

THE LIMITS OF CONTROL: THE MARKET STATE, DIVIDED POWER, AND THE RESPONSE TO 9/11

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ABSTRACT: *The 9/11 attacks demanded a response from the U.S. government, but designing and executing that response was not easily done. The United States is an advanced market society in which power is highly dispersed. Federal policymakers were confronted with challenges that we now regard as typical of the network form of governance. Their ability to act decisively was constrained by public law, by the political influence and superior knowledge of private industry, and by widespread skepticism about the legitimacy of federal authority. While many commentators worried about the excessive concentration of power in the federal executive branch after 9/11, it might be more accurate to say that the post-9/11 period was typified by a prolonged, and often unsuccessful, effort to induce cooperation and coordination by a range of public and private actors.*

INTRODUCTION

In the aftermath of the 9/11 attacks it was commonplace to make a sharp contrast between the organizational capabilities of the United States and those of its new enemies. We were said to have entered the era of “asymmetric warfare.” On one side was the U.S., with its impressive capacity to organize and deploy hierarchically structured military forces. On the other side was a highly decentralized and mobile terrorist network, structured to evade detection and survive (because of its acephalous character) repeated blows.¹ A critical question appeared to be the ability of governmental bureaucracies to respond effectively to the threat posed by these agile terror networks. Success hinged on questions of “organization and doctrine,” a RAND study observed late in 2001:

At the organizational level, we see a confrontation between hierarchical/state and networked/nonstate actors A particular challenge for the cumbersome American bureaucracy will be to encourage deep, all-channel networking among the military, law enforcement and intelligence

elements whose collaboration is crucial for achieving success Simply put, the West must start to build its own networks and must learn to swarm the enemy, in order to keep it on the run or pinned down until it can be destroyed (Arquilla, Ronfeldt et al. 2001, 364 and 369).

It eventually became clear that this early characterization of the conflict was mistaken in important ways. Al Qaeda, for example, proved to be an organizational hybrid that included bureaucratized arrangements for recruitment and indoctrination, security, financing and command (Gunaratna 2003). This meant that Al Qaeda shared some of the vulnerabilities of conventional bureaucracies, such as disruption by attacks on key actors within the organization's hierarchy (Gunaratna 2004).

At the same time, the U.S. government's response to the newly appreciated terror threat appeared to suffer from problems more often associated with networks than with bureaucracies. Bureaucracies are acknowledged to have many distinctive weaknesses—such as an inability to execute routines quickly, because of the need for approvals at multiple levels; or an inability to act with complete rationality because of limits on information-processing capacity at the most senior levels; or an inability to adopt new work methods quickly. Nonetheless, bureaucracies also have distinctive advantages, including concentration of authority and clear lines of command. An essential feature of the bureaucratic form, Weber said, is “a firmly ordered system of super- and subordination” (Weber 1946, 197). By contrast, networks are often assumed to lack such clear lines of command. A central problem of management in networks—that of “coordinating joint production” (Milward and Provan 2000, 363) by actors who are “sovereign” (Lazer 2003, 2) or only “loosely coupled” (Blatter 2003, 503–504)—does not arise so forcefully in bureaucracies because leaders have the advantage of formal authority.²

And yet the central problem confronted by the U.S. government in the aftermath of the 9/11 attacks was precisely this problem of “coordinating joint production.” Although it became commonplace to describe the post-9/11 era as one in which the federal executive acquired a dangerous concentration of power, the reality was quite different. The crisis actually illustrated the challenges of assuring homeland security within an economic and political system characterized by a substantial diffusion of authority among public and private actors. The federal government found itself constantly checked by constitutional and other forms of public law, by the political influence and superior knowledge of private industry, and by broad public skepticism about the legitimacy of federal power. Federal officials were compelled to act under conditions in which their authority was limited and constantly challenged. As a consequence, they spent a considerable amount of time attempting to build legitimacy, induce the cooperation of reluctant partners, and build structures for coordinating the action of multiple public and private actors. These are the critical tasks typically associated with network governance (Milward and Provan 2006).

This is not a surprising result. After all, the American system of governance was designed with the aim of fragmenting authority and confounding efforts to “coordinate production.” It was intended to be a constrained state, built to promote the

virtues of economic and political liberalism rather than collective security. Over time, political and economic conditions have evolved in ways that have reinforced the constraints of the initial design. These refined constraints are not always problematic: we should be glad, for example, to have robust protections of civil liberties. In other domains, however, these constraints have clearly complicated the effort to implement policies that are generally acknowledged to be in the public interest.

CONTROL AND THE PRIVATE SECTOR

The federal government's effort to improve homeland security had to be tailored to fit the reality that the United States is a highly advanced market economy. This has two implications. The first is that most of the assets that might be attractive targets for terrorist attacks (often called "critical infrastructure") are privately owned. This reality was vividly illustrated by the collision of American Airlines Flight 11 and United Airlines Flight 175 into the two towers of the World Trade Center: both the weapons and the targets were private assets. The second implication is that an attack on any part of the economy has the potential to have substantial ripple effects across the entire country. This reality was also illustrated by the 9/11 attacks, which immediately had logistical implications for the conduct of business across the country—and indeed, around the world.

