

Background

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Want Real Homeland Security? Give State and Local Governments a Real Voice

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Abstract: *Nearly a decade after 9/11, the U.S. government continues to approach homeland security from the viewpoint of protecting the United States from a conventional military attack by an outside enemy. This model places the vast majority of responsibility for preventing and responding to any attack on the federal government—and it is dangerously outdated. New threats facing the country require an updated, more inclusive approach. State and local governments need real input in the policymaking process; after all, it is states and localities that are experienced in responding to localized attacks. Heritage Foundation national security expert Matt Mayer and Los Angeles County Sheriff Lee Baca explain why and how American homeland security policy must change in order to respond to today's threats and challenges.*

The current—pre-9/11—homeland security policy model is not working. Although groups such as the Project on National Security Reform have broadly criticized the current model, those criticisms have not focused specifically on the failure to truly include state and local governments in the policy arena. At best, those efforts have continued to promote the failed model that merely gives states and localities a “venue,” but still no voice.

It is clear that this—and any—Beltway-driven policy apparatus:

- Fails to properly accommodate the views of state and local governments;

Talking Points

- The current—pre-9/11—homeland security policy model is not working. The post-9/11 world replaced the nation-state threat embodied by the Soviet Union with non-state actors like al-Qaeda, and replaced intercontinental ballistic missiles with suicide bombers.
- This shift shrank the role of the federal government, and placed much larger responsibilities on state and local governments.
- Any Washington-centric policy approach fails to embody the principle of federalism in homeland security policy—and fails to include the experience and resources of states and localities.
- If Americans want 21st-century homeland security policies to reflect the collective experience and resources of the nation's first responders and preventers, those men and women must be represented when a new policy is developed.
- Failure to provide such inclusion at the national policy table will result in more policies that unnecessarily burden states and localities, and that undermine the constitutional roles of all levels of government.

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- Fails to put the vast experiences of state and local governments to use;
- Fails to acknowledge the resource advantages of state and local governments; and,
- Most fundamentally, fails to understand that U.S. homeland security policy must embody the principle of federalism.

Part of addressing these shortfalls must include giving state and local governments a better seat at the national policymaking table. States and localities must have a say when homeland security policies are proposed, developed, discussed, released, and acted upon. This kind of collaboration is one important key to building the national homeland security enterprise the nation needs.

The Current Model

Before 9/11, providing for homeland security primarily involved protecting the United States from external conventional attack. This model rested on the premise that any strike by an enemy would involve military weaponry, thereby placing the vast majority of responsibility for preventing and responding to a strike on the federal government—largely by way of the Defense Department and outward-facing departments and agencies, such as the State Department and the Central Intelligence Agency. The role for state and local governments was simply to prepare for a potential attack and to respond to a foreign military strike as they would to a catastrophic natural disaster. This role largely involved putting in place local civilian defense councils that conserved resources, organized response capabilities, and practiced air raid drills.

The post-9/11 paradigm replaced the nation-state threat embodied by the former Soviet Union with non-state actors like al-Qaeda, and replaced intercontinental ballistic missiles with suicide bombers on airplanes and trains. This shift shrunk the role of the federal government and placed much larger responsibilities on state and local governments.

To deal with this new threat, the federal government created the Homeland Security Council (HSC) and the Department of Homeland Security (DHS). DHS also established a Homeland Security Advisory Council (HSAC) as well as other task forces and advisory bodies that included state and local representation. In addition, as is required by other federal agencies, DHS uses instruments, such as the “notice of proposed rule making,” to provide an opportunity for state and local governments to comment when it adds, removes, or changes a regulation. Finally, DHS has initiated various efforts, such as creating new outreach offices and state and local working groups, to increase its stakeholder outreach. During the Quadrennial Homeland Security Review, DHS established a platform to allow state and local first responders and preventers to offer their thoughts and suggestions.¹

These changes and initiatives, however, did not fundamentally alter the national policymaking structure in Washington, D.C. The HSC and DHS did not fully and fairly represent the equities and resources outside of the federal government. In 2009, the HSC was folded into the National Security Council. That change led to an improved interagency approach with a revitalized, reorganized, and integrated National Security Council that now treats domestic and international security concerns in a more holistic manner. While improving integration on security issues among the policymaking staffs is a step in the right direction, without adequate input on state and local perspectives this consolidation has also further solidified a Washington-centric approach to the policymaking process.

