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# COLLAPSING SPHERES: JOINT TERRORISM TASK FORCES, FEDERALISM, AND THE WAR ON TERROR

SUSAN N. HERMAN\*

## INTRODUCTION

The war on terror has created new frontiers in federalism. Joint Terrorism Task Forces [JTTF] operate on one of those frontiers.

As Willamette University College of Law's 2005 symposium, "Laboratories of Democracy: Federalism and State Independency," demonstrates, Oregon in general and Portland in particular are the pacesetter "laboratories" for our country's experiments in federalism.<sup>1</sup> The people of Portland are highly aware that the Supreme Court has not resolved all issues about when claims of local autonomy will trump the federal government's claim of national interest.

There are several different ways in which the federal war on terror has attempted to enlist state and local law enforcement officials as its "hands and feet."<sup>2</sup> An early example was a fall 2001 FBI program of interviewing, with the aid of local law enforcement officials, thousands of Arab and Muslim men around the country.<sup>3</sup> A more current example is the expanded use of Joint Terrorism Task Forces.<sup>4</sup> These hybrid federal/local law enforcement programs have created a variety

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1. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

2. See Chief Joseph Samuels, President's Message at the Meeting of the International Association of Chiefs of Police, *Strengthening the Relationship with Our Federal Partners* (Apr. 17, 2003) (quoting Attorney General John Ashcroft), available at [http://www.theiacp.org/documents/index.cfm?fuseaction=document&document\\_id=438](http://www.theiacp.org/documents/index.cfm?fuseaction=document&document_id=438).

3. See *infra* text accompanying notes 25-33.

4. See *infra* text accompanying notes 43-74.

of ambiguous relationships between federal and state or local officials, whether they are working together or in parallel, and have muddled the lines of authority and accountability that have characterized our dual sovereignty model of federalism. Both federal programs have met with general acceptance throughout most of the country, but not in Portland.

The issue roiling the Portland City Council when Willamette's 2005 symposium took place was whether to extend Portland's participation in a JTTF for another year.<sup>5</sup> In April 2005, after the symposium, Portland decided to withdraw its officers from the JTTF.<sup>6</sup>

The people of Portland discovered that the secrecy surrounding anti-terrorism efforts and investigations makes it a real challenge to maintain local control of local law enforcement officials engaged in joint federal/local enterprises. Portland decided to maintain its autonomy within its own sphere of operations, to maintain accountability of the executive branch officials within their pay, and to maintain legislative control of policy decisions that otherwise might disappear into the city's executive branch. The debates that took place over these issues in Portland are an interesting model for the rest of the country, where the issues Portland took so seriously barely seem to have been noticed.

In this article, I will first describe, in Section I, how the Supreme Court's dual sovereignty paradigm has been challenged by the war on terror. Section II will discuss the federalism issues raised by the Joint Terrorism Task Forces. These task forces do not come close to violating the constitutional principles of federalism the Supreme Court has set forth<sup>7</sup> because they are the product of voluntary agreement rather than compulsion. Nevertheless, even though Portland can choose whether or not to participate, the form of cooperation created by these joint ventures challenges the ability of any state or city to

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5. See Larry Abramson, *Portland Weighs FBI Pact, Privacy Concerns* (NPR radio broadcast, Feb. 11, 2005). A hearing on renewal of participation had been scheduled for December but was then postponed to allow the succeeding, newly elected city officials to decide the issue. Henry Stern, *Portland May Pull Out of FBI Task Force*, THE OREGONIAN, Dec. 21, 2004, at B01 ("Debate on the task force, as in past years, deeply divided the community.")

6. See Sarah Kershaw, *In Portland, Ore., a Bid to Pull Out of Terror Task Force*, N.Y. TIMES Apr. 23, 2005, at A9; [http://www.aclu-or.org/issues/terrorism/pjtjf/PDX\\_JTTF\\_Revised\\_Resolution0402805.htm](http://www.aclu-or.org/issues/terrorism/pjtjf/PDX_JTTF_Revised_Resolution0402805.htm) (last visited May 29, 2005) (substitute resolution, passed by City Council by a 4-1 vote on April 28, 2005); *ACLU Applauds Portland City Council Ending Role in FBI Joint Terrorism Task Force*, at [http://www.aclu-or.org/issues/terrorism/pjtjf/PJTTF\\_MainPage.htm](http://www.aclu-or.org/issues/terrorism/pjtjf/PJTTF_MainPage.htm) (last visited May 29, 2005).

7. See *infra* text accompanying notes 13-24, 103-104.

maintain accountability of its employees, to maintain any heightened state or local protection of civil rights and civil liberties, and to maintain its own structures governing policy-making authority.

The war on terror has precipitously shifted a tremendous amount of power to the executive branch of the federal government and minimized the role of Congress and the courts,<sup>8</sup> at the risk of undermining the United States Constitution's horizontal system of checks and balances. These joint federal and state/local enterprises might be viewed as weakening the vertical structures of the United States Constitution by collapsing previously autonomous spheres. Portland's experiences with the Joint Terrorism Task Force, like other federal/state skirmishes over the allocation of decision-making authority, also reveal that the war on terror can disrupt a locality's internal system of governance by forcing a shift of the center of policy-making gravity away from legislative bodies and toward the executive branches, where accountability and transparency are minimized.

Section III.A will describe another attempt by a city legislative body to control its local employees: an ordinance in Arcata, California that threatens city officials with a fine of \$57 if they officially assist or voluntarily cooperate with federal agents wielding Patriot Act powers of which Arcata disapproves.<sup>9</sup> The issues concerning preservation of local autonomy in the face of the federal government's conceded right to conduct its own investigations using its own tools anywhere in the country, and the local legislature's struggle to maintain its own policy-making role rather than allow its executive officials to decide for themselves how to deal with federal government requests for assistance or cooperation are the same issues that confronted the Portland City Council in the context of the JTTF debate. Section III.B will go on to describe a contrasting approach to the assertiveness of the Arcata City Council: the experience in New York City, where city executive officials have been allowed to make essentially unilateral decisions about the manner of their cooperation with federal anti-terrorism efforts. In one example, the New York Police Department went into court to ask to be relieved of limitations on their surveillance powers imposed by an earlier consent decree. In another, three different New York City mayors coped with the question of

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8. See, e.g., Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002) (discussing separation of powers and checks and balances issues created by the President's military tribunal order).

9. See *infra* text accompanying note 80.

city/federal relations with respect to the local enforcement of immigration law, all without substantial participation of the New York City Council.<sup>10</sup>

In Section IV, I will describe a few instances in which all branches of state or local government have been preempted by federal law or policy from making their own decisions about their manner of cooperation in the federally led war on terror, including a New Jersey freedom of information law requiring disclosure of the identities of occupants of local jails that was found to be preempted by an interim rule issued by the INS Commissioner when the law would have been applied during the fall of 2001 to reveal the names of federal detainees being held in the state's jails under contract with the federal government.<sup>11</sup> If such preemption is valid, could the Oregon law whose welfare was at the center of the Portland City Council's debates be simply swept out of the way if the United States Attorney General were to decide to preempt that law?

### I. THE DUAL-SOVEREIGNTY PARADIGM

Although federal and state/local law enforcement officers have worked together in the area of crime control in the past,<sup>12</sup> our paradigmatic model for these ventures has been a dual sovereignty model. Under this model, each "sovereign"<sup>13</sup> has a sphere of operations<sup>14</sup> in which it makes its own policy decisions; each controls the executive branch officials it hires to implement its policies; each decides how and to whom its officers will be accountable for their actions, including the extent of civilian review of its law enforcement activities. Although state and local officials must follow the dictates of the federal Constitution, any state may decide to exceed the floor of federal constitutional protection by providing more rights for suspects and defendants within its own sphere. Through its own state constitutional decisions, statutes, regulations, and common law, each state (and to

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10. See *infra* text accompanying notes 84-93.

11. See *infra* text accompanying notes 108-13.

12. See Daniel C. Richman, *The Changing Boundaries between Federal and Local Enforcement*, in 2 BOUNDARY CHANGES IN CRIMINAL JUSTICE ORGANIZATIONS 81 (Nat'l Inst. of Justice ed. 2000).