This second point deserves amplification. It was not always the case that a major attack in one part of the United States could be expected to have an immediate effect on daily life in another. The prerequisite was industrialization and the national integration of economic activity, manifested by the development of more sophisticated systems of transportation and communication and the growth of interregional commerce (Engerman and Gallman 1996). Internal integration of the American economy created massive efficiencies but also interdependencies, so that shocks in one place had immediate consequences elsewhere. Economic globalization—the process of integration across national borders—represents an extension of this process. Indeed, globalization has been defined as "a phenomenon by which economic agents in any given part of the world are much more affected by events elsewhere in the world" (Krueger 2000).

To put it another way, the expansion of a market economy generates wealth, but also vulnerabilities. In the aftermath of the 9/11 attacks, policymakers quickly began to inventory the weaknesses of the complex systems that undergirded the American economy. *E. coli* outbreaks in the 1990s had already demonstrated that industrialization of food production had lowered the cost of food but also created the potential for mass poisoning of consumers. The nation's electrical grids are vulnerable to disruption by attacks on poorly protected substations and transmission lines. Moreover, disruptions may have substantial ripple effects because of the increasing interconnection of grids, as the 2003 Northeast blackout showed. A terrorist attack on one of the nation's 104 commercial nuclear generating units might also have catastrophic consequences.

The interstate natural gas distribution system is equally vulnerable; many natural gas storage and processing facilities are located in densely populated areas. So too

are plants that produce or consume dangerous chemicals, which are also shipped through urban areas by unprotected trucks or trains. Security specialists also warn that the nation's rapidly growing "cyber infrastructure"—the computer networks essential to the operation of the country's financial, power, transportation, and emergency response systems—could be easily penetrated and undermined, causing paralysis in the industries that rely on them.

The growth and increasing sophistication of the market economy creates three substantial challenges for federal authorities interested in improving homeland security. These are all problems of control. First, there are legal limits to control: for example, while power grids have now spilled across state lines, authority to regulate those grids continues to be held principally by state governments. Second, there are informational asymmetries and uncertainties that complicate efforts at control. The complexity of these systems makes it difficult to assess precisely what the most serious vulnerabilities might be, or what interventions are most likely to reduce risks of disruption. Private actors might be in a better position to gauge these vulnerabilities, but even private actors might need to collaborate among themselves to fully appreciate the interdependencies within their sector of the economy. Finally, there are problems of conflicting incentives. Private firms might underinvest in precautionary measures if the cost of a disruption is likely to be spread throughout the economy. It might also be less expensive for industries to lobby against costly precautionary measures. In addition, competitive pressures deter firms from revealing information about their own vulnerabilities to competitors.

Federal authorities wrestled constantly with these challenges. For example, they experimented with governance structures intended to accommodate the realities of diffused authority and conflicting incentives. Expanding a policy introduced by the Clinton administration, the Bush administration relied heavily on voluntary industry panels known as Information Sharing and Analysis Centers to promote collaboration on the "management of operational risks" from terrorist attacks. These panels were promoted as a way of exploiting businesses' "unique operational insight into their industries' core functions" (Executive Office of the President 2003, 21), but the voluntary character of the exercise compromised their effectiveness. Many firms did not participate in the panels, or declined to share information about their own vulnerabilities, fearing damage to their competitive position or a risk of legal liability (General Accounting Office 2004).

Meanwhile, initiatives to regulate more firmly were compromised by industry opposition. The chemical industry's lobby actively resisted attempts to use the EPA's regulatory authority to improve security, as well as congressional efforts to achieve the same goal through new legislation (OMBWatch 2005), while the food industry successfully resisted congressional initiatives to rationalize and strengthen federal regulation (Pianin 2001). The Air Transport Association resisted proposals for enhanced security that would "saddle U.S. airlines and their customers with unfunded security mandates" (Milligan 2004). Industry lobbying is also said to have blocked initiatives for tighter security for shipping of hazardous material by rail and truck, while nuclear power plant owners deflected the Nuclear Regulatory Commission from efforts to tighten plant security (Davidson 2004).

The problem of control is most vividly illustrated by the task of improving security in containerized shipping. Economic globalization has led to a rapid increase in the amount of goods purchased by Americans from overseas suppliers. The total value of goods imported into the United States has grown sixteen-fold in nominal terms over the last 40 years.³ Most of these goods are now imported in shipping containers received by major U.S. seaports. It follows that the container traffic handled by these ports has also increased dramatically. This creates a major vulnerability. Marc Levinson observes:

This high-efficiency transportation machine is a blessing for exporters and importers, but it has become a curse for customs inspectors and security officials. Each container is accompanied by a manifest listing its contents, but neither ship lines nor ports can vouch that what is on the manifest corresponds to what is inside. Nor is there any easy way to check: opening the doors at the end of the box normally reveals only a wall of paperboard cartons (Levinson 2006, 7).

