

National Power, Post-9/11

By Michael S. Greve

A Place with Answers?

September 11, the Washington establishment believes, has ushered in a new era of big, respected national government. “Washington has an officially recognized role again,” proclaims a *Washington Post* op-ed. “Now, Government Is the Solution,” blares a *New York Times* headline. Hometown pundits rejoice over Washington’s “renewed feeling of self-esteem.” “After decades of self-loathing,” Jacob Weisberg enthuses in the *New York Times Magazine*, “Washington is proud once again to be the place with the answers.”¹ Said to be dead after September 11: Dot-com entrepreneurs. Public complaints over meddlesome bureaucrats. Limited government. Federalism.

The analysis has an air of unreality. For all the hand-wringing over public distrust of government, pre-9/11 Washington was hardly a Jeffersonian paradise. The 2000 presidential election was fought between a Democrat who thought that Washington had all the answers and a Republican who thought that it had most of them—including some new ones, such as channeling private charity and holding school principals “accountable.” Congress fought recurrent bouts of self-loathing through legislative fixes. September 11 did not further inflate the Beltway’s bubble of self-importance, because it could not. Nor has it expanded the national government’s presumed authority, which was already boundless.

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The effect of September 11, rather, has been to reintroduce us to the difference between national interests and frivolous, self-absorbed “national politics.” When American Airlines Flight 11 crashed into the World Trade Center, President George W. Bush was attending to his duties—sitting in on a second-grade class at Emma E. Booker Elementary School in Sarasota, Florida. Later that day, he found himself managing a national crisis and preparing for war. In a span of hours, Mr. Bush traversed the distance from the humiliating distractions that had come to pass for “national leadership” to the serious business for which we have a national government, and a president.

The reintroduction of exigent national concerns, in such stark and immediate contrast to the trivial pursuit of stage-managing society, provides an opportunity to reaffirm, in political debate and practice, the venerable constitutional principle that government must be limited—and energetic and effective in its proper sphere. If the central but lately forgotten distinction between national interests and the nanny state has been little remarked upon in the wake of September 11, that is largely so because the Washington establishment’s agenda hangs on erasing the difference.

Government in War and Peace

Wars sometimes—not always—prompt new programs, policies, and bureaucracies that later, long after the emergency has passed, prove permanent and indestructible. Robert Higgs, the most forceful proponent of this “ratchet” theory, argues that September 11 will produce such an effect.² The

past few weeks certainly seem to support that prediction. Public confidence in the national government's ability to do the right thing stands at levels not seen since the mid-1960s. Pennsylvania Governor Tom Ridge has come to Washington to head an ambitious Homeland Security initiative. Congress has bailed out and may soon be running a major, heretofore private industry (airlines), and numerous new crime-fighting, infrastructure, relief, and economic stimulus measures are in the works. Some of those measures appear needed but pose a danger of governmental "function creep"; for example, law enforcement tools to trace al Qaeda's money may come to be used to limit law-abiding citizens' financial privacy and to track international capital flows. Other pieces of legislation lack a plausible public purpose or connection to the events of September 11. K Street lobbyists have repackaged their constituencies, from beekeepers to pre-K teachers, as the front line against terrorism.

Even so, predictions of another war-induced government growth spurt and, in particular, occasional comparisons to World War II seem exaggerated, or at least very premature. Pearl Harbor prompted a wholesale national mobilization; September 11, official encouragement to vacation in New York and Hawaii. Instead of establishing war boards and commissions, Congress is enacting tax cuts. Fear of invasion and subversion in 1942 brought the internment of 110,000 American citizens of Japanese descent; the new federal Office of Homeland Security is struggling to coordinate cabinet secretaries' public statements, and nothing except its vaguely sinister name suggests that the office will turn into a menacing presence. Short of a war with the entire Islamic world or large-scale domestic quarantine, the required effort is simply too limited to produce a qualitative change in government. And while the mobilization of antiterrorism arguments for naked interest group purposes is certainly unseemly, it is not a new post-9/11 politics. It is the old politics, fought over a somewhat larger pot of money.

