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## **The Scales of Justice: Federal-Local Tensions in the War on Terror**

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Recently, the city of Portland, Oregon, found itself willing to just say no to the Federal Bureau of Investigation (FBI). After eight years of participation with the FBI in a joint task force to investigate residents suspected of plotting terrorist acts, the city decided to withdraw. The task force was an example of a federal-local law enforcement partnership that is now quite common in the United States, especially in the age of heightened concern about terrorism. Such partnerships bring together the investigatory expertise of federal agencies with the local knowledge of city or county law enforcement.

The decision to withdraw was the focus of much local controversy, and followed a protracted and impassioned public debate. Portland officials cited two main reasons for ending its cooperation with the FBI. The first involved strong suspicions from the city's Muslim community that they were being illegitimately targeted in investigations of alleged terrorist activity. Secondly, there was a concern that local officials were not sufficiently able to oversee the work the Portland police were doing in conjunction with the FBI. The FBI, citing the sensitivity of their investigations, did not want elected officials, including the mayor, to have access to their files. City officials thus felt prevented from assuming their responsibility to oversee the practices of law enforcement.

In an age in which the "war on terror" appears both unremitting and unwinnable, such conflicts between federal and local law enforcement agencies may become commonplace (see Thacher, 2005, for an analysis of similar dynamics in Dearborn, Michigan). But these conflicts are hardly new. Instead, they reflect long-standing tensions within American political culture over the proper balance of political power between central and local authorities. There remain persistent conflicts over the geographic scale – national, regional, state or local – of governance. These struggles are typically most ardent when actors at one scale seek an expansion of power that might reduce the power of actors at other scales.

These political tensions over the geographic scale of authority have a long pedigree; they have appeared in a range of policy arenas throughout American history. Most famously, perhaps, they were a central component of the struggle for the expansion of civil rights for African-Americans; federal efforts to enhance equal opportunity were met with resistance couched in the language

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of local control and states' rights. These tensions over the scale of governance also emerge, understandably, in the area of law enforcement, where the coercive power of governmental authorities is at its most evident. As the Portland story illustrates, strong political passions can emerge in contests over where to situate the power to investigate suspected criminals and to bring them into the criminal justice process.

In this chapter, we hope to show that what may appear, in the Portland case, as a new story about the politics of fighting terror is in fact a much older one about the scales of justice. This timeworn story about the balance of power between different geographical scales often focuses upon law enforcement practice, but it is hardly limited to that policy arena. In elaborating our argument, we reinforce the work of numerous scholars who recognize the significance of geographic scale. Their central insight is a simple but often neglected one: that the scalar location of social phenomena is critical to understanding how those phenomena operate (see, for starters, Brenner, 2001; Cox, 1993; Delaney and Leitner, 1997; Marston, 2000; McMaster and Sheppard, 2002). The significance of geographic scale is nowhere more evident than in discussions of political authority. Political actors and institutions with a global reach, for example, exert a different power from that of entities having a more limited scope. In short, to understand the extent and capacity of political power, one must understand the geographic scale at which it operates.

We seek to reinforce this line of work, but to focus attention more particularly on the *ideology* of scale, on the discursive political significance of situating practices at one jurisdictional level versus another. The ideological power of scale is especially obvious in the robust debates about where to locate the surveillance and arrest powers of law enforcement authorities.<sup>1</sup> As we will show, strong arguments can be made for situating this power at both federal and local levels. Because of the significance of the coercive capacity of law enforcement agents, political debates that rehash these arguments in the context of policing can be vigorous, as they were in Portland.

It is no great surprise that ideological struggles over the geographic scale of political authority are longstanding and impassioned in the United States. Such debates date to the formation of the republic. Certainly, the authors of the U.S. Constitution wrestled ardently with competing claims for federal and state governmental dominance; they sought to balance the need for centralized authority against the desire for an autonomous sphere for state governments. Such a balance is ever elusive, because the alignment of interests favoring more expansive federal or state power continually shifts depending on the issues and context. A political progressive, for instance, may favor centralized authority to reduce poverty but fear its exercise in acts of surveillance. A conservative, by contrast, may see things completely differently, favoring a hands-off approach on economic issues but a stronger hand on matters cultural and criminal.

