelligence (DNI) and Intelligence Sharing Environment (ISE), the default has been to turn to the national government to rectify the problems. But, as Mayer argues, even though "many experts and pundits scoff at the notion that federalism remains a relevant concept, the alternative is continued centralization in Washington, which does not have a very impressive record of transformation."[32]

The Project on National Security Reform (PNSR), a bipartisan effort assigned to tackle America security dilemmas, advocated an approach that closely followed Mayer's proposal. Offering a seven-decade synopsis of American policy and governance structures designed to counter a different kind of enemy, the PNSR State and Local Issue Team noted how the Cold War necessitated "a centralized, top-down national security state" whereas contemporary homeland security needs "require structures which are completely the reverse."[33] Striking the right balance between national security and homeland security configurations remains an elusive target despite ten plus years of

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[31] Matt Mayer, *Homeland Security and Federalism: Protecting America from Outside the Beltway*, (Praeger: Santa Barbara, 2009), 36.

[32] Mayer, *Homeland Security and Federalism*, 153.

[33] Project on National Security Reform Homeland Security Team, *State/Local Issue Team Solution Set.* (November 2008), 13.

attempts to figure out the true path. Though Sharon Caudle believes "substantial stability exists in national homeland security missions and objectives, as well as in policy and operational issues," the fact remains the U.S. has yet to realize exactly what type of control system works best.[34] To complicate matters, the domestic intelligence requirements of homeland security engender multiple facets of control problems because of the varying layers in which it is exercised.

Given the past transgressions of domestic intelligence abuse in the previous century, state initiatives to expand policing powers, increase intelligence gathering, and establish a presence within the burgeoning homeland security realm were not without risk. Moreover, their spread across the country represented a "stark departure from the traditional methods" of federally mandated solutions to domestic intelligence needs.[35] By expanding their law enforcement presence into nontraditional sectors, states began to fill the gaps that national agencies could not reach. However, that movement into gray areas would eventually reach a point requiring federal attention. Despite increasing policies and limits emanating from the DHS and DOJ, fusion centers remain an example of enhanced federalism, as evidenced by their continued growth and inclusion into national strategies. Though some argue the increasing national guidelines indicate a "federal intrusion into…traditional [state] spheres of power," there remains a strong deference by DHS to consistently approach fusion centers as state-run entities operating as critical partners to the national homeland security scheme.[36] The national agencies began to look upon these bodies as more than just gap-fillers or federal stand-ins; instead, the federal leadership now recognizes them as vital to securing sectors well beyond the capability of the federal government.

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[34] Sharon Caudle, "National Preparedness Requirements: Harnessing Management System Standards," *Homeland Security Affairs* 7, No. 14 (June 2011), http://www.hsaj.org/?fullarticle=7.1.14, 4.

[35] James Burch, "The Domestic Intelligence Gap: Progress Since 9/11?," *Homeland Security Affairs*, Proceedings of the 2008 Center for Homeland Defense and Security Annual Conference (April 2008), http://www.hsaj.org/?article=supplement.2.2., 2.

[36] Mayer, *Homeland Security and Federalism: Protecting America from Outside the Beltway*, 92.

C. THE PRESENT AND THE FUTURE

Though it is impossible to predict the path of American federalism development within the homeland security regime, a review of the most recent national high-level documents yields a noteworthy trend. Whereas some of the earlier documents made ample reference to the concept, and even devoted entire sections to espousing its principles, the later strategies and reviews entailed far less attention, as exemplified in the 2007 Homeland Security Strategy that made just a single mention of the word "federalism."

The downward trend continued into the Obama administration as well. Federalism does not appear by name anywhere in the existing national security strategies, DHS QHSR, DHS Bottom Up Review, or the DHS Strategic Plan. Whether or not these omissions portend something larger is a fundamental question for the future of homeland security. Mayer's declaration that the "federal government has acted by fiat and mandate with nothing more than lip service given to the principle of federalism," now appears to be an understatement.[37]

However, the absence of the word "federalism" from national documents does not necessarily mean it is a dying model for American governance. In actuality, the concepts of homeland security offer tremendous growth potential for advancing state and local capabilities. A prime example of these opportunities lies in fusion centers, whose relatively recent appearance in the national security structure provides an unprecedented challenge to duties previously only held by federal agencies. By examining both their compositions and connections, fusion centers reveal themselves to be at the forefront of a rising tide of federalism.

[37] Mayer, *Homeland Security and Federalism*, xv.

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III. MISSIONS AND STRUCTURES

The eleven-year evolution of homeland security encompasses more than adjusting macro-level, national themes. To be sure, the natural course of clearly federal events, ranging from such extraordinary disasters as hurricanes Katrina or Sandy to the normal drumbeat of three American presidential elections, significantly altered nationwide strategies and responses within the homeland security arena. Today, there is a great overlap of national security and homeland security interests, whereby seemingly straightforward localized items now hold great import for national decision-makers.

However, while homeland security maintains an undeniably centralized bent, an equally important transformation also has occurred at the state level. Contemporary intelligence requirements dictate a need for support by elements far below the usual agencies of the national government. Matthew Waxman addresses the end of an exclusively national solution by advocating, "harnessing state and local institutions for national security is needed to address …challenge[s] for which those institutions are much better suited than the federal government could ever be."[38] State fusion centers represent the answer to those challenges. Furthermore, the varying missions and structures of the individual fusion centers signify advances in federalism.

American federalism encountered a substantial crossroads on the morning of September 11, 2001. Because an unknown and unseen enemy deliberately attacked it on its own soil, the nation's response could easily have been one of an enduring centralization of power aimed. Instead, the opposite has occurred. A little more than ten years later, the country's resiliency in self-governance and self-protection manifests itself in a heightened amount of state-level capabilities and defenses, not a domineering federal government. Of those advances, fusion centers, with their adaptable mission parameters and flexible composition, stand as tangible representations of what homeland security and domestic intelligence should be. The Aspen Institute captures this sentiment by

[38] Matthew C. Waxman, "National Security Federalism in the Age of Terror," *Stanford Law Review* Vol. 64, No. 2 (2012), http://search.proquest.com.libproxy.nps.edu/docview/1011488898?accountid=12702, 2.

proclaiming, "this new approach to intelligence—serving local partners' requirements, providing intelligence in areas (such as infrastructure) not previously served by intelligence agencies, and disseminating information by new means— reflects a transition in how Americans perceive national security."[39] From their inception to their continued spread across the nation, the fusion center initiative epitomizes a strengthening in federalism. State governments now possess greater means to proactively acquire critical security information (criminal and terrorist) as well respond to all types of disasters. More importantly, those distinctions now occur under the auspices of a downward trend of intrusion by the federal government.

A. ORIGINS

From the very beginning, states would have much to say in the nation's reaction to the 9/11 attacks. First, the immediate emergency responses to all three targets fell to local officials, including the Pentagon. Second, state and local agencies embarked on law enforcement intelligence fusion center initiatives. Because several states took it upon themselves to create and employ these bodies without immediate federal government support, fusion centers enjoy a certain level of grassroots esteem for emerging within the dynamic situation of homeland security's early years. For instance, California established its first fusion center a mere two weeks after 9/11; less than three years later, the Golden State operated an intrastate network of four separate centers sustained by state taxpayers.[40]

The early recognition by state leaders that exigent national security dilemmas likely would likely significant local requirements stands as a milestone in federalism. Despite the conventional wisdom heralding a greater centralization of power in a national crisis, the states led this effort and continue to shape the basic contours of the state-federal relationship in and through the centers. Although some experts voice concerns the

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[39] Aspen Institute Homeland Security Group, "Homeland Security and Intelligence: Next Steps in Evolving the Mission," Hearing Before the U.S. House of Representatives Permanent Select Committee on Intelligence. Subcommittee on Terrorism, HUMINT, Analysis, and Counterintelligence (THACI). January 18, 2012, http://www.aspeninstitute.org/policy-work/homeland-security, 4.

[40] California State Threat Assessment System (STAS) Concept of Operations, handout from visit to Northern California Regional Intelligence Center, June 8, 2012, 3.

fusion center phenomena was nothing more than a hasty reaction by the states that may not stand the test of time, the fact remains that seventy-seven fusion centers have spread across the country in subsequent years.[41]

B. SHIFT IN MISSIONS, EXPANSION IN FOCUS

Though the origins of fusion centers clearly centered on a localized response to global terrorism, the subsequent decade produced a broadening of priorities and responsibilities. The shift in focus did not mean the centers lost sight of their original mission; rather the maturation of homeland security overall necessitated an expansion beyond their initial concerns. Once the initial shock of 9/11 began to be replaced by a long-term outlook, "state and local governments found their footing…[and] were able to absorb the new demands of homeland security into the existing mission space found in public safety and emergency management."[42] By widening their approach, states employed fusion centers, which extended their influence into additional areas of public safety, thereby strengthening the power of their respective states. Almost all of today's fusion centers commit the bulk of their resources and efforts to addressing what has become known as an "all-hazards" approach to homeland security—instead of serving strict counterterrorism requirements.

