

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

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### 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

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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 **Error! Bookmark not defined.-Error! Bookmark not defined.**

4. See *infra* text accompanying notes **Error! Bookmark not defined.-Error! Bookmark not defined.**

hybrid federal/local law enforcement programs have created a variety 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

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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/pjttf/PDX\\_JTTF\\_Revised\\_Resolution0402805.htm](http://www.aclu-or.org/issues/terrorism/pjttf/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/pjttf/PJTTF\\_MainPage.htm](http://www.aclu-or.org/issues/terrorism/pjttf/PJTTF_MainPage.htm) (last visited May 29, 2005).

7. See *infra* text accompanying notes **Error! Bookmark not defined.-Error! Bookmark not defined., Error! Bookmark not defined.-Error! Bookmark not defined.**

choose whether or not to participate, the form of cooperation created by these joint ventures challenges the ability of any state or city to 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 surveil-

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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 **Error! Bookmark not defined.**

lance powers imposed by an earlier consent decree. In another, three different New York City mayors coped with the question of 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?

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10. See *infra* text accompanying notes **Error! Bookmark not defined.-Error! Bookmark not defined.**

11. See *infra* text accompanying notes **Error! Bookmark not defined.-13.**