Even before 9/11, it had been recognized that weapons of mass destruction could be hidden inside a container smuggled into the interior of the United States without significant risk of detection (Flynn 2000, 63). This vulnerability became even more substantial after 9/11. The total number of shipping containers handled by major North American port increased by roughly 50 percent in the following four years (Institute of Shipping Economics and Logistics 2005).

Efforts to reduce vulnerabilities have again been compromised by limits on jurisdiction and industry pressure. The U.S. government lacks authority to mandate tighter security at foreign ports or the business locations at which containers are loaded. As a consequence, it must negotiate for the cooperation of foreign authorities. The shipping industry has also lobbied intensively against new rules that would impose added costs. (The World Shipping Council, one of several groups that have pushed for a voluntary approach to container security, spent \$1.2 million lobbying federal officials in the two years following 9/11 (Public Citizen 2004, 13 and 63–73).) As a result, the federal effort to improve security has relied heavily on voluntary cooperation by major shippers in programs to secure the “international supply chain.” Four years after the 9/11 attacks, analysts suggested that the containerized shipping industry continued to suffer from grave vulnerabilities (Flynn 2006).

CONTROL AND THE CITIZENRY

In many ways, the federal government also required the cooperation of the general public in its efforts to improve homeland security. Several of the initiatives required to improve security threatened to impose costs on citizens—through increased taxes, military service, inconveniences in daily life, or curtailment of rights. However, federal authorities once again faced severe constraints on their ability to compel the cooperation of citizens. In part this problem of control arose out of a problem of legitimacy: many citizens were unwillingness to cede authority to the federal government,

even in a moment of crisis. There were also constitutional and statutory checks on federal authority, which reflected and reinforced this distrust of federal authority.

A Problem of Legitimacy

Federal authorities confronted a problem of legitimacy that was substantial and deeply rooted. Even after 9/11, a majority of Americans continued to profess dissatisfaction with the size and power of the federal government (see table). Trust in the federal government increased for a brief period immediately following the 9/11 attacks but then reverted to its usual low level (Deane 2002).

Please say whether you are very satisfied, somewhat satisfied, somewhat dissatisfied, or very dissatisfied [about] the size and power of the federal government? (Source: Gallup Polls)

| <i>Date</i> | <i>VS</i> | <i>SS</i> | <i>SD</i> | <i>VD</i> | <i>DK/NA</i> |
|-------------|-----------|-----------|-----------|-----------|--------------|
| Jan-05 | 9 | 40 | 31 | 19 | 2 |
| Jan-04 | 11 | 38 | 31 | 20 | 1 |
| Jan-03 | 10 | 41 | 29 | 18 | 2 |
| Jan-02 | 13 | 48 | 26 | 13 | 1 |

Of course, there has been a corrosion of respect for government in many of the OECD democracies over the last three decades. But the United States is likely a distinctive case. "The distinctive aspect of the American Creed," Samuel Huntington observed, "is its antigovernment character. Opposition to power, and suspicion of government as the most dangerous embodiment of power, are the central themes of American political thought" (Huntington 1981, 33). More recently, the downturn in trust of government has also been "longest and clearest" in the United States (Pharr, Putnam et al. 2000, 9). As Marc Hetherington has observed, the "key change in American public opinion over the last forty years" has been the extent to which "Americans have lost faith in the federal government to implement and administer public policy" (Hetherington 2005, 8). The causes of this decline are complex, and include perceptions about policy failure and corruption (Nye Jr., Zelikow et al. 1997), anxieties induced by economic uncertainty, the exploitation of anti-statist sentiments in efforts at political mobilization (Fried and Harris 2001), and the amplification of such sentiments in popular media.

Whatever the cause, the consequences are clear: there is a connection between trust in the federal government and willingness to tolerate the claims that federal authorities may make on citizens. The Bush administration wrestled constantly with the challenges confronted by this problem of legitimacy. One general result was the administration's schizophrenic view of the 9/11 crisis: insisting, on the one hand, that there was a serious threat of attacks on U.S. territory, but at the same time encouraging citizens to carry on with business as usual. (Three weeks after 9/11, President Bush urged Americans to "Get down to Disney World. Take your families

and enjoy life, the way we want it to be enjoyed”[Executive Office of the President 2001].) The Bush administration was criticized for failing to call on citizens to make more of a sacrifice in the name of homeland security (Skocpol 2003, 249), but its calculations may have been straightforward. Policies that required an element of sacrifice were unlikely to be politically popular, particularly if the sacrifice was obligatory and correlated with a growth in the authority of the federal government.

The Bush administration shaped its homeland security policies to accommodate the problem of legitimacy. One small illustration is provided by the approach to airport security after 9/11. Federal authorities refrained from adopting passenger-interrogation techniques used by Israel’s national airline, recommended by a National Research Council study in 1996, which would have been more time-consuming for passengers and intrusive of personal privacy (National Research Council 1996, 14). Instead it relied on technical methods such as passenger profiling databases and baggage scanning systems. Even then, there were complaints about inconveniences caused by database errors and secondary inspections.

