

JOINT TERRORISM TASK FORCES AS A WINDOW INTO THE SECURITY VS. CIVIL LIBERTIES DEBATE

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I. INTRODUCTION

From torture, indefinite detention, and warrantless wiretapping to invasive physical searches at airports, the United States has been grappling with national security-justified intrusions on civil liberties for ten years now.¹ The debate frequently takes the form of (a) “9/11 changed everything, and we can’t go back to a 9/10 mindset”;² (b) “if we give up any little bit of our civil liberties, the terrorists have

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¹ See, e.g., Frederick P. Hitz, *Unleashing the Rogue Elephant: September 11 and Letting the CIA be the CIA*, 25 HARV. J.L. & PUB. POL’Y 765, 766 (2002) (arguing for less restrictions on the CIA, subject to balancing the need for civil liberties); Michael P. O’Connor & Celia Rumann, *Going, Going, Gone: Sealing the Fate of the Fourth Amendment*, 26 FORDHAM INT’L L.J. 1234, 1234 (2003) (arguing that the attacks on September 11 “set in motion a chain of events, which have undermined the constitutional limits of executive power”).

² Commander Glenn Sulmasy, *Boumediene v. Bush: A Catalyst for Change*, 21 REGENT U. L. REV. 363, 363-64 (2009) (“[I]n many regards, the worst part of the decision in *Boumediene* is that it really returns us back to the 9/10 mentality.”).

won”;³ or (c) “infringing our civil liberties will weaken our national security.”⁴

Matthew Waxman has argued that nearly all legal scholarship on national security has focused entirely on the “horizontal federalism” (i.e., traditional separation of powers) and the federal government’s role in managing national security, while largely ignoring “vertical federalism” (i.e., state-federal power distribution).⁵ In the context of counterterrorism, the federal focus has been, at first glance, understandable, given that the primary American response to the 9/11 attacks has been carried out by U.S. soldiers (and drone aircraft) in Afghanistan and Pakistan and by FBI agents and federal prosecutors within the country.⁶

This does not mean, however, that terrorism is a matter only for the federal government with no role at all for state and local law enforcement officers to play.⁷ Some acts of terrorism violate state law as well as federal law; for example, Terry Nichols was convicted in state as well as federal court on murder and terrorism-related charges based on his role in the 1995 bombing of the Murrah Federal Building in

³ Often this argument is punctuated by distorting a Benjamin Franklin quotation into “Those who would trade liberty for security, deserve neither.” See, e.g., Gus Hosein, *Returning to a Principled Basis for Data Protection*, 84 CHI.-KENT L. REV. 803, 803 (2010) (noting the quote’s frequent use in this debate); Dan Eggen, *Gonzales Echoes Defense of Wiretaps*, WASH. POST, Jan. 25, 2006, at A07 (noting a group of students protesting during then attorney general Alberto Gonzales’ appearance at Georgetown law school using a paraphrase of the famous quote). The actual quotation is, “Tho[s]e who would give up *e[ss]ential Liberty*, to purcha[s]e a little *temporary Safety*, de[s]erve neither *Liberty* nor *Safety*.” BENJAMIN FRANKLIN, AN HISTORICAL REVIEW OF THE CONSTITUTION AND GOVERNMENT OF PENNSYLVANIA 290 (1759).

⁴ See, e.g., GARRETT M. GRAFF, *THE THREAT MATRIX: THE FBI AT WAR IN THE AGE OF TERROR* 493 (2011) (noting that the FBI director argued that “[t]he nation’s security rested with its primacy of law”); *Transcript: Obama’s Speech to Congress*, CBS NEWS, July 27, 2009, <http://www.cbsnews.com/stories/2009/02/24/politics/main4826494.shtml> (“[L]iving our values doesn’t make us weaker, it makes us safer and it makes us stronger.”).

⁵ Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 STAN. L. REV. (forthcoming 2012).

⁶ See Note, *Responding to Terrorism: Crime, Punishment, and War*, 115 HARV. L. REV. 1217, 1221, 1223 (2002).

⁷ See *infra* notes 8-9 and accompanying text.

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Oklahoma City,⁸ and the Beltway Snipers (John Allen Muhammad and Lee Boyd Malvo) who terrorized the Washington, D.C. area in 2002 were prosecuted only in Virginia and Maryland state courts.⁹

Other counterterrorism investigations involve cooperative ventures between state and federal forces, typically through a Joint Terrorism Task Force (JTTF).¹⁰ In a typical JTTF arrangement, the local police department assigns a number of its officers to work on the task force with federal agents.¹¹ Although the local officers remain paid by their local department, they are considered federal agents for most purposes, including the United States' *respondeat superior* liability under the Federal Tort Claims Act for their tortious conduct.¹² As of 2011, over one hundred American cities are participating in JTTFs.¹³

The pooling of state and federal resources provides for a sum greater than the parts, as there are investigative advantages that accrue from combining federal and local law enforcement agents into a unified terrorism task force.¹⁴ Federal agents have access to a wider variety of investigative tools, such as national security letters¹⁵ and foreign intelli-

⁸ Tim Talley, *Religion Credited in Nichols Jury's Choice: Prison Conversion Helped Spare Oklahoma City Conspirator, Lawyers Say*, WASH. POST, June 13, 2004, at A12.

⁹ Thomas D. Nolan III, Note, *The Indoctrination Defense: From the Korean War to Lee Boyd Malvo*, 11 VA. J. SOC. POL'Y & L. 435, 451 (2004).

¹⁰ The very first JTTF arose in New York City as an effort to minimize turf battles between the FBI and the New York Police Department. See GRAFF, *supra* note 4, at 158-59.

¹¹ See generally FED. BUREAU OF INVESTIGATION, JOINT TERRORISM TASK FORCE MEMORANDUM OF UNDERSTANDING FORM, http://www.iir.com/Information_Sharing/global/resources/fusioncenter/joint_terrorism_task_force_mou.pdf [hereinafter JTTF MOU].

¹² *Id.* at art. 8, 10.

¹³ GRAFF, *supra* note 4, at 159.

¹⁴ See *infra* notes 15-22 and accompanying text.

¹⁵ 18 U.S.C. § 2709 (2006). National security letters allow the federal government to obtain "subscriber information and toll billing records information, or electronic communication transactional records" from telecommunications companies upon request by the FBI Director or appropriate designee, without the need for any court order; and as a special bonus, upon certification, the FBI Director or designee can order that the recipient of the national security letter not disclose anything about the government's request. *Id.*

gence surveillance warrants,¹⁶ none of which are available to local or state law enforcement officers.¹⁷ Local police officers bring a different set of advantages and experiences to the table.¹⁸ Because the local police department is typically much larger than the corresponding FBI office,¹⁹ it has the resources to engage in community policing—that is, “police engagement, collaboration, or partnership with private citizens.”²⁰ Community policing not only decreases adversarial relations between the police and the community but also increases police effectiveness.²¹ Community policing also means that local police officers know their communities and thus may have more “on the ground” intel-

¹⁶ 50 U.S.C. § 1804 (Supp. III. 2009); 50 U.S.C. § 1805 (Supp. III. 2009). In a terrorism investigation with foreign links, the federal government can seek a FISA warrant to spy on a person—even an American citizen—by demonstrating that there is probable cause to believe that its target is an agent of a foreign power and “that a significant purpose of the surveillance is to obtain foreign intelligence information.” 50 U.S.C. § 1804. With a FISA warrant in hand, federal agents are lawfully permitted to engage in electronic surveillance inside the United States without having to satisfy the arguably more demanding probable cause to believe that a crime has been or is being committed standard for obtaining an electronic surveillance warrant for regular criminal investigative purposes. 50 U.S.C. § 1805.

¹⁷ 18 U.S.C. § 2709 requires that the Director of the FBI, or his designee, make any requests for telephone toll or transaction records from service providers. 18 U.S.C. § 2709. 50 U.S.C. §§ 1804-1805 require that any person seeking a warrant be a federal officer. 50 U.S.C. §§ 1804-1805.

¹⁸ See *infra* notes 19-22 and accompanying text.

¹⁹ For example, the Portland Police Bureau has close to 1000 sworn officers, and almost 300 additional nonsworn officers. See PORTLAND POLICE BUREAU, ANNUAL STATISTICAL REPORT 8 (2009), <http://www.portlandonline.com/police/index.cfm?c=29863&a=346238>. By contrast, the FBI has a total of about 13,500 special agents across the entire country. GRAFF, *supra* note 4, at 521. To put that in context, New York City’s police department itself has almost three times as many officers (36,000) as the entire FBI does. *Id.*

²⁰ See Tracey L. Meares, *Praying for Community Policing*, 90 CALIF. L. REV. 1593, 1598 (2002); see also Kami Chavis Simmons, *New Governance and the “New Paradigm” of Police Accountability: A Democratic Approach to Police Reform*, 59 CATH. U. L. REV. 373, 423 (2010) (quoting WESLEY G. SKOGAN & SUSAN M. HARTNETT, COMMUNITY POLICING: CHICAGO STYLE 6-7 (1997)) (noting the community policing elements of “(1) ‘organizational decentralization and a reorientation of patrol in order to facilitate communication between police and the public’ (2) ‘commitment to broadly focused, problem-oriented policing’”).