13. Under the dual sovereignty model, states are sovereigns; the role of state subdivisions, counties, and municipalities, is more ambiguous. See *infra* text accompanying note 104.

14. See Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485 (1987) (exploring the different motivations of judges in drawing the boundary lines between the separate state and federal spheres).

some extent local government) can define what will be considered to constitute intolerable abuse in law enforcement and can decide what measures to take to counter what it defines as abuses. Law enforcement agents must follow the law of each higher entity in the hierarchy—city police, for example, must follow applicable city, state, and federal restrictions—and may ignore the restrictions of those lower in the hierarchy. Thus, because the law is cumulative, the officers are not placed in the position of Pavlov's dogs, asked to follow inconsistent sets of commands. A state may not impose any rules or restrictions that conflict with its federal obligations; a locality may not impose any rules that conflict with its federal or state obligations. Officers need only combine the applicable sets of rules and, by following the most demanding, will be in compliance with all.

The Supreme Court's double jeopardy jurisprudence has created a strong incentive for keeping federal and state criminal enforcement efforts discrete. Because of the Court's dual sovereignty exception, a person may be prosecuted by two different jurisdictions for the same offense, but only if the officers of those jurisdictions have not cooperated too much during the initial investigation and prosecution.<sup>15</sup> I have explained previously how this double jeopardy law can actually impede the implementation of federal interests.<sup>16</sup> Federal officials are discouraged, for example, from offering their assistance in a state civil rights prosecution, and encouraged to sit by and watch a state prosecution flounder so that they can preserve the possibility of initiating their own successive prosecution.<sup>17</sup>

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15. *Bartkus v. Illinois*, 359 U.S. 121, 123-24 (1959) (describing an exception to dual sovereignty successive prosecutions where the dual nature of the proceedings is a "sham" because authorities from the second jurisdiction have been heavily involved in the investigation or prosecution in the first).

16. See Susan N. Herman, *Reconstructing the Bill of Rights: A Reply to Amar and Marcus's Triple Play on Double Jeopardy*, 95 COLUM. L. REV. 1090, 1094-1106 (1995) (arguing that the Supreme Court's decision to adopt a competitive dual sovereignty model as opposed to a cooperative federalism model was not dictated by the Constitution).

17. This, of course, happened in the case of the prosecution of the Los Angeles police officers charged in federal court with violating the civil rights of Rodney King after having been acquitted in state court, as well as in other notorious cases like that of Lemrick Nelson, who was acquitted in state court of murdering Yankel Rosenbaum and then charged in federal court. The order of prosecution can also be reversed. Paul Hill, who was convicted of a federal offense under the Freedom of Access to Clinic Entrances statute, 18 U.S.C. § 248, for killing a doctor who worked at an abortion clinic, was re-prosecuted in state court for murder because the state wished to impose a heavier penalty than had been available under federal law. See Herman, *supra* note 16, at 1090 nn. 1-3.

Going a step further in enforcing the separation of federal and state crime control efforts, the Supreme Court in *Printz v. United States*,<sup>18</sup> interpreted the Tenth Amendment and principles of federalism to prohibit the federal government from “commandeering” state or local law enforcement officials to assist in implementing federal criminal law. The federal government was prohibited from enlisting local law enforcement officials to help conduct background checks on people within their jurisdictions who applied for gun permits.<sup>19</sup> As in the dual sovereignty area, one of the Court’s chief concerns in *Printz* was its desire to preserve separate spheres in which the dual sovereigns will operate.<sup>20</sup> According to Justice Scalia, author of the majority opinion, the lines of federalism are fixed<sup>21</sup> and no matter what the circumstances, the federal government must hire its own enforcement officials to implement federal programs, unless the state is given a choice whether or not to cooperate and voluntarily decides to do so.<sup>22</sup> The federal program, no matter how important, can be permitted to flounder unless Congress musters the funding to employ sufficient federal personnel to implement the program or to bribe state and local officials to participate, so that the lines of accountability will not be blurred.<sup>23</sup> Justice Scalia’s opinion in *Printz* suggests that in addition to the Tenth Amendment, various provisions of Articles I-III embed the principle that there must be dual spheres of sovereignty.<sup>24</sup>

During the fall of 2001, there was a moment where it appeared that this anti-commandeering model might spawn an exception for federal anti-terrorism efforts. The FBI wished to question thousands of Arab and Muslim men around the country, not because they were

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18. 521 U.S. 898 (1997).

19. *Id.* at 902-904. The local law enforcement officers were being asked to provide assistance on an interim basis until a federal system became operative. *Id.*

20. *Id.* at 921-22. Justice Scalia quoted THE FEDERALIST NO. 51, maintaining that the separation of the two spheres provides a “double security” for protecting liberty and checking tyranny. *Id.*

21. *See id.* at 932-33 (describing the Court’s conclusion that the states cannot be compelled to administer a federal program as “categorical” and declaring that balancing federal against state interests as inappropriate where the federal law in question compromises the structural framework of dual sovereignty).

22. *Id.* at 928. If the states do not have a choice, maintained Scalia, they could become the “puppets of a ventriloquist Congress.” *Id.*

23. *Id.* at 929-30 (suggesting that the Constitution contemplates that the state governments will represent and remain accountable to their own citizens). The argument about lines of accountability reiterates a concern expressed by Justice O’Connor in *New York v. United States*, 505 U.S. 144, 168-69 (1992), *see infra* text accompanying notes 88-89.

24. *Id.* at 924.

suspected of terrorism or any crime, but to find out whether they had any useful information. Lacking the manpower to conduct so many interviews, the FBI asked local police chiefs and sheriffs to assist with the interviews.<sup>25</sup> The request for local assistance was reminiscent of the request to local law enforcement officers condemned in *Printz*: the local officers were asked to share their experience with and knowledge of local residents as well as to provide sheer manpower to assist with the federal investigation.

Most local law enforcement officials were eager to cooperate, but not all. Portland, Oregon Chief of Police Mark Kroeker noted that Oregon has a state law, O.R.S. § 181.575 (2003),<sup>26</sup> which prohibits police from collecting or maintaining information about the political, religious, or social views of any individual or group unless the information is part of a criminal investigation and there are reasonable grounds to believe that the subject is or may be involved with criminal conduct.<sup>27</sup> The Portland City Attorney expressed the opinion that some of the questions the FBI wished to pose, if asked of people as to whom there was no “criminal nexus,” would violate the state law.<sup>28</sup> While federal agents are empowered, under the Supremacy Clause<sup>29</sup> to violate state law while implementing a federal program, state and local officers are not. Whether the Portland police might be asked to violate their own employer’s law by participating in the interviews was not the only issue that surfaced. The Chief of Police of Detroit, a

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25. See Fox Butterfield, *A NATION CHALLENGED: THE INTERVIEWS: Police Force Rebuffs F.B.I. on Querying Mideast Men*, N.Y. TIMES Nov. 21, 2001, at B7.

26. O.R.S. § 181.575 provides:

No law enforcement agency, as defined in ORS 181.010, may collect or maintain information about the political, religious or social views, associations or activities of any individual, group, association, organization, corporation, business or partnership unless such information directly relates to an investigation of criminal activities, and there are reasonable grounds to suspect the subject of the information is or may be involved in criminal conduct.

O.R.S. § 181.575 (2003).

27. The law evidently was enacted as part of a compromise to allow employers to get criminal background information on prospective workers. It has not been interpreted by any appellate court, although Portland has been sued a few times for retaining information about political activists, including the intriguingly named case of (Douglas) *Squirrel v.* (then Chief of Police Charles) *Moose*, in which the plaintiff alleged that the police had gathered information on *Squirrel* and other activists who participated in political demonstrations. See *Rop Zone, Portland Chief Denies City Not Cooperating: He Says Police Aiding U.S. Terror Probe*, THE SEATTLE TIMES, Dec. 3, 2001, at B6.

28. See Sam Howe Verhovek, *Federal Effort Does Not Violate Law, Oregon Attorney General Says*, N.Y. TIMES, Nov. 28, 2001, at B8.