The Bush administration also persisted with a policy of tax cuts even after the 9/11 attacks. These tax reductions were popular with much of the American electorate. In the immediate aftermath after the attacks, the Gallup Poll found a large majority of Americans still favored an acceleration of tax cuts already approved by Congress, the permanent adoption of tax cuts scheduled for phase-out, and further tax cuts for businesses and families. In part because of these tax reductions, the 9/11 crisis became the first security crisis in which the tax burden imposed by the federal government actually *declined*. During each of the two world wars, federal revenues quintupled; during the first four years of the Cold War, revenues increased by 70 percent. By contrast, federal revenue dropped by six percent between 2001 and 2004 (Executive Office of the President 2006, Historical Tables 1.1).

While Americans evinced support for a program of tax reductions, they also resisted efforts to limit benefits conferred through federal entitlement programs such as Social Security, Medicare and Medicaid, which will rise substantially as the number of older Americans increases. Other Anglophone democracies have handled this issue more decisively, taking steps to curb long-term obligations (Roberts 2003). In the United States, the reform debate centered on proposals (such as prescription drug coverage under Medicare Part D or private retirement accounts) that substantially *increase* long-term program expenditures.

The difficulty of imposing costs on citizens—either through taxes or benefit reductions—had concrete consequences for homeland security. Under current policies, the long-term fiscal position of the federal government is not favorable (International Monetary Fund 2005). Policymakers have attempted to reconcile the federal accounts by constraining the growth of spending on “non-discretionary” programs (that is, programs other than Social Security, Medicare and Medicaid). Within this category, the burden of expenditure restraint has fallen most heavily on non-defense programs not connected with homeland security, such as environmental protection, education and training, and social services (Congressional Budget Office 2006, 15–22). Nonetheless, there has been sharp pressure to constrain spending on discretionary homeland security programs as well.⁴

Congress' ambivalence about funding homeland security initiatives was evident in its treatment of the newly created Transportation Security Administration. Congress quickly imposed a cap on the number of personnel that could be employed by the agency and subsequently resisted administration requests to increase its budget (Light 2005). In December 2005, members of the 9/11 Commission criticized Congress for failing to provide funding that would allow faster adoption of technologies to screen airline passengers and checked baggage for explosives (9/11 Public Disclosure Project 2005). The 9/11 Commission members also complained about the lack of funding for maritime cargo screening. Critics noted that federal commitments fell far short of the actual cost of properly securing major port facilities (Benjamin and Simon 2005, 250; de Rugy 2005; Haveman, Shatz et al. 2005). Federal initiatives to improve shipping container security—such as the Container Security Initiative, the Customs-Trade Partnership Against Terrorism (C-TPAT), and Operation Safe Commerce—were also compromised by limited budgets (Government Accountability Office 2005, 16–17).

Other programs related to homeland security were similarly constrained. The U.S. Coast Guard continues to rely on a pre-9/11 plan for modernization of its aging fleet of ships and aircraft that will not be completed for another quarter-century (Flynn 2006). Fiscal pressures also discouraged the hiring of additional agents for the Border Patrol (Hedges 2005), while the Federal Emergency Management Agency sought to fund new terrorism-response responsibilities by scavenging from existing disaster programs (Government Accountability Office 2005). The Bush administration's 2007 budget proposal also included substantial cuts in federal funding for the national public health system (Executive Office of the President 2006, 105).

Civil Liberties

The burden that is typically imposed on citizens during security crises is not merely financial. A second sense in which citizens might have borne costs in the wake of the 9/11 attacks was through infringements of civil liberties. Indeed, citizens suffered severe intrusions on civil liberties in each of the five security crises experienced by the U.S. in the twentieth century.⁵ But federal authorities encountered stiff resistance when they attempted, after 9/11, to strengthen law enforcement powers in ways that threatened civil liberties. This was another illustration of the constraints imposed by broad public distrust of federal power. Constitutional and statute law also restricted the ability of federal authorities to mandate cooperation in new security initiatives.

Many commentators characterized the 9/11 crisis as a reprise of the security crises of the twentieth century. The federal government's handling of civil liberties after 9/11, the historian Alan Brinkley said, was "a familiar story" (Brinkley 2003). Legal scholar Geoffrey Stone saw "disturbing—and all-too-familiar—patterns in some of our government's reactions" (Stone 2003, 245). History was repeating itself, said the *Sacramento Bee* (Magagnini 2003). A natural consequence of this emphasis on historical analogies was a tendency to describe the effect of federal policies in stark terms: as a "war on our rights" (Cole 2004) or a "war on our freedoms" (Leone and Anrig 2003).

The historical analogies and the stark claims about the government's actions could not be justified. To appreciate this point it is important to remember the severity of the civil rights intrusions that accompanied earlier crises. During World War One and the Red Scare of 1919–1921, hundreds of American citizens were imprisoned or deported for sedition or disloyal statements. During World War Two, tens of thousands of citizens were detained for years on scant evidence that they posed a security threat. During the early years of the Cold War, thousands of Americans were denied employment or the right to travel because of their political beliefs. And during the “law and order crisis” of the late 1960s and early 1970s, the federal government subjected tens of thousands of Americans to surveillance, and often infiltrated and disrupted domestic protest movements. The 9/11 crisis ended without comparable harms being done to citizens' rights. (This is not to say that there were not serious abuses of rights; rather, they were done principally to non-citizens. Aliens *were* subjected to deportation, prolonged detention, denial of access to courts, cruel treatment and sometimes even abduction and torture. In other words, there was comparability between *aliens'* experience of the 9/11 crisis and *citizens'* experience of earlier crises.)