The marginal enlargement of the federal pork barrel is neither news nor, in any event, the point of the Washington-Is-Back theory. That refrain, rather, rests on the notion that September 11 will translate into a new respect for national power and its assertion against ornery business interests, state governments, and free-market fanatics. The united pursuit of a common objective will move the nation beyond the Reagan era's legacy of public cynicism and the glorification of private gain.

Public confidence in government having been restored, it will facilitate the pursuit of other pressing objectives.

That expectation, though, seems as exaggerated as the ratchet theory. World War II produced a long-term gain in public confidence, which the federal government then mobilized for domestic purposes (including a failed war against poverty). Those gains materialized because the war was big, dramatic, and unambiguously successful. The war against terrorism is none of those things—at least not yet.

Luxuries

The Washington-Is-Back view is suspect for a second reason: the initiatives that are supposed to flow from the new public trust in Washington read like Hillary Clinton's wish list. The good things that may come "from the national trauma include improved public health institutions, more effective immigration procedures, and eventually, more efficient internal combustion engines."³ Child care benefits, too, may now come to pass, along with a greatly improved and expanded passenger rail system. Indiscriminate public distrust of government kept Washington from bringing you all this, plus a much better grilled cheese sandwich. On September 11, though, we learned that "government-hating is . . . a luxury of secure times," to quote Mr. Weisberg.

Cynicism and distrust, however, had a lot to do with the federal government's own conduct—with the fraying of public objectives (such as free trade) under the push and pull of interest group politics; with a ceaseless meddling in local affairs and with demagogic gestures masquerading as "laws"; and with the utter indifference to the harmful effects of federal intervention.

The pre-9/11 telecommunications industry, for example, was the site of a regulation-induced sectoral recession. The pre-9/11 energy crisis in California and gasoline shortages in Midwestern markets likewise stemmed from misguided regulation. The regulatory wipeout of the nuclear power industry falls into that category, as does the near destruction of our energy production and distribution system through a thousand regulatory cuts—a boutique fuel here, a stationary source standard there, federal laws to accommodate endangered species, and Florida tourists fretting over oil rigs 200 miles offshore. Washington's pre-9/11 domestic priorities were a much ballyhooed education "reform" and the attempt to enact a federal Patients' Bill of Rights, including the right to sue health care providers before a jury of the trial lawyers' choosing.

Both bills would have wrought a massive intrusion into state and local affairs (education standards in the former case, state court procedures over state law claims in the latter). No legislator believed, and few even claimed, that these monuments to Washington's self-absorption would actually improve educational outcomes and health care delivery.

Washington's heedless activities, rather than the accompanying cynicism, were the true luxuries of secure times. They were made bearable by public apathy and affordable by the awesome resilience of the American economy.

The reply is familiar: of course government can fail. What is said to be wrong is the voters' leap from that experience into a reflexive distrust of national government in all its forms and pursuits. The Washington-Is-Back view, however, reflects the same mistake—a perception of national power as one blob, indivisible, with benefits and programs for all.

The voters' lack of discrimination is a form of rational ignorance. When most programs fail and politicians declare just about everything an urgent national priority, busy citizens will reasonably refuse to incur the inordinate time, effort, and expense that are needed to tell the good from the bad. The insiders' perspective, in contrast, reflects a stubborn liberal creed: If Alger Hiss is guilty, there goes day care. Osama bin Laden is guilty, and here come the federal nannies. On Amtrak.