Today, when a staff member at DHS (or any other federal entity) has a new policy idea, he will draft a policy paper. The policy paper will be circulated internally to a growing group of federal employees at DHS who will revise it. Once the policy paper receives approval from the executive team at DHS, the paper enters the interagency policy structure for revisions through the Interagency Policy Committees (IPCs).

1. While DHS should be commended for its outreach effort, the process for prioritizing, gathering, assessing, and integrating stakeholders was immature, inefficient, and of doubtful value. The authors commend the recommendations in the report by a National Academy of Public Administration panel that analyzed the outreach. See Franklin S. Reeder *et al.*, “A National Dialogue on the Quadrennial Homeland Security Review,” National Academy of Public Administration, April 2010, at <http://napawash.org.previeww40.carrierzone.com/wp-content/uploads/2010/08/QHSRFinalReport.pdf> (September 8, 2010).

The interagency policy structure is composed of representatives from all federal departments and agencies. Often, any agency or department has the ability to stop a policy from being approved, since consensus is required. Eventually, the policy will gain final approval at the desired level (not all policy must reach the President's desk). Once approved, the policy is rolled out.

At some point, usually late, in this process, the policy is circulated to state and local government representatives. This circulation could be broad or narrow depending on the issue. Those representatives will then send back comments, revisions, and suggestions to DHS. Unlike federal agencies or departments, state and local governments have no direct engagement in the policy process, and therefore no ability to stop policies they receive from being enacted. In fact, any comment, revision, or suggestion they provide can be totally ignored by the drafters.

Two Examples of How the Current System Works (or Doesn't)

Review, But No Veto Power. On February 28, 2003, President George W. Bush issued Homeland Security Presidential Directive 5 (HSPD-5): Management of Domestic Incidents.² Despite specifically noting that the “objective of the United States Government is to ensure that *all levels of government across the Nation* have the capability to work efficiently and effectively together, using a national approach to domestic incident management,” the implementation of HSPD-5 involved little to no state and local participation. (Emphasis added.)

One of the key elements of HSPD-5 was the development of a National Response Plan (NRP), which would take the place of the existing Federal Response Plan.³ HSPD-5 specifically failed to include state and local governments as entities with which DHS needed to consult. HSPD-5 stated that:

(16) The Secretary [of DHS] shall develop, submit for review to the Homeland Security

Council, and administer a National Response Plan (NRP). The Secretary shall consult with appropriate Assistants to the President (including the Assistant to the President for Economic Policy) and the Director of the Office of Science and Technology Policy, and other such Federal officials as may be appropriate, in developing and implementing the NRP. This plan shall integrate Federal Government domestic prevention, preparedness, response, and recovery plans into one all-discipline, all-hazards plan. The NRP shall be unclassified. If certain operational aspects require classification, they shall be included in classified annexes to the NRP.

(a) The NRP, using the NIMS [National Incident Management System], shall, with regard to response to domestic incidents, provide the structure and mechanisms for national level policy and operational direction for Federal support to State and local incident managers and for exercising direct Federal authorities and responsibilities, as appropriate.

(b) The NRP will include protocols for operating under different threats or threat levels; incorporation of existing Federal emergency and incident management plans (with appropriate modifications and revisions) as either integrated components of the NRP or as supporting operational plans; and additional operational plans or annexes, as appropriate, including public affairs and intergovernmental communications.

Given the broad function that the NRP would have over the response to domestic incidents, it defies comprehension why state and local governments would not be consulted meaningfully on its development.

After almost two years, DHS managed to release the NRP in December 2004.⁴ As a foreshadowing of

2. Homeland Security Presidential Directive 5: “Management of Domestic Incidents,” February 28, 2003, at http://www.dhs.gov/xabout/laws/gc_1214592333605.shtm (September 8, 2010).

3. Federal Emergency Management Agency, “Federal Response Plan,” April 1999, at <http://www.au.af.mil/au/awc/awcgate/frp/frpintro.htm> (September 8, 2010).

the dysfunction between DHS and the Federal Emergency Management Agency (FEMA) that would contribute to the failed response to Hurricane Katrina, DHS Secretary Tom Ridge replaced FEMA with a newly formed and relatively small Headquarters Integration Staff as the primary drafter of the NRP. So, not only did the federal government fail to meaningfully consult with state and local governments, it also minimized the role that the primary federal entity responsible for working with state and local governments during an incident had in developing the NRP.