The move toward embracing a more ambiguous problem set than just terrorism is probably as much related to an upswing in federalism as it is to a dearth of actual attacks over the last few years. For one thing, with the terrorism front relatively quiet, at least as regards the U.S. homeland, there is increased state attention to the broader concepts of natural disaster response, public safety, and emergency management. In light of the changing environment, "fewer than 15 percent of fusion centers describe their mission solely as addressing terrorist threats."[43] Possibly even more revealing, a recent Senate

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41 Masse and Rollins, *A Summary of Fusion Centers: Core Issues and Options for Congress* (CRS Report RL 34177), 7.

42 Samuel H. Clovis, Jr., "Promises Unfulfilled: The Suboptimization of Homeland Security National Preparedness," 1.

43 The Constitution Project, "Recommendations for Fusion Centers: Preserving Privacy and Civil Liberties While Protecting Against Crime and Terrorism," August 2012. http://www.constitutionproject.org/pdf/fusioncenterreport.pdf, 6.

investigation revealed that despite the federal government continually referring to fusion centers as crucial partners in preventing terror attacks, 40 percent of the centers did not even include terrorism among their self-described operational concerns.[44] Whereas counterterrorism carries with it deep-seated national implications, embracing an all-hazards approach affirms a more state-centric undertaking.

Moreover, the same Senate report conceded, "the exact missions of individual fusion centers are largely beyond the authority of the federal government to determine," a strong indicator that states are able to adjust their priorities continually, based on what they need—so they are not necessarily beholden to the dictates of DHS.[45] Though the Senate report offered substantial criticism on many aspects of fusion center performance, its major themes centered on DHS oversight and federal funding accountability. By acknowledging the freedoms of states to execute their roles without looking to DHS for consent, this recent report further cements federalism as a viable component in the fusion center process. This is not to say the national government will relinquish complete oversight, but this Senate report offers strong confirmation that states will continue maintain the ultimate decision-making authority for their fusion centers.

States must strike a balance between answering the collective call of national homeland security requirements and addressing their own law enforcement urgencies, especially given federal funding considerations. The 2008 PNSR alludes to these intricacies (and tensions) by revealing instances of "federal displeasure with states using fusion center grant funds to expand their centers' all-hazards capabilities instead of narrowly applying them to criminal and intelligence applications."[46]

The realities of homeland security have changed and momentum continues to build for the federal government to also embrace an all-hazards approach in lieu of a

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[44] *Federal Support for Involvement in State and Local Fusion Centers: Senate Majority and Minority Staff Report of the Committee on Homeland Security and Government Affairs, Subcommittee on Investigations*, 112th Cong. (October 3, 2012), 93.

[45] *Federal Support for Involvement in State and Local Fusion Centers: Senate Majority and Minority Staff Report*, 5.

[46] Project on National Security Reform Homeland Security Team, State/Local Issue Team Problem Analysis, 37.

strictly counterterrorism methodology. For example, the 2010 QHSR proclaimed effective American homeland security strategy must now look beyond the prevention of such attacks by tackling a much broader array of challenges, including natural disasters and other emergencies.[47] These sentiments were echoed in the 2010 *National Security Strategy*, which noted, "homeland security traces its roots to traditional and historic functions of government and society, such as civil defense, emergency response, [and] law enforcement."[48] Taken together, these two national policy documents reinforce approaches already being taken by state fusion centers. That is, they are able to address the contemporary needs of homeland security while distancing themselves from an over-saturation of terrorism commitments.

These additional assignments, to include emergency management and disaster response, fit neatly within federalism mandates because they represent the very essence of what state and local leadership must provide their constituents. While fusion centers still clearly demonstrate utility in the critically important national mission of counterterrorism, their metamorphosis into more of an all-hazards function greatly aids the states that house them to meet the evolving challenges of homeland security.

States are now able to use their fusion centers as more effective tools in the quest for greater public safety. As the initial Homeland Security Strategy in 2002 stated, "our traditions of federalism and limited government require that organizations outside the federal government take the lead in many of these efforts [to secure the homeland]."[49] Because of fusion center evolution, that type of sentiment is now reality, not hollow rhetoric.

C. UNIQUENESS AND NON-STANDARDIZATION

Because fusion centers are created, organized, and staffed primarily by the individual states in which they reside (only Wyoming does not have one), they lack uniformity across the nation. Some fusion centers maintain jurisdiction throughout a

47 QHSR, vii.

48 White House, *National Security Strategy*, May 2010, 15.

49 White House, *National Homeland Security Strategy*, 2002, 3.

state's territory, while some have regional responsibilities within a state; others are more limited in scope to a smaller metropolitan area. Some are co-located with fully engaged emergency management personnel in their Emergency Operations Centers (EOC). Others operate independently with a strict law enforcement intelligence slant. Even the names vary. Typically—but not always—centers' names contain the following words: assessment, analysis, intelligence, and coordination, or some combination thereof. There simply is no set definition or titles for these units, let alone similar mission orientation. In addition, there is significant variation in how the national agencies work with the states. Both DHS and FBI have yet to codify how they detail their own representatives to fusion centers and what functions they assume within them.[50] A one-size-fits-all approach to fusion centers simply does not exist, either from the states or the federal government.

Another example of fusion center variation involves the emerging concept of specialization. The growing linkages between the individual fusion centers into more of a nationwide network now enable some of the more prominent and capable organizations to concentrate on specific tasks. In a similar manner to national-level intelligence organizations that focus on specific areas (e.g., National Security Agency (NSA) while working together to form a national intelligence community, "the same attribute of specialization should be extended to the network of fusion centers."[51] For instance, if one of New York's fusion centers possesses superior analytic knowledge of a regional criminal syndicate, it would be appropriate to allow that unit to serve as a major hub of information to the rest of interstate fusion center network. Otherwise, each state affected by the criminal syndicate would be obliged to reach and sustain an appropriate level of familiarity and analysis. With a move toward specialization, fusion centers possessing critical expertise help "strengthen, bolster, or intensify the network's collective impact."[52]

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50 Masse and Rollins, *A Summary of Fusion Centers: Core Issues and Options for Congress* (CRS Report RL 34177), 10.

51 Justin L. Abold, Ray Guidetti, and Douglas Keyer, "Strengthening the Value of the National Network of Fusion Centers by Leveraging Specialization: Defining "Centers of Analytical Excellence,"" *Homeland Security Affairs* 8, Article 7 (June 2012), http://www.hsaj.org/?article=8.1.7, 1.

52 Justin L. Abold, et al., "Strengthening the Value of the National Network of Fusion Centers by Leveraging Specialization," 15.

Does this trend toward specialization come with risks? Possibly. Placing greater emphasis on some mission areas (and, therefore, some fusion centers) might lead to even greater disparity between the states and their homeland security priorities. Nonetheless, fusion centers will undoubtedly address the needs of their particular state first and foremost. No two fusion centers will look alike, nor should they.

There is arguably profound strength in this variation. Moreover, the adaptability and flexibility to meet emerging requirements boosts the overall value of the multiple fusion center constructs. Ultimately, these are state-run facilities, and so they must be organized in a manner specifically suited for the particular sub-federal requirements necessary in their own corner of the country (i.e., what makes sense for Minnesota might not work at all for Maryland). Enabling states to adjust their fusion centers to meet their needs prevents a monolithic set of miniaturized national intelligence agencies and enhances federalism.

States must be able to develop their own models to be "scalable and organized and managed on a geographic basis."[53] That way, fusion center efforts can effectively support the needs of their states while simultaneously integrating into the wider homeland security mission. If the opposite held true and fusion centers instead fell under rigid DHS guidelines, "too much standardization might undermine the advantages of experimentation and tailoring to conditions that come with local autonomy."[54]

D. LINKING EMERGENCY MANAGEMENT AND INTELLIGENCE

One of the more intriguing aspects of fusion centers and federalism remains the capacity for a state to tailor its own approach to homeland security using pre-existing agencies under its direction. Because the homeland security evolution continues to trend toward an all-hazards approach dealing with potential disasters of all types, not just terror-related incidents, there is a growing tendency to link domestic intelligence and

53 Department of Homeland Security, *Fusion Center Guidelines: Developing and Sharing Information in a New Era*, August 2006, 21.