²¹ See James Forman, Jr., *Community Policing and Youth as Assets*, 95 J. CRIM. L. & CRIMINOLOGY 1, 9 (2004); Michael D. Reising, *Community and Problem-Oriented Policing*, 39 CRIME & JUST. 1, 29-30 (2010).

ligence than their federal counterparts.²² This can be valuable both in terms of helping not only to identify potential threats but also to identify investigations of persons or groups known to be innocuous.

At the same time, JTTFs do raise some potential civil liberties concerns.²³ Because the JTTF may have access to classified government information, the local police officers usually undergo background checks to obtain “top secret” clearance;²⁴ as a result, the JTTF officers may know things that they are not allowed to share with their police supervisors or police chief, if those persons lack the necessary security clearance.²⁵ JTTFs provide an ideal subject to further explore the security versus liberty debate in the vertical federalism context.

In Part II, I examine the policy and institutional causes behind the reluctance, if not refusal, among federal intelligence agencies to share information with one another and, more importantly, with criminal investigative agents in the years leading up to 9/11.²⁶ Part III reviews the history of Portland’s experience with the JTTF, from its decision in 2005 to withdraw from the task force to the events that spurred its 2011 decision to rejoin the task force, albeit under modified conditions.²⁷ Part IV uses federalism as an analogy to examine the concerns raised by JTTFs, and Part V considers the solutions of interdiction (i.e., forbidding JTTFs) versus oversight.²⁸

²² See Meares, *supra* note 20, at 1598.

²³ See, e.g., *Joining the FBI Joint Terrorism Task Force Is Still a Bad Idea*, AM. CIV. LIBERTIES UNION OF OR. (February 2011), http://aclu-or.org/sites/default/files/JTTF_Backgrounder_Feb_2011_0.pdf (noting the past civil liberty violations in Portland); *Informational Hearing with Experts on the FBI JTTF Before the Portland City Council* 4-5 (Feb. 15, 2011) (testimony of Andrea Meyer, Legislative Director/Counsel of ACLU), http://aclu-or.org/sites/default/files/ACLUOR_Testimony_JTTF_Portland_0215_2011_0.pdf [hereinafter Testimony of Andrea Meyer] (arguing against joining a JTTF because of civil liberty issues).

²⁴ JTTF MOU, *supra* note 11, at art. 6.

²⁵ See Anna Griffin & Scott Learn, *Portland opts out of anti-terror task force*, THE OREGONIAN, Apr. 23, 2005, at A01, available at 2005 WLNR 6381536 (noting that in Portland, Oregon, this asymmetric access to information led the mayor in 2005 to withdraw the city’s participation from the JTTF then in existence).

²⁶ See *infra* Part II.

²⁷ See *infra* Part III.

²⁸ See *infra* Part IV, V.

II. 9/11 AND THE LACK OF INFORMATION SHARING

The September 11, 2001 terrorist attacks in New York and Washington, D.C., which killed almost 3000 people, represented a massive intelligence failure on the part of the United States government.²⁹ The National Commission on Terrorist Attacks Upon the United States (“9/11 Commission”) received testimony from 160 witnesses (and interviewed 1200 people) and sifted through volumes of evidence to provide a definitive, unclassified analysis of the attacks and the reasons for our failure to detect the plot ahead of time.³⁰ It ultimately recommended that Congress and the President restructure the intelligence community to facilitate information sharing among the various intelligence agencies.³¹

How might the lack of information sharing have contributed to the 9/11 intelligence failure? Consider the disturbing story of Khalid al-Mihdhar. In 2000, using a lead generated by the National Security Agency, the CIA’s Counterterrorist Center (CTC) had identified al-Mihdhar and Nawaf al Hazmi as suspected terrorists gathering in Bangkok, Thailand.³² Although the CTC lost track of al-Mihdhar and Hazmi, it learned in March 2000 from Thai officials that Hazmi had left Thailand for Los Angeles in mid-January; al-Mihdhar was on the same flight.³³ CTC did not inform the FBI about the presence of two suspected terrorists within the United States.³⁴

Later that year, al-Mihdhar became frustrated with his inability to learn English and to acquire piloting skills and left the United

²⁹ Hitz, *supra* note 1, at 765. *But see* RICHARD A. POSNER, PREVENTING SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11 20 (2005) (questioning the 9/11 Commission’s thesis that 9/11 resulted from intelligence “failures that can be rectified, making us safe, by changing the apparatus”).

³⁰ *See, e.g.*, THOMAS H. KEAN ET AL., WITHOUT PRECEDENT: THE INSIDE STORY OF THE 9/11 COMMISSION 14-15 (2006) (describing the kinds of information the commission was allowed to examine); NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., 9/11 COMMISSION REPORT, xv (2002), <http://www.9-11commission.gov/report/911Report.pdf> [hereinafter 9/11 COMMISSION] (noting the number of witnesses who testified and the number of witnesses the commission spoke with).

³¹ 9/11 COMMISSION, *supra* note 30, at 401, 411.

³² *Id.* at 181.

³³ *Id.*

³⁴ *Id.* at 182.

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States.³⁵ However, he reappeared on the CIA's radar in January 2001, when a CIA source was able to identify another suspected terrorist as Khallad, which, when combined with evidence that Khallad and al-Mihdhar were somehow connected to each other, made "Mihdhar seem even more suspicious."³⁶ Again, however, the CIA did not share this information with the FBI.³⁷ As the 9/11 Commission put it:

Because the FBI had not been informed in January 2000 about Mihdhar's possession of a U.S. visa, it had not then started looking for him in the United States. Because it did not know of the links between Khallad and Mihdhar, it did not start looking for him in January 2001.

This incident is an example of how day-to-day gaps in information sharing can emerge even when there is mutual goodwill.³⁸

Why did the CIA not pass along al-Mihdhar's and Hazmi's movements to the FBI? In large part, CIA analysts and FBI intelligence operatives were concerned about the "Wall"—the Justice Department's interpretation of a provision in the Foreign Intelligence Surveillance Act (FISA) governing special foreign intelligence surveillance warrants.³⁹ Under FISA, federal agents may lawfully obtain "FISA warrants" to engage in electronic surveillance of U.S. persons without having to demonstrate probable cause to believe that a crime has been or is being committed.⁴⁰ The legal requirement for a FISA warrant, rather, is demonstrating probable cause to believe that the target is an agent of a foreign power.⁴¹ In addition, on September 11, 2001 (and before), FISA required that the

³⁵ See JOHN MILLER ET AL., *THE CELL: INSIDE THE 9/11 PLOT, AND WHY THE FBI AND CIA FAILED TO STOP IT* 273-74 (2002).

³⁶ 9/11 COMMISSION, *supra* note 30, at 266.

³⁷ *Id.* at 266-67.

³⁸ *Id.* at 267.

³⁹ See Memorandum from Janet Reno, Att'y Gen. to the Assistant Att'y Gen, Dir. of FBI, Counsel for Intelligence Policy, and U.S. Att'ys, (July 19, 1995), [hereinafter Att'y Gen. Wall Procedures] available at <http://www.fas.org/irp/agency/doj/fisa/1995procs.html>; see also GRAFF, *supra* note 4, at 173.

⁴⁰ Compare 50 U.S.C. § 1802 (Supp. III. 2009) (authorizing electronic surveillance without a court order), with 18 U.S.C. § 2518 (2006) (requiring probable cause before issuance of a warrant for electronic surveillance).

⁴¹ 50 U.S.C. § 1805(a)(2)(A) (2006).

government certify that the “primary” purpose of the surveillance was gathering foreign intelligence, as opposed to gathering evidence for criminal investigation and prosecution.⁴²

The Justice Department had consistently viewed this FISA provision as creating a Wall between intelligence analysts and law enforcement agents with regard to evidence and information obtained through FISA warrants.⁴³ A key 1995 Justice Department memorandum reiterated and reinforced this separation in setting forth the internal guidelines for handling both the ongoing prosecution of the terrorists behind the 1993 World Trade Center bombing and the ongoing investigation of foreign agents and powers operating in the country.⁴⁴ The Justice Department under George W. Bush continued this understanding of the Wall as of August 2001.⁴⁵

Strictly speaking, the denial of information sharing with regard to al-Mihdhar’s whereabouts did not result from FISA. However, as the 9/11 Commission discovered, the Wall inspired a cautious approach to information sharing not just between agents and prosecutors (as was the subject of the 1995 memo), but also “between two kinds of FBI agents, those working on intelligence matters and those working on criminal matters.”⁴⁶ At some point, the Wall had metastasized into a “still more exaggerated belief that the FBI could not share *any* intelligence infor-

⁴² 50 U.S.C.A. § 1805(a)(1) (Supp. I 2001).