29. U.S. CONST. art. VI.



community with a substantial number of Arab and Muslim residents, expressed his own concern that playing the role of a federal terrorism investigator and questioning Arab and Muslim men in his community on behalf of the FBI could compromise his relations with members of his community and impede his ability to do the job he was being paid to do.<sup>30</sup>

In the fall of 2001, any objection or refusal to cooperate in any respect with the federal government's anti-terrorism program was politically loaded. Chief Kroeker, in a subsequent appearance on a nationally televised program on CNN,<sup>31</sup> proclaimed repeatedly that he and the Portland police were "participating 100 percent" with "every effort of the federal government in Portland" including the Joint Terrorism Task Force. "Our heart is there," he said, "but it's the law."<sup>32</sup> The Portland interpretation of how Oregon law applied to these interviews proved controversial. Both the Oregon Attorney General and Multnomah County District Attorney opined that state law did not prevent Portland police from asking the questions on the FBI's list because the interviews were voluntary.<sup>33</sup> The interviews proceeded, after some negotiations about who would ask what, without requiring any judicial intervention or interpretations of what the Tenth Amendment would or would not have required or prohibited. The FBI might have had to negotiate harder in some areas to work out who, as between federal and local agents, would ask what questions under what conditions, but the issue was settled without the intervention of constitutional doctrine and thousands of Arab and Muslim men were questioned. Because the issue was resolved politically, under the watchful eye of the media and the public, there was no need for any court to decide whether or not, as in *Printz*, the local law enforcement officials had a constitutional basis for declining to render their assistance.

Time has passed and it is no longer politically impossible for a state or local official to question aspects of the federal government's anti-terrorism program or even to threaten to withhold cooperation.

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30. Fox Butterfield, *A NATION CHALLENGED: THE INTERVIEWS; Police Are Split on Questioning of Mideast Men*, N.Y. TIMES, Nov. 22, 2001, at A1.

31. *Mornings with Paula Zahn, American Man Found Fighting on Taliban Side in Afghanistan; FBI May Be Easing Restrictions About Spying on Domestic Organizations* (CNN television broadcast, Dec. 3, 2001).

32. Chief Kroeker's solution was that to be on the safe side, federal agents rather than state or local agents should interview the 23 men involved. See *Zone*, *supra* note 27.

33. *Zone*, *supra* note 27; Verhovek, *supra* note 28.

Seven states and 378 cities and counties have now passed resolutions, based on a Bill of Rights Defense Committee [BORDC] model, condemning provisions of the USA PATRIOT ACT<sup>34</sup> and other aspects of the federal government's anti-terrorism activities.<sup>35</sup> Portland passed such a resolution on October 29, 2003;<sup>36</sup> Multnomah County passed a similar resolution on December 9, 2004.<sup>37</sup> These resolutions are based on three premises: 1) under the Supremacy Clause, a state or local entity cannot impede a federal investigation that conforms to federal law,<sup>38</sup> no matter how much the local residents dislike the federal powers being used; 2) in our system of federalism, localities can and should weigh in on the making of federal policy;<sup>39</sup> and 3) state and local governments are entitled to make decisions governing the conduct of their own employees. Some of these resolutions recognize and assert that state and local law enforcement officials need not themselves follow federal procedures with which they disagree, even if those procedures are found to be acceptable under the federal Constitution, and they may instruct local officers not to use the disap-

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34. Pub. L. No. 107-56, 115 Stat. 272 (2001).

35. See Bill of Rights Defense Committee, <http://www.bordc.org> (last visited June 8, 2005) (listing the seven states as Alaska, Colorado, Hawaii, Idaho, Maine, Montana, and Vermont).

36. Portland USA Patriot Act Resolution, at [http://www.bordc.org/portland-res.htm\\_detail.php?id=86](http://www.bordc.org/portland-res.htm_detail.php?id=86) (last visited June 8, 2005) (affirming that the war on terrorism requires cooperation of cities and states, and also 1) affirming Portland's "strong support for the First Amendment right of public demonstrations, vigils, protests, marches and similar forms of protected expression of ideas and views without fear of prosecution under federal terrorism laws," 2) expressing Portland's "strong opposition to the indefinite detention of people who have not been charged with a crime; and measures that target individuals for legal scrutiny or enforcement activity based solely on their religion or country of origin," and 3) requesting Oregon's members of Congress to work to limit the Patriot Act and to enact other legislation attentive to civil liberties concerns).

37. Multnomah County USA Patriot Act Resolution, at <http://www.bordc.org/detail.php?id=67> (last visited June 8, 2005).

38. Whether or not all of the controversial provisions of the Patriot Act are constitutional has not yet been decided for a number of reasons, including the secrecy surrounding their use. See Susan N. Herman, *The USA Patriot Act and the Submajoritarian Fourth Amendment*, 41 HARV. CIV. RTS.-CIV. LIB. L. REV. (2006) (forthcoming) (arguing that the current Fourth Amendment bar, as set by the Supreme Court, is so low that it is not surprising that "the people" believe they are entitled to more protection of privacy than the courts may guarantee).

39. See 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.corporate.findlaw.com/amar/20030307.html> (last visited June 8, 2005) (comparing the BORDC resolutions to the traditional role state and local governments have played in fighting disfavored federal legislation ever since the Virginia and Kentucky resolutions opposed the federal Alien and Sedition Acts in 1798).

proved tactics in their own investigations.<sup>40</sup> Some of the resolutions also raise questions about how far the Supremacy Clause requires state and local entities to go in actively cooperating with federal enforcement efforts with which they disagree.<sup>41</sup>

The same day the Portland City Council passed its own version of this resolution, the Council also agreed to renew Portland's participation in a Joint Terrorism Task Force for that year.<sup>42</sup> It was only after several years of debates and a change of the relevant elected officials that Portland decided in 2005 not to renew its participation.

## II. JOINT TERRORISM TASK FORCES AND FEDERALISM

### A. *The Features and Critiques of the JTTF*

According to the FBI's website, Joint Terrorism Task Forces [JTTF's] are "teams of state and local law enforcement officers, FBI Agents, and other federal agents and personnel who work shoulder-to-shoulder to investigate and prevent terrorism."<sup>43</sup> Although JTTF's were first used in 1980, their number has doubled since September 11, 2001.<sup>44</sup> There are now 66 JTTF's, including one in each FBI field office and others in smaller offices.<sup>45</sup> More than 2,300 personnel work on these task forces nation-wide.<sup>46</sup> The task forces are supposed to be a two-way street, enlisting the numerically superior manpower of the states and localities<sup>47</sup> to complement federal efforts, on the one hand, and sharing information gathered by the federal government with state and local enforcement officials on the other. Some have questioned whether the states and localities are indeed giving more than they receive,<sup>48</sup> but this is one of the many questions that cannot

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40. See, e.g., Arcata, CA resolution, *infra* note 80.

41. See, e.g., Hawaii's Senate Resolution, at [http://www.capitol.hawaii.gov/session2003/bills/scr18\\_.htm](http://www.capitol.hawaii.gov/session2003/bills/scr18_.htm) (last visited June 8, 2005) (opposing use of state funds, "to the extent legally possible," to monitor political and religious gatherings exercising their First Amendment rights).

42. See Stern, *supra* note 5.

43. Joint Terrorism Task Force, at <http://www.fbi.gov/terrorisminfo/counterterrorism/partnership.htm> (last visited June 8, 2005).

44. *Id.*

45. *Id.*

46. *Id.*

47. State and local police officers outnumber FBI agents 60 to 1. *Id.*

48. See Alasdair Roberts, *Big Brother Keeps Secrets Under Wraps*, THE POST-STANDARD, December 19, 2004, at C1.

be publicly debated in any meaningful manner because of the level of secrecy surrounding the operations of the JTTF's.

