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DAVID G. TRAGER PUBLIC POLICY SYMPOSIUM: OUR NEW FEDERALISM? NATIONAL AUTHORITY AND LOCAL AUTONOMY IN THE WAR ON TERROR

Introduction^{*}

Susan N. Herman[†]

I. INTRODUCTION

Some say that September 11 changed everything. The shock waves from September 11 have certainly shaken our institutional as well as our physical structures. The widely shared idea that since that day we have been a nation at war against terrorism has profoundly challenged many of our previous understandings about the meaning of our Constitution as well as our previous definition of “war” itself.

The reactions of the federal government to the attacks on the World Trade Center and the Pentagon have already been transformative. Congress responded to the attacks by enacting a sheaf of new legislation, most prominently the USA PATRIOT Act, which revises hundreds of federal laws about criminal law enforcement, surveillance, immigration, and

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information sharing among federal agencies,¹ and the Homeland Security Act, which creates a new locus of federal authority.² Congress's September 2001 Use of Force Resolution³ became the basis for the President's invasion of Afghanistan and then Iraq. The President issued an executive order providing for the use of military tribunals instead of civilian courts to try terrorism suspects,⁴ while federal agencies, especially the Department of Justice, have promulgated regulations that substantially change previous policies about detention of illegal immigrants, enforcement of immigration law, information sharing, and public access to information.

Questions about the constitutionality of many of these revisions of federal law and policy have drawn an ever-increasing amount of critical and public attention as people throughout the country have debated whether we as a nation are willing to recalibrate what we thought was the proper balance between our civil liberties and our security. Scholars, the press, and the general public have been debating issues like whether the Patriot Act goes too far in threatening First and Fourth Amendment values,⁵ whether racial profiling of Arab and Muslim men at airports is an unacceptable form of discrimination,⁶ and whether non-citizens should be subject to detention and deportation because of their associational affiliations.⁷ These debates pose profound questions about the

¹ USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

² Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified in scattered sections of 6 U.S.C., 28 U.S.C., and 50 U.S.C.).

³ Authorization for Use of Military Force, S.J. Res. 23, 107th Cong., Pub. L. No. 107-40, 115 Stat. 224 (2001).

⁴ Executive Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

⁵ See, e.g., GILMORE COMMISSION, V. FORGING AMERICA'S NEW NORMALCY: SECURING OUR HOMELAND, PROTECTING OUR LIBERTY 1, E-1 to E-14 (2003); LAWYERS COMMITTEE FOR HUMAN RIGHTS, IMBALANCE OF POWERS: HOW CHANGES TO U.S. LAW & POLICY SINCE 9/11 ERODE HUMAN RIGHTS & CIVIL LIBERTIES 2-8 (2003); LAWYERS COMMITTEE FOR HUMAN RIGHTS, ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES 6-17 (2003); LAWYERS COMMITTEE FOR HUMAN RIGHTS, A YEAR OF LOSS: RE-EXAMINING CIVIL LIBERTIES SINCE SEPTEMBER 11 (2002).

⁶ See, e.g., Christopher Edley, Jr., *The New American Dilemma: Racial Profiling Post-9/11*, in *THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM* 170-92 (Richard C. Leone & Greg Anrig, Jr., eds., 2003); Sharon Davies, *Profiling Terror*, 1 OHIO ST. J. CRIM. L. 45 (2003); AMERICAN CIVIL LIBERTIES UNION, SANCTIONED BIAS: RACIAL PROFILING SINCE 9/11 (2004), available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=15102&c=207> (last visited Aug. 2, 2004).

⁷ See DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* (2003).

extent to which we are willing to allow the events of 9/11 to alter our preexisting definitions of the individual rights guaranteed by the Constitution.

A smaller number of commentators have also noted the impact or potential impact of the Patriot Act and other revisions of the law on another plane of the Constitution: the separation of powers among the three branches of the federal government. Power, as if by centripetal force, has been flowing to the President, who has adopted an expansive reading of his authority as Commander-in-Chief. Aside from the question of whether military tribunals might deny individuals constitutional rights promised by the Bill of Rights, constitutional lawyers have questioned whether the President has the power to make the decision about whether to employ such tribunals in the absence of congressional action. May the President authorize the use of military tribunals and designate the "enemy combatants" to be tried there rather than in civilian courts, or must Congress play a greater role?⁸ Has the Patriot Act unduly aggrandized executive authority and inappropriately diminished the role of the courts in approving surveillance?⁹ Have the courts been overly deferential to the political branches in, for the most part, approving their actions,¹⁰ or overly intrusive in finding other actions unconstitutional?¹¹ The future balance of power among the

⁸ See, e.g., Neal K. Katyal & Laurence Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002); Ruth Wedgewood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J.L. 328 (2002).

⁹ See STEPHEN J. SCHULHOFER, *THE ENEMY WITHIN: INTELLIGENCE GATHERING, LAW ENFORCEMENT, AND CIVIL LIBERTIES IN THE WAKE OF SEPTEMBER 11* (2002); AMERICAN CIVIL LIBERTIES UNION, *UNPATRIOTIC ACTS: THE FBI'S POWER TO RIFLE THROUGH YOUR RECORDS AND PERSONAL BELONGINGS WITHOUT TELLING YOU* (2003), available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=13246&c=207> (last visited Aug. 2, 2004); Susan N. Herman, *The USA Patriot Act and the USA Department of Justice: Losing Our Balances?*, THE JURIST, Dec. 3, 2001, available at <http://jurist.law.pitt.edu/forum/forumnew40.htm> (last visited Aug. 2, 2004).

¹⁰ See *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003), vacated by 124 S. Ct. 2633 (June 28, 2004); Susan N. Herman, *Yasser Hamdi and the Fourth Circuit's Legal No-Man's Land*, THE JURIST, Jan. 13, 2003, available at <http://jurist.law.pitt.edu/forum/forumnew84.php> (last visited Aug. 2, 2004) (criticizing the decision as overly deferential). See also *North Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002) (holding that there is no constitutional right to access to deportation hearings), cert. denied, 538 U.S. 1056 (2003).

¹¹ See *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003) (holding that a designated "enemy combatant" was unconstitutionally detained), rev'd on other grounds by 124 S. Ct. 2711 (June 28, 2004); *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003), judgment vacated and remanded in light of *Rumsfeld v. Padilla*, 124 S. Ct. 2932 (June 30, 2004), amended, reinstated and transferred to District Court of District of Columbia, No. 03-55785, 2003 U.S. App. LEXIS 27800 (9th Cir. July 8, 2004); *Detroit*

three branches of the federal government as well as the meaning of the Articles of the Constitution allocating their powers will depend on how these questions are answered.

What has largely escaped critical attention so far, however, is that the involvement of state and local governments in combating terrorism may also be challenging our constitutional structures of government on yet another plane: federalism. To what extent might the increased preeminence of the federal government and particular actions taken in the context of the war on terror affect our understanding of the proper relationship between the federal and state or local governments? Will the recent Supreme Court decisions about the Constitution's balance of national and local power, so central to the work of the Rehnquist Court, stand, or will they be questioned or modified in the light of current events?