⁴³ See Att’y Gen. Wall Procedures, *supra* note 39. Indeed, even the George H.W. Bush administration considered implementing something like the Wall. See GRAFF, *supra* note 4, at 173.

⁴⁴ See Memorandum from Jamie Gorelick, Deputy Att’y Gen., to Mary Jo White, U.S. Att’y for the S. Dist. of N.Y. et al., (April 10, 2004), <http://www.cnss.org/1995GorelickMemo.pdf>. Gorelick later served as one of the 9/11 Commission members, and her prior authorship of this memorandum drew criticism from Republicans, who called upon her to resign because of a perceived conflict of interest. See KEAN ET AL., *supra* note 30, at 199-205. Gorelick did not resign, although she was recused from any involvement in the parts of the investigation that intersected her previous work at the Justice Department. See *id.* at 196.

⁴⁵ Memorandum from Larry D. Thompson, Deputy Att’y Gen., to Michael Chertoff, Assistant Att’y Gen., Criminal Div. et al., (Aug. 6, 2001), <http://www.fas.org/irp/agency/doj/fisa/dag080601.html> [hereinafter Intelligence Sharing Memo] (“The 1995 Procedures remain in effect today.”).

⁴⁶ 9/11 COMMISSION, *supra* note 30, at 79.

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mation with criminal investigators, even if no FISA procedures had been used.”⁴⁷

A prescient diatribe from an FBI field agent makes the point poignantly.⁴⁸ This agent had been investigating the 2000 attack on the USS *Cole* in Yemen and came across a lead generated by an FBI intelligence analyst about al-Mihdhar.⁴⁹ When the field agent asked the intelligence analyst for more information, the analyst told him that he could not have any information and in fact that he needed to destroy his copy of the lead; furthermore, if al-Mihdhar were caught, “only designated intelligence agents could conduct or even be present at any interview.”⁵⁰ The field agent wrote back:

Whatever has happened to this—someday someone will die—and wall or not—the public will not understand why we were not more effective and throwing every resource we had at certain “problems.”

Let’s hope the National Security Law Unit will stand behind their decisions then, especially since the biggest threat to us now, [Osama bin Laden], is getting the most “protection.”⁵¹

The author of that memo, Special Agent Steve Bongardt,⁵² exploded in rage the afternoon of September 11 when he learned that one of the hijackers was al-Mihdhar, whom supervisors had prevented him from investigating.⁵³ To an FBI supervisor who said that the FBI had done “everything by the book,” Bongardt responded, “[h]ope that makes you fucking feel better! Tens of thousands are dead!”⁵⁴

Nor was al-Mihdhar the only potential opportunity lost as a result of the Wall.⁵⁵ During the summer of 2001, the Minnesota FBI of-

⁴⁷ *Id.*

⁴⁸ See GRAFF, *supra* note 4, at 313.

⁴⁹ 9/11 COMMISSION, *supra* note 30, at 268.

⁵⁰ *Id.* at 271.

⁵¹ *Id.*

⁵² GRAFF, *supra* note 4, at 305-06.

⁵³ *Id.* at 313.

⁵⁴ *Id.*

⁵⁵ See 9/11 COMMISSION, *supra* note 30, at 273-76.

office was desperately—but unsuccessfully—seeking permission from the Justice Department to get a FISA warrant to examine a laptop belonging to a French citizen, Zacarias Moussaoui, who the office suspected was a foreign terrorist.⁵⁶ Moussaoui had been taking flight lessons at a U.S. school and aroused the suspicion of his flight instructor for a number of reasons: he lacked basic piloting information yet wanted to train on an advanced Boeing 747 instead of a small plane, he had far fewer piloting hours than other students, and he paid the school tuition in cash.⁵⁷ The Justice Department relied on the Wall to deny the Minneapolis FBI office's FISA warrant request.⁵⁸ As it turns out, Moussaoui had received that cash via wire transfer from al-Qaeda operative Ramzi bin al-Shibh.⁵⁹

The Wall was not an unreasonable interpretation of existing statutes such as the Foreign Intelligence Surveillance Act.⁶⁰ FISA itself was a response to the perceived surveillance abuses of the Nixon administration, which had spied on numerous domestic persons and groups thought to be political enemies of the White House.⁶¹ In 1972, the Supreme Court held that the federal government needed some kind of judicial approval to engage in domestic surveillance for security purposes, leaving it up to Congress to decide the appropriate procedures; however, the Court said nothing about whether the government could spy on foreign governments or their agents.⁶² The result was FISA, which did not expand federal authority but as Norman Abrams notes, “[C]an be seen as a statute that reined in the Executive Branch, regulat-

⁵⁶ *Id.* at 273-74.

⁵⁷ See *Flight instructor gets \$5 million for catching terror suspect*, CNN, Jan. 24, 2008, http://articles.cnn.com/2008-01-24/us/moussaoui.reward_1_zacarias-moussaoui-flight-instructor-flight-simulator?_s=PM:US.

⁵⁸ See 9/11 COMMISSION REPORT, *supra* note 30, at 274-75.

⁵⁹ *Id.* at 246. Bin al-Shibh had planned on being the twentieth hijacker but was unable to get a visa to enter the United States, so he stayed overseas to help manage the 9/11 plot. See PETER L. BERGEN, *THE LONGEST WAR: THE ENDURING CONFLICT BETWEEN AMERICA AND AL-QAEDA* 3 (2011).

⁶⁰ See *infra* notes 61-78 and accompanying text.

⁶¹ O'Connor & Rumann, *supra* note 1, at 1255.

⁶² *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 321-24 (1972).

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ing a kind of electronic eavesdropping that previously had been uncontrolled by the judiciary.”⁶³

As noted above, FISA required that the “primary” purpose of electronic surveillance was foreign intelligence gathering.⁶⁴ This standard came from *United States v. Troung Dinh Hung*,⁶⁵ in which federal agents did not obtain a warrant to spy on a Vietnamese citizen living in the United States whom the agents suspected of getting classified information from a U.S. source and passing it along to the Vietnamese government.⁶⁶ Through this surveillance, the government identified Troung’s source, who became his codefendant.⁶⁷ When Troung and his codefendant objected to the use of evidence obtained through that surveillance, the district court devised the “primarily” test to determine what evidence parties could or could not introduce.⁶⁸ In approving this rule, the appellate court explained, “[O]nce surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and . . . importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.”⁶⁹

In the case itself, the trial court had concluded that on a particular date (July 20, 1977), the government’s interest had changed from being primarily about foreign intelligence gathering (to identify the source of the leak) to being primarily about criminal prosecution.⁷⁰ The trial court was able to make this determination because on that date and the day before, “several memoranda circulated between the Justice Department and the various intelligence and national security agencies indicating that the government had begun to assemble a criminal prosecution.”⁷¹ Significantly, the court acknowledged that even before

⁶³ NORMAN ABRAMS, *ANTI-TERRORISM AND CRIMINAL ENFORCEMENT* 298 (3d ed. 2008).

⁶⁴ *See supra* notes 41-42 and accompanying text.

⁶⁵ *United States v. Troung Dinh Hung*, 629 F.2d 908, 915 (4th Cir. 1980).

⁶⁶ *Id.* at 911-12.

⁶⁷ *Id.* at 912.

⁶⁸ *Id.* at 912-13.

⁶⁹ *Id.* at 915.

⁷⁰ *Id.* at 916.

⁷¹ *Id.*

July 20 the Justice Department's Criminal Division "had been aware of the investigation from its inception."⁷² In other words, prosecutorial knowledge of the surveillance did not, by itself, convert the investigation into a criminal one.⁷³

In revisiting *Troung Dinh Hung*, one can see how the Justice Department's interpretation of the Wall went astray.⁷⁴ Instead of trying to determine when an investigation would cross the line from seeking foreign intelligence information to seeking evidence for use in criminal prosecution—i.e., "primarily"—the Justice Department appeared to impose a more restrictive standard: whether the investigation was "solely" for foreign intelligence purposes.⁷⁵ Yet, *Troung Dinh Hung* had rejected this approach as being insufficiently deferential to the executive branch's expertise in foreign relations and its "needs and responsibilities . . . in the foreign intelligence area."⁷⁶ Of course, that such a standard was not legally required—which was the *Troung Dinh Hung* court's ruling—did not mean that the Justice Department could not, as a matter of policy, hold itself to a more restrictive standard.⁷⁷ The ultimate point of the 9/11 Commission was that such a policy, though plausible at the time it was implemented, nevertheless may well have impeded the government's ability to detect and foil the 9/11 plot.⁷⁸

Still, it would be unfair to lay the entire blame for lack of information sharing on the faulty interpretation of the Wall.⁷⁹ Amy Zegart argues that institutional design flaws prevented both the CIA and the

⁷² *Id.*

⁷³ *See id.*

⁷⁴ *See infra* notes 75-78 and accompanying text.