The terms governing each of these cooperative ventures are set forth in a Memorandum of Understanding [MOU] between the locality and the FBI, the terms of which are often kept secret from the public.<sup>49</sup> The draft MOU the Portland City Council considered has been made public.<sup>50</sup> Under its terms, it appears that Portland police officers assigned to the Portland JTTF [PJTTF] continued to be paid by the city, although their overtime was paid by the federal government.<sup>51</sup> Local officers were sworn in and deputized as Special Federal Officers and received appropriate federal security clearances;<sup>52</sup> they were required to agree not to disclose any classified or sensitive information to non-JTTF members without the express permission of the FBI and to sign non-disclosure agreements,<sup>53</sup> and they were considered to be federal employees "for purposes of defending claims arising out of JTTF activity."<sup>54</sup>

These sections created a somewhat ambiguous, hybrid status for the Portland police participants. On the one hand, they continued to be Portland employees by dint of their salaries and supervision; on the other, they were subject to control by the FBI in a number of respects, including the need to get the FBI's permission before disclosing information about investigations and their own roles in those investigations. The section constituting the Portland police officers as federal employees for purposes of defending claims could be read to provide those officers with immunity against a lawsuit for violating a state law that provides more rights to targets of investigation than federal law—like O.R.S. § 181.575.<sup>55</sup> Other sections of the memorandum provided that state law was not to be supplanted or undermined. Responsibility for the conduct of the Portland officers remained with their Portland police supervisors; their participation was subject to re-

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49. See *id.* (discussing the requests for disclosure of MOU's which were denied by Los Angeles and New York Police Departments). The ACLU has filed a Freedom of Information Act suit seeking information about the terms of these agreements. See Noelle Crombi, *ACLU Wants FBI to Lift Its "Cloak" on Surveillance*, THE OREGONIAN, Dec. 3, 2004, at A01.

50. See Draft of Oregon's Memorandum of Understanding, at [http://www.aclu-or.org/issues/terrorism/pjttf/PJTTF%20MOU%2010\\_04.html](http://www.aclu-or.org/issues/terrorism/pjttf/PJTTF%20MOU%2010_04.html) (last visited June 8, 2005).

51. *Id.* at section VIII.

52. *Id.*

53. *Id.*

54. *Id.* at section IX.

55. O.R.S. § 181.575 (2004); see *supra* note 26 for text.

view by the Portland police Lieutenant “to insure compliance with applicable Oregon statutes and laws,”<sup>56</sup> and the memorandum explicitly stated that “in situations where the statutory or common law of Oregon is more restrictive of law enforcement than comparable federal law, the investigative methods employed by the state and local law enforcement agencies shall conform to the requirements of such Oregon statutes or common law.”<sup>57</sup>

Thus Portland contractually agreed that its officers would remain subject to state and local law and not fully become federal agents permitted to operate under less constrained federal procedures. Department of Justice guidelines, for example, now permit placing an undercover agent in a political or religious meeting even without any suspicion that anyone at that meeting meets the criminal nexus requirement Oregon law imposes.<sup>58</sup> Oregon officers are prohibited from acting in the absence of a criminal nexus, and must also limit their involvement in immigration raids.<sup>59</sup> The document is fairly clear in its instruction to the Portland police officers to follow the greater demands of state law, and former Mayor Vera Katz had declared herself satisfied that the Portland police were complying with state law.<sup>60</sup> Current Mayor Tom Potter, the former Portland Chief of Police, has proved more difficult to satisfy.

Opponents of PJTTF participation regarded the MOU’s attempts to assure respect for the more demanding Oregon state law as insufficient. First, they were wary of simply trusting assurances that state law is being respected when they would not have been able to review whether or not those assurances are accurate.<sup>61</sup> One commissioner said, “I’m not going to take it on faith that the federal government is using our officers in compliance with Oregon law.”<sup>62</sup> The chief issue became how to provide for civilian oversight of the police given the

56. Draft of Oregon’s Memorandum of Understanding, section III B, at [http://www.aclu-or.org/issues/terrorism/pjtff/PJTTF%20MOU%2010\\_04.html](http://www.aclu-or.org/issues/terrorism/pjtff/PJTTF%20MOU%2010_04.html) (last visited June 8, 2005).

57. *Id.* at section IV. C. See also *id.* at Section III. C. (“Failure to abide by local, state, or federal law by a Portland Police Bureau officer can result in the suppression of evidence in criminal trials, in civil liability against the City of Portland or individual officers, and in the criminal prosecution of officers.”).

58. See The Attorney General’s Guidelines on Federal Bureau of Investigation Undercover Operations, at <http://www.usdoj.gov/olp/fbiundercover.pdf> (last visited June 8, 2005).

59. See Zone, *supra* note 27 (discussing a 1987 Oregon law which prevents police from enforcing federal immigration law).

60. Stern, *supra* note 5.

61. *Id.*

62. *Id.* (quoting Randy Leonard).

veil of secrecy surrounding the operations of the JTTF. Opponents alleged that abuses of the anti-terrorism authority have occurred elsewhere<sup>63</sup> and that there is no way for the City Council or the public to know whether or not there have been or will be abuses, as defined by Oregon law, in Portland.<sup>64</sup> Several different concerns were raised about the MOU's blurring of the lines of accountability. Under the MOU, information could be shared with Oregon's United States Senators and Representatives and with the Mayor if the Mayor could obtain an adequate security clearance, but not with other civilians, including the members of the City Council.<sup>65</sup> During the final round of negotiations, the FBI declined to offer the Mayor or the council members the same top level security clearance as the officers who would have been assigned to the PJTTF.<sup>66</sup> Mayor Potter, a former Portland chief of police, acted as police commissioner with oversight of the police department<sup>67</sup> according to Portland tradition. And because of the non-disclosure agreements, the local police officers might not have been able to tell the public or the press whether or not any state, local, or federal agents were spying on religious or political groups or violating the state's law in any other manner.

The non-disclosure agreement created a distinct possibility that violation of the state law by Portland employees could go undiscovered. Although the MOU instructed the Portland officers to comply with state law, it is not clear, given the non-disclosure agreement, that one of the Portland police officers would have been permitted even to report a police colleague for joining in a federal effort in disregard of Oregon law, or even to confess his or her own violation of state law, as this might entail divulging the details of a clandestine federal op-

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63. See, e.g., Testimony of Andrea Meyer, ACLU of Oregon, Portland City Council (Oct. 2003) available at [http://www.aclu-or.org/issues/terrorism/pjtff/PJTTF\\_ARM\\_Testimony\\_2003.pdf](http://www.aclu-or.org/issues/terrorism/pjtff/PJTTF_ARM_Testimony_2003.pdf) (last visited June 8, 2005) (testifying that "an anti-terrorism officer of the Sheriff's department in Fresno, California infiltrated Peace Fresno," a local political group that "was and is not suspected of criminal activity").

64. The ACLU FOIA suit is designed to uncover whether agents investigating terrorism are spying on religious or political activities in Oregon, see Crombi, *supra* note 49. Brandon Mayfield, a Portland lawyer who was arrested for participating in the bombing in Madrid (a charge later dropped when federal authorities realized that his fingerprint did not actually match one found at the scene), was said in court documents to have traveled to and from a mosque, an activity that constituted one of several reasons proffered as justifying an arrest warrant. *Id.*

65. Draft of Oregon's Memorandum of Understanding, section IV B, at [http://www.aclu-or.org/issues/terrorism/pjtff/PJTTF%20MOU%2010\\_04.html](http://www.aclu-or.org/issues/terrorism/pjtff/PJTTF%20MOU%2010_04.html) (last visited June 8, 2005).

66. See Kershaw, *supra* note 6.

67. *Id.*

eration. Since investigations conducted by the JTTF, especially surveillance of a suspect group, are carried out in secret, the targets of surveillance would not be likely to know if Portland police officers were violating state law, or even that they were involved in an investigation, and so it might be that no one would be able to complain of a violation even if one did occur.<sup>68</sup> There was also concern that the activities of the JTTF may not actually be limited to anti-terrorism activities in practice, but may spill over to ordinary criminal law enforcement.<sup>69</sup>

The MOU's command to follow state law respecting the gathering of information was clear but, other than sheer trust, there were few mechanisms for enforcing that command that were not under the control of the FBI. In addition, because the files created by the JTTF are considered to be FBI files, they are not subject to the requirement of state laws that such files be reviewed and purged, which makes it impossible to enforce the Oregon statute's provision against the maintenance of such files.<sup>70</sup>

Another type of accountability argument focuses on the lines of funding rather than supervision. The JTTFs offer a way for the federal government to use local law enforcement officers as its "hands and feet" without footing the bill for their services. As in *Printz*, the argument can be made that if the federal government wants manpower, it must pay instead of conscripting state or local employees.<sup>71</sup> There is also an independent constitutional basis, in the Protection Clause of Article IV, for arguing that it is the responsibility of the federal government to protect the people of Portland against terrorist

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68. The Fresno episode surfaced by accident when the local undercover agent involved died in a motorcycle accident and his actual name was published in the newspaper with his photograph. Some of the peace activists who had been at meetings the agent had attended recognized his picture, registered the difference in the name he had given them, learned of his actual employment, and figured out that he had been assigned to spy on their meeting. This sort of sequence of events is not likely to happen very often. *Accord Peace Group Infiltrated By Government Agent*, DEMOCRACY NOW!, Thursday, October 9, 2003, at <http://www.democracynow.org/article.pl?sid=03/10/09/1556226%20> (last visited June 12, 2005).