The Supreme Court

The one-piece theory of national power has made a prominent appearance in the journalistic analysis of the Supreme Court and its likely response to September 11. Quoted in a much discussed article by Linda Greenhouse of the *New York Times*, experts proffered the following syllogism: the Supreme Court's federalism—the centerpiece of the Rehnquist Court's jurisprudence—rests on “a fundamental distrust, a disdain for [the] national government” (Professor Sandy Levinson). Post-9/11, we like the national government. Ergo, constitutional, judicially enforced federalism is dead—a “luxury of peaceful times” (former Solicitor General Walter E. Dellinger, in now familiar language).⁴

The expectation of a judicial about-face, like the ratchet and confidence theories mentioned earlier, seems greatly exaggerated in light of historical experience. Of all the twentieth-century wars, only one (World War II) prompted a judicial expansion of national authority.⁵ Justices are not easily impressed

by a general sense that national power must be endorsed or rejected wholesale.

The modern Court has limited some national powers, but none that might be needed in a war against terrorism. Most of the federalism decisions over the past two decades, for example, deal with the states' immunity from private lawsuits under federal statutes. Those cases—some constitutional, many more statutory—limit the ability of Congress to mobilize private interests, such as environmental groups and poverty lawyers, to enforce purported statutory objectives in federal court. The events of September 11 and since do not remotely suggest a reconsideration of the precedents, and the Supreme Court has already signaled an eagerness to extend their reach.⁶

A likelier, and probably the likeliest, candidate for a judicial reversal is the Supreme Court's prohibition against the federal “commandeering” of state and local officers for the enforcement of federal programs. Such commandeering, however, apart from being unconstitutional, is very rare and highly ineffective, for the obvious reason that the locals resent it. The watchword of federal, state, and local antiterrorism efforts is and will be *cooperation*, and the national government will secure cooperation in the usual fashion—by funding state and local efforts. Far from hampering such federal initiatives, the Supreme Court has repeatedly encouraged them as a permissible form of federal regulation.

Nor is the Supreme Court likely to revisit recent decisions that limit the authority of Congress to regulate noneconomic conduct (such as the possession of guns on school grounds and gender-based violence) under the commerce clause. The Court has disavowed the notion that a proffer of important national interests transforms the clause into an anything-goes warrant, and September 11 provides no occasion to rethink that position.⁷

The Endangered Species Act, for example—a subject of continuing, intense commerce clause litigation in the lower courts—purports to authorize the federal protection of, among other species, the Tooth Cave pseudoscorpion, the Tooth Cave spider, the Bee Cave Creek harvestman, the Tooth Cave ground beetle, the Kretschmarr Cave mold beetle, and the Bone Cave harvestman, none of them known to engage in commerce and all residing exclusively in Tooth Cave, Amber Cave, and Kretschmarr Cave on the Jollyville Plateau in Travis County, Texas. Although a federal district judge has just sustained this exertion of federal might, it is

and should be highly suspect.⁸ While it is comforting to know that the national government is capable of locating cave-dwelling life forms at least here at home, it does not need that authority to track down al Qaeda.

Far from validating random exercises of limitless national power, September 11 and its aftermath may in fact make federalism somewhat more compelling. In times of peace, federal activities that are really none of Washington's business lack a sharp contrast with urgent affairs of truly national proportions. All Beltway productions look more or less alike, and all judicially imposed lines between local and national concerns, more or less arbitrary. Now that Osama bin Laden has entered the national stage, perhaps the Bone Cave harvestman will look more distinctly local.

National Power, Now

A similar dynamic might unfold, with some luck and effort, in the political arena. For all its horrors, September 11 may yet allow us to reassert the crucial distinctions between public purposes and constituency favors, between the national interest and local affairs. Certainly, the event has brought us face to face with the reality that those distinctions had been lost—not just in domestic matters, but even in military and diplomatic affairs.