While structural questions about federalism might seem abstract and even dry to non-lawyers, the participants in the David G. Trager Public Policy Symposium held at Brooklyn Law School on November 21, 2003,¹² recognized these questions as timely, fascinating, and extraordinarily challenging. The boundaries of federalism are critical to the war on terror because the Supreme Court's case law may limit how far the federal government can go in enlisting state and local law enforcement officials in their terrorism investigations. For example, may the federal government require local law enforcement officials to question suspects or to enforce immigration law, or order a seaport to upgrade its security measures if those upgrades will have to be paid for by a city or

Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002) (holding that there is a constitutional right of access to deportation hearings at least under the circumstances of that case); Susan N. Herman, *Checking Our Balances*, AMER. LAWYER, July 2003, available at www.law.com/jsp/article.jsp?id=1056139904894 (arguing for meaningful judicial review of government's anti-terrorism actions).

¹² The participants included Ann Althouse (University of Wisconsin Law School), Vikram Amar (University of California at Hastings Law School), Erwin Chemerinsky (then at the University of Southern California Law School, now at the Duke University School of Law), Paul Finkelman (University of Tulsa College of Law), Lucas Guttentag (ACLU Immigrants Rights Project), Arnold M. Howitt (Taubman Center for State and Local Government, John F. Kennedy School of Government, Harvard University), Vicki C. Jackson (Georgetown Law School), Jason Mazzone (Brooklyn Law School), Burt Neuborne (New York University School of Law), Elizabeth Rindskopf Parker (Dean, University of the Pacific, McGeorge School of Law), Judith Resnik (Yale Law School), Hon. David G. Trager (United States District Judge, Eastern District of New York, former Dean, Brooklyn Law School), and Ernest A. Young (University of Texas Law School), and myself as convenor and moderator.

state? Conversely, the Supreme Court's case law may also limit how far state and local governments can go in refusing to cooperate with those federal investigative efforts. May local law enforcement officials, for example, refuse to disclose the immigration status of their local residents to federal officials because they wish to encourage residents, regardless of their immigration status, to use police and other local services?

Part of the challenge in confronting such questions about spheres of authority arises from the fact that the recent constitutional law constraining political choice about the relationship between national authority and local autonomy has been fostered by Justices and scholars at the conservative end of the political spectrum, who have tended to disfavor big centralized government and to champion local choice.¹³ These judicially crafted limitations on federal power have generally been opposed by those at the other end of the political spectrum, who have tended to favor a strong federal role in areas like civil rights enforcement and environmental regulation and to be skeptical of "states' rights" arguments.¹⁴ The federalism-based limitations the Supreme Court developed during the 1990s were applied to prevent Congress from enacting gun control laws,¹⁵ remedies for violence against women,¹⁶ and particular remedies for civil rights violations.¹⁷ Now that the federal government may be perceived by those toward the left of the political spectrum as a greater threat to individual liberty, the potential antidote of local autonomy may seem more attractive than it did during periods when states' rights arguments were associated with arch-segregationists. And now that the federal government's agenda is to promote national security, centralized federal authority may seem more essential to those who believed that individual states should be

¹³ See, e.g., Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277 (2004).

¹⁴ See, e.g., Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994). See also Young, *supra* note 13.

¹⁵ *United States v. Lopez*, 514 U.S. 549 (1995); *Printz v. United States*, 521 U.S. 898 (1997).

¹⁶ *United States v. Morrison*, 529 U.S. 598 (2000).

¹⁷ *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (holding that Congress may not enforce damages provision of the Age Discrimination in Employment Act against state employers); *Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2000) (holding that Congress may not enforce damages provision of the Americans with Disabilities Act against state employers); but see *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (holding that damages provision of Family and Medical Leave Act may be enforced against state employers).

allowed to opt out of federal schemes for civil rights or labor law enforcement. To what extent will judges and scholars who had identified themselves with a position on the law of federalism rethink their commitments and take up the structural arguments of the other side? Where is the line between principle and politics? Will the Supreme Court's federalism doctrine affect the war on terror, or will the war on terror affect that body of law?

The papers published in this symposium issue begin an important national conversation on the subject of federalism and the war on terror. To discern the common threads among these papers, readers will find it useful to consider first, the very brief bird's-eye view of federalism in United States history provided here; second, a description of the problems (each based on actual current events) that the symposium participants were asked to consider and discuss; and finally, a brief description of the articles themselves.

II. THE CURRENT LAW OF FEDERALISM: OF *PRINTZ* AND PREEMPTION

The questions of when state and local governments may enforce their own laws and how much they can be required to accede to and even cooperate with federal law, have been central throughout the history of our country. One impetus for the drafting of the Constitution was to enhance the role the federal government had played under the Articles of Confederation.¹⁸ The Constitution provides a general outline of the relative powers of the federal and state governments but not a blueprint for how those powers are to be allocated. The Supremacy Clause clearly states that federal laws consonant with the Constitution will be Supreme¹⁹ but the text of Article I, in its grant of powers to Congress and its limitation on the states,²⁰ and the Tenth Amendment, reserving to "the states respectively or the people thereof" the powers not conferred on

¹⁸ See THE FEDERALIST NO. 10 (James Madison); THE FEDERALIST NOS. 15 & 27 (Alexander Hamilton); ANDREW C. MCLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 137-47 (1936).

¹⁹ U.S. CONST., art. VI § 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land . . .").

²⁰ See U.S. CONST., art. I, §§ 8, 10.

the federal government,²¹ do not provide any simple referent for deciding how far federal power may extend, or whether the states truly have spheres of autonomy the federal government may not invade. The Supreme Court, fondly describing the balance of power the Constitution attempted to strike as "Our Federalism," has taken different positions over the years in calibrating how that balance is to be attained.

When the Constitution was young, foundational opinions by Justices John Marshall and Joseph Story nurtured the newborn federal government and protected it against defiant claims of autonomy raised by powerful states. Maryland wanted to tax the Bank of the United States as a business within its state lines, but in *McCulloch v. Maryland*²² Marshall held that this claim of state prerogative unduly threatened federal interests as determined by Congress. The Supremacy Clause, as interpreted, prevented citizens of an individual state from impeding a federal enterprise; Maryland's action was considered a threat to federal interests because the power to tax is the power to destroy and because Marshall saw another version of the detested taxation without representation in a tax that would be paid by those beyond Maryland's borders but benefit only those within Maryland.

In *Martin v. Hunter's Lessee*²³ the Court ruled against Virginia's claim of authority to decide a dispute about the ownership of Virginia real estate without Supreme Court interference, on the ground that interpretation of a federal treaty was involved and that the United States Supreme Court must have the final authority to interpret that treaty, even if that meant overruling the highest court in Virginia. In both of these cases, the Articles of the Constitution, which predated the Bill of Rights, were interpreted as allowing the federal government to subordinate local interests to its own national interests not because any individual had a right enforceable against Maryland or Virginia, but because of the structures of government the Constitution had created.

On the other hand, state and local entities also played a critical role in influencing national events, even including the foundation of the country. Local committees of correspondence

²¹ U.S. CONST., amend. X ("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.").

²² 17 U.S. (4 Wheat.) 316 (1819).

²³ 14 U.S. (1 Wheat.) 304 (1816).

were instrumental in fomenting the Revolution. The national Declaration of Independence was preceded by a series of local declarations of independence. Resolutions written by Thomas Jefferson and James Madison and adopted by the legislatures of Kentucky and Virginia respectively, argued forcefully against some of the first controversial federal legislation, the Alien and Sedition Acts of 1798. These resolutions maintained that the Sedition Act in particular violated the First Amendment, engendering debates about the proper role of the states in interpreting the United States Constitution.