54 Matthew C. Waxman, "Police and National Security: American Local Law Enforcement and Counter-Terrorism after 9/11" *Journal of National Security Law & Policy*, Vol. 3, p. 377. (November 21, 2008), Columbia University Public Law Research Paper No. 08-191, http://ssrn.com/abstract=1305268, 391.

emergency management. As a result, some states are incorporating their EOCs with their fusion centers. Although EOCs and fusion centers each possess unique responsibilities and capabilities, their overlapping intelligence and operational duties to public safety warrant colocation and/or increased coordination. DHS recognizes that fusion centers "are uniquely situated to empower front-line law enforcement, public safety, fire service, emergency response, public health, critical infrastructure protection, and private sector security personnel."[55]

Fusion centers and EOCs each have skill sets and tools at their disposals to accomplish their individually assigned missions, but a significant amount of overlap exists to enhance the other's effectiveness. This commonality leads to increased cooperation and, as the *Implementing Recommendations of the 9/11 Commission Act* recommended, an overall process that fosters a "collaborative environment" between the seemingly disparate public safety efforts.[56] Some, but not all, states took those proposals onboard. For example, a 2011 DHS Office of the Inspector General (OIG) report addressing Fusion Center and EOC relationships noted the employment of fusion intelligence tools to mitigate a natural disaster; likewise, another state utilized its emergency management capabilities to provided local situational awareness to a fusion center.[57]

Developing the relationships between emergency management and fusion center intelligence makes perfect sense. After all, the initial moments following a disaster are chaotic and confusing regardless if it is terror-related. Additionally, recovery from any

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[55] Department of Homeland Security, "State and Major Urban Area Fusion Centers," December 5, 2012, http://www.dhs.gov/state-and-major-urban-area-fusion-centers.

[56] *Implementing the Recommendations of the 9/11 Commission Report Act of 2007*, quoted in U.S. Department of Homeland Security, Office of the Inspector General Report, *Relationships Between Fusion Centers and Emergency Operations Centers,* December 2011, 7.

[57] U.S. Department of Homeland Security, Office of the Inspector General Report. *Relationships Between Fusion Centers and Emergency Operations Centers,* December 2011, 11. However, the federal government remains an impediment to states taking full advantage of this aspect of the fusion centers. The same DHS OIG report also revealed FEMA grant regulations currently forbid states from using federal EOC monies "for construction or renovation of state, local, or tribal fusion centers." U.S. Department of Homeland Security, Office of the Inspector General Report. *Relationships Between Fusion Centers and Emergency Operations Centers,* December 2011, 14. States that have the means to overcome those funding limitations find themselves better equipped to handle the wide range of homeland security challenges.

type of disaster will include common operations that require close coordination between all aspects of public safety: law enforcement and emergency response. However, not all states are willing incorporate EOCs into their fusion systems. Some resist because of the sensitivities about potentially mixing intelligence with un-cleared personnel without a need to know.

Whether states employ an all-crimes or all-hazards fusion center methodology could have significant consequences for its citizens when an emergency situation occurs. The DHS OIG Report advocated that "although a fusion center can adopt either approach for its operations, the all-crimes approach may sever part of the link between preparedness and response, a link that is critical to protecting American lives."[58] Those states that embrace combining their emergency management and fusion processes wind up possessing enhanced homeland security capabilities. By leveraging response efforts with intelligence initiatives, a combined fusion center/EOC relationship provides a state with the opportunity to fully take charge instead of relying on federal government intervention.

If states take it one step further and induce neighboring states to adopt like-minded approaches about fusion centers and EOCs, resources and expertise can be further pooled. The concept of regionalism thus produces "economies of scale…ensuring…effective emergency responses…that transcend traditional jurisdictional boundaries;" a concept made even more valid by the fact that disasters can be widespread affairs spilling over the borders of individual states.[59]

E. DRAWBACKS OF VARIATION

The missions and structures of state fusion centers vary as much as the distinct identities of the fifty states. But the lack of uniformity comes with a potentially significant price. From a watchdog perspective, the arbitrary arrangement and purpose of

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[58] U.S. Department of Homeland Security, Office of the Inspector General Report. *Relationships Between Fusion Centers and Emergency Operations Centers,* December 2011, 9.

[59] Kiki Caruson, Susan A. MacManus, Matthew Kohen, and Thomas A. Watson, "Homeland Security Preparedness: The Rebirth of Regionalism," *Publius: The Journal of Federalism*, Vol. 35, No. 1, (Winter 2005), http://www.jstor.org/stable/4624705, 167.

these fusion centers inhibits an effective performance appraisal, or a true calculation of whether or not they hold enough value for the American people.[60] Though states bear the final responsibility for molding these units as they see fit, the absence of a standardized framework raises questions as to how effectively they plug in to the national scheme. For instance, the federal government views fusion centers as critical elements in the struggle against thwarting future terror attacks, but can only offer non-mandatory guidelines and best practices. Concerns also exist about how the lack of uniformity may impinge the dispersal of information. For example, a CRS Report lamented how the absence of a common fusion center organization might result in channeling any products down into a narrower audience instead of promulgating them outward.[61]

Yet another negative element of fusion center variation involves the wide range of individual staff members serving in their functional capacities. Because a singular staffing chart for all fusion centers does not exist, "employees often occupy multiple organizational roles (e.g., police officers or National Guard members and fusion center analysts), which can lead to an understandable, but nonetheless problematic, blurring of professional identities, rules of conduct, and systems of accountability."[62] Additionally, the mélange of personnel from different organizations leads to "mismatched security clearances and ambiguous understandings" that can lead to a contamination of intelligence or, at the very least, an inefficient work environment.[63]

Does the diverse nature of fusion centers present potential issues for homeland security initiatives? Yes. The absence of standardization from one state to the other may reduce effectiveness in implementing some of the mission areas touted by the national government. However, from a federalism perspective, the individuality exhibited by the

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60 ACLU, "What's Wrong With Fusion Centers," 9.

61 Masse and Rollins, *A Summary of Fusion Centers: Core Issues and Options for Congress* (CRS Report RL 34177), 4.

62 Torin Monahan, "The Future of Security?: Surveillance Operations at Homeland Security Fusion Centers," *Social Justice* 37, no. 2 (2010), http://search.proquest.com/docview/919958504?accountid=12702, 91.

63 William C. Banks, "Legal Landscape for Emergency Management in the United States," *New America Foundation*, (February 2011), http://security.newamerica.net/sites/newamerica.net/files/policydocs/Banks_Legal_Landscape.pdf, 55.

different fusion centers does not lessen state capabilities. By prominently demonstrating uniqueness within an overarching national strategy, states have re-established their standing while still being capable partners with the federal level.

F. DECENTRALIZATION AND HOMELAND SECURITY INTELLIGENCE

Although the lack of uniformity may be perceived as but another example of government inefficiency, these fusion centers remain ideal representations of American federalism. The prerogative of states to construct them as needed and tailor their operational commitments to meet local concerns highlights the powers delineated in the Constitution. While the failure of state law enforcement entities to coalesce into a modular apparatus appears as a weakness to some, it is instead a matter of strength and keeping in line with time-honored tendencies. As Matthew Waxman declared, "harnessing police agencies for a national security agenda creates difficult organizational challenges, magnified by the resilience of U.S. policing's decentralization and heterogeneity."[64]

This decentralization forms an integral concept in homeland security and federalism that became evident immediately after the attacks. Some quickly recognized the need for states to act on their own following 9/11 because the "adoption of standard, rational, hierarchical designs and practices is likely to be particularly unsuitable for organizations that are expected to operate in complex, unstable environments…more unstable environments create a need for greater decentralization of authority and less emphasis on formal structure."[65] The federal government simply could not step in and fill all of the homeland security requirements from the top down, nor could it quickly and efficiently organize the states to help themselves.

In the absence of hierarchy, states formulated a "decentralized and organically developed network" of fusion centers that, in turn, grew into "a national asset, [whose]

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64 Matthew C. Waxman, "Police and National Security: American Local Law Enforcement and Counter-Terrorism after 9/11," 385.