- The development of a military response to the attacks of September 11 consumed considerable time because the Clinton administration had never asked the Joint Chiefs of Staff to design a counterstrategy beyond a public relations stunt to help the commander-in-chief through the next round of opinion polls, such as the lobbying of a few missiles.
- Post-9/11, national newspapers have carried pictures of toddlers—American toddlers—being torn from their parents, father and mother both having been detailed to war duties. One should not have to see such pictures even in times of mobilization. The proximate cause of their appearance is a political decision to run the U.S. armed forces as an experiment in gender relations and female empowerment.
- A nationally distributed cartoon showed Taliban leaders seeking to escape from brief-wielding trial lawyers parachuting into Afghanistan. Ahead of the joke, the trial lawyers are already exploring means of collecting money on anti-Taliban damage suits. Their hope to attach the

Taliban assets frozen by the United States is warranted by very unfunny precedents. Over the State Department's strenuous insistence that foreign frozen assets (a) remain, legally speaking, the property of a sovereign foreign government and (b) might serve as a bargaining chip in U.S. diplomatic negotiations with that government, Congress and the Clinton administration subrogated damage claims on frozen assets belonging to Cuba and to Iran. The U.S. government now holds IOUs on those assets and will at some point have to deal with them, at an unknown economic and diplomatic cost. The trial lawyers, on the other hand, are in the clear—with a pot of cash that used to be a foreign policy asset.

What passed for national policy, in other words, was a series of accommodations to political fads and circumstances, from insistent constituency demands to presidential sex scandals. Beyond highlighting the dangers, September 11 has brought a sharper national focus. The administration's conscientious and largely successful effort to prepare the American public for a long, messy, and unattractive war reflects a much greater seriousness and sense of national purpose than the photo ops of the past. Longer term, events have surely impressed the urgency to expand and restructure the armed forces in accordance with national and strategic demands, rather than local and pork-barrel considerations.

Similar examples of a renewed focus on national purposes and a concurrent demise of local or interest group obsessions exist outside the military context. Notably, the Federal Bureau of Investigation is reorienting its enforcement activities from deadbeat dads, carjackers, and local crack dealers to terrorist organizations. There goes the detritus of an era of bipartisan "tough on crime" demagoguery—and good riddance.

Even the interest group wrangling over the post-9/11 fiscal spoils is not an unmitigated disaster. The budget process would have produced that spectacle even without the terror attacks, except that a slightly different chorus of claimants would have oinked a slightly different tune. Meanwhile, September 11 pushed both federal education reform and the Patients' Bill of Rights off the legislative agenda. Jointly or severally, those enactments would have brought vastly more centralized government than the most ambitious antiterrorism program has contemplated to date. We may, of course, revisit those baubles. For the time being, though, federalism is ahead on points.

Distinctions

While the distinctions between federal responsibilities and local concerns, between the national interest and constituency demands, are much clearer now than two months ago, their political force will depend on their confident assertion in the context of specific disputes. Doubts are warranted on that score. Liberals and Democrats can no longer tell those differences, as is illustrated by the Washington-Is-Back pundits' smooth transition from the war against terrorism to better dental care reimbursements.

Republicans and conservative libertarians probably still can, but they hesitate to do so in public. The administration has yet to declare any of its earlier domestic initiatives and priorities off the table. Among conservative and libertarian think tanks and columnists, the near exclusive response to the post-9/11 flurry of legislative activity has been bellyaching over an impending expansion of big government.

The reluctance to articulate and act on crucial political distinctions is only partly explained by fear of being charged with a partisan exploitation of a national emergency. At some level, many conservatives and libertarians seem to have resigned themselves to the liberal idea of national power as a force that must be loathed or loved *tout ensemble*. They seem to fear that the necessary distinctions can no longer be made to stick—perhaps because any acknowledgment of a national responsibility would unleash an interest group stampede; perhaps because the distinctions are uncertain, contestable, and in any event too confusing for average citizens. Antigovernment rhetoric is more familiar, more unifying, and perhaps more effective.