The profoundly divisive issue of slavery pitted national authority against state autonomy in surprising ways. Congress and the Supreme Court tried to enforce the Constitution's uneasy compromise, which allowed states to decide for themselves whether to permit slavery, by limiting the prerogatives of the free states. Pennsylvania tried to enforce its own anti-slavery policies by requiring meaningful process and proof before allowing an alleged fugitive slave to be seized in Pennsylvania and extradited to a slave state under the federal Fugitive Slave Law. The Supreme Court held that the federal law preempted even Pennsylvania's procedural modifications.²⁴ Even more notoriously, the Court held that the federal Constitution prevented Missouri from making Dred Scott a free man and a citizen of the state.²⁵ Ultimately, the structure the Constitution had provided could not contain or resolve the fundamental clashes over slavery and states' rights which were to erupt in the Civil War. Following the war, the Reconstruction Era Amendments to the Constitution fundamentally rearranged the relationship between the federal and the state governments.²⁶ The newly minted constitutional limitations imposed on the states empowered the federal government to take the lead in promoting a newly expanded national agenda, including matters like racial equality, even over the most adamant resistance of state and local governments. The areas where the federal government could preempt local law, and where the states' own choices could be overruled, grew exponentially.

²⁴ *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842); see Paul Finkelman, *The Roots of Printz: Proslavery Constitutionalism, National Law Enforcement, Federalism, and Local Cooperation*, 69 BROOK. L. REV. 1399 (2004).

²⁵ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

²⁶ U.S. CONST. amends. XIII, XIV, XV.

During the twentieth century, a long series of Supreme Court cases known to all first-year constitutional law students reacted to increasing federal regulation by first resisting and later approving Congress's power to legislate under the Commerce Clause.²⁷ By mid-century, it appeared that the courts would not challenge Congress's political decisions about what to regulate on a national level. But in another historic series of decisions beginning in 1995, the Supreme Court revived judicially-enforced limitations on federal power, setting out constitutional rules that circumscribed the relationship between the federal and state and local governments, and limiting Congress's power both under the Commerce Clause²⁸ and the Fourteenth Amendment.²⁹

The current law of federalism empowers state and local governments, but only within limits. On the one hand, the Rehnquist Court derived from the Tenth Amendment a rule that the federal government is prohibited from "commandeering" local law enforcement officials.³⁰ In the main case elucidating this principle, *Printz v. United States*,³¹ the Court found unconstitutional a provision of the federal Brady Act that required local law enforcement officials to assist in conducting background checks before issuance of a gun permit. The Court reasoned that the states, as discrete sovereigns, must have the right to choose whether to participate in a federal enforcement program. State employees are paid with state resources and therefore, according to Justice Antonin Scalia, must always have the right to decline to implement a federal program. In a dissenting opinion written on behalf of four members of the Court, Justice John Paul Stevens argued

²⁷ See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating federal regulation of poultry market); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (invalidating federal regulation of coal industry); *United States v. Darby*, 312 U.S. 100 (1941) (allowing federal wage and hour requirements); *Wickard v. Filburn*, 317 U.S. 111 (1942) (allowing federal regulation of wheat consumed by the farmer who grew it).

²⁸ See *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating federal law criminalizing possession of a firearm in a school zone); *United States v. Morrison*, 529 U.S. 598 (2000) (finding Commerce Clause an inadequate constitutional basis for Violence Against Women Act).

²⁹ *Morrison*, 529 U.S. 598 (2000) (finding Congress's enforcement power under the Fourteenth Amendment an inadequate basis for Violence Against Women Act); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (finding Fourteenth Amendment insufficient basis for Congress's enactment of Religious Freedom Restoration Act).

³⁰ See *New York v. United States*, 505 U.S. 144 (1992) (holding that Congress may not require state legislature to enact legislation).

³¹ 521 U.S. 898 (1997).

that if the federal interest were sufficiently grave, both logic and history argued for allowing the federal government to enlist local law enforcement agents in implementing a program representing the political will of the nation as a whole.³² Uncannily, Stevens anticipated that a battle against international terrorism might provide an occasion for requiring local law enforcement officials to assist federal agents.³³ Justice Scalia's majority opinion, however, took the position that there could be no balancing and no exceptions to the anti-commandeering principle because the structures of the Constitution are fixed, inviolate, and cannot bend depending on the nature of the federal interest involved.³⁴

In the fall of 2001, federalism first challenged federal hegemony in combating terrorism when the FBI requested the assistance of local law enforcement officials in questioning some 5,000 Arab and Muslim men around the country. The Detroit Chief of Police, among other local officials, declined because he thought that cooperating with the federal effort would impede his own law enforcement agenda by undermining his relationship with Arab and Muslim men in his community.³⁵ The Portland, Oregon Chief of Police also declined, pointing to an Oregon state law that prohibited such questioning in the absence of probable cause.³⁶ Because *Printz* had held that local officers could not be "commandeered" to help enforce federal gun control laws, federal and local officials alike assumed that the local law enforcement agents could choose not to cooperate with the FBI interrogation program.

³² *Printz*, 521 U.S. at 939.

³³ *Id.* at 940 ("Matters such as the enlistment of air raid wardens, the administration of a military draft, the mass inoculation of children to forestall an epidemic, or perhaps the threat of an international terrorist, may require a national response before federal personnel can be made available to respond.").

³⁴ *Id.* at 932.

[W]here, as here, it is the whole *object* of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a "balancing" analysis is inappropriate. It is the very *principle* of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect. . . . We . . . conclude categorically, as we concluded categorically in *New York*: "The Federal Government may not compel the States to enact or administer a federal regulatory program."

Id. (internal citations omitted).

³⁵ Fox Butterfield, *Some Police Chiefs Object to Interviews*, N.Y. TIMES, NOV. 22, 2001, at A4.

³⁶ Fox Butterfield, *A Nation Challenged: The Interviews; A Police Force Rebuffs F.B.I. on Querying Mideast Men*, N.Y. TIMES, Nov. 21, 2001, at B7.

On the other hand, the Supreme Court has also held that because of the Supremacy Clause,³⁷ the federal government may preempt state or local laws that thwart national interests.³⁸ In the classic case of *Olmstead v. United States*,³⁹ for example, the Court ruled that the federal government could with impunity ignore a Washington state statute that prohibited wiretapping. Because the Supremacy Clause entitled federal agents to override local laws in promoting their national agenda, the agents were permitted to use evidence of bootlegging that they had obtained by wiretapping Olmstead's telephone in disregard of the state law. It is also unquestioned that the federal government has the power to send its own FBI agents into Detroit or to Portland, Oregon, to conduct interrogations regardless of the wishes of the Detroit Chief of Police or the restrictions of Oregon state law. *Printz* prohibits commandeering local law enforcement officials, but does not prohibit circumventing or ignoring them or their state and local laws.

This facet of federalism, limiting the impact of local autonomy, has also come into play in the war on terror as state and local governments have been making their own diverse decisions about whether the new federal anti-terrorism legislation goes too far in infringing privacy, liberty, free speech, or freedom of association. There are now well over three hundred cities, towns, and villages, as well as four states (Alaska, Hawaii, Maine, and Vermont), that have enacted variations of an ACLU-inspired Bill of Rights Defense Committee resolution expressing disagreement with various Patriot Act provisions and sometimes prohibiting local officials from assisting in federal enforcement efforts in various ways.⁴⁰ Because of cases like *Olmstead*, it is generally assumed that these local governments may not resist or limit federal enforcement efforts within their jurisdictions, even though, because of *Printz*, they may not be required to offer their own services to help. But may a local legislature order its local law enforcement officials not to cooperate with federal agents, or

³⁷ U.S. CONST. art. VI, § 2.