69. This has happened in Las Vegas, for example. See Jeffrey Rosen, *Prevent Defense*, THE NEW REPUBLIC, Sept. 6, 2004.

70. Testimony of David Fidanque; Executive Director, ACLU of Oregon, at <http://www.aclu-or.org/issues/terrorism/pjtff/JTTFResTestDavidFidanque033005.htm> (last visited June 12, 2005). The files presumably would also be immune from state disclosure laws and subject only to federal FOIA requests, which may be more burdensome and time-consuming to litigate. *Id.*

71. See, e.g., *Printz v. United States*, 521 U.S. 898 (1997).

attacks.<sup>72</sup> If this is true, the salaries of the JTTF participants should be paid by federal rather than local tax dollars. If the federal government is not paying these officers, under this line of argument, the federal government should not be controlling them even to the extent provided in the draft MOU. The forms of federal control under the MOU, particularly control over the dissemination of information relevant to whether state law has been violated, is in some respects tantamount to federal preemption of state law, accomplished by contract rather than by congressional action. The people of Portland, through their elected representatives, should have some means of reviewing the extent of the resources they are offering the federal government.

Not all of the arguments outlined above were raised during the course of the Portland debates, but the Mayor's and City Council's concerns about accountability proved decisive. Negotiations ultimately proved fruitless and the FBI refused to offer top security clearances to the Mayor or city council members. The City Council therefore voted to withdraw the Portland officers from the PJTTF.<sup>73</sup>

The agent in charge of the Portland FBI office remarked, perhaps wistfully, that he knew of no other local government that has pulled out of a JTTF.<sup>74</sup>

### *B. The PJTTF and the Law of Federalism*

The Portland City Council provided a dramatic model of dual sovereignty federalism in action by taking its responsibilities seriously. Portland's conclusion is a logical culmination of the arguments the Supreme Court has accepted in the dual sovereignty arena and in *Printz*. The City Council's debates demonstrated how difficult it is for local policy makers to fulfill their supervisory and policy-making roles when they cannot have access to relevant information. This difficulty could have become an excuse for the Council to cede all decisions to federal decision makers, but the council members were unwilling to do so. As one Portland Commissioner said "the onus rests on those of us who were elected to govern the city to make sure that here in Portland things are going well."<sup>75</sup> The policy makers

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72. See Jason Mazzone, *The Security Constitution*, \_\_ UCLA L. REV. \_\_ (2005) (forthcoming) (arguing that the federal government's constitutional obligation to protect the states against invasions and rebellions requires anti-terrorism efforts to be federally funded).

73. See Kershaw, *supra* note 6.

74. Stern, *supra* note 5.

75. *Id.*



in other jurisdictions may or may not have inserted provisions similar to those in the PJTTF in their invisible MOU's to ensure that local law will be respected and civilian oversight and accountability preserved. It seems that only in Portland did an official body actively debate the value of the words on paper.

The federal government cannot, because of *Printz*, compel participation in a JTTF,<sup>76</sup> so whether or not to participate is a political decision. Localities are offered the expertise and intelligence gathering capabilities of federal anti-terrorism agents in exchange for signing over some of their employees to a certain degree of federal control. But the policy makers who must decide whether the trade off is worthwhile cannot know how much intelligence or expertise is actually being offered, how much federal agents actually control operations in practice, or whether local officials have actually disregarded or colluded in disregard of state or local restrictions on investigations. The members of the PJTTF and their supervisor at the Portland Police Bureau would have been the only city employees to know what was happening. The Mayor and council members, with a lower security clearance, would have been able to share some but perhaps not all of that information. If the Portland police had become disillusioned or dissatisfied with the workings of the PJTTF, they could have advised the City Council not to renew its agreement and the City Council would then have had to decide whether to accept their recommendation, probably without having access to the information on which that recommendation was based. Under those circumstances, it is likely that the City Council would defer to the officers' superior knowledge of what had been happening. Thus the real decisions about whether the trade off of accountability for information is worthwhile would actually be made by executive branch officials who are less accountable to the public than the legislature.<sup>77</sup>

The JTTF structure, mostly because of the secrecy of its operations, thus impedes the City Council's ability to supervise the activities of its employees and also, as a practical matter, allows those employees to have a weighty influence on the decision about whether or

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76. Some may argue that there should be an exception to *Printz* where the federal government is exercising its war powers. See *infra* notes 115-17.

77. See Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757 (1999) (discussing the low level of accountability of federal law enforcement agents). The Mayor is an exception here, because he is politically accountable to the voters. Contrast the City Council's lack of opportunity to learn what the JTTF's are doing with Congress's oversight capabilities.

not the city will participate. These joint ventures do not commandeer, but they do interfere with the state or city's usual methods of creating accountability and allocating decision-making authority. The Tenth Amendment, as defined in *Printz*, prohibits coercion; it does not so far prohibit interference with a state's decision about how to organize its policy-making authority – the state's separation of powers.<sup>78</sup> Many of the same issues of accountability and autonomy described in *Printz* and the dual sovereignty doctrine are implicated, however, even if Portland's participation is voluntary.

How sharp is the line between cooperation and cooptation? I do not expect or recommend that the Supreme Court will develop a new facet to its Tenth Amendment jurisprudence to render this a judicial rather than a political question. And so it will be the states and localities themselves, through their policy-making bodies, the legislatures, which will have to try to draw these lines. The Portland City Council tried to negotiate the terms of the MOU to provide a greater role for itself in order to fulfill its obligation to its constituents, but this proved impossible.<sup>79</sup> Perhaps the reason the MOU's in other jurisdictions have been kept secret is that one or both of the parties is reluctant to publicize the terms of the deal they have structured. The federal government might well be loath to tell Portland if it has agreed to a sweetheart deal in some other city; the city officials might well be loath to let their constituents know that they have signed away their authority and are simply trusting their own police and the FBI to prevent abuses, including violations of state or local law, from occurring. It is certainly an inconvenience for the FBI to have to negotiate the terms of each JTTF separately, but this balkanization is the essence of our Federalism.

### III. LEGISLATIVE ACCOUNTABILITY

#### *A. Arcata and Accountability*

Another jurisdiction that has been notably assertive in trying to maintain local legislative control over local executive branch officials in the face of potential federal investigations is Arcata, California. Like many other communities, Arcata objected to various provisions of the Patriot Act, but recognized that it did not have the power to

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78. *Printz v. United States*, 521 U.S. 898, 923 (1997).

79. See Kershaw, *supra* note 6.

prohibit federal agents from using those powers in Arcata. Unlike other communities, which passed only resolutions expressing their condemnation of various tactics federal agents have been empowered to use, Arcata passed an actual ordinance, not just a resolution, prohibiting its law enforcement officials from officially assisting or voluntarily cooperating with surveillance activities by federal agents who employ the disapproved procedures.<sup>80</sup> To give its ordinance teeth, the Arcata City Council provided for a fine of \$57 for violating the ordinance, which applies only to the top nine managers of the city, instructing them that they must refer any Patriot Act investigation request to the City Council itself.<sup>81</sup>

To the extent that the Arcata ordinance might be read as instructing or allowing city officials to interfere with federal enforcement efforts, it would be considered unconstitutional in light of the Supremacy Clause. Regardless of a locality's negative opinion of the tactics of federal officers, the locality cannot bind federal officers to its own standards or enforce its own standards in a manner that impedes the federal government's investigation.<sup>82</sup> But the word "cooperation" is vague, and in light of *Printz*, loaded. Would it improperly impede federal officers for Arcata employees to decline to provide them with information about local residents from their own files or computer database? To decline to allow them to use the office copy machine? To decline to provide them with office space? It will be years before the Supreme Court spells out the limits of what a locality may be required to do, or not do, when operating in the no man's land between the protection of the *Printz* anti-commandeering principle and the prohibition of the Supremacy Clause. Meanwhile, the Arcata City Council does seem to have some space in which to decide that it will not go beyond required non-interference by providing assistance of the sort that could not be commandeered.