65 Charles R. Wise, "Organizing for Homeland Security," *Public Administration Review*, Vol. 62, no. 2. (April 2002), http://www.jstor.org/stable/3109897, 132.

sustainment…is a shared responsibility across all levels of government."[66] As a result of the individual states' efforts to construct these fusion centers, the overall national homeland security capability received a much-needed boost in capability. Of course, the dilemmas of homeland security cannot be solved with a stand-alone confederation of these state-run bodies. The complexities of the new security requirements will ultimately require multiple networks, not a singular network to meet the challenges of the multi-dimensional requirements.[67]

The concept of decentralization not only feeds into the discussion concerning fusion centers, but also into the evolving topic of the broad-based homeland security intelligence, or HSINT. The same inherent difficulties that preclude precisely defining homeland security itself also impede constructing a complete description of HSINT, as evidenced by how some experts view the terms domestic intelligence and homeland security intelligence as merely being interchangeable, even conversational in nature.[68] Instead of a widely accepted accounting of its meaning prevailing, the word HSINT is loosely thrown around to meet the requirements of the description at hand. Although arguments abound that by maintaining such a vague definition, those involved with producing HSINT remain hamstrung and muzzled, the opposite is actually true.[69]

To be certain, the confusion over narrowly defined parameters may be somewhat frustrating, but it does not necessarily hamper fusion center efforts. In fact, one particular HSINT concept "envision[s] a less hierarchical or a more decentralized structure…[where] state, local, and private sector organizations have taken on a more activist role that includes collecting their own intelligence while working with federal law

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66 *Fiscal Year 2013 FEMA Budget Request*: Hearing before the House Committee on Appropriations, Subcommittee on Homeland Security. 112th Cong. (March 7, 2012) (statement of W. Ross Ashley, III), 2.

67 Wise, "Organizing for Homeland Security," 141,

68 U.S. Library of Congress, Congressional Research Service, *Homeland Security Intelligence: Perceptions, Statutory Definitions, and Approaches,* by Todd Masse, CRS Report RL33616, (Washington, DC: Office of Congressional Information and Publishing), August 18, 2006, 3.

69 Geoffrey S. French, **"**Leading the Next Phase of Homeland Security Intelligence: Providing Better Definitions, Roles, and Protections," *Rethinking Leadership and "Whole of Government" National Security Reform: Problems, Progress, and Prospects,* United States Army War College, Strategic Studies Institute. May 2010, https://www.hsdl.org/?view&did=23924, 154.

enforcement and IC partners."[70] The dispersal of such organizations throughout the different levels of government plays to the strengths of federalism and, subsequently, to the gathering and deciphering of HSINT. Since the bodies responsible for conducting vital threat analysis already consist of widely diffused skillsets spread out over large geographic areas, attempts to consolidate and centralize would likely undercut the inherent advantages enjoyed from the seventy plus fusion centers currently operating under the purview of the states.[71] Rigid definitions and monolithic organizational structures do not equip any level of leadership (federal, state, or local) with the essential tools necessary for confronting homeland security challenges.

G. MONEY MATTERS

The missions and structures of fusion centers repeatedly demonstrate the rise of state capabilities within homeland security. The skillful execution of assigned tasks and the proper manning of these components help validate the need for states to absorb more and more national security responsibilities. However, the final question really is the bottom line: who is paying for it? One of the primary means of determining who holds the power is determining who holds the purse. It is no different for fusion centers. Stuck in the middle between competing governmental priorities, a belief exists that "while fusion centers are not federal entities and have no federal legal status, they are a central element of homeland security policy and receive substantial federal support and guidance."[72] This begs the question of whether a reliance on homeland security grant monies equates into a diminishment of federalism. But here again, the uniqueness and non-standardization of fusion centers precludes being trampled upon by an over-influential national government because there simply is no codified financial arrangement for the state agencies. Case in point, a survey of fusion center resources revealed the proportion of federal dollars ranged from 0 to 100 percent of the total operating funds;

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[70] Todd Masse, *Homeland Security Intelligence: Perceptions, Statutory Definitions, and Approaches,* CRS Report RL33616*,* 4.

[71] Masse, *Homeland Security Intelligence: Perceptions, Statutory Definitions, and Approaches* (CRS Report RL33616), 10.

[72] The Constitution Project, "Recommendations for Fusion Centers: Preserving Privacy and Civil Liberties While Protecting Against Crime and Terrorism," 7.

moreover, the average hovered around 30 percent while the median stood at just 21 percent.[73] With that much variation in federal spending, it is hard to conceive of the states being collectively influenced by DHS lines of accounting.

Nonetheless, in the event of an across-the-board reduction in federal fusion center expenditures, some will be forced to close (or consolidate) because it is highly unlikely state funding will always be redirected to keep fusion centers operating at their current levels. To combat this issue against the backdrop of an increasingly tighter fiscal outlook, states are now exploring future sustainment measures, but they still need consistent federal funding to accomplish those goals.[74] Fusion center advocates recognize the looming danger of uncertain budgets and point to federal dollars as being the key in keeping the National Network of Fusion Centers active in the homeland security realm.[75] But does this equate to a dependency from DHS and, furthermore, does this constitute a threat to the federalism advances since 2001? As scholars noted shortly after 9/11 when homeland security dollars flowed freely down to the states, "a greater degree of financial assistance will most likely involve a greater degree of federal policy and regulatory prescription of activities that previously were left almost wholly to state and local governments."[76]

While one may perceive the large allotments to state homeland security efforts as predisposing them to federal subservience, the wholesale fiscal accountability of DHS speaks otherwise. Although overall DHS funding and oversight is beyond the scope of this thesis, the agency's bungling of fusion center budgeting supervision gives credence to the notion that states have been somewhat free to do what they want with the money and avoid narrowly-defined parameters. In a particularly critical Senate report from 2012 addressing the national government's involvement with state fusion centers, "the

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73 Masse and Rollins, *A Summary of Fusion Centers: Core Issues and Options for Congress* (CRS Report RL 34177), 11.

74 U.S. Department of Homeland Security, Office of the Inspector General Report, *DHS' Role in State and Local Fusion Centers Is Evolving (OIG-09-12),* (December 2008), 36.

75 *Fiscal Year 2013 FEMA Budget Request*: Hearing before the House Committee on Appropriations, Subcommittee on Homeland Security. 112th Cong. (March 7, 2011) (statement of W. Ross Ashley III), 6.

76 Wise and Nader, "Organizing the Federal System for Homeland Security: Problems, Issues, and Dilemmas," 56.

investigation found that DHS did not know with any accuracy how much grant money it has spent on specific fusion centers, nor could it say how most of those grant funds were spent, nor has it examined the effectiveness of those grant dollars;" furthermore, the estimates of total expenditures range from just under $300 million to almost $1.5 billion.[77] Accordingly, this staggering lack of accountability from DHS lessens the potential to characterize DHS fusion center funding as intruding on federalism. If anything, conventional wisdom dictates that states astutely utilized what was provided to them and advanced their own initiatives.

H. CONCLUSION

Before 9/11, little attention was paid to domestic intelligence, or even the concept of "homeland security." The mere mention of an inward-looking security apparatus elicited grave concerns about the U.S. morphing into an undesirable police state, or resuscitated lingering memories of civil liberties abuses at the hands of the FBI and the Central Intelligence Agency (CIA). But fast-forward a decade later and the nation now operates an expansive intelligence-gathering framework designed to prevent the next attack. While some elements still maintain a watchdog perspective and repeatedly caution against government over-intrusion into innocent people's lives, the vast majority accept the measures executed by FBI, DHS, and other homeland security elements. So what changed and why?

Arguably, the roles assumed by non-federal authorities, namely state fusion centers, help assuage the fears of those apprehensive about living under the watchful eye of the government. When viewed through a constitutional lens, fusion center development and proliferation represent a re-assertion of American federalism because they demonstrate an increased accumulation of power available to the states. Two of the most important elements of this upswing in federalism result from the missions and structures of fusion centers. The decentralized nature of the overall homeland security apparatus as well as the growing numbers of vital national mission areas enables state

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[77] *Federal Support for Involvement in State and Local Fusion Centers: Senate Majority and Minority Staff Repor*t, 3.

fusion centers to rise in stature. Because each state is free to tailor their own agencies to meet the needs of their constituents, fusion centers enjoy the kind of flexibility urgently needed in today's domestic security environment. Properly outfitting and configuring these components, as the states have done in tweaking the seventy-plus existing models, pays off immensely when conducting operations in the most challenging security ecosystem of all: the information sharing environment.

IV. NETWORKING THE INTELLIGENCE

In the spring of 2002, the Markle Foundation Task Force, consisting of leading American national security experts, released a report titled "Protecting America's Freedom in the Information Age" on the consequences of embryonic communication technologies. Though homeland security was then in its infancy, the prospects of executing critical, nation-protecting defensive tasks within an increasingly globally connected world loomed large. Traditional hierarchical communication methodologies were quickly being overtaken by new systems that benefitted from "dynamic connections…across levels of an information community…[whose] directories and data repositories are frequently distributed and dispersed."[78] The remarkable expansion in global communication held great promise for unprecedented relationships between heretofore inaccessible partners. But with this potential for advances came equally significant concerns for new hazards. As with changing information technologies, the Markle Report envisioned "the threats to national security [becoming] decentralized, networked, and dynamic."[79] To counter al Qaeda and other groups, the United States faced a dilemma: how to construct and/or rearrange existing national security capacities within the fundamental guidelines of American democracy while, at the same time, preserving the treasured liberties.