³⁸ See, e.g., *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (holding that federal law preempts California remedies for Holocaust survivors); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000) (holding that federal law preempts Massachusetts policy with respect to trade with Myanmar).

³⁹ 277 U.S. 438 (1928).

⁴⁰ See Bill of Rights Defense Committee, at <http://www.bordc.org> (last visited Aug. 11, 2004).

even impose a fine on its officials if they do provide such assistance?"⁴¹

Although the lines drawn by *Olmstead* and *Printz* are sharp in theory, the concept of "cooperation" quickly begins to appear fuzzy when applied to particular sets of facts. At what point does the federal right to override local prohibitions, sanctioned by *Olmstead*, become the illicit commandeering prohibited by *Printz*? To what extent may the federal government preempt local laws when individual state or local law enforcement officials are willing to cooperate with federal investigations but are prevented from doing so by state or local legislation? At what point does the refusal of states and localities to cooperate with the federal government become interference with federal law and raise the Supremacy Clause problem of *McCulloch*? The problems described in the next section illustrate the complexity of the questions posed in applying the principles of *Printz* and preemption to such situations.

III. PROBLEMS IN FEDERALISM

At the Trager Symposium, participants discussed the law of federalism, as briefly described above, as applied to five problems, all of which are actual examples of national/local border skirmishes that have arisen in conjunction with the war on terror.

A. *Local Autonomy? Police Chiefs' Refusal to Participate in FBI Interviews*

In November, 2001, as mentioned above, Attorney General John Ashcroft requested the assistance of local police departments in interviewing, on the basis of a list compiled by the FBI, foreign men of Middle Eastern origin living within their communities to determine whether any of these men presented a terrorist threat or had useful information about possible terrorists. While most police departments agreed to the Attorney General's request, some refused and others expressed concerns, either normative concerns about the fairness of the interrogation program or practical concerns

⁴¹ See, e.g., CITY OF ARCATA, CAL., ORDINANCE NO. 1339 (Apr. 2, 2003) (Ordinance Amending the Arcata Municipal Code to Defend the Bill of Rights and Civil Liberties).

about whether acting as de facto federal agents would impede their ability to do their own jobs by causing adverse reactions in the targeted communities. Andrew Kirkland, Acting Chief of Police in Portland, Oregon, argued that his officers could not interview individuals who were simply named on the FBI's list but not suspected of any specific crime because state law required a showing of probable cause prior to conducting such interviews.⁴² In Detroit, Police Chief Charles Wilson, citing constitutional concerns and limited resources, refused to deploy his officers to "go out and treat people like criminals."⁴³ In Tucson, Captain John Leavitt agreed to cooperate with the Attorney General's request only if it did not violate local guidelines prohibiting racial profiling.⁴⁴ Chicago police, fearful of souring relationships with local immigrant communities, initially refused to conduct interviews but later worked out a plan with the FBI agreeing to provide assistance after the U.S. Attorney's Office first sent an informational letter to the interview subjects.⁴⁵

Symposium participants discussed three questions with respect to *Printz* and the interrogation program. First, could the federal government constitutionally require local police departments to help interview individuals named on an FBI list? Second, could the federal government – either Congress or perhaps even the Department of Justice acting without explicit congressional authorization – preempt state or local laws, like the Oregon probable cause law, that prohibit or limit the ability of police to conduct these kinds of interviews? Third, should the anti-commandeering doctrine of *Printz* have an exception for national security, or should it be replaced by a more flexible, multi-factor balancing test?⁴⁶

⁴² See Butterfield, *supra* notes 35, 36. The Oregon Attorney General, Hardy Myers, later issued an opinion that the questioning would not violate state law. See Sam Howe Verhovek, *A Nation Challenged: The Interviews; Federal Effort Does Not Violate Law, Oregon Attorney General Says*, N.Y. TIMES, Nov. 28, 2001, at B8. Because there were only about two dozen Portland men on the FBI list, federal authorities noted that they could interview the men themselves, perhaps with some assistance from the Attorney General, and thus accept the Portland police position. See *id.*

⁴³ Butterfield, *supra* note 35.

⁴⁴ *Id.*

⁴⁵ For a fascinating discussion of the impact of the war on terror on local policing generally, see William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137 (2002).

⁴⁶ See Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180 (1998) (suggesting that the formalistic, categorical anti-commandeering principle articulated in *Printz* is in tension with the pragmatic and political nature of federalism).

Participants expressed a wide range of views on the question of whether *Printz* is wrong or overly rigid, and whether the *Printz* anti-commandeering principle actually poses any significant problem in the war on terror.⁴⁷

B. Local Resistance to the USA PATRIOT Act: Bill of Rights Defense Committee Resolutions

Beginning in January 2002 with a resolution in Ann Arbor, Michigan, the legislatures of four states⁴⁸ and several hundred localities have passed resolutions and ordinances inspired by model resolutions circulated by the Bill of Rights Defense Committee (BORDC), opposing aspects of the USA PATRIOT Act and affirming the state or locality's commitment to civil liberties.⁴⁹

Each of the state resolutions calls on the United States Congress to repeal provisions of the Patriot Act that allegedly infringe constitutional rights, and seeks to curtail local cooperation with the Act's provisions. The Hawaii resolution prohibits the use of state resources for activities under the Patriot Act that would infringe individuals' constitutional rights, including monitoring by state law enforcement personnel of political and religious gatherings and eavesdropping on communications between lawyers and their clients.⁵⁰ The Alaska resolution prohibits the state's law enforcement and other agencies from investigating individuals and organizations in the absence of probable cause to believe that the target is involved in criminal activity, from using state

⁴⁷ Most localities, even if they initially opposed the interrogation program, ultimately cooperated, sometimes after negotiating about what procedures they would follow, and sometimes after the state exerted pressure on localities. And since most localities were cooperating and offering the assistance of their law enforcement personnel, the FBI would have had sufficient resources to send its own agents into the limited number of communities where resistance to local enforcement remained adamant. See Verhovek, *supra* note 42.

⁴⁸ Hawaii (Apr. 25, 2003), Alaska (May 21, 2003), Maine (Mar. 23, 2004), and Vermont (May 28, 2003). See Bill of Rights Defense Committee, Progress on Statewide Civil Liberties Resolutions, at <http://www.bordc.org/states.htm> (last visited Aug. 11, 2004).

⁴⁹ See Bill of Rights Defense Committee, Local Efforts, at <http://www.bordc.org/OtherLocalEfforts.htm> (last visited Aug. 11, 2004); Bill of Rights Defense Committee, Chronology of Civil Liberties Resolutions, Ordinances, and Ballot Initiatives, at <http://www.bordc.org/Chronology.pdf> (last visited Aug. 11, 2004).