Further demonstrating the lack of any meaningful role by state and local governments in the adoption of the NRP is the fact that the officials who approved the NRP do not include a single non-federal representative.⁵ The Department of Education, an entity with no role whatsoever in domestic incident response, is a signatory to the NRP, while FEMA is not. Not one governor or mayor signed it.

Not surprisingly, when the first real test of the NRP occurred after Hurricane Katrina struck the Gulf Coast, not only did FEMA, under the leadership of Michael Brown, ignore the NRP, but Louisiana Governor Kathleen Blanco and New Orleans Mayor Ray Nagin also failed to comply with the response plan. This failure resulted in widespread confusion on operations, communications, and protocols.

On March 22, 2008, the federal government replaced the NRP with the National Response Framework (NRF). As is typically the case with new directives, DHS circulated drafts of the NRF for public comment. But, once again, DHS was under no obligation to make any changes to the

draft NRF based on comments from state and local governments.

No Consultation and No Veto Power. In order to help combat America's swelling illegal immigration population, Immigration and Customs Enforcement (ICE) launched a program in January 2006 based on the authority provided in Section 287(g) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.⁶ Section 287(g) authorizes the federal government to enter into Memorandums of Agreement (MOAs) with state and local law enforcement entities that allow those entities to enforce federal immigration laws.⁷

The 287(g) program proved popular with state and local law enforcement agencies. With limited financial resources, ICE entered into 66 MOAs with state and local law enforcement agencies. ICE trained more than 1,000 officers who then helped identify roughly 130,000 illegal immigrants who could be deported.⁸

Despite the popularity of 287(g) with state and local entities, DHS—under the leadership of former Arizona governor Janet Napolitano, who issued a record number of vetoes on Arizona illegal immigration legislation—altered the program: On July 9, 2009, the Obama Administration announced innocuous-sounding plans to make the MOAs “more uniform.” But there are substantive changes that go to the heart of the program and will disrupt any real attempt to enforce the law. As highlighted in a previous Heritage Foundation paper,⁹ the changes include:

Forcing local law enforcement agencies to pursue all criminal charges. The new MOAs would require law enforcement to prosecute

4. U.S. Department of Homeland Security, “National Response Plan,” December 2004, at <http://www.iir.com/global/FusionCenter/NRPbaseplan.pdf> (September 8, 2010).

5. *Ibid.*, pp. v–viii.

6. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Public Law 104–208, September 30, 1996, at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_cong_public_laws&docid=f:publ208.104.pdf (September 8, 2010).

7. *Ibid.*, p. 547.

8. Immigration and Customs Enforcement, “Updated Facts on ICE’s 287(g) Program,” April 12, 2010, at http://www.ice.gov/pi/news/factsheets/section287_g-reform.htm (September 13, 2010). [possible change tk]

9. Matt A. Mayer and Jena Baker McNeill, “Time to Stop the Rush for ‘Amnesty’ Immigration Reform,” Heritage Foundation Backgrounder No. 2385, March 18, 2010, at <http://www.heritage.org/research/reports/2010/03/time-to-stop-the-rush-for-amnesty-immigration-reform>.

illegal immigrants taken into custody for all initial offenses. In practice, if law enforcement discovers that a person in custody is illegally in the U.S., the agency will often start removal proceedings instead of going through a costly and lengthy criminal process that would produce the same result. Requiring criminal prosecution would deplete the resources of local jurisdictions for no practical or legitimate reason.

Limiting the use of immigration checks to those arrested for major offenses. The new MOAs attempt to limit the use of immigration checks to those arrested for major offenses. However, most illegal immigrants who have been identified under the program commit misdemeanors, not felonies. Mohammad Atta, one of the 9/11 hijackers, was pulled over in a traffic stop two days before the 9/11 attacks. If the officer had inquired about Atta, he might have discovered that Atta was in the country illegally and might have prevented his participation in the attacks.

Questioning the credibility and professionalism of state and local law enforcement. The announced changes insinuate that ICE should do more to prescribe how Section 287(g) participants use their authority. However, Americans have traditionally trusted local law enforcement officers to enforce U.S. criminal laws. In contrast, the Obama Administration's changes would question the decisions of law enforcement to a degree that would dissuade them from participating in the program.