This was largely a result of the strengthening of institutional safeguards against rights violations as a consequence of earlier security crises. By the early 1960s, American courts had overturned, on constitutional grounds, laws that allowed the punishment of individuals for the expression of political opinion. In 1970, Congress also restricted the executive branch's power to detain citizens on security grounds. In the mid-1960s, the U.S. Supreme Court also recognized a constitutional right of privacy, and in succeeding years invoked that right to justify restrictions on the government's authority to engage in surveillance. In the 1970s, following a series of Nixon-era scandals, Congress also pressured the executive branch to comply with new restrictions on domestic surveillance. These controls continued to operate during the 9/11 crisis. (The resources of advocacy groups such as the American Civil Liberties Union also grew substantially during the crisis.)

This persistent effect of these checks on federal authority was not often appreciated. For example, critics often described the Patriot Act, adopted by Congress in October 2001 in an effort to bolster the counterterrorism capabilities of the federal government, as though it had wholly overthrown the bundle of restrictions on executive action built up over the preceding four decades. Senator Patrick Leahy suggested that Congress was “bending or even shredding” constitutional rights (ABC News 2001). “The Patriot Act,” said one prominent academic, “radically transformed the landscape of government powers in ways that virtually guarantee repetition of some of the government's worst abuses of the past” (Cole and Dempsey 2002, 218).

This was overstatement. The Patriot Act modified, but did not overturn, the policies constructed to protect civil liberties following the law and order crisis. Indeed, as time passed, critics conceded that some changes contained within the bill were unobjectionable, consisting of updates to legislation to accommodate technological changes such as the advent of cell phones and electronic mail.

By 2005, debate centered primarily on two provisions of the Patriot Act. One of these was section 215 of the law, which broadened the circumstances under which

the FBI could ask the Foreign Intelligence Surveillance Court, established in 1978 to oversee domestic national security investigations, for an order to obtain documents relating to counterterrorism investigations. On its adoption, Senator Russell Feingold worried that section 215 would allow the FBI to “go on a fishing expedition and collect information on virtually anyone”(Kuhnhehn 2001). Librarian associations made section 215 the centerpiece of their campaign against the Patriot Act, arguing that the government would be able to “sweep up vast amounts of information about people who are not suspected of a crime” (New York Library Association 2003).

The librarians’ campaign, which played on the collision between the dark specter of government surveillance and the evident wholesomeness of the public library, proved highly effective. By 2005, section 215 was popularly known as the “library provision,” even though it encompassed documents held by any business or non-profit organization. Vermont senator Bernard Sanders introduced a Freedom to Read Protection Act (HR 1157, 108th Cong.) to restore “the right to read without government surveillance,” which gained broad public support. However, section 215 did not give the government “unlimited access to anything you read,” as the law itself made clear; and the FBI’s internal procedures created additional checks (Lichtblau 2005). The Justice Department reported that it used section 215 only 35 times in the Patriot Act’s first three years, and never against a public library (Department of Justice 2005).

This may have been because federal investigators found it more convenient to rely on section 505 of the Patriot Act, which expanded the FBI’s ability to use another investigative tool, the National Security Letter, to collect business records. Organizations are barred from disclosing the fact that they have received such letters. It was reported in 2005 that the FBI was issuing 30,000 letters a year (Gellman 2005). By that time, however, two federal courts had ruled that the expanded authority given to the FBI violated constitutional guarantees on freedom of expression and against unreasonable search and seizure.⁶ It also proved difficult to show concrete harm from abuse of the provision, save for an apprehension that continued vigorous use of the letters would have a chilling effect on free expression.

However, this was enough to encourage resistance to an extension of the Patriot Act powers after 2005. Bipartisan ambivalence about some of the measures included in the Patriot Act meant that they were weakly entrenched. Conservatives in the House of Representatives had insisted that a sunset provision be added to the law, causing it to lapse at the end of 2005 unless Congress voted for its renewal (O’Harrow 2005, 24–27). This proved to be a critical limitation. Enthusiasm for stiffer investigative powers waned quickly after 9/11. At the end of 2005, Congress proved unwilling to renew the Patriot Act without modifications. After months of negotiations, a modified law was approved in 2006 with new restrictions on the “library provision” and the use of National Security Letters.⁷

The controversy that followed the disclosure in December 2005 of covert domestic surveillance by the National Security Agency provided further evidence of the difficulties federal authorities face when their counter-terror efforts appeared to infringe on citizens’ rights. The *New York Times* revealed that the NSA, acting on a presidential directive

issued shortly after 9/11, had tapped email traffic and phone calls sent from, or received by, terrorist suspects in other countries (Risen and Lichtblau 2005). The public reaction was remarkable for its intensity. The *Times* called the program one of the most graphic examples of wartime abuses of liberties in all of American history, and “a giant step toward totalitarianism” (Herbert 2006; *New York Times* 2006).