⁵⁰ H.C.R. No. 267, 22nd Leg., Reg. Sess. (Haw. 2004), available at http://www.capitol.hawaii.gov/sessioncurrent/bills/HCR267_.htm; H.R. No. 192, 22nd Leg., Reg. Sess. (Haw. 2004), available at <http://www.capitol.hawaii.gov/sessioncurrent/bills/HR192.htm>.

resources to implement federal immigration law, and from using racial profiling except to locate a specific suspect described with reference to the suspect's race.⁵¹ The Vermont resolution as initially drafted responded to the provision of the Patriot Act allowing for federal officials to obtain an individual's library records by requesting that the office of the Vermont Attorney General provide legal support to any local library that refuses to turn over a patron's records, while the version enacted urged amendment of the relevant section of the Patriot Act to exempt libraries from its reach.⁵²

According to the list maintained by the Bill of Rights Defense Committee as of August 11, 2004,⁵³ 340 cities, towns and counties around the country had also passed local resolutions or ordinances. These resolutions contain an even greater variety of provisions expressing local opposition to the Patriot Act and limiting the participation of local officials in the Act's enforcement. The Detroit resolution, passed on December 6, 2002, expresses concern that the Act undermines the liberties of local residents of Arab, Muslim, or South Asian descent and affirms the city's strong support for civil liberties; requests local libraries to warn their patrons that federal officers might obtain their library records; and directs the Detroit city clerk to generate every six months a summary of information provided to the federal government under the Patriot Act.⁵⁴ The Portland, Oregon resolution of August 8, 2003 also affirms the city's support for civil liberties; directs the city's police to refrain from enforcing federal immigration law and from investigating individuals and groups without particularized suspicion of criminal activity; and directs the City Attorney to disclose to the public every three months information about individuals detained on suspicion of terrorist activity and to report on any sharing of information with

⁵¹ H.J.R. No. 22, 23rd Leg., Reg. Sess. (Alaska 2003).

⁵² Compare J.R.H. No. 9, Resolution as Introduced, 2003-2004 Leg. Sess. (Vt. 2003), available at <http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2004/resolutn/JRH009.HTM>, with J.R.H. No. 9 (No. R-203), Joint Resolution Strongly Urging the President to Revise Executive Orders and Policies, and for Congress to Amend Provisions of the U.S.A. Patriot Act, Which Seriously Erode Fundamental Civil Liberties, 2003-2004 Leg. Sess. (Vt. 2003), available at <http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2004/acts/ACTR203.HTM>.

⁵³ Bill of Rights Defense Committee, Local Efforts, available at <http://www.bordc.org/OtherLocalEfforts.htm> (last visited Aug. 11, 2004).

⁵⁴ Local Resolution to Protect Civil Liberties, City Council of Detroit, Michigan (Dec. 6, 2002), available at <http://www.bordc.org/Detroit-res.htm>.

federal officials.⁵⁵ Many communities object to their law enforcement officers assisting in enforcement of federal immigration laws, on the theory that even illegal immigrants should be encouraged to use city or state services without fear if they wish to report a crime, provide information, or use public health services. An Arcata, California provision imposes a fine of \$57 on any city official who assists in Patriot Act enforcement.⁵⁶ Political battles are still raging over what positions local government units will take. In New York City, for example, at the time of the Trager Symposium the City Council was debating whether to adopt a variation of the BORDC resolution, which subsequently passed.⁵⁷

On this issue, the participants discussed: 1) whether these state and local resolutions raise any problems of constitutional dimension, and 2) whether, even if constitutional, it is inappropriate for state and local governments to weigh in on the federal government's prosecution of the war on terror.

One of the first discussions of the BORDC resolutions to have been published, by symposium participant Professor Vikram Amar, had noted that the tradition of local governments weighing in on national policy dates back to the eighteenth century, when state and local governments served as "the point of organization" for the Alien and Sedition Acts. During the pre-Civil War era, abolitionists used their local governmental bodies to criticize state and federal laws supporting slavery.⁵⁸ Americans have organized on the local level, from the Committees of Correspondence to the present. The participants generally concluded that the expressive and hortatory portions of the Bill of Rights Defense Committee Resolutions allow state and local governments to play an historic and appropriate role, serving as mediators between individuals who oppose federal policy and the federal government itself, as well as seedbeds with the potential to challenge and change federal law. Many of the BORDC

⁵⁵ Resolution Regarding Patriot Act, City Council of Portland, Oregon (Oct. 29, 2003), *available at* <http://www.bordc.org/portland-res.htm>.

⁵⁶ See Evelyn Nieves, *Local Officials Rise Up to Defy the Patriot Act*, WASH. POST, Apr. 21, 2003, at A1.

⁵⁷ Res. No. 60-2004, New York City Council (Feb. 4, 2004), *available at* http://www.nycouncil.info/issues/current_legislation.cfm.

⁵⁸ Vikram David Amar, *Is It Appropriate, Under the Constitution, for State and Local Governments to Weigh in on the War on Terror and a Possible War with Iraq?* (Mar. 7, 2003), *at* <http://writ.news.findlaw.com/amar/20030307.html>.

resolutions simply express disagreement with provisions of the Patriot Act in a way the participants believed was distinguishable from the local anti-federal policy actions the Supreme Court found preempted in a pair of recent cases,⁵⁹ or govern only the conduct of state or local law enforcement officials in doing their own jobs.

To the extent that the BORDC resolutions go beyond expressing disagreement with federal policy, other questions arise. For example, some resolutions invite or allow local governments to draw their own conclusions about whether federal actors acting under Patriot Act provisions would be violating federal constitutional law. Amar, in his presentation, argued that this too is an appropriate role for state and local governments to play, and that federal officials should be liable in state courts for their unconstitutional actions.⁶⁰ Allowing state and local governments to provide such additional protection for federal constitutional norms would be a dramatic development in the law of federalism, empowering state and local governments while imposing tighter constraints on federal officials.

Finally, provisions of the BORDC resolutions that prohibit local law enforcement personnel from assisting in certain federal enforcement efforts, sometimes even sanctioning them for doing so, raise an additional, challenging question about the nature of Our Federalism. May the federal government preempt such laws on the ground that prohibiting an individual from assisting federal law enforcement agents in a federal investigation interferes with federal interests, as in *Olmstead*? Or under the principle of *Printz*, might a state successfully argue that the federal government may not interfere in a state's own internal organization by encouraging state or local employees to defy political decisions made by their legislature or their agency? If the legislature of Arcata, California wishes to impose a uniform policy on its own city employees, may the federal government preempt that uniform policy by demanding that individual city employees be allowed

⁵⁹ *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (holding that federal law preempts California provision of remedies for Holocaust survivors supplemental to federal government agreements); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (holding that federal law preempts Massachusetts policy governing state's trade with Myanmar).

⁶⁰ See Vikram David Amar, *Converse § 1983 Suits in Which States Police Federal Agents: An Idea Whose Time Has Arrived*, 69 BROOK. L. REV. 1369 (2004).

to make their own decisions about whether to cooperate with a federal investigation?⁶¹

Applying the Supreme Court's current doctrines about *Printz* and preemption is only the first step in analyzing such questions. As *McCulloch* recognized, federalism, at bottom, is about political accountability; the constitutional law of federalism tries to ensure that the appropriate majority can review the policy decisions and actions of its own government officials. A state or local legislature expresses the viewpoints of its constituents precisely because it is politically accountable to those constituents. Most law enforcement officials are not directly politically accountable and their policy decisions and actions are often invisible to the people who pay their salaries and elect their supervisors. On the other hand, state and local enforcement officials may find themselves in the position of Pavlov's dogs, trying to follow inconsistent demands made on them by federal agents with whom they are working, and state or local bodies for whom they work.

One concrete example of this conflict between uniform city policy and federal interests has already arisen and been litigated in the area of immigration enforcement.