The Constitution's Fourth Amendment not only protects Americans from unlawful searches and seizures, but also mandates a valid warrant be served based on probable cause of wrongdoing. But with fusion centers, the threshold drops down to merely "suspicious behavior." As a Congressional Research Report (CRS) indicates, "arguments against fusion centers often center around the idea that such centers are essentially pre-emptive law enforcement—that intelligence gathered in the absence of a criminal predicate is unlawfully gathered intelligence…[and] the greater the chances that

78 Markle Foundation, *Protecting America's Freedom in the Information Age: A Report of the Markle Foundation Task Force*. John and Mary R. Markle Foundation, (New York: October 2002), https://www.hsdl.org/?view&did=437325, 12.

79 Markle Foundation, *Protecting America's Freedom in the Information Age*, 12.

civil liberties may be violated."[80] The same report also recognized that fusion centers expand their information sources "beyond criminal intelligence, to include federal [i.e., "national"] intelligence, as well as public and private sector data."[81] Does this finding mean fusion centers function exclusively on questionably obtained intelligence that consistently violates the Fourth Amendment? No, of course not. However, the potential does and will continue to exist until the country acquires a greater understanding of them operating in an often murky security environment where state and federal priorities merge.

As James Baker stated, "the Constitution rarely answers the national security question; rather, it provides each generation the procedural means to do so."[82] Arguably, the answer to the dilemma of global connections and national security over the last decade emanates from the concept of federalism. In other words, one of the oldest principles of American governance is successfully poised to exploit some of the newest technologies. The dispersal of intelligence production through far-flung state fusion centers offers remarkable opportunities to attain homeland security requirements. The heightened roles of states to acquire, analyze, and disseminate crucial intelligence products used by national leadership point to a growth in sub-federal power. The previous way of providing for national security employed heavy restrictions on the availability of classified information, even within the federal level of government. The lessons learned from the mistakes in 2001 made it very clear that barriers to intelligence-sharing needed to change.

A. BARRIER REMOVAL: STATE ACCESS TO THE FEDERAL COOKIE JAR

Before 9/11, national-level intelligence information flowing from the federal government to the states amounted to very little of what occurs today. The reason for this

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[80] U.S. Library of Congress, Congressional Research Service, *A Summary of Fusion Centers: Core Issues and Options For Congress,* by Todd Masse and John Rollins, CRS Report RL34177 (Washington, DC: Office of Congressional Information and Publishing, September 19, 2007), 5.

[81] Masse and Rollins, *A Summary of Fusion Centers: Core Issues and Options for Congress* (CRS Report RL 34177), 2.

[82] James Baker, *In the Common Defense*, 30.

stemmed from Cold War dictates about clear lines between domestic and foreign defense requirements, as well as the civil liberties anxieties of the preceding decades. However, once the threats blurred distinctions between overseas and domestic responsibilities, states actively sought a greater role. Subsequently, they developed fusion centers to tackle what they perceived to be was a demonstrable lack of adequate terrorism information sharing from the federal government.[83] Moreover, experts began to question "the efficiency and effectiveness of federal homeland security efforts" if the nation failed to engage those state and local bodies, especially given the advantages they possessed in traditional law enforcement capacities that now had complete relevance in federal counterterrorism efforts.[84]

To overcome these shortcomings, many began to advocate a comprehensive, national effort to distribute more homeland security intelligence more broadly and more quickly. To be sure, the 9/11 Commission addressed the need for greater information distribution between components of the FBI and CIA, but it only briefly alluded to increased participation by state and local forces. Finally, after two pieces of landmark legislation (the *Intelligence Reform and Terrorism Prevention Act of 2004* and *Implementing Recommendations of 9/11 Commission Act of 2007*) laid the initial groundwork*,* the Bush Administration released a 2007 *National Strategy for Information Sharing* that delineated roles and responsibilities for a wide-ranging set of government components, including state and local fusion centers. The policy also pronounced that the evolving model of information sharing would be inextricably linked with other foundational security concepts including: the *National Security Strategy*, *National Strategy for Combating Terrorism, National Strategy for Homeland Security,* and *National Intelligence Strategy.*[85] By affirming the significance of information sharing within its vital national strategies, the federal government paved the way for advancements in state capacities.

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83 Shane Harris, "Fusion Centers Raise a Fuss." *National Journal* 39, no. 6 (Feb 10, 2007), http://search.proquest.com/docview/200291400?accountid=12702, 51.

84 John Kincaid and Richard L. Cole, "Issues of Federalism in Response to Terrorism," 187.

85 White House, National Strategy for Information Sharing, October 2007, 5.

For fusion centers, the new policy was important because "it declared for the first time that state and local governments should be treated as full and trusted partners with the federal government in our nation's efforts to combat terrorism."[86] Thus recognized and empowered, states demanded and received access to intelligence and information databases previously open only within the circles of the federal government; now state law enforcement and public safety officials gained unparalleled access to critically important classified information. The FBI considers this growing trend of fusion center integration to be "the broadest dissemination of secret information in the nation's history."[87] According to a 2011 survey by the National Fusion Center Association, nearly 90 percent of its member agencies "had access, either within the fusion center or on-site, to classified systems through which the Federal Government disseminates time-sensitive information and intelligence products."[88]

The *National Strategy for Information Sharing* specifically pointed out state fusion centers as vitally important to fulfilling its mission and proclaimed them to be the primary node for terrorism-related information flowing down from the federal government. In addition, it addressed the need to "respect" federalism and iterated that, "unless specifically prohibited by law, or subject to security classification restrictions, these fusion centers may further customize [national terrorism intelligence] for dissemination to satisfy intra- or inter-State needs."[89]

In some ways, the availability of classified material holds substantial promise in advancing federalism. Whereas state and local agencies once confined themselves to law enforcement databases in the quest for public safety, the opportunity to consume national intelligence information now renders them with greater capabilities to meet their larger

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86 U.S. Department of Justice. Global Justice Information Sharing Initiative, Baseline Capabilities for State and Major Urban Area Fusion Centers A Supplement to the Fusion Center Guidelines, September 2008, 3.

87 Thomas Cincotta, "Platform for Prejudice: How the Nationwide Suspicious Activity Reporting Initiative Invites Racial Profiling, Erodes Civil Liberties, and Undermines Security," Political Research Associates, (March 2010), www.publiceye.org/jump/sar.html, 30.

88 National Fusion Center Association. *2011 National Network of Fusion Centers Final Report*. May 2012. https://www.hsdl.org/?view&did=713070, 13.

89 White House, *National Strategy for Information Sharing*, October 2007, 20.

public safety and security requirements. To be certain, this new information-sharing realm does have the potential to diminish, not enhance federalism. Federal agencies still have the final say which intelligence can be disseminated down to the state level and can restrict state participation in sensitive investigations. Because the concept is still under development, the outcome for federalism is far from being decided. However, the momentum gained from repetitive inclusion of the states in the overall homeland security process indicates a positive trend for federalism.

B. NO SILENT PARTNERS: STATE INTELLIGENCE PRODUCTION

Being increasingly connected to federal agencies and intelligence networks clearly enhances state capabilities. However, to become truly effective partners in homeland security, states must also bring information into the system. In terms of attaining greater intelligence success, it is just as much about the "push" as it is the "pull" and the thousands of state and local law enforcement officials serve to feed the network.