In sum, there is an ongoing and contentious politics around the scale of governance. We use the war on terror, and the story of Portland, to illustrate the *potency and indeterminacy* of the political struggles over scale. We move through five sections. In the first, we review the history of federalism in the United States, noting the ongoing struggle over where to situate political authority. We consider, second, the specific case of crime control, and review those forces that grant increased—though never complete--legitimacy to more centralized law enforcement efforts. In our third section, we focus on the War on Terror and the federal response to it, most notably in the form of the USA Patriot Act. We follow this with an analysis of the political contest in Portland. A concluding section summarizes and extends our analysis.

### **U.S. Federalism and the Constitutionally Embodied Struggle Over Scale of Governance**

Questions of federalism have often become imbricated in such contemporary hot-button political debates as abortion, gay marriage, and medical marijuana. Yet the potential of scale of governance to become a focus for political debate is effectively enshrined within the U.S. Constitution. From the beginning, irreconcilable currents of distrust of both local and centralized decision-making have animated the form of the Constitution and subsequent interpretive case law. Thus, current political debates over the scale of governance, as witnessed in Portland, invoke and repeat the framers' original conflicting views about how to strike the right balance of power between central and local political authorities (Blomley, 1994, at 116-120), the barest outlines of which we sketch here.

In concrete terms, this institutionalized tension finds its most obvious and influential manifestation in the U.S. Constitution. On its face, Article VI, Clause 2 – known as the “supremacy clause” – establishes the preeminence of the Federal government and federal law, providing that:

“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”<sup>iii</sup>

This centralized authority was subsequently reinforced by the Fourteenth Amendment, which likewise limits the powers of the states to transgress individual rights under the Federal Constitution:

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>iii</sup>

Such powerful assertions of the authority of a strong central government are offset by language in both the Tenth and Eleventh Amendments, each of which carves out an equally robust state and local governmental sphere. Under the Tenth Amendment, “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people,”<sup>iv</sup> thus promising effectively unrestrained local governmental authority over those matters not explicitly addressed by the Federal Constitution. In a similar vein, the terms of the Eleventh Amendment exempt the states from suit in the Federal courts under certain circumstances, providing that, “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”<sup>v</sup>

While the constitutional division of power between local and national scales of governance is fairly straightforward in theory – all power to the states except where authority has been explicitly granted to the federal government by the constitution – in practice it becomes both ambiguous and historically fluid. Indeed, because of the susceptibility of the constitutional grants of federal authority to widely varying interpretation<sup>vi</sup>, the federalist scheme embodied by the constitution has created a state of permanent struggle between scales of governmental authority.

Indeed, the question of scale of sovereignty was seen as so essential to the survival of the young republic that it animated the creation of party politics in the United States; Hamilton’s Federalist Party advanced the cause of a strong central government, Jefferson’s Democrat-Republican Party the need for state and local authority. It was within the courts, however, that much of the struggle between scales of governance has played out. Notwithstanding Jefferson’s victory in the 1800 election, the U.S. Supreme Court’s 1819 ruling in *McCulloch v. Maryland*<sup>vii</sup> solidified the trend towards consolidation of centralized governmental authority by upholding the Federal authority to establish a national bank. In a move that foreshadowed subsequent judicial expansions of federal Power, the *McCulloch* court based its decision upon the enumerated Constitutional grant of federal powers of taxation, borrowing, and regulation of interstate commerce along with Article I, Section 8, Clause 18 permitting the national government to, “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”<sup>viii</sup>