⁶¹ See Letter from Susan N. Herman & Jason Mazzone, Professors of Law, Brooklyn Law School, to A. Gifford Miller, New York City Council Speaker (Dec. 9, 2003), available at <http://www.nycbordec.org/federalism.html> (arguing that the New York City resolution subsequently passed is an example of "federalism at its best").

Our structures of federalism are supposed to work by allowing parts of the country to preserve their distinct voices and to serve their distinct interests. As a city with a large immigrant population, New York may legitimately dissent from a national consensus that we should seek security even at the price of targeting immigrants generally and Arab and Muslim men in particular. We cannot, of course, prevent federal law enforcement officials from enforcing federal legislation like the Patriot Act. But we can certainly instruct our congressional delegation to seek to modify that legislation, and we can decline to further jeopardize members of our community by calling upon the New York Police Department and other city law enforcement agencies not to infiltrate mosques without some particular reason, and not to frighten immigrants into avoiding the police by questioning their immigration status when they wish to report a crime.

C. *Local "Cooperation" with Immigration Enforcement and Federal Preemption*

1. Federal Preemption of New York City's "Don't Ask, Don't Tell" Policy

In 1989, Mayor Ed Koch issued an executive order providing that no New York City officer or employee shall transmit information respecting any alien to federal immigration authorities unless the disclosure was either required by law, authorized by the alien, or respecting an alien suspected by the agency of criminal activity. In 1996, Congress, in section 642 of the federal Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), provided that no person or agency may prohibit, or in any way restrict, a federal, state, or local government entity from sending information regarding an individual's immigration status to the INS, maintaining such information, or exchanging such information with any other federal, state, or local government entity. New York City challenged this provision, arguing that it violates the Tenth Amendment and the prerogative of New York City to administer core functions of government, including the provision of police protection and the regulation of the City's own work forces. The City's concern was that undocumented aliens might fear to approach or cooperate with city agencies if they were afraid that the City would turn them over to the INS for deportation, and that the City would therefore be hampered in such functions as providing protection to crime victims and obtaining the cooperation of witnesses to crimes.

The district court rejected the City's Tenth Amendment claim and ruled that the City's policy was preempted.⁶² The Second Circuit affirmed on a somewhat narrower ground, finding that the City's concern about protecting the confidentiality of undocumented aliens had not been expressed in a confidentiality policy of general applicability.⁶³

On September 17, 2003, Mayor Michael Bloomberg signed a new executive order governing the acquisition and disclosure of a range of confidential information, including

⁶² *City of New York v. United States*, 971 F. Supp. 789 (S.D.N.Y. 1997), *aff'd*, 179 F.3d 29 (2d Cir. 1999).

⁶³ 179 F.3d 29 (2d Cir. 1999).

immigration status.⁶⁴ Under the new policy, a New York City officer or employee may inquire about immigration status only if: 1) that status is necessary for a determination of eligibility for some program, service, or benefit, or 2) the officer is required by law to make such inquiry. Law enforcement officers may not inquire about immigration status unless investigating criminal activity other than mere status as an undocumented alien, and police officers are not to inquire about the immigration status of crime victims, witnesses, or others seeking assistance. The new executive order also states under what circumstances such information may be disclosed. Immigration status generally may not be disclosed if the individual is not suspected of illegal activity other than “mere status as an undocumented alien,” but may be disclosed if “such disclosure is necessary in furtherance of an investigation of potential terrorist activity.”⁶⁵

The participants discussed three questions with respect to New York City’s former “Don’t Ask, Don’t Tell” policy, and its new, federally-mandated “Don’t Ask, Do Tell” policy. First, did the courts properly find the earlier New York City policy preempted? Second, to what extent may the City be required to maintain records, inquire about immigration status, or disclose immigration status? Third, what are the consequences of voluntary state and local enforcement of civil or criminal immigration laws?⁶⁶

2. Local Authority to Enforce Immigration Law?

On June 24, 2002, an internal Department of Justice (DOJ) memorandum reversed previous DOJ policy by asserting that state and local law enforcement officials possess at least some “inherent authority” to arrest and detain people for violations of immigration law, including civil violations.⁶⁷ The DOJ has requested local law enforcement cooperation as part of

⁶⁴ New York City Executive Order No. 41 (Sept. 17, 2003), *available at* <http://search.citylaw.org/isysquery/irld17d/2/doc>.

⁶⁵ *Id.* § 2.

⁶⁶ See Symposium, *Migration Regulation Goes Local: The Role of the States in U.S. Immigration Policy*, 58 N.Y.U. ANN. SURVEY AM. L. 283 (2002).

⁶⁷ The memorandum was not released so the breadth of the authority asserted is not known. A current lawsuit under the Freedom of Information Act seeks disclosure of the memorandum’s terms. See *Nat’l Council of La Raza v. Department of Justice* (S.D.N.Y. filed Apr. 14, 2003), complaint *available at* <http://www.aclu.org/Files/OpenFile.cfm?id=12356>.

a "narrow anti-terrorism mission," to enhance enforcement of immigration laws by adding 650,000 state police officers to the 20,000 federal border patrol agents, of whom only 1,947 have been employed for internal enforcement.⁶⁸

Some critics question whether this devolution of federal power is constitutionally permissible.⁶⁹ Others conclude that state and local authorities lack inherent authority to arrest for civil violations of immigration law, but could enforce civil immigration laws if expressly authorized by federal and state law.⁷⁰

Many state and local agencies have agreed to cooperate in these efforts. Florida officials, for example, completed an agreement with the Justice Department authorizing thirty-five state troopers and other officers to arrest immigrants solely for overstaying a visa or entering the country illegally, even if they are not suspected of having committed any offense under state or local law.⁷¹

With regard to local enforcement of federal immigration law, the participants discussed: 1) whether local enforcement of immigration law is constitutional if expressly authorized by federal law; and 2) whether local officials wielding such enforcement authority would share the substantial immunity from judicial review that federal immigration agents enjoy.⁷²

⁶⁸ See Press Release, Department of Justice, U.S. Attorney General (June 5, 2002); see also American Civil Liberties Union Testimony, Hearing on Immigration Enforcement Since September 11, 2001 Before the Subcommittee on Immigration, Border Security, and Claims, of the House Judiciary Committee, 108th Cong. (Mar. 8, 2003), available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12566&c=206>.

⁶⁹ See, e.g., Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection and Federalism*, 76 N.Y.U.L. REV. 493, 527-28 (2001).

⁷⁰ See, e.g., Jeff Lewis, et al., *Authority of State and Local Officers to Arrest Aliens Suspected of Civil Infractions of Federal Immigration Law*, 7 BENDER'S IMMIGR. BULL. 944 (2002). For an illuminating case, see *DeCanas v. Bica*, 424 U.S. 351 (1976) (unanimous opinion by Brennan, J.) (holding that federal immigration law does not preempt California statute imposing penalties on employers for hiring undocumented workers).

⁷¹ See Susan Sachs, *Long Resistant, Police Start Embracing Immigration Enforcement*, N.Y. TIMES, Mar. 15, 2002, at A11.

⁷² Federal courts have ruled that absent federal authorization, a state law discriminating against legal permanent residents is subject to strict scrutiny as alienage discrimination. If the law were mandated by federal statute, it would be subject to the rational basis test applicable to federal immigration authorities. A more difficult question is whether a permissive federal statute diminishes the level of federal equal protection to which a state statute is subject. See *Aliessa v. Novello*, 754 N.E.2d 1085, 1098-99 (N.Y. 2001) (applying strict scrutiny in invalidating state discrimination against immigrants in welfare program, despite federal authorization).