1. Digging up the Dirt

Fusion centers operate as producers of intelligence, not just consumers: state and local officers acquire potentially nationally relevant reports and maintain the ability to promulgate them throughout the larger homeland security apparatus. The movement to a more robust information-sharing process also strengthens the roles of the states because the information spreads out among all levels government instead of remaining behind the federal "wall" inaccessible to the individual states. In so doing, states can now routinely demonstrate their growing importance in the overall scheme of national security by taking advantage of the two-way flow of intelligence. As James Burch stipulates, "information sharing should include the proactive sharing of both finished intelligence…and raw data…[however,] this is a significant and fundamental paradigm shift for the intelligence community, where control of sources, methods, and raw data translates into power."[90] Because fusion centers are evolving in an era that places a

[90] Burch, "Domestic Intelligence Gap," 15.

higher emphasis on sharing, rather than protecting information, their standard operating procedures reflect an increased willingness of officials to distribute critical data to others.[91]

Although state and local authorities will not likely see the most highly classified national intelligence, the inclusion of fusion centers within the expanding system of information sharing indicates great potential to cement their status as critical nodes. Rather than being relegated to receiving highly filtered or fragmented information, states instead operate as valuable partners possessing critical analytic and collection competencies. The National Governors Association highlighted these emerging skillsets when it acknowledged that, "the proper collection, analysis, and dissemination of information and intelligence at the state and local levels will enhance the capabilities required at the regional and national levels to better connect the dots and disrupt criminal and terrorist acts."[92]

One of the most cited examples of successful fusion center integration involved the terror plot of Najibullah Zazi in 2009 when the efforts of a Colorado fusion center enabled authorities to thwart a potentially disastrous attack on New York City's subway system. Although a 2012 Senate report attempted to downplay the fusion center's contributions in preventing the attack, the director of the FBI's Denver field office at the time of the investigation praised the fusion center as being vitally important because of the unique capabilities it possessed.[93]

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91 John Rollins and Tim Connors, *State Fusion Center Processes and Procedures: Best Practices and Recommendations.* (New York: Center for Policing Terrorism, 2007). http://www.manhattan-institute.org/pdf/ptr_02.pdf, 13.

92 Carmen Ferro, David Henry, and Thomas MacLellan, "A Governor's Guide to Homeland Security," *National Governor's Association Center for Best Practices, Homeland Security and Public Safety Division*. (November 2010), http://www.nga.org/files/live/sites/NGA/files/pdf/1011GOVGUIDEHS.PDF, 30.

93 P. Solomon Banda,"Ex-FBI Denver Head Slams Terror Center Report," *CBS Denver*, http://denver.cbslocal.com/2012/10/03/ex-fbi-denver-head-slams-terror-center-report/. The Senate report stressed that most of Colorado's contribution to this case came from state police officers assigned to the fusion center, and not necessarily from designated analysts employed by the Colorado Information Analysis Center (CIAC). The report does not dispute state-level involvement with the investigation, but rather it claims the law enforcement analysis could have occurred without a fusion center construct. *Federal Support for Involvement in State and Local Fusion Centers: Senate Majority and Minority Staff Report, 98.*

2. Federal Encouragement

A recent Senate report urged DHS to expand its connection to fusion centers and demonstrate a more robust consumption of state and local intelligence.[94] The reason for this is simply a numbers game. The widespread accumulation of homeland security-related data would overwhelm federal authorities and invariably lead to potentially serious omissions without the involvement of extra personnel. Instead, "state and local fusion center analysts conduct assessments and produce intelligence products…that otherwise would not be addressed by federal authorities."[95] The ability of these state-run entities to acquire, analyze, and disseminate nationally pertinent intelligence makes them a valuable commodity for homeland security efforts because they substantially extend the reach of government. The ultimate payoff for this type of arrangement comes in the form of a markedly improved intelligence distribution up and down the different levels of government.

Moreover, the information flow is not only vertical, but horizontal as well, when critical pieces of intelligence move in from, and out to, the more distant components of the homeland security apparatus. A decade of coordinated, nationwide information sharing efforts now enables all elements charged with ensuring America's security "to function in hubs and spokes and distributed networks, empowering people at the edges of agencies instead of working in hierarchical pyramids."[96]

Arguably, this hub-and-spoke arrangement also enables "diagonal" information sharing because a fusion center operating in one state now has the capacity to inform a DHS representative in another. A prime example of this arrangement arose from the Goose Creek incident in 2007 when rapid exchanges of information between Florida, South Carolina, North Carolina, the DHS National Operations Center (NOC), two FBI

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94 *Federal Support for Involvement in State and Local Fusion Centers: Senate Majority and Minority Staff Report*, 14.

95 Justin L. Abold, Ray Guidetti, and Douglas Keyer, "Strengthening the Value of the National Network of Fusion Centers by Leveraging Specialization," 4.

96 U.S. Congress. Senate, Committee on Homeland Security and Governmental Affairs, *Ten Years After 9/11: A Status Report On Information Sharing* (statement of Zoe Baird Budinger and Jeffrey H. Smith), 112th Congress, October 12, 2011, 4.

JTTFs, and a Coast Guard-led maritime security task force resulted in the arrest and indictment of two Egyptian nationals.[97] To be sure, Goose Creek is one of the more notable occurrences of using network capabilities to speed response times among disparate agencies; the overwhelming majority of homeland security interactions between the levels of government continues to be mundane and routine. However, this everyday aspect of interaction does not lessen the importance of states being plugged into the national network. If anything, it attests to the normality of the arrangement – and the centrality of the states in it.

In addition, as technological efforts yield greater access for states, the reverse is also true: federal agencies can easily see down into state-level information. With the development of the National Data Exchange (N-DEx), a system now exists that "enabl[es] federal law enforcement, counterterrorism and intelligence analysts to automatically examine the enormous caches of local and state records for the first time."[98] The improved access and sharing efforts being developed for homeland security ultimately benefits all components, no matter what level of government. As of its 2010 Increment 3 debut, N-DEx incorporated 200,000 users sharing such routine, low-level law enforcement information as traffic citations and dispatch calls within a "repository of criminal justice records, available in a secure online environment, managed by the FBI."[99] Even though the data that passes through N-DEx can only be categorized as criminal justice material, it is not hard to imagine taking advantage of this system for domestic intelligence purposes. It certainly signifies a steady advancement in federalism because the national government understands the value of locally produced information within the broader task of homeland security.

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97 Department of Homeland Security, "Fusion Center Success Stories," http://www.dhs.gov/fusion-center-success-stories.

98 Robert O'Harrow, Jr. and Ellen Nakashima, "National Dragnet Is A Click Away," *Washington Post*, March 6, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/03/05/AR2008030503656_3.html?sid=ST2008030600920.

99 Federal Bureau of Investigation, "N-DEx: Law Enforcement and National Data Exchange," http://www.fbi.gov/about-us/cjis/n-dex/n-dex-2.

C. GOOD NEIGHBORS: OLD-FASHIONED NETWORKING

Although one of the first things that comes to mind when using the word "network" involves electronic databases and enhanced connectivity with widely dispersed units, a more human approach also exists that should not be discounted. Effective employment of this growing national communication system still relies heavily on the day-to-day interactions between the people who stand the watch.

1. Building Relationships

Fusion centers enhance state power not only from utilizing advances in technological networking, but from the more traditional means of interpersonal networking as well. In addition to acquiring unprecedented federal database access, fusion centers "also break down bureaucratic barriers by assigning employees of these government entities to shared physical workspaces, often leasing space in the same buildings as FBI field offices."[100] In this case, the physical interface between partners matters as much as the flow of information between the organizations. From a practical standpoint, co-locating fusion centers near federal law enforcement and DHS offices remains a more logical arrangement than blindly communicating with each other over computer, telephone, or via infrequent meetings. The more comfortable the fusion centers are working together with their federal counterparts (and vice-versa), the less chance of substantial miscommunication or misidentification of a critical piece of intelligence. Adequately developing positive and habitual state-federal homeland security relationships improves the overall effectiveness for each level.

Furthermore, this interaction should go beyond the cursory detailing of federal agents to fusion centers.[101] While maintaining individual federal liaison officers within the construct of state fusion centers continues to improve intelligence sharing, it is the true networking through pervasive organizational cooperation that provides the greatest

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[100] Cincotta, "Platform for Prejudice," 27.

[101] U.S. Library of Congress, Congressional Research Service, *Fusion Centers: Issues and Options for Congress* (Updated), by John Rollins, CRS Report RL34070 (Washington, DC: Office of Congressional Information and Publishing, January 18, 2008), 38.

opportunities for enhancing state capability. As a result, states benefit immensely from this type of sustained closeness to federal expertise.

More importantly, maximizing state-local-federal interoperability can help alleviate organizational biases that might otherwise stymie intelligence efforts. Because "people are naturally prone to gravitate towards and give more information to members of their own organization and less information to outsiders," strengthening professional relationships through increased co-location and collaboration offers significant advantages for homeland security efforts.[102] The mutual support derived from operating in close proximity to one another remains a positive by-product of fusion center development.

2. Resistance to Cooperation

However, some critics view the increased cooperation of local law enforcement centers with federal officials as a potentially dangerous arrangement that could yield greater state subservience instead of autonomy. Instead of enhancing state and local power, the amplified collaboration with national agencies might further blur the lines resulting in non-federal bodies becoming subsumed within DHS and FBI initiatives, thus raising fundamental questions about civil liberties and the roles played by police forces.