While the Supreme Court's early decisions set the stage for an expansion of new federal powers, a series of National crises and initiatives –the Civil War and the Depression, Lyndon Johnson's "Great Society" effort to eradicate poverty and promote civil rights, and most recently the "War on Terror," – have given -impetus to such an expansion. Along with the defeat of the South in the Civil War and the invalidation of slavery by the Thirteenth Amendment, a further shift of governmental power from the local to the national scale developed. Specifically, the post-Civil War period saw both the invalidation of state laws regulating commercial activities such as railroads<sup>ix</sup> under notions of federal commerce clause preemption, as well as the creation of the first substantial Federal regulatory agencies such as the Interstate Commerce Commission. Shortly after the turn of the 20<sup>th</sup> century, the judiciary began interpreting the commerce clause as validating the extension of federal authority to almost all economic activity in the "stream of commerce."<sup>x</sup> Such judicial involvement in the balance of power between governmental scales was essential to the consolidation of federal power, and the birth of the modern centralized regulatory state.

The pull toward the expansion of federal power under the commerce clause grew stronger in years following the Great Depression and World War II. Notwithstanding substantial initial resistance to Roosevelt's "New Deal" efforts to respond to the worldwide economic depression, the Court's decisions in the late 1930's <sup>xi</sup>effectively opened the door to unlimited federal economic regulation, enabling the federal government to exert a virtually unchallengeable dominance over an increasingly broad range of economic activities.

Following the pattern set by both post-Civil War federal programs and the New Deal, a strong centralized national government continued to be regarded as the primary tool for enacting sweeping political change in the name of social justice, and overcoming what were perceived to be parochial, and often discriminatory, local practices. This tendency was most strongly manifested by the Federal government's championing of the cause of civil rights in the 1950's and 60's. Thus, *Brown v. Board of Education*,<sup>xii</sup> --which extended the Fourteenth Amendment's protections to the racial composition of state classrooms -- and Johnson's Great Society project – which led to passage of the Civil Rights Act of 1964 as well as a host of environmental regulations, and an increasingly intertwined system of federal grants to all scales of local government conditioned upon local compliance with an increasingly large number of federal requirements – all typified a judicial move towards larger and larger scales of governmental authority.

While much of the historical jurisprudence interpreting the constitutional tensions between scales of governance has – as outlined above – favored a centralized federal government, this trend has been resisted by a countercurrent favoring state and local authority. For example, before the eruption of federal authority over civil rights in the 1950's and 60's the Court had previously deferred to Southern states' "Jim Crow" laws and practices.

Thus as early as the 1890's the Court upheld a state statute requiring railways to provide equal but separate accommodations for white and "colored" passengers<sup>xiii</sup>, as well as racial segregation in public education as 'a matter belonging to the respective states.'<sup>xiv</sup>

Similarly, the modern Rehnquist Court has begun to reassert the fundamental importance of state governmental authority in a number of landmark cases putting a check on the continued expansion of federal authority. In particular, the Supreme Court has begun to limit Congress' previously unbounded Commerce Clause powers<sup>xv</sup>, while recognizing States' Tenth Amendment immunity from federal mandates for state adoption and/or participation in federal regulatory programs.<sup>xvi</sup>

It is important to stress that the efforts to increase federal power, often in the name of progressive social change, have been consistently resisted both in the political arena and in the courts through traditional arguments for the virtues and necessity of governance at local and state scales. Southern resistance to federal civil rights programs and court-ordered integration provide the prime example of this trend. In this instance, arguments for racial segregation were re-articulated as more facially neutral assertions of state rights and inherent local sovereignty. Since the 1950's, similar rhetoric in favor of "state's rights" and "small government federalism" have been mobilized in efforts to oppose a host of federally recognized rights, entitlements, and social programs – as in the case of abortion rights and affirmative action, and to attempt to preempt the creation of such rights, entitlements, and programs – as in the case of gay marriage.