What is clear is that the Arcata City Council, like the Portland City Council, wanted to preserve for itself the responsibility to make

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80. See, e.g., CITY OF ARCATA, CAL., ORDINANCE NO. 1339 (2003) at <http://www.bordc.org/detail.php?id=119> (last visited June 8, 2005) (Amending the Arcata Municipal Code to Defend the Bill of Rights and Civil Liberties). See also Kevin Fagan, *Arcata The Defiant, Town Ordinance Penalizes Officials Who Cooperate with Patriot Act, but Law May Not Stand Up in Court*, SAN FRANCISCO CHRONICLE, Apr. 13, 2003, at A17.

81. CITY OF ARCATA, CAL., ORDINANCE NO. 1339 (2003) at <http://www.bordc.org/detail.php?id=119> (last visited June 8, 2005).

82. See, e.g., *Olmstead v. United States*, 277 U.S. 438 (1928) (permitting federal officers to use wiretap evidence obtained in violation of a Washington state statute).

sure that things in Arcata are “going well” in their own estimation instead of leaving the critical policy decisions to their executive branch employees. If the City Council, rather than local executive officials, considers federal agents’ requests for assistance with Patriot Act authorized investigations, it is possible that the debates over how far such assistance should go will be no more visible to the public than they would have been in a police department office. The federal investigations will still be shrouded in secrecy. But the decision will be made in a forum with greater accountability and perhaps diversity of viewpoint. And it will be made by the body the people of Arcata have trusted with the authority to make policy. If their ordinance does not violate the Supremacy Clause by going too far in the direction of actually interfering with federal investigators, is there anything unconstitutional about the City Council compelling its employees to abide by their policy decisions by fining them for violations?<sup>83</sup>

### *B. New York City and Accountability*

Not all local legislative bodies have been as assertive as the Portland and Arcata City Councils. In New York City, for example, the City Council has allowed the executive branch to decide several significant issues that have arisen about the relationship of federal and city policies. First, the New York Police Department went to court to seek relief from a pre-September 11 consent decree that had prohibited it from sending undercover agents to infiltrate religious or political organizations.<sup>84</sup> The litigation over this matter was complex and went through several stages,<sup>85</sup> but the City Council made no serious attempt to wrest the policy decisions in question from the city’s executive branch.<sup>86</sup>

Beginning in 1989 with an Executive Order issued by Mayor Ed Koch, New York City had a sanctuary policy which provided that city employees could not ask the immigration status of people they en-

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83. The Second Circuit, in *City of New York v. United States*, 179 F.3d 29, 35 (2d Cir. 1999), held that states do not have an “untrammelled” right to prohibit voluntary cooperation, in a context discussed *infra* at text accompanying notes 87-92.

84. *Handschu v. Special Servs. Div.*, 273 F. Supp. 2d 327, 329-35 (S.D.N.Y. 2003).

85. See Jerrold L. Steigman, Note, *Reversing Reform: The Handschu Settlement in Post-September 11 New York City*, 11 J.L. & POL’Y 745, 765-70 (2003).

86. Several resolutions calling for oversight hearings were introduced, see, e.g., Res. No. 548, N.Y. City Council (2002), at <http://webdocs.nycouncil.info/textfiles/Res%200548-2002.htm?CFID=474918&CFTOKEN=>, but do not seem to have been enacted or to have led to any actions on the part of the City Council.

countered in the course of doing their jobs and, with limited exceptions, could not share with federal officials any information about immigration status that they happened to acquire.<sup>87</sup> In 1996, Congress enacted a statute providing 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 federal immigration authorities [INS], maintaining such information, or exchanging such information with any other federal, state, or local government entity.<sup>88</sup> Mayor Rudolph Giuliani challenged the constitutionality of this statute as applied to New York City, arguing, *inter alia*, that the Tenth Amendment entitled New York City to make policy decisions respecting control of its own employees.<sup>89</sup> When the court ruled that the federal law preempted the city's policy under the circumstances presented by the case, Mayor Michael Bloomberg set out on the difficult and politically charged task of forging a new policy. The city's sanctuary policy had been motivated by a concern that undocumented aliens might fear to approach or cooperate with city agencies if they were afraid that the City would turn them over to federal authorities for deportation, and that the City would therefore be hampered in such functions as providing protection to crime victims or obtaining the cooperation of witnesses.<sup>90</sup> In his Executive Order, the Mayor created a modified "Don't Ask, Do Tell" policy, attempting to accommodate the requirements of the federal statute and the local policy objectives.<sup>91</sup> Throughout the deliberations and public dis-

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87. New York City Mayoral Exec. Order No. 124 (Aug. 7, 1989) (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).

88. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 642, Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-707 (1996).

89. *City of New York v. United States*, 179 F. 3d 29, 31-34 (2d Cir. 1999).

90. It is no coincidence, of course, that New York City is home to a large immigrant population. For an opposing point of view on the desirability of and motivation for sanctuary laws, see Heather MacDonald, *The Illegal-Alien Crime Wave*, 14 *City Journal* 46 (2004) (describing sanctuary laws as dangerous "pandering" to immigrant communities).

91. New York City Mayoral Exec. Order No. 41 (Sept. 17, 2003). The order authorizes a New York City officer or employee to inquire about immigration status only if 1) that status is necessary for 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; police officers may not inquire about the immigration status of crime victims, witnesses, or others seeking assistance, and may authorize disclosure of immigration status if "such disclosure is necessary in furtherance of an investigation of potential terrorist activity. The Mayor's original attempt at a revised policy, in May 2003, was narrower in a number of

cussions about the content of this controversial policy, the New York City Council considered weighing in, but did not actually do so.<sup>92</sup> The New York City Council did adopt a resolution opposing various Patriot Act provisions, similar to the resolution adopted by Portland, on February 4, 2004.<sup>93</sup>

Other localities, of course, have different stories to tell. The City of Los Angeles, for example, still has a policy opposing providing immigration information to federal authorities.<sup>94</sup> Under this policy, Special Order 40, a Los Angeles police officer who notifies federal immigration authorities about an illegal alien picked up for minor violations faces disciplinary sanctions.<sup>95</sup> Los Angeles adopted a Bill of Rights Defense Campaign resolution on January 21, 2004, around the same time as New York City.<sup>96</sup>

At the federal level, critics of the Bush administration anti-terrorism policies have complained that Congress is not providing sufficient oversight over the executive branch's investigations and other operations.<sup>97</sup> The same concern about unconstrained executive authority should echo in state and local assemblies as well.

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respects and met a public outcry, showing that executive officials are certainly also subject to political accountability. Alisa Solomon, *Don't Ask Don't Tell: Outcry Over New City Policy on Reporting the Undocumented Stuns the Mayor*, VILLAGE VOICE July 9, 2003, available at <http://www.villagevoice.com/news/0328,solomon,45387,1.html>.

92. See New York City Council, <http://www.nycouncil.info/> (last visited June 8, 2005).

93. Bill of Rights Defense Committee, <http://www.bordc.org/detail.php?id=69> (last visited June 8, 2005).

94. Special Order No. 40 from LAPD Police Chief Daryl F. Gates (Nov. 27, 1979) (mandated by the Los Angeles City Council).

95. *Id.* The order also prohibits officers from "initiating police action where the objective is to discover the alien status of a person." *Id.*

96. Bill of Rights Defense Committee, <http://www.bordc.org/detail.php?id=58> (last visited June 8, 2005).

97. See, e.g., Frank Davies, *Patriot Act is Important Legacy of Sept. 11 Attacks*, MIAMI HERALD, Sept. 8, 2002 (noting the fear that the Patriot Act might "lead to domestic spying on a large scale, with infringement of citizens' rights and little congressional oversight"); Rafael Lorente, *Attacks Left Americans Fearing for their Security and their Liberties*, SUN-SENTINEL (Fort Lauderdale, FL), Sept. 7, 2003, at A1 (quoting Christopher Pyle, a professor at Mount Holyoke College and a former Army Intelligence officer who worked for Senate Frank Church's Select Committee on Intelligence, as fearing that "[w]e are in a situation now where our fear of the terrorist threat has driven us to create the intelligence apparatus of a police state," and as having argued that "modern computer technology, in the hands of an overzealous Department of Justice with little congressional oversight, could be a dangerous new weapon"); *First Things First*, Editorial, WASH. POST, Nov. 8, 2004, at A24 (citing a report from the American Enterprise Institute that demonstrates that "neither Congress nor the Bush administration ever conducted any real risk assessment or applied any real oversight" to the Department of Homeland Security despite an "enormous amount of new funding").