In one notable instance of local resistance to national initiatives, the city of Portland, OR, rescinded its police association with the area's JTTF in 2005 because of perceived oversight and security clearance issues. The city's determination to distance itself from the JTTF originated from a rising sentiment of its law enforcement efforts being commandeered by national agencies. This self-imposed separation from the JTTF lasted until 2011 when, following the FBI's revelation of a terrorism plot within the city, Portland officials hastily re-engineered their cooperation with the federal government to

[102] Joseph W. Pfeifer, "Network Fusion: Information and Intelligence Sharing for a Networked World," *Homeland Security Affairs* Vol. 8, No. 17, (October 2012) http://www.hsaj.org/?article=8.1.17, 7.

avoid repeating the mistake of being left out of the loop in the investigation.[103] Portland's reassessment of the security situation demonstrates that although sub-federal entities maintain their inherent sovereignty to execute public safety measures as they see fit, the benefits of operating within a mutually supporting intelligence apparatus outweigh the costs of what some perceive to be aggressive federal encroachment.

Despite this case, the overwhelming trend is one of greater integration of law enforcement elements between the various levels of government. Retaining police independence may appeal to certain elements of the population, but the nature of homeland security necessitates greater state and local contributions, thereby heightening federalism. The joint nature of the security arrangement produces advantages for all levels.

D. FRINGE BENEFITS: NON-TERRORISM SUCCESSES

In all likelihood, fusion center development would not have occurred without the 2001 attacks on U.S. soil. However, these agencies perform many other critical functions other than counterterrorism. The roles they perform as public safety components help further validate the need for these bodies.

1. Crime and Security

Expanding state and local involvement with federal authorities unquestionably augments the overall national homeland security mission; concurrently, those same municipalities reap additional benefits for themselves as a result from participating in the post-9/11 information sharing structure. This is not to say non-federal ISE elements

[103] William Yardley, "Portland, Ore., Votes to Rejoin Task Force After Terrorism Scare," *New York Times*, April 30, 2011, http://www.nytimes.com/2011/05/01/us/01portland.html?_r=0. Another example of a municipality asserting control occurred in San Francisco in May 2012. After ethnic groups raised concerns about surveillance efforts, the city passed an ordinance requiring more transparency outlining police cooperation with the local JTTF. However, the lessons learned from the Portland experience likely spurred San Francisco officials to avoid completely breaking off cooperation with the JTTF. http://sanfrancisco.cbslocal.com/2012/05/10/sf-mayor-lee-signs-civil-rights-measure-on-dealings-with-feds/.

operate primarily for their own needs, but working within the system provides substantial opportunities for achieving successes that are not specifically attributable to homeland security mission areas.

Acutely aware of the requirements faced by its valuable non-federal participants, the *National Strategy for Information Sharing* "recognizes the sovereignty of State and local governments…[and fusion center] incorporation into the ISE takes into account that these centers support day-to-day crime control efforts and other critical public safety activities."[104] Maintaining the proper balance of effort between national and local security requirements can place added stress on a system largely constructed under the threat of terrorism, but one that is almost entirely run by those who maintain an absolute obligation to protect their own constituents against normal crimes and hazards.[105]

However, despite the potential for what may be perceived as a conflict in choosing between homeland or local security, states can actually use the burgeoning national network to enhance *both* fights. A RAND Corporation survey of state and local authorities outlined just such a possibility when it summarized the newer emphasis on counterterrorism intelligence efforts as a means to also reinforce traditional law enforcement capabilities. According to the survey's respondents, "on the one hand, municipalities consistently report that they are redirecting traditional crime-control resources to support homeland security missions. On the other hand…the possibility [exists] that counterterrorism intelligence activities may hold the promise of increasing…effectiveness against [serious] crime…by building skills that are critical to confronting such problems."[106]

In essence, by assigning a national task of counterterrorism to state and local authorities, the U.S. government provides ample opportunities to expand federalism by

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104 White House, *National Strategy for Information Sharing*, October 2007, A1-1.

105 U.S. Congress. Senate, Committee on Homeland Security and Governmental Affairs, Ten Years After 9/11: A Status Report On Information Sharing (written statement of Thomas McNamara), 112th Congress, 1st Session, October 12, 2011, 18.

106 K. Jack Riley, Gregory F. Treverton, Jeremy M. Wilson, and Lois M. Davis, State and Local Intelligence in the War on Terrorism, (Santa Monica: RAND Corporation, 2005), http://www.rand.org/pubs/monographs/2005/RAND_MG394.pdf, 60.

elevating state competencies in a multitude of arenas, not the least of which is basic public safety within their jurisdictions. Long-time fusion center advocate and leading law enforcement figure, William Bratton, refers to these bodies as "centers of gravity" in the struggle against both crime and terrorism, an apt description of the multiple threat responsibilities they face.[107] What may appear on the surface as forced compliance to national security efforts instead presents local officials with expanded opportunities of asserting control while providing increased protection against any number of hazards. Including states into the national network does not mean they are absorbed. In practice, and for the conceivable future of homeland security, the opposite is true.

2. Networking Disasters

While state and local participation in the national information-sharing network provides them with numerous advantages in preventing crime and terrorism, the aggressive utilization of the fusion concept also offers inherent advantages in other vital homeland security mission areas. For example, one of the key components of homeland security addressed by the QHSR focuses on disaster resiliency.[108] The capacity to rebound from what would otherwise be devastating circumstances depends, in large part, on a robust, interconnected system enabling the free-flow of information between the vital components of society. Without the movement of crucial data, authorities on all levels would operate in isolated bubbles and risk wasting time and effort executing uncoordinated responses, possibly exacerbating already dangerous situations.

To combat this inefficiency, fusion centers stand as proven models of integrated networking because they already "connect to a diverse group of agencies to share intelligence and information not only for prevention and protection, but also for mitigation, response, and recovery."[109] Although prevention and protection remain critically important, it is impossible to conceive of a future without disasters, either

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[107] William J. Bratton, speech to the 2008 National Fusion Center Conference, March 18, 2008, *Los Angeles Police Department*, http://www.lapdonline.org/inside_the_lapd/content_basic_view/37865.

[108] U.S. Department of Homeland Security, *Quadrennial Homeland Security Review Report*, 59.

[109] Joseph W. Pfeifer, "Network Fusion: Information and Intelligence Sharing for a Networked World," 10.

manmade or natural. Therefore, substantial effort must be put into determining what will happen after something does go wrong or, in the case of mitigation, taking measures now to lessen future impacts. As such, state fusion centers provide the technologically integrated tools necessary to accomplish those tasks that occur *after* disasters strike because they already operate within a system that places great emphasis on acquiring, processing, and sharing data *before* they occur.

Increasing fusion center disaster-related involvement with such varied public safety components as emergency management, health providers, first responders, private businesses, and law enforcement elements helps reinforce the notion that states are now elevating and standardizing their overall disaster response capabilities. By solidifying these relationships while simultaneously employing emerging data networks, states are now in the position to "help cement the long-term value and viability of the fusion centers in support of emergency management."[110] In other words, state and local authorities can tap into the pre-existing framework of the intelligence-centric network to link up with other fusion centers and pool disaster-related resources or knowledge; consequently, the non-federal levels of American government demonstrate increased powers to provide for its citizens. Because the emerging data fusion and networking concepts offer unprecedented opportunities to coordinate previously disconnected government elements, the overall reach and strength of states enjoy a significant boost. Although the information-sharing concept emphasizes effectively managing homeland security intelligence focused on terrorism, the opportunity for states to exploit the network capabilities for critical public safety missions offers great potential for heightening federalism.

110 U.S. Department of Justice, Global Justice Information Sharing Initiative, and U.S. Federal Emergency Management Agency, *Considerations for Fusion Center and Emergency Operations Center Coordination: Comprehensive Preparedness Guide (CPG) 502,* May 2010, 12.

E. INFORMATION OVERLOAD: DO ALL THE PIECES FIT?

The emergence of collaborative and distributive information systems offers ample opportunities for the homeland security "enterprise" to become more efficient, as well as more effective. However, there are some dark sides to implementing these technologies.

For one thing, in the years after 9/11, the race to remedy the well-known intelligence sharing shortfalls invariably led to an overabundance of competing systems. As the government scrambled to correct the fatal flaws that led to the attacks, the emerging databases unfortunately exhibited redundant and overlapping characteristics. For example, a 2006 Justice Research and Statistics Association (JRSA) survey discovered 266 independent systems for sharing crime and terrorism information either already in existence or in various stages of development.[111] What started out as aggressive problem solving to break down the intelligence "wall" now has the potential to create a new issue: overloading the analysts with information. A common analogy to this situation is when an individual searches on Google about a breaking news story. Oftentimes dozens or hundreds of "hits" may appear. The long list may indicate a significant incident, but in reality, it more accurately reflects the various press agencies simply repeating each other to produce an exorbitant amount of words on the same topic.