Even worse than the substantive changes was the procedural component: These changes were made without any input by state and local governments. Because the vast majority of illegal immigrants reside outside Washington, D.C., these changes were made without concern for the enormous

financial and criminal impact that illegal immigrants have on states and localities.

A system that places all policy power in the hands of the federal government simply does not work when the vast majority of resources and impacts are in states and localities.

Policymaking: Disconnected from Resources

Unlike during the Cold War, when the federal government had the soldiers and weapons used to deter and, in some cases, fight the enemy or the enemy's proxy, the domestic resources needed to prevent and respond to a terrorist attack are primarily possessed by state and local government and outside Washington, D.C.

Far more people employed by state and local governments are involved in domestic security than people employed by the federal government. In fact, "[w]hen firefighters and emergency management personnel are included [with law enforcement personnel], the state and local personnel advantage is roughly 2,200,000 to 50,000."¹⁰ As for funding domestic security, Heritage research concluded that:

[T]he eight-year combined budget for the DHS and DOJ [Department of Justice] is roughly \$323 billion. The total eight-year homeland security budget (law enforcement, the fire service, and emergency management) for just the 26 states and District of Columbia and the 85 cities and counties that comprise the top 43 jurisdictions that are eligible for federal Urban Areas Security Initiative (UASI) funds due to the risk of a terrorist attack is at least \$220 billion, or 68 percent of the combined DHS and DOJ budget. With the homeland security budgets of the remaining 24 states and thousands of cities and counties combined with the state military affairs budgets, state and local homeland security spending certainly exceeds federal spending.¹¹

10. Matt A. Mayer, "An Analysis of Federal, State, and Local Homeland Security Budgets," Heritage Foundation *Center for Data Analysis Report* No. 09-01, March 9, 2009, at <http://heritage.org/Research/Reports/2009/03/An-Analysis-of-Federal-State-and-Local-Homeland-Security-Budgets>.

11. *Ibid.*

Despite the fact that states have more personnel and provide more funding for homeland security, the policy structure that arose after September 11, 2001, perpetuated the exclusively federal national security model, which means that the federal policy tail wags the far larger state operational dog.

Given the wide array of 21st-century risks, this structure makes no sense since it disconnects those with the primary responsibilities, personnel, resources, and, most critically, experience from developing the policies under which they will have to work. If Americans want a truly national homeland security enterprise, they must empower the state and local governments that largely make up that enterprise to fully partake in it.

State and Local Governments at the National Policy Table

Giving state and local government an opportunity to comment only after policy documents have been discussed, drafted, edited, and distributed broadly within the federal government simply is not working. Likewise, having agencies filter and edit the input of state and local concerns into the Interagency Policy Committees distorts rather than informs the policymaking process. This approach lessens the level of transparency that should exist between the three levels of government involved in the nation's national security enterprise.

In March 2009, National Security Advisor General James Jones proposed transparency as a principle to guide the interagency process. General Jones stated that “the United States must integrate its ability to employ *all* elements of national power in a cohesive manner.”¹² This transparency and integration must be extended to state and local partners.

On January 11, 2010, President Obama signed an executive order establishing the Council of Governors. The council's purpose is to advise and review Defense Department policies on “such matters as involving the National Guard of the various States; homeland defense; civil support; synchronization

and integration of State and Federal military activities in the United States; and other matters of mutual interest pertaining to National Guard, homeland defense, and civil support activities.”¹³ The establishment of the council presented a recognition that the current system of consultation must be improved. Similar initiatives may be applicable for homeland-security-related matters. In addition, there must be appropriate representation of state and local perspectives in the formulation of homeland security policy in the National Security Council.

Establishing a National Enterprise

Ultimately, the right solution is to establish a true homeland security enterprise. Protecting America at home is a national mission that requires the concerted effort of the entire nation, including state and local governments, the private sector and nongovernmental organizations, local communities, families, and individuals. Many of the most vital tasks are conducted most effectively in a decentralized manner. The national enterprise must facilitate cooperation, innovation, resiliency, flexibility, and adaptability—not promote rigid Washington-centric solutions.