⁷⁵ *See* Att'y Gen. Wall Procedures, *supra* note 39; *see also* Intelligence Sharing Memo, *supra* note 44 (stating that the Justice Department still adopts the 1995 Procedures, which require a more restrictive standard).

⁷⁶ *Troung Dinh Hung*, 629 F.2d at 915-16.

⁷⁷ *See, e.g.,* *Loving v. United States*, 517 U.S. 748, 777 (1996) (Thomas, J., concurring) (stating that the President can always provide more protection than constitutionally required); *United States v. Bauer*, 84 F.3d 1549, 1558-59 (9th Cir. 1996) (describing multiple instances of Congress providing more protection than constitutionally required).

⁷⁸ *See* 9/11 COMMISSION, *supra* note 30, at 271-72.

⁷⁹ *See infra* notes 80-88 and accompanying text.

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FBI from detecting the 9/11 plot.⁸⁰ The CIA, according to Zegart, was hampered by structural problems such as the lack of budget control over other intelligence agencies, as well as cultural pathologies that created the wrong incentives for analysts.⁸¹ On the latter point, Zegart contends that the CIA rewarded analysts for getting reports quoted in the Presidential Daily Brief (PDB) without regard to the accuracy or usefulness of those reports.⁸² A good example of the limited utility of the CIA's reporting is in the August 6, 2001 PDB, which contained an item by two CIA analysts aimed at alerting President Bush to the dangers posed by al-Qaeda.⁸³ This is the PDB that some Bush critics have argued gave him advance notice of the 9/11 attacks.⁸⁴ Titled "Bin Laden Determined to Strike in US," the PDB stated:

We have not been able to corroborate some of the more sensational threat reporting, such as that from a [—] service in 1998 saying that Bin Ladin wanted to hijack a US aircraft to gain the release of "Blind Shaykh" 'Umar 'Abd al-Rahman and other US-held extremists.

Nevertheless, FBI information since that time indicates patterns of suspicious activity in this country consistent with preparations for hijackings or other types of attacks, including recent surveillance of federal buildings in New York.⁸⁵

With the benefit of hindsight, of course, one can link this PDB item to the 9/11 attacks; but reading it from the mindset of August 6, 2001, one is hardpressed to imagine what President Bush was supposed

⁸⁰ See AMY B. ZEGART, *SPYING BLIND: THE CIA, THE FBI, AND THE ORIGINS OF 9/11* 63 (2007).

⁸¹ *Id.* at 64-65, 67, 68.

⁸² *Id.* at 68.

⁸³ See 9/11 COMMISSION, *supra* note 30, at 260.

⁸⁴ See Morton M. Kondracke, *Bush Survives Iraq Attacks, 9/11 Accusations*, ROLL CALL, Apr. 19, 2004; Mark S. Mellman, *Start worrying now*, THE HILL, Apr. 14, 2004, at 12.

⁸⁵ Presidential Daily Brief, President Bush, Bin Laden Determined to Strike in US (Aug. 6, 2001), *reprinted in* 9/11 COMMISSION, *supra* note 30, at 261-62.

to do.⁸⁶ Zegart's thesis predicts that the CIA would incentivize its analysts to produce reports of this sort.⁸⁷

In addition, although the Wall came under attack after 9/11, there are reasons to believe that until then, the intelligence agencies tacitly supported it as "a way for agencies to hide information and protect sources."⁸⁸

It is also not to say that the United States definitely would have foiled the 9/11 plot had the CIA just shared its intelligence regarding al-Mihdhar's and Hazmi's locations with FBI field agents.⁸⁹ Perhaps nothing different would have happened. After all, the FBI was not entirely clueless about the possibility of terrorists flying airplanes; two months before 9/11, an FBI special agent in Phoenix wrote a memorandum raising the "possibility of a coordinated effort by Osama Bin Laden to send students to the United States to attend civil aviation [schools]."⁹⁰ Although prescient, this memo did not even make its way to all of its intended recipients until after the Twin Towers had collapsed.⁹¹

Moreover, all five of the hijackers on Flight 77 had in fact been selected for secondary screening—al-Mihdhar and two others by the Computer Assisted Passenger Prescreening System, and Hazmi and another by a suspicious American Airlines check-in counter employee.⁹² Because the primary concern at the time was a bomb in checked luggage, al-Mihdhar and the others were allowed to board the plane, presumably on the assumption that terrorists would not remain on board a plane they were going to blow up in midair.⁹³ Thus, even without the

⁸⁶ See, e.g., MILLER ET AL., *supra* note 35, at 332 (characterizing the Aug. 6, 2001 PDB as "vague" and "stating the obvious").

⁸⁷ See ZEGART, *supra* note 80, at 115.

⁸⁸ GRAFF, *supra* note 4, at 282.

⁸⁹ See *infra* notes 90-96 and accompanying text.

⁹⁰ MILLER ET AL., *supra* note 35, at 288-89.

⁹¹ 9/11 COMMISSION, *supra* note 30, at 272.

⁹² *Id.* at 3.

⁹³ There were several notable bomb-related air terrorism plots before the 9/11 attacks in which the perpetrator of the attack or attempted attack was not onboard with the packed explosives, including the 1988 destruction of Pan Am Flight 103 over Lockerbie, Scotland; the failed attempt in 1986 by Nezar Hindawi to blow up an El Al

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CIA's information about al-Mihdhar, the usual airline screening process had already identified the five hijackers on that flight as deserving of additional scrutiny—the problem was that this additional scrutiny did not keep them off the plane.⁹⁴

It is therefore uncertain whether the CIA's information, had it been shared, would have led to a different result.⁹⁵ Of course, there is an important distinction between appearing generally suspicious to airline personnel and computer-screening programs and being identified as a possible al-Qaeda suspect. At least certain elements of the federal government were acutely aware, even before 9/11, of the threat that al-Qaeda posed to U.S. interests.⁹⁶

Even had the FBI been alerted to al-Mihdhar's presence and detained him, that might only have prevented al-Mihdhar from joining his fellow hijackers on Flight 77. As United Flight 93 demonstrated, four terrorists were still able to hijack a plane and ultimately kill everyone on board.⁹⁷ On the other hand, four hijackers were not enough to keep control of revolting passengers, who caused Flight 93 to crash short of its intended target in Washington, D.C. (either the White House or the

flight by concealing a bomb in his fiancé's baggage; and Ramzi Yousef's testing of a bomb on Philippine Airlines Flight 434 as a precursor to the Operation Bojinka plot (with 9/11 mastermind Khalid Sheikh Mohammed) to blow up eleven airliners over the Pacific Ocean simultaneously. *See* GRAFF, *supra* note 4, at 132-52; SIMON REEVE, *THE NEW JACKALS: RAMZI YOUSEF, OSAMA BIN LADEN AND THE FUTURE OF TERRORISM* 79-85 (1999).

⁹⁴ 9/11 COMMISSION, *supra* note 30, at 3.

⁹⁵ *See id.* at 276-77.

⁹⁶ *See* MILLER ET AL., *supra* note 35, at 331-33; LAWRENCE WRIGHT, *THE LOOMING TOWER: AL-QAEDA AND THE ROAD TO 9/11* 309-15 (2006) (“The movements of . . . Hazmi and Mihdhar, offered the most realistic hope for American intelligence to uncover the 9/11 conspiracy.”); RICHARD A. CLARKE, *AGAINST ALL ENEMIES: INSIDE AMERICA'S WAR ON TERROR* 227 (2004) (“I briefed . . . Condi Rice, Steve Hadley, Dick Cheney, and Colin Powell. My message was stark: al Qaeda is at war with us, it is a highly capable organization, . . . and it is clearly planning a major series of attacks against us”); *cf.* BERGEN, *supra* note 59, at 39 (arguing that only “a few dozen U.S. government officials . . . understood the true scope of the al-Qaeda threat” and that “almost all of the top national security officials in the Bush administration[] had no idea”).

⁹⁷ CLARKE, *supra* note 96, at 15.

Capitol building).⁹⁸ Without al-Mihdhar, maybe Flight 77 would have crashed short of the Pentagon.

The most optimistic scenario—that al-Mihdhar’s apprehension would have unraveled the entire plot—is unlikely but within the realm of possibility.⁹⁹ Social network scientist Valdis Krebs has demonstrated that all nineteen hijackers formed a covert network whose members might have been identified.¹⁰⁰ Krebs used public sources, primarily post-9/11 newspaper accounts, to plot the relationship among the hijackers.¹⁰¹ They were a tightly linked group, with pilots, such as Mohammed Atta, Marwan al-Shehhi, and Hani Hanjour, at the center of key nodes radiating out to each other and to other hijackers.¹⁰² If al-Mihdhar had been identified and followed, he might only have needed to lead federal agents to one of the pilots who would have been at the center of the conspiracy.¹⁰³

Of course, Krebs performed his analysis after the 9/11 attacks, so he was able to select news stories that were aimed at uncovering a known event, as opposed to detecting an unknown future plot.¹⁰⁴ Krebs acknowledges that his “social network analysis . . . is applied more successfully to the prosecution, not the prevention, of criminal activities.”¹⁰⁵ It is extremely unlikely that analysts could have put together a picture of the covert 9/11 network ahead of time simply by data mining millions of cell phone and bank records.¹⁰⁶ Instead, Krebs concludes that “[t]he best solution for network disruption may be to discover possible suspects and then . . . map their individual personal networks - see whom else they lead to, and where they overlap.”¹⁰⁷ Al-Mihdhar’s two most direct links were to Nawaf al-Hazmi and pilot Hani Hanjour, and

⁹⁸ *Id.* at 33.