Yet it would be a mistake to make a simple equation between progressive policy and increased federal power, or between reactionary politics and local power. Certainly, local activism is often progressive in its approach (see Andrea McArdle, Chapter in this volume), and skeptical of federal authority. Similarly, as is witnessed in contemporary debates over gay marriage, conservative groups often seek strong assertions of centralized power to limit local autonomy. These concurrent, contradictory developments belie the presumption, often operative in U.S. politics, that centralized federal authority is the tool of progressive, often left-leaning social and economic agenda, and that the assertion of states' rights and the need for localized scales of government largely serve as tropes for conservative opponents of such agenda. These contradictory currents illustrate our central claim: that the ideologies of scale are simultaneously potent and fluid. Advocates of certain policy positions often legitimate those positions by associating them with a particular scale of governance, be it centralized or de-centralized. But their allegiance to that scale may be fleeting; in other instances, those same advocates may champion the benefits of situating authority at an alternate scale.

This is what played out in Portland, a politically progressive city that found itself resisting federal interventions in law enforcement. To understand that dynamic, we need first to understand the scale politics of law enforcement.

## Federalism and Crime Control

The boundary between federal and local control is often an ill-defined and contentious one; it can be a political fault line riddled with fissures and dislocations. In short, those who favor localized control both fear centralized power and trumpet notions of organic, bottom-up politics. The danger of federal power is that it will go unchecked, and enable central authorities to pry too deeply into, and regulate too completely, the affairs of the citizenry (Fogelson, 1971; Marx, 1990). The romance of local control is bound up with its association with the citizen-subject, who is close to the dynamics that most directly shape his or her life, and who should possess the capacity to shape those dynamics through localized political action (see Bryan, 2003).

On the other hand, centralized power can accomplish worthy social goals. As noted above, the federal government has stepped in to guarantee civil liberties where local authorities refuse to protect them. It also often seeks to provide oversight and direction to large-scale problems of governance. Certainly, efforts to reduce poverty are more likely to succeed if developed on a national scale, given the macroeconomic dynamics that generate income patterns. Isolated efforts by localities will hardly alter those patterns much, if at all (Massey, 1979).

These tensions are especially evident in debates over the proper control of law enforcement. The police power is, by tradition, a hallowed *local* power in the United States. As Sandra O'Connor argued in a recent dissent in a key federalism case, *Gonzales v. Raich*,<sup>xvii</sup>, “[t]he States’ core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens.”<sup>xviii</sup> This guarantee of localized control over law enforcement stems, in large part, from suspicions of centralized power that animated the protections in the Bill of Rights against government authority. Because the abuse of such authority is often embodied as the prying federal law enforcement agent, key provisions of the Bill of Rights, including the Fourth and Fifth Amendments, were written precisely to keep the inquisitive eyes of the central government from any unjustified surveillance.

The favored status of localized policing means that there are an abundance of law enforcement agencies in the United States. Geller and Morris (1990) document that the United States has nearly 12,000 municipal, 79 county, and more than 18,000 township police agencies; more than 3,000 county sheriff’s departments; 51 state police and highway patrols; and nearly 1,000 nonfederal special-purpose police agencies. Given this sprawling law enforcement apparatus, and the resultant potential for duplication, lack of communication, and interjurisdictional disputes, it is not surprising that federal agents tout the efficiency that results from more centralized, and hence coordinated, crime reduction efforts.

These efforts to centralize law enforcement practices have historically run in tandem with the wider efforts to assert federal control. The Federal Bureau of Investigation (FBI) was created coterminously with the New Deal, and was meant to target organized and other forms of trans-state crime (Powers, 1987; Theoharis, et. al., 1999). In these efforts, the FBI sought to create partnerships with local law enforcement, in no small part through developing centralized databases to collate crime patterns and various key pieces of information, such as fingerprints. In the Great Society era, federal commissions sought to understand crime and law enforcement patterns, especially because these were seen as central dynamics fueling many instances of urban unrest (Kerner Commission, 1968; McCone Commission, 1965). Out of these commissions emerged centralized efforts to improve the efficiency and effectiveness of policing. The primary example here was the Law Enforcement Assistance Association (LEAA), which subsequently metamorphosed into the National Institute of Justice (NIJ).