That defensive posture and the apprehensions that prompt it are not unreasonable. National and local responsibilities, affairs of state and interest group rackets, are not always easily distinguished even in theory, let alone amidst the noise and clatter of political combat. An airline or reinsurance bailout will reflect some mix of national interests and interest group demands, and the distinction is easily overrun. Even so, the distinctions are not impossible. A failure to articulate them will spell missed opportunities and, in the long run, a failed agenda.

- The restoration of functioning energy markets is not mere deregulation (although that should be a large part of it). It is an affirmative national responsibility—

because of national security concerns, because of market integration, and because the national government that wrecked those markets has an obligation to clean up the mess.

- Providing information about terrorist threats and effective emergency responses is a federal responsibility, since no state or local government has an incentive to pay for the collection of knowledge that would benefit all other (nonpaying) jurisdictions in like manner. The *management* of local emergencies, in contrast, is best left to the Rudy Giulianiis, who have a better sense of the local landscape than federal bureaucrats.
- Ensuring an adequate supply of smallpox vaccine—for example, by immunizing producers from punitive damage lawsuits under state law—is a distinctly national obligation, which should be addressed posthaste. Since pervasive externalities—meaning the deadly effects of a highly contagious disease—render private or local prevention strategies ineffective, it makes sense to pool resources. By way of a contrast that can now be explained, the prevention of a few statistical deaths from trace levels of arsenic in groundwater—another case of pre-9/11 arm-flapping and an embarrassing defeat for the administration and critics of federal overregulation—is *not* a federal responsibility. No identified externality or other market failure would render diverse, local risk abatement strategies ineffective or unavailable.

Such distinctions are necessary, even if they prove politically difficult in many cases. An insistence that marginal domestic initiatives must give way to national priorities will, of course, encounter fierce resistance from their advocates and beneficiaries. That consideration, plus the urgent tasks at hand, may have kept the administration from reappraising its domestic agenda. At some point, though, a business-as-usual attitude will create the impression that the war is a distraction from domestic “priorities,” rather than the other way around. Sooner or later, the administration must shelve marginal, poll-driven programs. At the same time, it must explain to the public and to Senator John Kerry—the most intransigent opponent of oil drilling on Alaska’s North Slope—that the sensibilities of calving caribou will have to make room for national energy needs.

Conversely, national priorities may, of course, get hijacked. Vigilance against special interest “war

profiteering”—one conservative activist’s description of the post-9/11 budget “process”—is altogether commendable and indeed indispensable. Still, an agenda for limited government cannot rest entirely on an appeal to antigovernment sentiment. It cannot be a mirror image of liberalism’s wholesale faith in one national power—a kind of liberalism with a minus sign (as Leo Strauss characterized a different political outlook, in a different context). To acknowledge that fact is not to accept the absurd notion, peddled with great solemnity but not a shred of evidence by *soi-disant* Tocquevillians, that a general distrust of government somehow undermines the civic culture or the powers that the national government truly needs. Rather, it is to recognize the actual Tocqueville’s actual insight: while public distrust provides a reservoir of support for what we now call a limited-government agenda, it is in the end perfectly consistent with a growing, bloated government and conducive to it.⁹ A government whose meddling and centralization have forfeited the people’s trust will attempt to fix the situation by meddling some more—typically, by bribing some constituency or other and thus engendering yet more cynicism and distrust all around. That dynamic increases and accelerates with the democratization, growth, and professionalization of government. The only way to short-circuit it is to insist on the irreducible difference between national interests and constituency politics, between national priorities and local affairs.

Now is the time to make that effort. Everyone understands that Osama bin Laden is not a mere addition to a long “priority” list of cave bugs, caribou, and the Very Hungry Caterpillar that detained Mr. Bush in countless campaign appearances and right up to September 11. Terrorist cells on American soil are not simply another irritant on top of suburban sprawl and second-hand smoke. Those people and the threats they pose are in a completely different league. Let us deal with them and forget the distractions.

If that case cannot be made even now, Washington is back, indeed.