⁹⁹ See *infra* notes 100-08 and accompanying text.

¹⁰⁰ See Valdis E. Krebs, *Uncloaking Terrorist Networks*, 7 FIRST MONDAY (Apr. 1, 2002), <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/941/863>.

¹⁰¹ *Id.*

¹⁰² *Id.* at fig. 4.

¹⁰³ See Krebs, *supra* note 99.

¹⁰⁴ See *id.*

¹⁰⁵ *Id.*

¹⁰⁶ See *id.*

¹⁰⁷ *Id.*

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Hanjour was directly linked to Mohammed Atta, the ringleader of the hijackers.¹⁰⁸

To sum up, we cannot say definitively that the 9/11 plot would have been stopped if only the CIA shared what it knew about Khalid al-Mihdhar with the FBI.¹⁰⁹ Civil liberties were no doubt enhanced by that interpretation, as federal agents sought fewer FISA warrants than they might have.¹¹⁰ However, any chances to detect and foil the plot were greatly diminished because of the government's overly restrictive interpretation of the Wall.¹¹¹

III. PORTLAND'S EXPERIENCE WITH THE JTTF

The Wall and the events of 9/11 demonstrated that there is tension between the government's desire for procedures that enhance counterterrorism efforts and the concern that such procedures will result in government abuses that infringe on the civil rights of Americans.¹¹² The city of Portland, Oregon, highlighted this tension in the recent debate over whether to participate in a JTTF.¹¹³

Among major American cities, Portland has had a unique experience with the JTTF.¹¹⁴ In 2005, the city formally withdrew its participation in a JTTF with the FBI.¹¹⁵ Then Mayor Tom Potter explained that the Portland police officers assigned to the task force had "top secret" clearance to be able to see the federal government's classified information, but Potter himself and the police chief had only "secret"

¹⁰⁸ *Id.* at fig. 4.

¹⁰⁹ 9/11 COMMISSION, *supra* note 30, at 272.

¹¹⁰ *See id.* at 79.

¹¹¹ *See id.* at 79-80.

¹¹² *Law Enforcement and the Intelligence Committee: Tenth Public Hearing Before the National Commission on Terrorist Attacks upon the United States* (2004) (testimony of John Ashcroft, Att'y Gen. of the United States), http://www.9-11commission.gov/hearings/hearing10/ashcroft_statement.pdf (testifying that "[t]he single greatest structural cause for September 11 was the wall" and quoting from the 1995 memo that the Wall was erected to "go beyond what [was] legally required").

¹¹³ Brad Schmidt, *Joint Terrorism Task Force debate captures Portland's idiosyncratic attitude*, THE OREGONIAN, Mar. 11, 2011, http://www.oregonlive.com/portland/index.ssf/2011/03/jttf_debate_captures_portlands.html.

¹¹⁴ *See infra* notes 115-52 and accompanying text.

¹¹⁵ Griffin & Learn, *supra* note 25.

clearance and thus could not see the same information.¹¹⁶ As a result, Potter felt that he could not “protect[] the rights of all Portlanders.”¹¹⁷ With the city’s withdrawal, from 2005 to 2011, Portland was the only major American city without a JTTF agreement.¹¹⁸

Five years later, a dramatic event would ultimately spark the city’s return to a JTTF.¹¹⁹ On the evening after Thanksgiving 2010, during Portland’s annual Christmas tree-lighting ceremony, held in downtown Portland, a 19-year-old Somali American man named Mohammed Mohamud stepped out of a car and dialed a number on a cell phone.¹²⁰ According to federal agents, Mohamud was trying to detonate a truck bomb parked just outside a light rail station, with the goal of killing thousands of Portlanders.¹²¹ Fortunately for the city, Mohamud’s coconspirators were, in fact, undercover federal operatives who had ensnared him in a sting.¹²² The bomb in the truck was inert, and the city was in no actual danger that evening.¹²³

In the absence of a JTTF between the FBI and the city of Portland, the FBI did not formally share any information about the undercover sting operation with local officials, although the FBI did alert Portland Police Bureau Chief Mike Reese about the operation as a cour-

¹¹⁶ Anna Griffin & Ryan Frank, *Portland delays FBI showdown*, THE OREGONIAN, Mar. 31, 2005, at A01, available at 2005 WLNR 5097274.

¹¹⁷ Ryan Frank, *FBI rules out Potter demand on terror force*, THE OREGONIAN, Mar. 24, 2005, at A01, available at 2005 WLNR 4694378.

¹¹⁸ Tom Lininger, *Federalism and Antiterrorism Investigations*, 17 STAN. L. & POL’Y REV. 391, 391 (2006); Schmidt, *supra* note 113. There was still a JTTF in the Portland metropolitan area, with participation from local police officers in nearby cities such as Beaverton. *Portland Division: Partnerships*, FBI.GOV, <http://www.fbi.gov/portland/partners> (last visited Feb. 16, 2012).

¹¹⁹ See Maxine Bernstein, *Portland Mayor Sam Adams, Police Chief Mike Reese discuss return to Joint Terrorism Task Force*, THE OREGONIAN, Nov. 29, 2010, http://www.oregonlive.com/portland/index.ssf/2010/11/portland_mayor_police_chief_di.html.

¹²⁰ Affidavit of FBI Special Agent Ryan Dwyer ¶¶ 4, 14, *United States v. Mohamud*, No. 10-475-KI, 2011 WL 654964 (D. Or. 2011) (No. 10CR00475), 2010 WL 4859758.

¹²¹ *Id.* ¶ 83.

¹²² *Id.* ¶¶ 6-7.

¹²³ *Id.* ¶ 88.

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tesy.¹²⁴ Shortly after the public announcement of Mohamud's arrest and the disclosure of the FBI's arrest warrant and probable cause affidavit, Mayor Sam Adams (who also serves as the police commissioner) stated publicly that the city might be open to rejoining the JTTF.¹²⁵ In a radio interview, Adams explained his possible willingness to reconsider his prior opposition to the JTTF:

Well, it's - we have a new administration, and an administration at the federal level, and new leadership at the local level - in the FBI and U.S. Attorneys [sic] Office - that I have a lot more trust in than the prior administration. That's [sic] one reason to take a look at our status of membership in the JTTF.

The other is it's been five years, and this event happened. And our profile is now higher, globally, on this issue. I think it's time to look at our membership status in JTTF. I'm [sic] going at it from a - sort of a fact-based approach. And I come at it in an objective manner, you know, with a focus on what is the best interest of keeping Portland safe? And what is the best interest of keeping Portland the open and embracing and fair society that we seek to be?¹²⁶

As the city debated whether to rejoin the JTTF, clear battle lines emerged.¹²⁷ On one side were the FBI and the U.S. Attorney's Office,

¹²⁴ See Maxine Bernstein, *Commissioner Saltzman urges Portland to quickly rejoin Joint Terrorism Task Force*, THE OREGONIAN, Dec. 1, 2010, http://www.oregonlive.com/portland/index.ssf/2010/11/commissioner_saltzman_urges_po.html.

¹²⁵ *Should Portland Rejoin Terrorism Task Force?*, NAT'L PUB. RADIO (Nov. 30, 2010), <http://www.npr.org/2010/11/30/131704364/should-portland-rejoin-terrorism-task-force>.

¹²⁶ *Id.* The Mayor's reference to a new federal administration is curious, considering that by late 2010, various commentators had been noting the similarity between the Obama Administration's counterterrorism policies and those of the second-term Bush Administration. See, e.g., Peter Bozzo & Henry Shull, *Obama's Blank Check*, HARV POL. REV., Dec. 5, 2010, available at <http://hpronline.org/americas-foreign-policy/obama-s-blank-check> ("[I]t is nonetheless true that the Obama administration has been defined more by continuity than change in [national security].").