These agencies have sought to influence local law enforcement by charting “best practices” and providing resources for departments to adopt these practices (Ross, 2000). Reforms such as community policing and problem-solving policing were spurred in large part by these agencies. Local law enforcement agencies were thus provided incentives to adopt these reforms, because they could lead to an infusion of resources (Giblin, 2004; Crank and Langworthy, 1992; Herbert, 2005). More directly, federal law enforcement agencies seek to influence local law enforcement through various joint efforts to combat crimes having trans-local dynamics, such as drug trafficking. Local police departments often recognize incentives to participate in such task forces; they can gain training, expertise, and status. At the same time, they are sometimes wary of collaboration. Federal agents might usurp local authority or claim excessive credit for any successes that might result. These outside agents might also disrupt relations local police have developed with informants or members of marginal communities, such as undocumented immigrants. Local police may wish not to arrest people who are technically in violation of federal law in order to protect key sources of information they have cultivated over a long period of time. These delicate relations can possibly be damaged by heavy-handed federal law enforcement officers who seek quick and well-publicized arrests.

In short, any hope for identifying bright lines that clearly demarcate where federal police power should end and local police power should begin remains elusive. Geller and Norris (1990, 233) summarize the situation well: “The justification usually offered for the hodgepodge of American police forces is that freedom, and a healthy system of checks and balances arising out of interagency competition, precludes the creation of a national police force. This is a deeply, one might say passionately, held belief, and it is for the time being politically unassailable.”

Yet this belief *is* politically assailed, in no small part because of the increased prominence of crime as an issue in national politics. This dates most significantly to the 1960's, when Republican presidential candidates Barry Goldwater (1964) and Richard Nixon (1968) employed the so-called "Southern strategy" to lure conservative whites from their traditional alliance with the Democratic Party. Key to this strategy was the linking of civil rights activism with criminality; the protests of activists were characterized as synonymous with a breakdown in "law and order" (see Beckett, 1997). More generally, the law-and-order political discourse that emerged remained a viable vote-getting strategy in the subsequent years, and fueled the massive fourfold increase in incarceration in the United States (Parenti, 1999; Wacquant, 2001). Given the political prominence of the desire to fight a "war" on crime, federal-level politicians sought to toughen criminal laws and expand federal intervention into criminal investigations.

From this position, it is a short step to a federalized emphasis on fighting a new war, this one on terrorism, despite the continuing importance of local policing institutionally and ideologically. Not surprisingly, the federal-local fault line has once again been disturbed by efforts to combat terrorism, most notably in the form of the USA Patriot Act.

### **Federalism and Crime Control under the "War on Terror."**

The "war on terror" generally, and such specific measures as the Patriot Act ("Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism") may represent a substantial break with a number of traditional doctrines of U.S. criminal law. Yet they should also be understood as the most recent chapter in the continuing American struggle over the scale at which crime control is governed, as well as a continuation of the trend toward consolidating and nationalizing authority over crime control.

From its inception, the Federal Government has framed the "war on terror" as both a multi-scalar conflict requiring police efforts ranging from the local to the international, as well as a conflict that must inherently be managed by a strong central authority. Almost two months after the September 11 attacks, President Bush posited the "war on terror" as more than an effort "to defend our homeland," but rather as "a war to save civilization." (Bush, 2001). Even given the international scale of such a project, Bush was careful to articulate the War on Terror as inherently a local effort, but one that required a strong, supervisory federal government: "To coordinate our efforts we've created the new Office of Homeland Security. Its director. . .reports directly to me -- and works with all our federal agencies, state and local governments, and the private sector on a national strategy to strengthen our homeland protections" (Bush, 2001). In the context of airport security, Bush explicitly framed safety as directly correlated to federal oversight of local law

enforcement: “We have posted the National Guard in America's airports and placed undercover air marshals on many flights. I call on Congress to quickly send me legislation that makes cockpits more secure, baggage screening more thorough, and puts the federal government in charge of all airport screening and security” (Bush, 2001).