## IV. PREEMPTION AND ACCOUNTABILITY

The New York City sanctuary policy, no matter what branch of the City government adopted it, was displaced by a federal statute in which Congress valued federal interests—in enforcing immigration law—above what the City had determined to be its own local interest—in avoiding provision of incentives for undocumented aliens to remain underground even if they became crime victims or necessary witnesses.<sup>98</sup> The Second Circuit ruling that the federal statute preempted the city policy, however, was quite narrow and left room for a Tenth Amendment based argument that Congress may not interfere with the city's ability to set policy for and control its own employees.<sup>99</sup> The court found that neither the City nor the state had in fact made a general policy decision about the need to protect confidential information like immigration status.<sup>100</sup> The Executive Order creating the sanctuary policy was very specific and provided only that one particular type of information—immigration status—could not be disclosed to one particular type of recipient—federal immigration officials.<sup>101</sup> If New York City or State were to adopt a general confidentiality policy, the court suggested, a preemption argument might then fail because federal interests, as *Printz* found, cannot be exalted at the price of subjugating state or local employees and compelling them to serve federal interests above the interests of their own employer.<sup>102</sup>

The power of the federal government to preempt state or local law is restrained by the Tenth Amendment, but the contours of the Tenth Amendment with respect to issues like these are far from fully defined. The Supreme Court has decided only two cases explicating its current view of the Tenth Amendment's anti-commandeering principle. Before *Printz*, the Court had ruled, in *New York v. United States*<sup>103</sup> that the Tenth Amendment prohibits federal commandeering of a state legislature. In her opinion for the Court, Justice O'Connor expressed a concern about accountability that was later reiterated in *Printz*: If the federal government orders a state legislature to take a certain action, how will voters know whom to blame if they dislike

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98. 179 F. 3d 29, 32-33 (2d Cir. 1999).

99. *See id.* at 35-37.

100. *See id.* at 36-37.

101. *See id.*

102. *Id.* at 34-37.

103. *New York v. United States*, 505 U.S. 144, 161-66 (1992).

that action, or whom to diselect?<sup>104</sup>

The same concern could be raised about the revised New York City sanctuary policy. If city residents are angry when a city employee discloses someone's immigration status to federal officials, pursuant to federal request, the lines of accountability are blurred regardless of whether the inquiry was mandatory.<sup>105</sup> City taxpayers pay the salary of the employee but can control neither the employee's actions nor the use of information acquired working in an official capacity. Even if city employees are not being "commandeered," because they are not actually compelled by the federal government to do anything, the city is being prohibited from creating policy that its employees must follow and from sanctioning them if they fail to follow that policy. This means that the city council, the legislative branch, cannot make final policy decisions and that executive branch officials, perhaps even low level employees, will have the power to decide when to disclose information to the federal government. Policy and practice could vary among the city's agencies. Power shifts to the executive branch again, where decisions in individual cases may be made in a manner invisible to the public and where the state or locality's own decision about how to allocate policy making authority is subverted.

There has been another interesting example of a judicial finding of federal preemption of a state policy decision respecting the conduct of the war on terror within that state. Among those detained by federal authorities in the aftermath of September 11, 2001 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.<sup>106</sup> Many of these detainees were housed in New Jersey jails, including the Hudson and Passaic County jails, pursuant to a voluntary agreement the federal government had previously entered with New Jersey state authorities to house federal

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104. *Id.* at 168-69.

105. I have always had doubts about the persuasiveness of the public relations assumptions underlying Justice O'Connor's accountability argument. Local officials would be quick to proclaim that they are acting under federal government compulsion and should not be blamed for unpopular actions about which they had no choice. If local officials, like the county sheriffs in *Printz*, have a choice about whether to cooperate with a federal program, they may be subject to a public check on that decision if they are elected officials. The same will not be true of all city employees, most of whom are appointed rather than elected.

106. Ronald K. Chen, *State Incarceration of Federal Prisoners After September 11: Whose Jail Is It Anyway?*, 69 BROOK. L. REV. 1335, 1336 (2004).



detainees in New Jersey's excess jail space.<sup>107</sup>

The Department of Justice refused to release the names of these special interest detainees.<sup>108</sup> A lawsuit brought in New Jersey state court, *ACLU of New Jersey, Inc. v. County of Hudson*,<sup>109</sup> sought to compel the sheriffs and wardens of the Hudson and Passaic jails to comply with a long-standing provision of New Jersey state law mandating public disclosure of the identities of the inmates of New Jersey jails.<sup>110</sup> The trial court granted the plaintiffs partial summary judgment, ordering compliance with the state law after a limited stay of ten days granted at the request of the United States (which had been afforded defendant-intervenor status).<sup>111</sup> The United States promptly filed an appeal of this decision; 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.<sup>112</sup> The New Jersey appellate court held that New Jersey law had been validly preempted and reversed the trial court's order of disclosure.<sup>113</sup>

As in the PJTTF, a local interest in the use of local resources—here in the use of jail space paid for by New Jersey taxpayers—was pitted against the federal interest in conducting the war on terror in whatever manner the federal government deems appropriate—in this case a claim of need for secrecy of the identities of detainees. As in Portland, those who had to make decisions about the use of the local resources had no meaningful way to evaluate the federal claim of need. Because the federal claim was held to prevail, New Jersey was left with the same choice as Portland: to deny the use of its local re-

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107. *Id.* at 1338.

108. *See* *Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice*, 331 F.3d 918, 920 (D.C. Cir. 2003) (upholding refusal to make this information available under the Freedom of Information Act).

109. *ACLU of N.J., Inc. v. County of Hudson*, 799 A.2d 629, 635 (N.J. Super. Ct. App. Div. 2002).

110. N.J. STAT. ANN. § 30:8-16 (West 1997).

111. *ACLU of N.J.*, 799 A.2d at 636.

112. *Id.* at 639.

113. *Id.* at 655; *see* *Chen*, *supra* note 106 at 1339-45 (giving a full account of this litigation).

sources to the federal government or to abide by the federal government's impenetrable decisions about how those resources will be used. Only by refusing to contract with the federal government for use of New Jersey jail space could New Jersey implement its own disclosure policies or preserve its own autonomy to make policy decisions. As in Portland, a negotiated contract that would allow the state's interest to be served would not be a likely result. The federal government is as unlikely to cede to New Jersey the decision of when it is appropriate for inmates to be held in secret or incommunicado as it was to grant high level security clearances to Portland officials. The joint enterprise is based on asymmetrical power and so the only true power of the locality is to decline to participate at all.

One might question allowing a federal administrative official, rather than Congress, the authority to preempt state law in such a peremptory fashion.<sup>114</sup> But the use of the preemption doctrine by the New Jersey court in this case accomplished exactly what residents of Portland feared—federal policy supplanted competing local concerns, even when the state's own policy choices, providing a greater level of protection than federal constitutional law would require, were embodied in a statute. Portland residents feared even the subtle possibilities for encroachment presented by a JTTF agreement that on its face purported to honor state law. There was nothing subtle about the federal government's blunt action with respect to the New Jersey sunshine law. The law was perceived as conflicting with the manner in which the federal government wished to conduct the war on terror, and so it was swept aside.