¹²⁷ See *infra* notes 128-40 and accompanying text.

favoring a return to the pre-2005 JTTF arrangement.¹²⁸ On the other side were anywhere from one to three members of the five-person city council and the American Civil Liberties Union (ACLU) of Oregon.¹²⁹ Unsurprisingly, the Portland Police Bureau was quiet on the issue.¹³⁰

Those opposed to rejoining the JTTF reiterated the same concerns that had driven Mayor Potter to pull the city out of the arrangement five years earlier.¹³¹ In addition, some critics highlighted what they described as a pattern of civil rights violations by the FBI and the Portland police, which close cooperation of the agencies would no doubt exacerbate.¹³² The ACLU emphasized its concern that Portland police officers could be forced to violate state law as a result of their participation in a JTTF.¹³³ In particular, the ACLU pointed to Oregon Revised Statute 181.575 (ORS 181.575), which states in relevant part:

No law enforcement agency . . . 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.¹³⁴

The two key restrictions on counterterrorism investigations in ORS 181.575 are those requiring a “direct relation to criminal activity” and “reasonable grounds to suspect involvement in criminal conduct.”¹³⁵ If these restrictions have real teeth, then ORS 181.575 might

¹²⁸ Bernstein, *supra* note 119.

¹²⁹ *Id.*

¹³⁰ Back in 2005, then police chief Derrick Foxworth publicly supported the JTTF. See Anna Griffin, *Portland chief backs FBI force*, THE OREGONIAN, Mar. 30, 2005, at A01, available at 2005 WLNR 5018904.

¹³¹ Bernstein, *supra* note 119.

¹³² See, e.g., Testimony of Andrea Meyer, *supra* note 23 (noting that if Portland were to join the JTTF, its officers might not always force federal officers to follow state laws that provide more protections to civil rights than does federal law).

¹³³ See *Id.* at 4-5.

¹³⁴ OR. REV. STAT. § 181.575 (2009).

¹³⁵ *Id.*

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offer substantial civil liberties protection to Oregon residents and visitors. Because this is a state law, it is binding on Portland police officers,¹³⁶ but because of the Supremacy Clause, it has no effect on federal agents.¹³⁷ Accordingly, federal agents may have greater leeway than Portland police officers in terms of counterterrorism investigations.¹³⁸ Yet, if the JTTF follows the direction of its federal agents, then Portland police officers might end up violating state law.¹³⁹ As the ACLU's Andrea Meyer explained in her testimony before the city council, "based on Portland's history, not all of which is that 'historic,' it is critical that there be civilian oversight of **all** Portland police activities, most especially, intelligence gathering activities."¹⁴⁰

Mayor Adams offered a compromise: the city would rejoin the JTTF, but its police officers would be allowed to participate only where there was an identified "imminent" or "credible threat."¹⁴¹ This compromise seemingly addressed the ORS 181.575 concern since any cooperative investigations would be based on actual, direct suspicion of criminal activity, rather than the political, religious, or social views of the targets.¹⁴²

However, United States Attorney Dwight Holton responded that this condition was "fatally flawed":

[T]he restriction is not workable. Investigation and prevention of complex crimes and terrorism are typically fluid and fast-moving, and it makes no sense to ask PPB officers to be in for one part of a conversation, but out for another part of the same conversation as investigators discuss findings from assessments, investigations, etc., in

¹³⁶ OR. REV. STAT. § 181.010 (2009).

¹³⁷ Testimony of Andrea Meyer, *supra* note 132, at 5.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 2.

¹⁴¹ See Maxine Bernstein, *Portland Commissioner Randy Leonard pressed for clause that may scuttle city rejoining terrorism task force*, THE OREGONIAN, Apr. 21, 2011, http://www.oregonlive.com/portland/index.ssf/2011/04/portland_commissioner_randy_le_6.html.

¹⁴² See *id.*

evaluating and addressing terrorist threats in Portland and beyond.¹⁴³

A week later, the Portland City Council unanimously supported a modified agreement that permitted Portland Police Bureau involvement in the JTTF on an “as-needed” basis.¹⁴⁴ Given the prior intense division between city council members, it was perhaps surprising that all five councilmembers signed off on this compromise language.¹⁴⁵ Yet, different councilmembers somehow read into the new language what they wanted.¹⁴⁶ Commissioner Randy Leonard, who had opposed rejoining, said, “By passing this resolution tonight, the Portland Police Bureau is not re-joining the Joint Terrorism Task Force.”¹⁴⁷ Commissioner Dan Saltzman, who had consistently advocated a return to the JTTF, said, “I think this is light-years ahead of [Portland’s decision in 2005 to pull out of the task force].”¹⁴⁸

Unlike the previous, failed proposal, the successful one eliminated the “imminent” or “credible threat” requirement, thus resolving U.S. Attorney Holton’s objection.¹⁴⁹ Depending on how leniently one interprets “as needed,” the agreement could allow a more or less continuous JTTF.¹⁵⁰ At the same time, the new proposal retained an important oversight provision that permits the Portland police officers to consult with the city attorney.¹⁵¹ The pre-2005 JTTF, by contrast, had no such provision, which meant that back then, Portland police officers on the

¹⁴³ See Letter from Dwight C. Holton, U.S. Att’y of Dist. Or., to Sam Adams, Mayor of Portland, Or. (Apr. 19, 2011) (on file with author).

¹⁴⁴ Brad Schmidt, *Portland City Council unanimously approves ‘as-needed’ involvement with JTTF*, THE OREGONIAN, (Apr. 29, 2011, 10:46 AM), http://blog.oregonlive.com/portlandcityhall/2011/04/portland_city_council_unanimou.html.

¹⁴⁵ *Id.*

¹⁴⁶ Brad Schmidt, *Portland City Hall roundup: Documents show how JTTF agreement morphed*, THE OREGONIAN, (May 26, 2011, 1:40 PM), http://blog.oregonlive.com/portlandcityhall/2011/05/portland_city_hall_roundup_doc.html.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See Schmidt, *supra* note 144.

¹⁵⁰ See *supra* note 145-48 and accompanying text.

¹⁵¹ PORTLAND, OR., RESOLUTION NO. 36859 2 (2011), available at <http://efiles.ci.portland.or.us/webdrawer/rec/4240062/view/>.

JTTF had no one to turn to in order to see if they were being asked to violate state laws.¹⁵²

IV. FEDERALISM AND COMMANDEERING ANALOGY

As discussed earlier, an important way in which JTTFs might be seen as harming individual rights is the possibility that the federal government will effectively commandeer local police agencies into carrying out federal directives.¹⁵³ The problem is especially acute if the federal directives require the violation of state law, but it exists even if no such violation is required.¹⁵⁴ I say “effectively” to make clear that JTTFs do not *directly* commandeer local authorities.

Direct commandeering of local law enforcement officers is unconstitutional.¹⁵⁵ In *Printz v. United States*, the Court struck down a provision in the federal Brady Handgun Violence Prevention Act (Brady Act) that required local sheriff’s offices to perform background checks on would-be gun purchasers.¹⁵⁶ Part of the problem with federal commandeering lay in the fact that “[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service-and at no cost to itself-the police officers of the 50 States.”¹⁵⁷ In addition, such commandeering ran afoul of the Take Care Clause by permitting Congress to delegate executive authority away from the President and into the hands of local law enforcement officers, who would be responsible for implementing the Brady Act.¹⁵⁸ Finally, and most on point, the Court had previously struck down an effort at commandeering state legislatures to enact state laws to deal with nuclear waste generated within their borders.¹⁵⁹ In *New York v. United States*, the Court explained that both state and federal government accountability is impaired by such commandeering, because each level of govern-

¹⁵² See JTTF MOU, *supra* note 11, at art. 6.

¹⁵³ See *supra* notes 131-40 and accompanying text.

¹⁵⁴ Testimony of Andrea Meyer, *supra* note 132, at 4-5 (noting the ACLU’s contention that state officers may be forced to violate state laws while working on a JTTF).

¹⁵⁵ *Printz v. United States*, 521 U.S. 898, 933 (1997).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 922.

¹⁵⁸ *Id.* (referring to U.S. Const. art. II, § 3).

¹⁵⁹ *New York v. United States*, 505 U.S. 144, 188 (1992).

ment can deflect responsibility and blame for unpopular legislation by pointing fingers at the other level of government.¹⁶⁰

To be sure, JTTFs do not directly commandeer local police.¹⁶¹ As Portland demonstrated in 2005, a city is free to decline to participate in a JTTF.¹⁶² Nevertheless, there are aspects of JTTFs that resemble commandeering.¹⁶³ For one thing, although the relationship may be voluntary, thereby distinguishing JTTFs from the compelled background checks in the Brady Act, it seems less an equal partnership than a federal mission with assistance from the locals. Note, after all, that the local officers on the JTTF are considered federal agents for liability purposes.¹⁶⁴ The makeup of the typical JTTF skews heavily toward federal agents and prosecutors, further suggesting that the role of the local officers is to help the core federal group.¹⁶⁵ This is not to say that the local police department might not also benefit from the participation of its officers in the JTTF.¹⁶⁶ For example, in the Portland bomb sting case, the police bureau perhaps could have had more input and involvement in the denouement of the sting operation, with an eye toward managing local concerns. Even so, the ultimate goal would have been a *federal* case, not a state case.¹⁶⁷

This can be a significant point where state law offers more civil liberties protection than federal law does, such as the aforementioned ORS 181.575,¹⁶⁸ which prohibits Oregon law enforcement officers from collecting or keeping information about people or groups based on their “political, religious or social views . . . unless such information directly

¹⁶⁰ *Id.* at 182-83.