Moreover, like prior efforts in the “war on crime,” the federal government has backed up strong rhetoric regarding the need for centralized leadership with substantial regulatory and economic incentives and initiatives. Specifically, the Patriot Act calls for the intensification of federal involvement with, oversight of, and participation from a variety of state and local governmental agencies. For example, Section 215 of the Patriot Act permits the federal government to obtain a court order mandating the production of any documents or other information held by any organization – including state agencies and libraries – solely upon the unsupported assertion by an FBI agent that such information is “for an authorized investigation . . . to protect against international terrorism or clandestine intelligence activities”<sup>xxix</sup> The implications of Section 215 for local government are particularly powerful given that, as of October 2002, a survey conducted by the University of Illinois reported that, “Federal and local law enforcement officials, visited at least 545 (10.7%) libraries to ask for records pursuant to Section 215. Of these, 178 libraries (3.5%) received visits from the FBI” (Estabrook, 2002). Because Section 215 makes it illegal for an individual or organization approached by the FBI to report that records were requested, the numbers reported by Estabrook almost certainly have underreported FBI efforts to obtain information from such local governmental entities as libraries.<sup>xx</sup>

That said, perhaps the greatest potential implication of local authority in the federal prosecution of the “war on terror” is through various programs providing for local/federal crime control partnerships. For example, Section 701 of the Patriot Act authorizes the Federal Office of Justice Programs to “make grants and enter into contracts with state and local law enforcement agencies and with nonprofit organizations to identify and combat multi-jurisdictional criminal conspiracies.”<sup>xxxi</sup> Likewise, Section 816 enables the United States Attorney General to establish a variety of “regional computer forensic laboratories,” for the purpose of providing training and assistance to “Federal, State, and local law enforcement personnel,” in the investigation and prosecution of local and Federal computer crimes, as well as to “facilitate and promote the sharing of Federal law enforcement expertise and information about the investigation, analysis, and prosecution of computer-related crime with State and local law enforcement personnel.”<sup>xxii</sup> Section 908 provides for the Federal Attorney General and CIA to provide local and state officials training in the identification and use of “foreign intelligence information.”<sup>xxiii</sup> The Patriot Act even goes so far as to empower the federal government to contract with local law-enforcement for the protection of military bases during the duration of the Iraq war, with the Department of Defense footing the bill.<sup>xxiv</sup>

Beyond the specific terms of the Patriot Act, the “War on Terror” has also brought a redoubled effort to create and maintain “Joint Terrorism Task Forces” (JTTF). Described by the FBI as “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 acts of terrorism,” such JTTFs were first created in the 1980s (Federal Bureau of Investigation, 2005). While such partnerships expanded slowly in the 1990s in response to the World Trade Center and Oklahoma City bombings, the “war on terror” has spurred a resurgence in the creation of JTTFs (Dreyfuss, 2002).

The incentives for local law enforcement agencies to participate in the “war on terror” are potentially quite substantial. For example, \$50 million and \$100 million were allocated for local contracts to “identify and combat multi-jurisdictional criminal conspiracies,” under Section 701 during fiscal years 2002 and 2003 respectively (Doyle, 2001). Likewise, Section 1005 provides \$25 million per year until 2007 for grants from the Attorney General to “States and units of local government to improve the ability of State and local law enforcement, fire department and first responders to respond to and prevent acts of terrorism,” (Doyle, 2001).<sup>xxv</sup> Effectively writing a blank check for local terrorist response readiness projects, Section 1013 provides for “appropriations in whatever sums are necessary for fiscal years 2002 through 2007” to “enhance the capability of State and local jurisdictions to prepare for and respond to terrorist acts” (Doyle, 2001).<sup>xxvi</sup> Finally, Section 1015 approves appropriations up to \$250 million per year for, “state and local grants for the development of various integrated information and identification systems,” through fiscal year 2007. (Doyle, 2001).<sup>xxvii</sup>