Americans face threats—naturally occurring and deliberate—that can, will, and do target all elements of society. It is therefore incumbent upon all elements of society to work together to counter these threats. To be more agile, U.S. bureaucracy must foster better decision making in Congress and in the interagency process, support the development of a new generation of professionals, and facilitate information-sharing throughout all elements of the enterprise. Furthermore, to close the gaps where terrorists hide, Americans must empower individuals and communities to be prepared and extend international cooperation throughout U.S. homeland security activities. In a 2008 report, a task force chaired by the Center for Strategic and International Studies and The Heritage Foundation identified the following critical tasks for developing a national enterprise:

12. General James Jones, “Memorandum on the 21st Century Integration Process,” The White House, March 18, 2009.

13. Press release, “President Obama Signs Executive Order Establishing Council of Governors,” The White House, January 11, 2010, at <http://www.whitehouse.gov/the-press-office/president-obama-signs-executive-order-establishing-council-governors> (September 8, 2010).

- **Foster** a national culture of preparedness by focusing on building self-reliant communities and individuals;
- **Shift** to focus on building and sustaining a resilient national infrastructure;
- **Expand** international cooperation throughout homeland security programs;
- **Develop** a framework for domestic intelligence; and
- **Establish** national programs to improve professional development at all levels of governance on security and public safety.¹⁴

Accomplishing and enabling these tasks requires national policies that better reflect the requirements of the entire homeland security enterprise.

A key step in building the national enterprise will be establishing more robust state and local representation within the executive branch that puts the principle of federalism into practice, allowing the participation in the formation of policy that directly affect all levels of government on vital security issues. Additionally, rather than have their views filtered and edited through current consultation processes such as the HSAC, state and local advisors on policy must be given the opportunity equal to federal agencies within the IPC. They should be allowed to contribute to policy and strategy formulation and provide the impact analysis that is routinely absent from the current process.

The President should issue an executive order that gives states and localities a seat at the federal policy table on homeland security issues. Enhancing state and local input requires avoiding simply adding even more bureaucracy to an already bloated government apparatus. This policy group should be kept small and within the executive office of the President. The group should work directly with the National Security Council and be included in appropriate Interagency Policy Committees.

To ensure that the people assigned to this group are able to adjust to how things work in Washing-

ton, D.C., to gain the experience necessary to have a meaningful impact, and to reduce the inefficiencies inherent to rapid turnover, they should be detailed to this group for multiyear terms. Because state and local budgets are already tight, funding should come from the yearly federal appropriations.

The presidential directive should specifically lay out the process and criteria for selection. This process should be rigorous, fair, non-partisan, and transparent. The members of the policy group should be required to have a significant amount of experience in protecting their communities so they can apply the greatest amount of collective experience possible. Once an individual's term expires, he or she should return to the state or local entity and provide unique insight into the federal process.

If Americans want 21st-century homeland security policies to reflect the collective experience and resources of the nation's first preventers and first responders, they must ensure that those men and women are represented when a new or amended policy is developed, debated, drafted, revised, and released. Failure to provide such inclusion at the national policy table will result in more policies that are so awkward to implement that they are ignored, more policies that place unnecessary mandates and requirements on states and localities, more policies that undermine the constitutional roles for all levels of government, and more policies that fail to adhere to this country's federalist principles.

This change to the national homeland security enterprise reflects a 21st-century process, increases the ultimate efficacy of national policy, and reflects the balance of power and real roles and responsibilities across government entities. The time to make this change is now.

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14. David Heyman and James Jay Carafano, "Homeland Security 3.0: Building a National Enterprise to Keep America Safe, Free, and Prosperous," Heritage Foundation *Special Report* No. 23, September 18, 2008, at <http://www.heritage.org/Research/Reports/2008/09/Homeland-Security-30-Building-a-National-Enterprise-to-Keep-America-Safe-Free-and-Prosperous>.

Security and Federalism: Protecting America from Outside the Beltway. *Lee Baca* is sheriff of the Los Angeles County Sheriff's Department, the largest in the U.S., with a budget of \$2.4 billion. He leads a staff of 18,000 and provides protection to 40 incorporated cities, 90 unincorporated communities, nine community

colleges, hundreds of thousands of daily rail commuters, and 4 million people in the greater Los Angeles area. Sheriff Baca also manages the nation's largest local jail system, which houses 20,000 prisoners, and serves as the Director of Homeland Security–Mutual Aid for California Region I, which serves 13 million people.