Notes

1. See, respectively, James Conaway, “Suddenly, a Capital Back in Focus,” *Washington Post*, October 14, 2001, Outlook section; Robin Toner, “Now, Government Is the Solution, Not the Problem,” *New York Times*, September 30, 2001, sec. 4; Jacob

Weisberg, “Feds Up,” *New York Times Magazine*, October 21, 2001, p. 6.

2. Michael W. Lynch with Robert Higgs, “Glory Days for Government,” *Reason Online*, September 20, 2001 (available at www.reason.com/ml/ml092001.html, accessed October 12, 2001). Higgs developed the ratchet theory in a book entitled *Crisis and Leviathan: Critical Episodes in the Growth of American Government* (Pacific Research Institute, 1987). The theory has been criticized on the grounds that it cannot explain why U.S. wars in the nineteenth century failed to produce government growth. Moreover, the theory does not seem to work well in cross-national comparisons. Great Britain, for example, dismantled her wartime institutions after World War I (but not after World War II), and the rapid growth of government in Sweden obviously cannot be explained by modern wars (which the Swedes did not fight). For a meticulous argument that the growth of government is driven not by wars but by economic equality and rising levels of education, see Sam Peltzman, “The Growth of Government,” *Journal of Law and Economics*, vol. 23 (1980), p. 209.

3. Conaway, “Suddenly, a Capital Back in Focus.”

4. Linda Greenhouse, “Will the Court Reassert National Authority?” *New York Times*, September 30, 2001, sec. 4. The article also quoted this author to the effect that the impacts of September 11 on the Supreme Court’s decisions would be “subtle and nuanced.”

5. At the end of World War I, the Supreme Court handed down *Hammer v. Dagenhart*, 247 U.S. 251 (1918), arguably the most aggressive antinationalist decision of all times. (It barred the federal government from regulating child labor under the commerce clause.) World War II, in contrast, produced two cases that effectively spelled the end of constitutional federalism: *United States v. Darby*, 312 U.S. 100 (1941), which overruled *Hammer v. Dagenhart*, and the notorious decision in *Wickard v. Filburn*, 317 U.S. 111 (1942), which held that the national government’s authority extends even to the regulation of wheat grown entirely for home consumption. The bane of federalism jurisprudence to this day, *Wickard* was clearly a wartime decision. The Vietnam War, in turn, left traces on First Amendment law and a few other areas of constitutional law, but none on federalism. The continued erosion of federalism during that era had to do with the civil rights movement, the Great Society, and environmentalism, not with the war.

6. The Supreme Court has granted *certiorari* in four state sovereign immunity cases. In the most important of these cases, which the Court agreed to hear *after* September 11, the Court will decide whether states are immune from suit not only in regular federal courts but also in privately initiated adjudicatory

proceedings in federal agencies. The Fourth Circuit Court of Appeals answered in the affirmative. *South Carolina State Ports Authority v. Federal Maritime Commission*, 243 F.3d 165 (*certiorari* granted October 15). The U.S. solicitor general argued that the case was wrongly decided but nonetheless urged the Supreme Court not to review it—presumably, in the expectation that the Court will affirm the Fourth Circuit.

7. One can imagine a conflict between those rulings and national efforts in the war against terrorism. For example, while federal hate crime statutes are almost certainly unconstitutional under the Court's analysis, the federal government may now be

able to rest a prosecution of such crimes (say, against Muslims) on a national interest that, in pre-9/11 days, would have seemed contrived. Such an interest, however, will still not justify a commerce clause statute.

8. *GDF Realty Investments v. Norton*, 2001 WL 1223519 (S.D. Texas, August 30, 2001).

9. Alexis de Tocqueville, *Democracy in America*, edited by Harvey Mansfield and Delba Winthrop (University of Chicago Press, 2000). See "On the Influence That Democratic Ideas and Sentiments Exert on Political Society," book 2, part 4, chapters 1–7, pp. 639–73.