This sort of rhetoric provided further evidence of the distrust with which many Americans viewed the federal government. Harsh criticism was directed at federal authorities even though there was not yet any evidence that the program had led to wrongful prosecutions or that intelligence had been used by political appointees to attack their opponents. A secret audit of the program undertaken by the Justice Department in 2004 apparently found no documented abuses of the program. There were legitimate concerns that the fact of surveillance itself constituted an invasion of privacy and might (once the existence of the program was disclosed) have a chilling effect on free speech. But these were smaller violations than during the law and order crisis of the 1960s and early 1970s, when federal agencies used intelligence to disrupt domestic protest movements by blackmailing or ostracizing protest leaders, and allowed political leaders to use intelligence as a tool for attacking their political opponents (Select Senate Committee to Study Government Operations 1976, Books II and III).

The NSA surveillance program also provided evidence of the strength of the controls that had been constructed to deter federal intrusions upon citizens’ rights. The program had been monitored by the NSA’s Inspector General and briefly suspended to address Justice Department concerns about the intrusion on civil liberties. Attorney General Gonzales conceded that the administration did not consult with Congress about the NSA program because it had concluded that legislative approval “was not something we could likely get . . . without jeopardizing the existence of the program” (Executive Office of the President 2005). This was not an adequate excuse for failing to seek approval, but it was an accurate estimate of the political climate. In the preceding three years, public and congressional opposition had stymied a series of programs that trenched on citizens’ privacy rights—such as the Justice Department’s Operation TIPS, the Defense Department’s Total Information Awareness (TIA) program, the Multistate Anti-Terrorism Information Exchange (MATRIX), and the Department of Homeland Security’s Computer Assisted Passenger Profiling System (CAPPS II).

COORDINATION WITHIN THE PUBLIC SECTOR

Federal authorities, attempting to design and implement programs intended to improve homeland security, confronted familiar problems when they attempted to enlist (or impose upon) private actors in the execution of those programs. A host of problems—shortfalls in legitimacy, informational asymmetries, skewed incentives—made the task of building a durable network of “co-producers” difficult.

We might think that the task of coordinating effort would have been easier *within* the public sector. But this was not the case. Even within the public sector,

federal authorities confronted challenges in coordinating the behavior of highly autonomous entities. Within the federal government itself, the task was to develop governance structures that would allow better information sharing and coordination of activities, and reduce tensions caused by conflicting institutional missions and interests. Federal authorities also wrestled with design of governance structures that would promote cooperation among federal, state and local actors. Here, cooperation was complicated by constitutional restrictions and conflicting views about the appropriate federal role: federal authorities were once again compelled to manage a delicate problem of legitimacy.

Intra-Governmental Cooperation

The 9/11 crisis prompted several efforts to design governance structures that would improve coordination and information-sharing within the federal executive branch. The dominant technique consisted of bureaucratic reorganizations. The largest of these reorganization efforts was the creation of the Department of Homeland Security (DHS), authorized by legislation in 2002 and formally established in March 2003.

Comprising 22 agencies transferred from seven other departments, the new departmental structure was intended to overcome “old categories, old jurisdictions, and old turf” (as Secretary Michael Chertoff said in 2005), but this proved to be an elusive goal. Major management systems were not integrated, and major components of DHS struggled bitterly over the division of resources. Congress sometimes compromised the integration effort by refusing to permit the reallocation of resources or tasks, and failing to rationalize its own oversight structures (Rood, Strohm et al. 2006). By 2005, morale within DHS was worse than in any other federal agency, with a large majority of workers saying that they did not understand how their own work related to DHS’ goals (Rosenbaum 2005).

A reorganization that was intended to improve coordination within the network of intelligence agencies encountered similar difficulties. The federal intelligence community is highly fragmented, with responsibilities for collection and analysis of intelligence shared by 17 agencies (Posner 2005, 50). The first major effort to compel integration within the community—manifested in the assignment of coordinative responsibilities to the new Central Intelligence Agency in the National Security Act of 1947—failed because of the resistance from older competitors, as did later projects to improve coordination through the establishment of a new Director of National Intelligence (Zegart 1999). Although the National Intelligence Reform Act of 2004 finally appointed a Director of National Intelligence to oversee the whole community, his powers are still constrained, both formally and by the realities of “bureaucratic warfare” and Congress’ own failure to rationalize its oversight mechanisms (Fessenden 2005).

Reorganization is particularly difficult in the U.S. federal government because of the separation of executive and legislative powers within the U.S. Constitution. The proposition that the bureaucracy is a creature of the legislative branch, treated as a

commonplace in American politics (Zegart 1999, 17 and 33; Kettl 2004, 42), does not hold true in many other advanced democracies. Many of the distinctive features of the American bureaucratic structure—such as the apparent irrationality of its bureaucratic structures, the close relationship between agencies and congressional patrons, and the absence of integrative mechanisms such as a single class of career managers—flow from this constitutional reality. In other words, one of the main reasons why coordination proved so difficult *after* 9/11 was that the system was so strongly predisposed against coordination *before* 9/11, because of distinctive constitutional features and deeply entrenched practices that had evolved out of those features.