¹⁶¹ See JTTF MOU, *supra* note 11, at art. 3.

¹⁶² Griffin & Learn, *supra* note 25.

¹⁶³ See *infra* notes 165-67 and accompanying text.

¹⁶⁴ See JTTF MOU, *supra* note 11, at art. 10. Granted, being considered a federal agent is on balance likely to be a boon to the local police officer, since ordinary tort claims against said officer would be subject to the Federal Tort Claims Act, 28 U.S.C. § 1346, under which the United States would be substituted in place of the officer as the defendant. 28 U.S.C. § 1346(b)(1) (2006).

¹⁶⁵ See *supra* text accompanying note 8 (noting that local officers are generally considered federal agents in a JTTF).

¹⁶⁶ See *supra* notes 15-17 and accompanying text (describing the benefits to local police departments in a JTTF).

¹⁶⁷ See JTTF MOU, *supra* note 11, at art. 9.

¹⁶⁸ OR. REV. STAT. § 181.575 (2009).

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relates to a [criminal] investigation[,] . . . *and* there are reasonable grounds to [believe that the person or group] is or may be involved in criminal [activity].”¹⁶⁹

There have not been any published cases turning on ORS 181.575, but an unpublished district court decision, *Challis v. Katz*, provides some limited insight into how the statute might be construed.¹⁷⁰ In *Challis*, a Portland police officer stopped two motorcyclists for traffic infractions (which were not disputed in the ensuing litigation).¹⁷¹ The officer filled out a “Field Contact Report” about the traffic stop, noting that the motorcyclists “were wearing the colors of their respective clubs,”¹⁷² which possibly indicated gang affiliation; however, the officer testified later that he did not suspect the motorcyclists of being engaged in any criminal activity.¹⁷³ Portland police officers stopped Challis on numerous other occasions, usually for traffic violations, but one time, officers investigating a complaint of excessive noise at a motel wrote down the license plate numbers of a number of motorcycles, including Challis’s.¹⁷⁴ The police department’s Criminal Intelligence Unit collected the information from all of these stops “to assist in the investigation and development of racketeering charges against” the motorcycle club.¹⁷⁵

A district court tossed out Challis’s section 1983 lawsuit on summary judgment, concluding that “[i]n each of the incidents relied upon by plaintiff, the officers in question were acting reasonably while

¹⁶⁹ *Id.* (emphasis added).

¹⁷⁰ *Challis v. Katz*, No. Civ. 00-047-HA, 2001 WL 34043763 (D. Or. July 13, 2001). In a related case, a lawyer who had represented Challis previously and who responded to Challis’s call for assistance by driving to the scene of the traffic stop also sued the city under ORS 181.575, based on the traffic report written about his supposedly disruptive conduct. *Neal v. City of Portland*, No. Civ. 00-703-HA, 2002 WL 31488261, at *1 (D. Or. Sept. 13, 2002). The same district judge granted summary judgment in favor of the city on the ground that the information contained in the police report did not concern the lawyer’s political activities. *Challis*, 2001 WL 34043763, at *1, *6.

¹⁷¹ *Challis*, 2001 WL 34043763, at *2.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at *3.

¹⁷⁵ *Id.*

harboring suspicions of the possibility of criminal activity.”¹⁷⁶ In reaching this conclusion, the court relied heavily on the training and experience of the police officers, who suspected that Challis’s club “is, or may be, involved in criminal activity.”¹⁷⁷

It is important to keep in mind that the court resolved this case on the city’s motion for summary judgment, which is appropriate only if there are no genuine disputes of material fact.¹⁷⁸ Yet, in this case, one of the critical pieces of evidence was the assertion by a police officer that the Bureau of Alcohol, Tobacco, and Firearms (ATF) and the United States Marshal’s Service (Marshal’s Service) “consider the Brother Speed Motorcycle Club to be an outlaw motorcycle club.”¹⁷⁹ One wonders what exactly it means to be “an outlaw motorcycle club” and how such a vague descriptor constitutes “a direct relationship to a criminal investigation[].”¹⁸⁰ Do the ATF and Marshal’s Service suspect that the Brother Speed Motorcycle Club is engaged in narcotics trafficking? Weapons violations? Or some other crimes of violence? Labeling them an “outlaw” motorcycle club is not much different from calling them “bad guys.”¹⁸¹ Under the *Challis* analysis, ORS 181.575 provides little check on the police, so long as a court defers to the law enforcement agency’s assessment of whether it considers the suspect to be associated with “bad guys.”¹⁸² Of course, *Challis* represents just a single federal judge’s view of ORS 181.575, and it may well be that a different judge would have ruled differently. But it certainly does not provide an example of robust interpretation of the state law.

V. INTERDICTION VERSUS OVERSIGHT

The anti-JTTF position essentially seeks to prevent any civil liberties infringements and civil rights violations by denying the FBI for-

¹⁷⁶ *Id.* at *7.

¹⁷⁷ *Id.*

¹⁷⁸ FED. R. CIV. P. 56(a).

¹⁷⁹ *Challis*, 2001 WL 34043763, at *7.

¹⁸⁰ *Id.* at *6.

¹⁸¹ *Id.* at *7.

¹⁸² *See id.* at *6-7.

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mal access to local law enforcement resources.¹⁸³ If the FBI cannot coordinate with local police officers, then it cannot induce them to violate state laws that might be more protective of individual rights than federal law.¹⁸⁴ This position, however, seems not to take into account the lessons of the 9/11 intelligence failure.¹⁸⁵

Notice that the 9/11 Commission did not recommend blocking all information sharing between federal intelligence and law enforcement agents, despite the possible abuse of FISA warrants.¹⁸⁶ As various critics have argued, the change from the “primary” purpose of the FISA warrant to a “significant” purpose has opened the door to FISA warrants whose *primary* purpose is to gather evidence for a criminal prosecution, so long as the federal agents can plausibly claim that a second, *significant* purpose is to gather foreign intelligence information.¹⁸⁷ To the extent it was adhered to, the Wall likely did block this sort of collusion.¹⁸⁸ As noted earlier, however, this protection of civil liberties may have come at a tragically high price: lost opportunities to detect and foil the 9/11 plot.¹⁸⁹

Indeed, a year after the 9/11 Commission issued its report, it released a report card grading the federal government’s efforts toward implementing the 9/11 Commission’s recommendations.¹⁹⁰ With regard to information sharing reforms, the 9/11 Commission criticized the lack of adequate progress:

Incentives for information sharing

D

Changes in incentives, in favor of information sharing, have been minimal. The office of the program manager for information sharing is still a start-up, and is not get-

¹⁸³ See *Joining the FBI Joint Terrorism Task Force Is Still a Bad Idea*, AM. CIV. LIBERTIES UNION OF OR. 2-4 (February 2011), http://aclu-or.org/sites/default/files/JTTF_Backgrounder_Feb_2011_0.pdf.

¹⁸⁴ See *id.* at 2.

¹⁸⁵ See *supra* Part II.

¹⁸⁶ See 9/11 COMMISSION, *supra* note 30, at 417.

¹⁸⁷ See Scott J. Glick, *FISA’s Significant Purpose Requirement and the Government’s Ability to Protect National Security*, 1 HARV. NAT’L SEC. J. 87, 101 (2010).

¹⁸⁸ See 9/11 COMMISSION, *supra* note 30, at 78-79.

¹⁸⁹ See *supra* Part II.

¹⁹⁰ See KEAN ET AL., *supra* note 30, at 341.

ting the support it needs from the highest levels of government. There remain many complaints about lack of information sharing between federal authorities and state and local level officials.

Government-wide information sharing **D**

Designating individuals to be in charge of information sharing is not enough. They need resources, active presidential backing, policies and procedures in place that compel sharing, and systems of performance evaluation that appraise personnel on how they carry out information sharing.¹⁹¹

In addition to greater information sharing, the 9/11 Commission supported greater oversight.¹⁹² In other words, rather than block the federal government from sharing information out of fear that abuses might occur, the 9/11 Commission concluded that it was preferable to run the risk that such abuses might occur.¹⁹³ Effective oversight would increase the likelihood of detecting such abuses, which could be addressed through after-the-fact remedies such as damages or injunctive relief through section 1983 or *Bivens* lawsuits.¹⁹⁴

To be sure, oversight and interdiction are not mutually exclusive options. Having both approaches would almost certainly be more effective than one or the other, as oversight is aimed at detecting and deterring abuses and interdiction is aimed at creating barriers to those abuses in the first place.¹⁹⁵ The key policy issue is whether the additional protection provided by interdiction is worth the negative impact on counterterrorism efforts.¹⁹⁶

¹⁹¹ *Id.* at 344.

¹⁹² 9/11 COMMISSION, *supra* note 30, 419-20.

¹⁹³ *See id.* at 407-19.