3. CLEAR

Legislation pending in the House of Representatives as of November 2003 under the title Clear Law Enforcement for Criminal Alien Removal Act of 2003 (CLEAR) proposed to authorize local law enforcement officials to enforce immigration law.⁷³ The bill also proposed to use Congress's spending power to encourage state and local governments to participate in enforcing immigration laws.⁷⁴ Under this proposal, two years after the date of enactment, any state or subdivision of a state that failed to have in effect a statute that expressly authorized state and local law enforcement officials "to enforce federal immigration laws in the course of carrying out the officer's law enforcement duties shall not receive any of the funds that would otherwise be allocated to the State under section 241(i) of the Immigration and Nationality Act (8 U.S.C. 1231(i))."⁷⁵ CLEAR also provided financial incentives by reallocating forfeited funds to compliant states, and sharing civil penalties collected due to state and local immigration enforcement with states and localities.⁷⁶

The participants discussed whether CLEAR, if enacted, would be constitutional.⁷⁷

D. Federal Preemption vs. State Disclosure Law: The New Jersey County Jails

Among those detained by federal authorities in the aftermath of 9/11 were some 762 "special interest" aliens, primarily men from Arab or South Asian countries who were detained by the INS for some number of months prior to their eventual deportation. Many of these detainees were housed in New Jersey state jails, including Hudson and Passaic County jails, pursuant to a voluntary agreement the federal

⁷³ Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act of 2003, H.R. 2671, 108th Cong. § 101 (2003).

⁷⁴ *Id.* § 102.

⁷⁵ *Id.* This section provides for the federal government to reimburse states for the costs they incur in incarcerating undocumented criminal aliens.

⁷⁶ *Id.* § 102-103. Another bill pending in the House would penalize states allowing undocumented persons to obtain driver's licenses. H.R. 655, 108th Cong. (2003).

⁷⁷ For a discussion of the desirability of CLEAR, see Julia Malone, *Lawmakers Split on Immigration Act*, ATLANTA JOURNAL-CONSTITUTION, Oct. 2, 2003, at 2B. As of the date of publication of this issue, the CLEAR Act was still pending in Congress.

government had previously entered with New Jersey state authorities to house federal detainees in New Jersey's excess jail space.⁷⁸

The Department of Justice refused to release the names of these special interest detainees, even when sued under the federal Freedom of Information Act.⁷⁹ A lawsuit brought in New Jersey state court⁸⁰ sought to compel the sheriffs and wardens of the Hudson and Passaic jails to comply with a long-standing provision of New Jersey state law⁸¹ mandating public disclosure of the identities of all jail inmates, a more explicit state counterpart to federal disclosure law. The trial court granted the plaintiffs partial summary judgment, ordering compliance with the state law after a limited stay of ten days issued at the request of the United States (which had been granted defendant-intervenor status). The United States promptly filed an appeal and on the same day, April 17, 2002, INS Commissioner James Ziglar signed an emergency interim regulation superseding state law by prohibiting state jail officials from disclosing the identities of the detainees held on behalf of the INS, whether by contract or otherwise. The plaintiffs argued that the regulation exceeded the authority delegated to the Attorney General by Congress, violated the Administrative Procedure Act in that there had been no notice and comment period, and violated the Tenth Amendment. The New Jersey appellate court held that New Jersey law had been validly preempted and reversed the trial court's order of disclosure.⁸²

Symposium participants, including lead counsel for plaintiffs, Dean Ronald Chen (appearing by videotape), discussed whether the appellate court had correctly found that the New Jersey disclosure law was preempted.⁸³

⁷⁸ For a full account, see Ronald K. Chen, *State Incarceration of Federal Prisoners After September 11: Whose Jail is it Anyway?*, 69 BROOK. L. REV. 1335 (2004).

⁷⁹ The DOJ was sued in federal court under the Freedom of Information Act. See *Center for National Security Studies v. Department of Justice*, 331 F.3d 918 (D.C. Cir. 2003) (rejecting FOIA request for identities and information about Fall 2001 detainees), *cert denied*, 124 S. Ct. 1041 (2004).

⁸⁰ *ACLU of New Jersey, Inc. v. County of Hudson*, 799 A.2d 629 (N.J. Super. Ct. App. Div. 2002), *cert. denied*, 803 A.2d 1162 (N.J. 2002).

⁸¹ N.J. STAT. ANN. 30:8-16 (West 2002).

⁸² *ACLU of New Jersey*, 799 A.2d 629 (N.J. Super. Ct. App. Div. 2002).

⁸³ See Chen, *supra* note 78. Under the theory of preemption advanced in Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313 (2004), a court could not properly have found preemption because Congress had not acted.

E. *Preemption of Local Consent Decrees*

In various locations around the country, consent decrees as well as local laws limit the ability of local police to monitor and infiltrate political or religious organizations. In New York City in 1985, following litigation brought by political groups over police tactics in the 1960s and 1970s, the New York Police Department (NYPD) entered the *Handschu* settlement.⁸⁴ Among other things, this settlement, approved by the district court and upheld by the Second Circuit, prohibited the police from investigating political organizations without first showing specific evidence of a pending crime by the group's members; limited the storage and dissemination of information gathered about political activities; and created procedures for citizen complaint and review.

In September 2002, New York City and the NYPD, citing changed circumstances after 9/11 and the department's need for greater freedom to investigate suspected terrorist organizations in order to prevent future attacks, moved pursuant to Federal Rule of Civil Procedure 60(b)(5) to modify the consent decree. Over the opposition of the original *Handschu* plaintiffs, in early 2003 the district court granted the motion, principally by removing the requirement that the police demonstrate evidence of pending criminal activity before investigating a group and its members.⁸⁵ On August 7, 2003, in response to the plaintiffs' complaint about police questioning of anti-war demonstrators arrested at a recent protest rally in Manhattan, the district court incorporated as part of the modified decree the NYPD "Guidelines for Investigations Involving Political Activity," which were based on FBI Guidelines.⁸⁶

Meanwhile, a DOJ draft of proposed federal legislation dubbed "Patriot Act II," leaked to the public in early 2003, contained a provision that would have discontinued consent decrees that impeded terrorism investigations conducted by federal, state, or local officials and would have terminated all such decrees entered prior to September 11, 2001, including the

⁸⁴ For a full description of the history of this litigation, see Jerrold L. Steigman, Note and Comment, *Reversing Reform: The Handschu Settlement in Post-September 11 New York City*, 11 J.L. & POL'Y 745 (2003).

⁸⁵ *Handschu v. Special Servs. Div.*, 273 F. Supp. 2d 327 (S.D.N.Y. 2003).

⁸⁶ 288 F. Supp. 2d 411 (S.D.N.Y. 2003).

Handschu settlement.⁸⁷ This legislation had not been introduced in Congress at the time it garnered national publicity and still has not been introduced.⁸⁸

On this issue, the symposium participants discussed: 1) whether courts should modify consent decrees on the application of local police for greater powers to investigate organizations as part of the war on terror; and 2) under what circumstances federal law can modify or abolish such consent decrees. Should it matter whether police departments or cities that are parties to the original decrees support modification?