Intergovernmental Cooperation

Federal attempts to improve capacity for emergency response were also compromised by the fact that the actors who would bear the immediate burden of response—such as police forces, firefighters, emergency medical technicians, and public health workers—were agents of state and (more often) local government. In this arena, federal authorities again experimented with institutional arrangements that would accommodate both the constitutional reality of divided sovereignty, as well as conflicting views about the proper role of the federal government.

Federal authorities relied on financial inducements as a main mechanism for encouraging state and local governments to improve their capacity to respond to emergencies. But grant programs had four significant limitations as instruments for shaping the behavior of state and local agencies. The first was the need to accommodate congressional pressure for fair distribution of grants. In its initial authorization of post-9/11 grant programs, Congress required that each state be guaranteed an equal allotment of grant money, with a top-up based on population. In other words, assessment of actual risk played no role in allocating funds. A second difficulty was delay caused by administrative difficulties in reviewing grant applications and making disbursements (Congressional Budget Office 2004, 6–7). A third was pressure from grant recipients to divert funds from terrorism preparedness to more common risks (Government Accountability Office 2005). In some cases there was also evidence of simple misuse of funds (Kean and Hamilton 2005). The Department of Homeland Security, which had responsibility for major grant programs, conceded that it had limited capacity to properly monitor how grants were used (Government Accountability Office 2005). (An earlier report on FEMA's grant programs made a similar observation about the weakness of oversight systems (Kettl 2004, 71).)

Federal authorities also attempted to formalize “problem-solving networks” (Milward and Provan 2006) comprised of federal, state, and local emergency responders. But the design of such networks was not easy. A 2003 simulation of terrorist attacks in Chicago and Seattle revealed substantial difficulties in communication among agencies (Department of Homeland Security 2003), while a 2004 simulation of a catastrophic hurricane in the U.S. Gulf Coast showed serious misunderstandings about the role that agencies expected to play in disaster response (Select Bipartisan

Committee 2006, 81–84). In December 2004 the Department of Homeland Security published a National Response Plan designed to “fundamentally change” (Hess and Harrald 2004) how the nation responds to extreme events by improving collaboration of federal, state and local agencies. However, post-hoc studies of the response to Hurricane Katrina in August 2005 showed that federal officials either did not understand their obligations under the plan or failed to fulfill those obligations (Select Bipartisan Committee 2006).

Lurking in the background of discussions about preparedness and response was a constitutional question: how forceful should the federal government be in taking leadership in this area? Historically, its role had been limited. Until the mid-1970s, the federal government had no clear role in this area; the Federal Emergency Management Agency (FEMA) was not created until 1979. State officials had an uneasy relationship with FEMA, on the one hand wanting better coordination of support from federal agencies but on the other hand fearing an erosion of state autonomy. These fears were aggravated by the expansion of FEMA’s role under the Clinton administration. The Bush administration had been elected on a promise that it would limit the role of the federal government, and this applied to FEMA as well. In May 2001 FEMA’s director promised that the agency would “restore the predominant role of state and local response to most disasters” (Allbaugh 2001).

This ambivalence about the federal role was evident during the Katrina disaster. In the early phases of the disaster, as the Government Accountability Office later observed, “the federal posture generally was to wait for the affected states to request assistance” (Government Accountability Office 2006, 4). As the scale of the disaster became clear, federal officials became more assertive, but state officials then resisted requests that they cede control over emergency response, causing a “virtual stand-off” (Lipton, Drew et al. 2005) that led to delay and confusion. After Katrina, the Bush administration promised that it would take a more forceful role in coordinating the response to major disasters. But in the next major test of the nation’s response capabilities, Hurricane Wilma, Florida officials again resisted federal efforts to take a leadership role in recovery (Block and Schatz 2005).

THE PROBLEM OF CONTROL IN A MARKET STATE

For many observers, the critical feature of post-9/11 politics has been the accretion of authority within the executive branch of the federal government. Arthur Schlesinger, who famously described the Nixon administration as “an imperial presidency,” has described the George W. Bush administration as an “imperial presidency redux” (Schlesinger 2004). Nor is Schlesinger alone in this comparison; Andrew Rudalevige also describes the Bush administration as a “new imperial presidency” (Rudalevige 2005). The Bush White House, says Stuart Taylor, Jr., is staffed by “executive supremacists” who are committed to a project of “creeping presidential autocracy” (Taylor, Jr. 2006). For these observers, there is a “problem of control” within the federal government—but the problem is one of a superabundance of authority, rather than a shortage.

This is a mistaken, or at least incomplete, view of the condition of the federal executive branch. It is undoubtedly the case that the Bush presidency has been marked by an effort to expand the authority of the executive branch, and that some of the claims on power made by the Bush administration have been deeply troubling. However, we must be careful not to overstate the extent to which the Bush administration has succeeded in expanding executive power. As the preceding discussion has shown, there are many domains in which the capacity of federal authorities to coordinate action by other actors remains highly constrained. Indeed, the capacity of a president to coordinate action *even within the executive branch* is clearly constrained, as reorganizations in the fields of homeland security and intelligence have demonstrated.