If Commissioner Ziglar could preempt New Jersey law in this manner, without congressional action or even a notice and comment period, could Attorney General Gonzales simply preempt the Oregon law that the Portland City Council has been struggling to honor and provide that participants in a PJTTF shall follow the more lenient federal rather than the more demanding state restrictions on their conduct? Would politics prevent the Attorney General from taking such an action, making it unnecessary for the courts to define the limits of the Tenth Amendment? If Portland remains the only jurisdiction to have insisted on its autonomy, it is less likely that other jurisdictions

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114. See Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1329-30 (2004) (arguing that preemption should be found only when Congress has expressly preempted state law or when federal and state laws are mutually exclusive).

would rise up to defend Portland's right to implement its own state and local policies. If such a federal action were politically feasible, would the Tenth Amendment be interpreted as limiting the federal preemption power in the Oregon hypothetical or with respect to New York City's sanctuary policy (assuming that policy were to meet the condition of becoming part of a deeper rooted legislative scheme protecting privacy)?

How sharp is the line between commandeering and generous application of the preemption doctrine? How sharp is the line between a local policy that is more protective of rights than the federal Constitution requires and a local policy that conflicts with federal law or interests?

### CONCLUSION

Because the examples given above all concern the conduct of the "war" on terror, some will argue that our usual models of federalism must give way to an extraordinary and exceptional need for federal power. If the war powers can justify incommunicado detention of citizens who have not been charged with or convicted of a crime<sup>115</sup> or allowing the government to withhold information about how it is using its surveillance powers,<sup>116</sup> perhaps even Justice Scalia would find the Tenth Amendment prohibition against commandeering inconclusive in this exceptional setting. If Article II war powers do provide a basis for the FBI to commandeer Portland, Arcata, or New York City law enforcement officials, then questions about how to draw boundaries under *Printz* could become moot. I believe that it would be a poor idea for the federal government to create exceptions to our usual structures of federalism for this amorphous "war" of indefinite duration.<sup>117</sup> The examples of federal/state/local interactions discussed in this article show the practical utility of federalism as a political rather

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115. See *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2715-16 (2004) (leaving open the question of whether incommunicado detention of United States citizen not charged with a crime is constitutional).

116. See *ACLU v. United States Dep't of Justice*, 265 F. Supp. 2d 20, 21 (D.D.C. 2003); *ACLU v. United States Dep't of Justice*, 321 F. Supp. 2d 24, 27 (D.D.C. 2004) (ruling that government could claim a national security exemption to the Freedom of Information Act and decline to divulge information about how or even how often Patriot Act surveillance powers were being used).

117. See Richard T. Ford, *Police Don't Fight Wars*, 29 BOSTON REV. 1 (Dec. 2004), available at <http://bostonreview.net/BR29.6/ford.html> (suggesting that the war powers analogy is inapt because local police do not fight wars).

than a judicial doctrine. It is interesting that the Tenth Amendment did not need to be called into play to require the Portland or Detroit Chiefs of Police to interrogate Arab and Muslim men not suspected of any crime or to authorize them to decline. The politics of the day pressured many local law enforcement officials to cooperate. If most communities agree with a federal program, isolated instances of rebellion do not impede the federal program. It is feasible for the FBI to send a few extra agents to Portland or Detroit if local agents cannot or will not participate in their interrogation program in isolated spots. It is only if many communities disagree with an FBI program that federal resources will be challenged. At that point, the FBI will be pressured to change its tactics because it may not have the resources to conduct a program that is widely unpopular. Thus federalism can act as a popular check on federal tactics neither the courts nor Congress have prohibited.<sup>118</sup> The Bill of Rights Defense Committee resolutions are one interesting source of information about what concerns people around the country have about federal surveillance techniques. The negotiations over JTTF's, at least in Portland, have been another.

Daniel Richman has argued that the political process of federal/state negotiations over the terms of JTTF participation will promote both accountability and effectiveness in the war on terror because local officials, having an important service to sell, will have the bargaining power to insist on accountability and to protect their own vision of the appropriate balance between security and liberty.<sup>119</sup> Under this optimistic theory, one might argue that the same dialectic could work to achieve a proper balance between state, local, and federal concerns about the local enforcement of immigration law and other issues of apparent conflict. New Jersey, having jail space the federal government desires, has the bargaining power to decide whether to continue to contract with the federal government if the state's policy about disclosure of the identities of residents is not to be honored. And perhaps the political dialectic could generally act as a "self-correcting constitutional compass"<sup>120</sup> that would inspire the federal government to take greater account of grass roots concerns about providing adequate privacy for people's religious and political activi-

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118. See Ann Althouse, *The Vigor of Anti-Commandeering Doctrine in Times of Terror*, 69 BROOK. L. REV. 1231, 1250-61 (2004).

119. See Daniel Richman, *The Right Fight: Local Police and National Security*, 29 BOSTON REV. 1 (Dec. 2004), available at <http://bostonreview.net/BR29.6/richman.html>.

120. See Burt Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725, 731 (1981).

ties, library records, and Internet surfing.<sup>121</sup>

This view may be overly optimistic. One of the very few other academic commentators to have focused on the role of local policing in the war on terror, William Stuntz, predicts that the courts will not find anything unconstitutional about the federal legislative powers that communities like Portland, Arcata, and New York City have condemned and that, instead of operating as a brake on a federal juggernaut, states will then feel encouraged to board the bandwagon and confer the same powers on themselves.<sup>122</sup>

Perhaps pessimistically, I think that Stuntz is more likely to be right in predicting a constitutional race to the bottom than Richman is in predicting a happy synthesis resulting from the federalism dialectic being conducted in the Portland City Council. For one thing, Portland is no more typical of the rest of the country than Arcata. Only if there were widespread opposition to federal policies would the federal government have to change its policies in any significant way, even if it is inconvenient to negotiate individual deals. Furthermore, the fact that so many MOU's are not public and so contracts between the federal government and individual local governments cannot be compared means that there is little possibility of collective action having an impact. Private deals may exist that differ from jurisdiction to jurisdiction, but if they are secret, other communities will not be inspired to insist on a similar deal and the public may not be aware that so many issues are being swept under the rug.

The fact that cities are not "sovereigns" in the same constitutional sense that states are complicates the application of federalism doctrine to most of the examples described above. In *Printz*, county sheriffs, described as state employees, occasioned a discussion of federal interference with the state's sphere of operations. In many of the examples described above, individual cities were objecting to tactics their states may not have found objectionable. After the Portland City Attorney expressed the opinion that the FBI's proposed questioning of Arab and Muslim men would violate Oregon State law, and that it would be recalled, lawyers for the county and state declared that it would not.<sup>123</sup> How much autonomy a city has will vary depending on the state's local government law. One commentator has argued that

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121. See Althouse, *supra* note 118, at 1250-61.

122. William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2156-60, 2181 (2002).

123. See *supra* text accompanying notes 28 and 33.

our notions of federalism are actually an impediment to effective federal and local joint ventures because a state government with discrete legal rights is interposed between the national government and the cities, the principal partners of federal law enforcement officials in anti-terrorism efforts.<sup>124</sup> In the PJTTF example, the city was negotiating directly with the FBI, but the state always looms in the background.

It is not surprising that the shock waves of the war on terror are shaking relationships among political entities within the states. The horizontal checks and balances among the three branches of the federal government have been profoundly shaken.<sup>125</sup> As described above, the vertical checks of federalism—the relationships among federal, state, and local powers—are also being challenged, although mostly in ways that are not generally apparent. The discussion of the Portland debates about the problems created by even a heavily negotiated MOU suggests that in most other cities where JTTF's operate, some quantum of local power and money may well have been transferred to federal control, out of the view of the public. In times of national crisis, power tends to flow to the federal executive branch from all directions, as if by centripetal force. What may be a surprising outcome, and one no one seems to have observed, is that the same forces that are leading to expanded presidential authority—the desire to enable secret, coordinated, and prompt action—are leading to a similar dislocation of power within municipalities. The discussion of the PJTTF demonstrates how policy-making authority over anti-terrorism investigations—including questions about how much power and money to cede to the federal government and how vigorously to implement special state or local protections of privacy and liberty—tends to lodge in the executive branch of local governments instead of the local policy making bodies. But not in Portland.

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124. Edward Rubin, *Federalism Won't Work*, 29 BOSTON REV. 1 (Dec. 2004), available at <http://bostonreview.net/BR29.6/rubin.html>.

125. See Susan N. Herman, *The USA Patriot Act and the USA Department of Justice: Losing Our Balances?*, THE JURIST (Dec. 4, 2001), at <http://jurist.law.pitt.edu/forum/forumnew40.htm>.