Not surprisingly, the evidence suggests increased federal-local cooperation. While there were 35 formal Joint Terrorism Task Forces before the September 11 attacks, each of the FBI’s 56 field offices now has a JTTF. In addition, there are another 10 “stand-alone” JTTFs in the FBI’s larger resident agencies, plus a large variety of “JTTF annexes” sponsored by other field offices in “small to medium sized resident agencies” (Casey, 2004). Indeed, considering the nationwide scope of federal involvement with local law enforcement under the rubric of combating terrorism – even in areas with neither a history nor a substantial threat of terrorist attack (Dreyfuss, 2002) – the war on terror represents a previously unprecedented expansion of federal oversight and control over the traditionally local governmental sphere of crime control.

That such joint task forces can enflame long-standing disputes about the scales of justice is best illustrated by one of the places where the debate burned brightest--Portland. Even if expansive federal authority often has been seen as more “progressive” politically, Portland’s political culture, for avowedly progressive reasons, rejected a strong federal role in policing.

## **Local Resistance to the War on Terror: The Portland Case:**

The City of Portland devoted local police resources to a Joint Terrorism Task Force between 1997 and 2005. The tumultuous history of this partnership between local and federal law enforcement agencies provides a particularly germane example of how scale can be ideologically mobilized by those with both local and federal interests. It also highlights a number of tensions and issues concerning the scale of law enforcement, some of which have traditionally been identified with the expansion of federal jurisdiction in the past, and some of which are new and particular to the political climate since September 11, 2001.

To understand the debate in Portland, we conducted a content analysis of news articles appearing in *The Oregonian*, the lone metropolitan daily newspaper, with a circulation of nearly 350,000 (450,000 on Sunday). This analysis serves as the basis for our discussion of the mobilization of discourses of scale by local and federal law enforcement agencies, politicians, and interest groups. As a mainstream newspaper governed by contemporary journalistic standards of balanced reporting, *The Oregonian* can be presumed to represent the viewpoints of the key actors on either side of this and other prominent public debates. It is thus a good source to use to discern the contours of this debate, and the key tropes mobilized by those on either side.

Our analysis covers a period extending from the inception of the Portland JTTF, to the controversial vote by City Council to withdraw local police officers from the JTTF in April 2005. The Joint Terrorism Task Force was discussed in 117 articles in the eight-year period. Each news story was assigned a score based on the frequency and nature of discourses present. Articles that devoted more space to perspectives critical of local involvement in the JTTF were classified as being opposed to participation, while articles that devoted a greater amount of attention to issues relating to the benefits of JTTF membership were classified as being in favor of participation (see table 1.1). Overall, a greater number of articles (n=61) appearing in *The Oregonian* opposed local participation in the task force. That said, a significant amount of news coverage was favorable to local participation on the task force (n=46). A smaller number of articles (n=10) devoted an equal amount of attention to both sides of the debate, earning a neutral score.