The difficulties that federal authorities encounter arise from fundamental decisions about the organization of political and economic affairs that are now two centuries old. The United States was constructed as a compound republic, as Madison said in *The Federalist No. 51*; power was divided and redivided so that no one interest, or part of government, could dominate another. The system of governance was designed with the intention that it would be “in domestic matters . . . dispersive and fragmented; a political system which is dedicated to the defeat, except temporarily and under the direct pressure of overwhelming crisis, of any attempt to generate domestic sovereignty” (Burnham 1970, 176). The nation was also intended to have a liberal economic order that fragments authority even further.

It is often argued that “network governance” is a new phenomenon, arising mainly from social and political changes of the last two decades, but the basic conditions that compel federal authorities to be skilled in network management are in fact much older. However, these distinctive features of American governance have probably become more deeply entrenched with the passage of time.⁸ Institutional protections against civil liberties have become more complex, and public suspicion of the state is more deeply rooted. Government has been further constrained as the market economy has expanded. In part this is simply a result of the increase in privately held wealth. Critical industries have more resources to exploit vulnerabilities within the process of lawmaking, and public interest groups have more resources to defend against incursions on civil liberties. The “marketization” of American society (that is, the subsumption of an ever-larger portion of everyday life within the market sector) has likely had the added effect of deepening antipathy toward the exercise of state authority. Philip Bobbitt argues that political leaders in advanced market states face the reality that their authority will be constantly challenged—either because of the declining legitimacy of state actors, the growing power of non-state actors, or the growing complexity of the social and economic processes that it seeks to influence (Bobbitt 2002).

We can regard the record of the Bush administration as consisting of a series of initiatives intended to respond to this problem of authority. One technique is to reframe the “9/11 problem” as a *military* problem, requiring a military response such as a “Global War on Terror.” By “taking the war to the terrorists” (Executive Office of the President 2004), the Bush administration attempted to relocate the 9/11 problem in a policy domain in which the executive branch has historically enjoyed much greater autonomy.⁹ Another technique deployed by the Bush administration

was to expand the ambit of executive authority by the assertion of constitutional prerogatives. Yet another was to weaken rival centers of power by restricting the outflow of sensitive information.

These are the most obvious and contentious techniques for increasing authority. A range of other techniques has been deployed as well—such as reorganizations, inter-departmental task forces, intergovernmental planning exercises, intersectoral advisory committees, regulatory initiatives, and grant programs. After five years, we cannot be left with the impression that the Bush administration has succeeded in building an “imperial presidency.” On the contrary, the record provides substantial evidence of the difficulty of designing and executing policy responses in an advanced market state. The Bush presidency did not solve the problem of control: rather, it gave vivid evidence of its intractability.

NOTES

1. In fact, this sort of network was a domestic product: the white nationalist Louis Beam had advocated “leaderless resistance systems” as the best structure for resisting government attempts to infiltrate and disrupt the movement.

2. This statement is subject to two major caveats. First, it must be recognized that leaders in bureaucracies may lack actual, rather than formal authority, because of informational asymmetries and resource dependence problems. Second, there is a body of literature that take a less anarchic view of networked governance. Agranoff and McGuire have defined “public management networks” as “multiorganizational arrangements . . . led or managed by government representatives”(2001), while Milward and Provan have studied “decentralized and devolved governmental regimes” in which public agencies execute programs through contracts with a variety of private, non-profit or governmental organizations (2003).

3. Data on the value of goods imported by the United States is provided by the Bureau of Economic Analysis of the Department of Commerce.

4. Statistics on the percentage growth of homeland security programs since 2001 may not convey this reality sufficiently. It may be that in certain areas spending has grown “hugely” in percentage terms, but in some areas pre-9/11 expenditure was negligible (Benjamin and Simon 2005).

5. World War One, the Great Red Scare, World War Two, the second “red scare” of the early Cold War period, and the “law and order” crisis of the late 1960s and early 1970s.

6. The decision of the U.S. District Court for the Southern District of New York in *John Doe v. Ashcroft* was given in September 2004; the decision of the U.S. District Court for the District of Connecticut was given in September 2005. In the Connecticut case, “gag provisions” were found to violate the First Amendment. In the New York case, the Court also found that the terms governing the National Security Letter itself violated the Fourth Amendment.

7. National Security Letters cannot be used to obtain certain records collected as part of libraries’ traditional functions, and recipients of letters have the explicit right to consult lawyers.

8. This argument is consistent with the approach taken by scholars in the historical institutionalist school (see Thelen and Stienmo 1992; Pierson and Skokpol 2004).

9. Theodore Draper and Aaron Wildavsky made the same point when they argued that the U.S. system actually includes a “bifurcated” or dual presidency, consisting of one part that is tightly constrained in matters of domestic policy and another that is loosely constrained in military affairs (Wildavsky 1969; Draper 1991).

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