F. Other Frontiers of Federalism

Additional federalism issues are presented by the Joint Terrorism Task Forces that many local governments have joined, with agreements spelling out the nature of local cooperation with federal agents. Campus security guards, as well as police and sheriffs, have been deputized as federal agents. Even though these forms of cooperation are voluntary, they challenge our traditional notions about the relationship between the federal and state/local governments (generally described as a “dual sovereignty” model).⁸⁹ And the crucial question of who will pay for post-9/11 enhanced security raises questions about unfunded federal mandates and the nature of the federal financial obligations to state and local governments on a constitutional as well as a political level.⁹⁰

Will the war on terror have the unexpected consequence of breaking down barriers between levels of government, as it is breaking down barriers between branches of the federal government? Will the balance of federal/local power shift, as power has shifted among the branches of the federal government? The fascinating discussion of the issues described above can be found on the Brooklyn Law School website.⁹¹ The

⁸⁷ Draft Domestic Security Enhancement Act of 2003, § 312, *available at* http://www.publicintegrity.org/dtaweb/downloads/Story_01_020703_Doc_1.pdf (last visited Aug. 10, 2004).

⁸⁸ For a bill opposing such legislation, see Benjamin Franklin True Patriot Act, H.R. 3171, 108th Cong. (2003) (criticizing the USA PATRIOT Act and subsequent proposed legislation such as the Domestic Security Enhancement Act).

⁸⁹ For a discussion of this relationship, see Stuntz, *supra* note 45.

⁹⁰ See Jason Mazzone, *What Congress Owes New York*, N.Y. TIMES, Apr. 24, 2003, at A31.

⁹¹ See David G. Trager Public Policy Symposium (2003), *at* http://www.brooklaw.edu/news/newsarchive/2003-11-21trager_symposium.php (last visited Aug. 10, 2004).

roundtable discussion was preceded by presentation of the papers in this issue, which are described briefly below.

IV. PAPERS PRESENTED AT THE SYMPOSIUM

The Trager Symposium began to explore how constitutional limitations apply both to federal agents engaged in the war against terrorism and to local officials who are resisting what they believe to be federal government overreaching, using the above examples. Professor Ann Althouse⁹² argued that the structures of federalism provide an attractive alternative to litigating the constitutionality of federal government actions in the war on terror. Her paper maintains that Justice Robert Jackson, concurring in the *Korematsu* decision, was right in thinking that courts do not make sound decisions about the scope of civil liberties during times of war or national crisis, so that the courts might well uphold Patriot Act provisions that she might think unconstitutional. State and local opposition to Patriot Act policies, on the other hand, might actually cause the federal government to modify its policies. Althouse discusses the functions that state and local resistance might serve, comparing the current round of Bill of Rights Defense Committee resolutions to the opposition of Sheriff Printz, whose refusal to enforce a locally unpopular provision of federal law was upheld by the Supreme Court.

Professor Ernest Young, coming from the other end of the political spectrum, welcomes Althouse's born again defense of the structures of federalism.⁹³ While "states' rights" during the 1960s was often code for supporters of racial segregation, Young notes the current phenomenon of liberals coming over to "the dark side" and finally understanding that the structures of federalism might, as James Madison believed, provide a "double security" for liberty.⁹⁴ He describes this opportunistic attraction to the structures of federalism as an example of the flexibility of the structures themselves. State and local government can play an expressive role and can provide a potential rallying point against undesirable federal policy

⁹² Ann Althouse, *The Vigor of Anti-Commandeering Doctrine in Times of Terror*, 69 BROOK. L. REV. 1231 (2004).

⁹³ Young, *supra* note 13.

⁹⁴ THE FEDERALIST NO. 51 (James Madison).

(although Young remains agnostic himself about whether the Patriot Act provisions are problematic).

Professor Paul Finkelman, a legal historian, described the pro-slavery origins of our concept of national authority, as exemplified by the Supreme Court decision in *Prigg v. Pennsylvania*,⁹⁵ in which the Supreme Court ruled that federal law preempted a Pennsylvania state law providing procedural protections for fugitive slaves (or people mistakenly believed to be fugitive slaves) being extradited back into slavery.⁹⁶ In his article, Finkelman compares Pennsylvania's response to the prospect of enforcement of the locally detested Fugitive Slave Law with the refusal of local law enforcement officers to enforce the locally unpopular Brady Act provision invalidated in *Printz*, and the Bill of Rights Defense Committee resolutions reacting to locally unpopular provisions of the Patriot Act. He also discusses the Supreme Court's watershed treatment in *Prigg* of the question of the scope of local autonomy. Although the Court held that federal law preempted Pennsylvania's attempt to add even process-based requirements to the Fugitive Slave Law designed to impede the actions of federally-sanctioned slave catchers, Justice Story's opinion suggests that state officials might not have been required to enforce the Fugitive Slave Law themselves.

Professor Erwin Chemerinsky presented a paper arguing that the federal government should not be permitted to preempt state law unless Congress has clearly made the decision to do so.⁹⁷ Requiring a clear expression of congressional will as a precondition to a finding of preemption would empower the states by allowing them more leeway to implement their own local policies and priorities. Under Chemerinsky's theory, for example, it would seem that the Bill of Rights Defense Committee provisions or Oregon state law probable cause requirements described above could not be preempted by unilateral action of the Department of Justice. Chemerinsky would also conclude that the federal agency regulation could not properly preempt the New Jersey disclosure law discussed in Dean Ronald Chen's article,⁹⁸ without congressional action to displace the state law requiring

⁹⁵ 41 U.S. (16 Pet.) 539 (1842).

⁹⁶ Finkelman, *supra* note 24.

⁹⁷ Chemerinsky, *supra* note 83.

⁹⁸ Chen, *supra* note 78.

publication of the identities of the detainees in New Jersey jails. Chen's article provides background on the sequence of events and the federal and state actions at issue in the New Jersey jail case, which provides a sort of Petri dish for analyzing the scope of national authority and local autonomy.

Finally, Professor Vikram Amar argues that state courts and legislatures should be afforded authority to sanction federal officials who violate the federal Constitution within their states.⁹⁹ This would allow localities leeway to decide for themselves what conduct would violate federal constitutional norms, rather than ceding that issue to the federal courts or any other branch of the federal government, a right some of the BORDC resolutions claim.¹⁰⁰ Amar's earlier essay on Findlaw¹⁰¹ discussed the role state and local governments have played at various times during our history, as mediators between federal government actions and individual dissent from those actions. His proposal would provide a new answer to one of the key questions posed by the Virginia and Kentucky Resolutions: What role may the states play in interpreting and enforcing the United States Constitution?

V. CONCLUSION

As author Joseph Ellis noted in his popular recent book on constitutional history,¹⁰² part of the genius of our Constitution is that rather than attempting to answer all questions about structures, rights, and power, the Constitution provides a framework for a continuing debate and dialogue about these issues. The war on terror provides a new and important backdrop against which some key debates about the nature of the relationship between the federal and state/local governments will take place. Brooklyn Law School's Trager Symposium was the beginning of that debate, but by no means the end. The description above of the papers, the problems discussed, the questions raised, and some of the positions taken, shows that it was not possible in one day, even with an astoundingly talented group of legal scholars, to exhaust this topic. In fact, one symposium participant suggested that the

⁹⁹ Amar, *supra* note 60.

¹⁰⁰ See *supra* note 60 and accompanying text.

¹⁰¹ Amar, *supra* note 60.

¹⁰² JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION*

group should reconvene every six months to monitor and discuss the continuing challenges the war on terror will undoubtedly pose to Our Federalism.