¹⁹⁴ *See generally* 42 U.S.C. § 1983 (2006) (providing for federal remedies against state actors who violate civil rights); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971) (allowing lawsuit directly under the Fourth Amendment against FBI agents for civil rights violations).

¹⁹⁵ *See infra* notes 200-18 and accompanying text.

¹⁹⁶ *See* 9/11 COMMISSION, *supra* note 30, at 394-95.

Moreover, there is no guarantee that oversight would be completely effective at deterring and redressing infringements of civil liberties.¹⁹⁷ Again, the 9/11 Commission's report card illustrates some of the difficulties that might be expected with regard to setting up oversight regimes.¹⁹⁸ Not only had the government failed to implement the 9/11 Commission's recommendations regarding information sharing, it somehow also managed to drop the ball on the civil liberties front:

Privacy and Civil Liberties Oversight Board D

We see little urgency in the creation of this Board. The President nominated a Chair and Vice Chair in June 2005, and sent their names to the Senate in late September. To date, the Senate has not confirmed them. Funding is insufficient, no meetings have been held, no staff named, no work plan outlined, no work begun, no office established.

Guidelines for government sharing of personal information D

The Privacy and Civil Liberties Oversight Board has not yet begun its work. The DNI [Director of National Intelligence] just named a Civil Liberties Protection Officer (November 2005).¹⁹⁹

Congress established the Privacy and Civil Liberties Oversight Board (PCLOB) in 2004 under the Intelligence Reform and Terrorism Prevention Act as a five-member board.²⁰⁰ As the 9/11 Commission noted, it was not until mid-2005 that President Bush nominated members.²⁰¹ The Senate confirmed two of the five nominees in February 2006 and the other three a month later.²⁰² However, critics—including one of the five board members—complained that the PCLOB was not truly “independent,” as it was placed organizationally within the execu-

¹⁹⁷ See *infra* notes 203-14 and accompanying text.

¹⁹⁸ See KEAN ET AL., *supra* note 30, at 344.

¹⁹⁹ *Id.*

²⁰⁰ See GARRETT HATCH, CONG. RESEARCH SERV., RL 34385, PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD: NEW INDEPENDENT AGENCY STATUS 2 (2009).

²⁰¹ *Id.* at 4.

²⁰² *Id.*

tive branch, and the President could fire the board members at will.²⁰³ In 2007,²⁰⁴ Congress modified the Intelligence Reform and Terrorism Prevention Act and made the PCLOB an independent agency.²⁰⁵ President Bush nominated three new persons to serve as board members, but Congress took no action.²⁰⁶ Nor have things improved under President Barack Obama.²⁰⁷ In early 2011, he did nominate two persons to the PCLOB,²⁰⁸ but due to the three-person quorum, even if Congress quickly confirmed those two nominations, the PCLOB would still be unable to act.²⁰⁹ The PCLOB has thus far failed to live up to its promise due in large part to politics.²¹⁰

By contrast, the Portland JTTF agreement uses an existing entity (the city attorney) to provide some degree of oversight.²¹¹ This oversight is indirect, in the sense that it occurs only if the Portland police officers on the JTTF invoke it.²¹² If those officers willingly violate Portlanders' civil rights and keep secret about it, the city attorney is not going to be in a position to stop the malfeasance.²¹³ This makes the city attorney's oversight less than perfect. At the same time, the problem of bad faith on the part of local police officers is generally independent of the issues raised by JTTFs.²¹⁴ In the same way, the FISA Wall was of

²⁰³ *Id.* at 2-4; see Ellen Nakashima, *Civil Libertarians Protest Privacy Policy; New Guidelines Do Little to Protect Established Rights, White House Board Told*, WASH. POST, Dec. 6, 2006, at A11.

²⁰⁴ Not coincidentally, the November 2006 midterm elections saw Democrats take control of Congress from the Republicans, setting up party-based conflict between the White House and Congress. See *America Votes 2006*, CNN.COM, <http://www.cnn.com/ELECTION/2006/> (last visited Feb. 16, 2012).

²⁰⁵ GARRETT HATCH, CONG. RESEARCH SERV., RL 34385, PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD: NEW INDEPENDENT AGENCY STATUS 5 (2009).

²⁰⁶ *Id.* at 7.

²⁰⁷ See *infra* notes 208-10 and accompanying text.

²⁰⁸ *Presidential Nominations Sent to the Senate*, THE WHITE HOUSE, <http://www.whitehouse.gov/the-press-office/2011/01/05/presidential-nominations-sent-senate> (Jan. 5, 2011).

²⁰⁹ 42 U.S.C. § 2000ee (Supp. III. 2009).

²¹⁰ See *supra* notes 200-15 and accompanying text.

²¹¹ See PORTLAND, OR., RESOLUTION NO. 36859 2 (2011), available at <http://efiles.ci.portland.or.us/webdrawer/rec/4240062/view/>.

²¹² See *id.*

²¹³ See Testimony of Andrea Meyer, *supra* note 132, at 4-5.

²¹⁴ See *id.* at 5.

minimal effectiveness in redressing violations where FBI agents intentionally misrepresented or lied on the warrant application.²¹⁵ Thus, the appropriate measure of any oversight mechanism's effectiveness lies in its ability to address civil rights violations stemming from participation in a JTTF, not any and all civil rights violations.

Here, the city attorney fares reasonably well. Unlike the PCLOB, the Portland city attorney's office is not a position that is politically feasible to leave unfilled, as it serves as the lawyer for the city.²¹⁶ It is difficult to see how a mayor would prefer to leave the position vacant rather than have the city attorney available to answer inquiries from JTTF members. Moreover, whereas the initial incarnation of the PCLOB was not independent of the President²¹⁷—i.e., the head of the branch that the board was charged with overseeing as regards to privacy rights abuses—the Portland city attorney is truly independent of the FBI, the United States Attorney's Office, and even the Portland Police Bureau.²¹⁸

VI. CONCLUSION

It is true that national security and civil liberties do not always exist in a zero-sum environment. Some government actions not only infringe civil liberties but may also weaken our security by increasing discontent among the public or scaring away those whose help we need.²¹⁹ Others, such as President Obama's repudiation of waterboard-

²¹⁵ *Cf. id.* (arguing that there will not always be compliance with the law, or oversight of Portland officers, if those officers are breaking the law themselves).

²¹⁶ See *What is the Difference between the City Attorney and the District Attorney?*, CITY ATTORNEY, <http://www.portlandonline.com/attorney/index.cfm?c=39852&a=106052> (last visited Feb. 16, 2012) ("The City Attorney is the attorney for the City of Portland, and is appointed by the City Council. The attorneys in the Office provide legal services to the Mayor, City Council, City Treasurer, City Clerk as well as for City Departments, boards, commissions and offices of the City of Portland.").

²¹⁷ See GARRETT HATCH, CONG. RESEARCH SERV., RL 34385, PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD: NEW INDEPENDENT AGENCY STATUS 2 (2009).

²¹⁸ See *What is the Difference between the City Attorney and the District Attorney?*, CITY ATTORNEY, <http://www.portlandonline.com/attorney/index.cfm?c=39852&a=106052> (last visited Feb. 16, 2012).

²¹⁹ The immediate post-9/11 use of immigration laws and the material witness detention statute to engage in a dragnet of mostly Middle Easterners, for example, may be a good example of such a lose-lose response. See Carrie Johnson, *Court Allows*

ing as an interrogation tactic,²²⁰ may have evinced a commitment to civil and human rights on the one hand and strengthened our moral image among other countries—hence, increased the likelihood of their cooperation with our counterterrorism efforts.²²¹

Some instances, however, such as those relating to information sharing and interagency or intergovernment cooperation, may indeed constitute a zero-sum game.²²² Efforts to increase civil liberties will negatively impact national security and vice versa.²²³ The challenge in these instances is to find the right balance point.²²⁴ In the real world, there are no hard and fast formulas to determine that point, and well-intentioned decision makers can err, as appears to have been the case with the Justice Department's erecting of the FISA Wall.²²⁵

Portland's decision to withdraw from, and then later to rejoin, the JTTF provides a good opportunity to analyze another instance of government decision makers' attempt to determine the best balance point between national security and civil liberties.²²⁶ Rather than repeat the Justice Department's mistake with the Wall, the city council opted for a better oversight regime.

Lawsuit Against Ashcroft: Former Official's Bids for Immunity in Ex-Detainee's Case is Rejected, WASH. POST, Sept. 5, 2009, at A03.

²²⁰ See Ensuring Lawful Interrogation, 74 Fed. Reg. 4893, 4894 (Jan. 22, 2009).

²²¹ See Bartram S. Brown, *The Relevance of International Law to the Domestic Decision on Prosecutions for Past Torture*, 59 DEPAUL L. REV. 775, 801 (2010) (noting the damaging effect on the United States reputation as a result of waterboarding).

²²² See RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 31 (Geoffrey R. Stone ed., 2006).

²²³ *Id.*

²²⁴ *Id.* at 31-32.

²²⁵ See *supra* Part II.

²²⁶ See *supra* Part III, V.