However, in a homeland security scenario, the danger lies not only in too much data being regurgitated by dissimilar systems, but the lack of integration between the systems. The former Inspector General for DHS, Richard L. Skinner, testified before Congress in July 2012 that the "Homeland Security Information Network (HSIN) and the Homeland Security State and Local Community of Interest (HSLIC) systems, both developed by DHS, are not integrated…[and], as a result, users must maintain separate accounts, and information cannot easily be shared across the systems."[112] Suffice to say,

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111 U.S. Library of Congress, Congressional Research Service, *Terrorism Information Sharing and the Nationwide Suspicious Activity Report Initiative: Background and Issues for Congress*, by Jerome Bjelopera, CRS Report R40901 (Washington, DC: Office of Congressional Information and Publishing, June 10, 2011), 3.

112 *The Future of Homeland Security: The Evolution of the Homeland Security Department's Roles and Missions: Hearings before the Senate Committee on Homeland Security and Governmental Affairs* 112th Cong. (July 12, 2012) (statement of Richard L. Skinner, former Inspector General of DHS), 4.

this disjointed networking effort yields frustrations for state fusion centers that rely on being intertwined within the national framework of homeland security actors.

The results are startling: over the course of an 18 month period in 2009–2010, an average of 49 percent of state and local officials with access to the HS SLIC actually logged into the system; instead, the DHS OIG reports that "e-mail and phone calls remain the primary methods for sharing information with fusion centers."[113] Despite the tremendous exertion in creating a seamless set of technologically-advanced information sharing regimes, state and local practitioners of homeland security more often than not end up relying on e-mails and telephones from their federal counterparts. From a federalism perspective, this type of reliance potentially lessens the power of the states by making them more beholden to the national level agencies to provide the critical pieces of intelligence.

F. CONCLUSION

Although the redundant and overlapping networks possess many negative attributes, their great potential in changing the way the U.S. tackles its homeland security issues far outweighs the drawbacks. The system is not perfect because there will always be a greater amount of intelligence than can possibly be processed by those entrusted with doing so; furthermore, key pieces of data will inevitably become hidden under the layers and in the nooks of these networks. Additionally, some analysts and components will find it easier to function without heavy reliance on intricate databases, preferring instead to perform their roles in a more traditional context.

Nevertheless, the decade-plus evolution of homeland security produced dramatic advances in how the U.S. defends itself, highlighted by the monumental upswing in information sharing capabilities. Now, as the homeland security initiative continues to mature, the government must capitalize on what it has already created. Whereas the

[113] U.S. Department of Homeland Security, Office of the Inspector General Report, *Information Sharing With Fusion Centers Has Improved, but Information System Challenges Remain* (OIG 11-04), October 2010, 15.

immediate aftermath of 9/11 spurred heavy investment in establishing the frameworks of the various networks, the Markle Foundation forecasts the next step will be ensuring "informal and flexible groups from different parts of government and the private sector [are able] to work together on the full range of crosscutting issues to share expertise—as they do for counterterrorism."[114] Plugging states and localities into this nationwide network as equal partners reinvigorates some of the most time-honored federalism traditions.

[114] *Ten Years After 9/11: A Status Report On Information Sharing: Hearings before the Senate Committee on Homeland Security and Governmental Affairs*, 112th Cong. (October 12, 2011) (statement of Zoe Baird Budinger and Jeffrey H. Smith), 10.

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V. CONCLUSION

Without question, the surge of national government intervention after 9/11 was expected—and welcomed. Exemplified by such efforts as stationing troops at airport security checkpoints or positioning jet fighters into combat air patrols in the skies overhead, the federal government took extraordinary measures to insert itself into as many places as possible in the hopes of deterring the next attack. Moreover, the inception of DHS in early 2003 produced yet another bureaucratic layer in the quest to defend the homeland and resulted in billions of further expenditures. As Matthew Brzezinski noted in his book, *Fortress America*, "the public was clamoring for the government to take action on terrorism, and creating DHS would certainly give the impression that the administration was doing all it could to prosecute the war on terror- not only abroad, but at home, as well."[115] By the time the 9/11 Commission released its detailed report in 2004 imploring greater sharing of intelligence between the various agencies, the U.S. appeared to be well down the path towards a centrally-dominated domestic security arrangement. The long-term constitutional effects of these efforts appeared uncertain.

But a funny thing happened on the way to consolidating power on the banks of the Potomac: The states began to assert themselves into the conversation by developing fusion centers and then staunchly advocating their inclusion into the broader national security construct. From a federalism perspective, these fusion centers represent a clear example of advancing non-federal interests in areas previously off-limits to the states. As homeland and national security imperatives became so intertwined over the course of the last decade, it is not a stretch to say fusion centers probably signify a major development not only for the routine jobs they perform on a day-to-day basis, but also for what they mean in the larger conversation of the American system of government.

The final answer is not yet written and may be impossible to know right now. The small sample size of years not decades, the classified nature of the applicable elements, and the muddled boundaries so characteristic of homeland security preclude a long-term,

[115] Matthew Brzezinski, *Fortress America* (New York: Bantam Books, 2004), 179.

historical analysis of federalism as demonstrated by fusion centers. In addition, the United States is only halfway through the second presidential administration after 9/11 and appears embroiled in an increasingly partisan political discourse. All of these factors (plus a host of others) weigh against a conclusive determination of how federalism will eventually play out.

To get a better sense of what fusion centers might signify, it is important to address the framework in which the states previously operated from. Because the late 19th century and all of the 20th century witnessed a sustained encroachment on federalism by the central government, it was more difficult for states to secure greater powers. In addition to the vivid post-Civil War affirmation of a more centrally unified United States, the subsequent decades also saw increasing demonstrations of national government prominence. The federal government asserted itself more frequently into the lives of its citizens through such measures as an omnipresent New Deal strategy, as well as the ensuing creation of numerous regulatory agencies within the vast domestic realm (Environmental Protection Agency, National Labor Relations Board, Occupational Health Safety Administration, etc.) State capabilities vis-à-vis the federal government diminished over time as Washington's influence crept into areas normally subject to local oversight.

The concept of federalism was by no means a dying virtue of American governance, of course. State and localities functioned just fine, of course, and even successfully resisted some federal measures (i.e., the legal fight against the Brady Act background checks).[116] Nevertheless, the trend remained one of the federal government generally holding sway over the states in what more or less amounted to a competition among the levels for control.

However, what is past is not always prologue. The emerging environment in the aftershocks of 9/11 has altered what was once a zero-sum game of power shifting among the levels of control and governance. In other words, power gained by the federal government previously resulted in an equal loss for the states and localities. Today, when

116 *Printz v. United States*, 95 S. Ct 478 (1997), in LexisNexis Academic.

all levels of government integrate more easily, homeland security requirements portend an era not only of mutual support, but mutual advances. For instance, states exercise some crucial national security responsibilities via fusion center operations, but that no longer translates into quantifiable powers being taken *away* from the federal government. At the same time, federal authorities now possess the means to utilize state and local law enforcement systems to enhance national security effectiveness while still leaving the sub-federal capabilities intact. Does this mean state-federal power struggles are a thing of the past? Absolutely not. Disputes over authorities and boundaries will remain an inherent difficulty with the American federal system, but the ultimate security goal is a shared one: protection of the homeland. States cannot do it themselves, nor can the national government. Fusion centers stand in as exemplary models for this new calculus of the American security environment.

Fusion centers operate within a growing national network that fosters closer relationships with federal partners and delivers greater access to critical intelligence through an array of interconnected databases. As a result, states are becoming increasingly valuable partners in the fight to acquire, analyze, and disseminate the type of information necessary to help protect the nation. They are not mere conduits of intelligence, but rather full-fledged components functioning within the greater homeland security apparatus. Their actions, even the most mundane, incrementally advance the capabilities of the various states. Possessing the ability to be tailored to the specific needs of their municipalities and performing critical governmental functions unrelated to terrorism, fusion centers are indicative of a promising growth industry.

Although serious questions remain unresolved, including the ever-present dilemma on civil liberties and who gets to see which information on American citizens, fusion centers signify a remarkable innovation for states to employ. Continued modernization and heightened network integration will yield even greater results in the years to come. Perhaps most significant of all, these fusion centers foretell a fundamental adjustment to federalism.

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