**Table 1.1. Discourses present in media coverage of JTTF participation, 1997-2005**

<b>Position of article</b>	<b>Discourses</b>	<b>Key voices</b>
<i>Opposed to participation in JTTF: 61</i>	<ul style="list-style-type: none"> <li>- Potential abuse of civil rights/racism (49)</li> <li>- Legality; conformity with state constitution (35)</li> <li>- Need for locally elected oversight of police (28)</li> <li>- Potential for police surveillance of legitimate political activity (26)</li> <li>- Not worth expenditure / should focus on local issues (18)</li> <li>-Participation in federal investigations hinders effective community policing (10)</li> </ul>	<p><i>Mayor Tom Potter; Mayor Vera Katz; City commissioner Randy Leonard; city attorney Jeff Rogers; Stanley Cohen, legal council for Kariye; Dave Fidanque, ACLU spokesperson; Bilal Mosque community; Islamic Center of Portland; Japanese American Citizen's League</i></p>
<i>In favor of participation in JTTF: 46</i>	<ul style="list-style-type: none"> <li>- Need to protect local security (33)</li> <li>- Need to protect security at the national scale (24)</li> <li>- Need to combat domestic terrorist groups (22)</li> <li>..</li> <li>- Importance of information sharing between local/federal agencies (22)</li> <li>- Portland's exceptionalism; isolation from regional interests (14)</li> <li>- Legality of investigations(13)</li> <li>- Portland's scalar position in wider war on terror (13)</li> </ul>	<p><i>Mayor Vera Katz; Chief of Police Kroeker; Chief of Police Derrick Foxworth; Assistant U.S. Attorney John Kroger; FBI Agent Matthews; FBI Agent Jordan; Beaverton Mayor Ron Drake; local Portland business groups</i></p>
<i>Neutral: 10</i>		
<i>Total: 117</i>		

Editorial space devoted to the JTTF in the years leading up to the September 11 terrorist attacks was limited. Oregon FBI chief Kathleen McChesney had pushed for the creation of an anti-terror task force in 1997, when local law enforcement efforts were largely concerned with threats to local infrastructure from domestic activist groups and those accused of “eco-terrorism.” This focus was evident in the wording of the initial City Council ordinance, which mandated the use of local law enforcement resources to “identify and target for prosecution those individuals or groups who are responsible for Right Wing and/or Left Wing movements, as well as acts of the anti-abortion movement and the Animal Liberation Front/Earth Liberation Front.” (*Oregonian*, December 1, 2000). The wording of the ordinance troubled local civil rights advocates, who were concerned that the mandate of the JTTF granted too many surveillance powers to both local and federal law enforcement agents. In particular, they cited Portland’s troubled history of cases involving misuse of surveillance material by local police forces. A number of high-profile local cases colored subsequent discussions of law enforcement powers by local critics. In one case, an officer of the Portland police intelligence unit had leaked a cache of surveillance documents. The embarrassing revelation that the leaked documents contained a photograph of Portland Mayor Vera Katz at an agricultural labor rally in the 1960s helped fuel arguments that local police resources could potentially be used to monitor legitimate political activity. In a separate case, political activist Douglas Squirrel successfully sued the City in 1993, alleging that Portland police officers had conducted illegal surveillance of his political activities by dispatching two undercover agents to a meeting that Squirrel attended in 1992. Multnomah County Circuit Judge Michael Marcus found that the conduct of the Portland Police Bureau violated state law because Squirrel had not committed a crime during the course of the meeting. He ruled that “The mere presence of an individual, group, organization, corporation, business or partnership at an event or activity where criminal behavior is discussed, planned or conducted by others shall not be sufficient basis” for recording the behavior of that individual (*Oregonian*, December 2, 2001).

Thus in the early stages of local participation on the JTTF, critics mobilized arguments about the potential for abuse of police power and the illegitimate surveillance of non-criminal political activity. Prior to September 11, 2001, primarily local actors used these discourses to question the role and motivations of local law enforcement emboldened by federal assistance. These discourses changed following September 11. Local resistance to the JTTF increasingly focused on using State legal precedent to protect local citizens’ rights from the potential overreaching of surveillance by federal agencies.

The Marcus ruling formed the basis for criticisms of the legality of police participation on the JTTF in November of 2001, when the FBI planned to conduct interviews with 200 local individuals of Middle Eastern descent. City attorney Jeff Rogers argued that the interviews violated a 1981 Oregon statute that prohibited law enforcement agents from collecting or maintaining information on individuals who were not suspected of criminal activity. City politicians and

attorneys framed their opposition to the planned questioning in legal terms, arguing that partisan politics had no sway over their mobilization of state law.

Yet advocates of federal involvement cited Portland's exceptionalism in challenging the planned participation of local law enforcement agents. Critics of Portland's City Council repeatedly framed the municipal government's actions as unique and uncharacteristic of sentiment in other cities. One U.S. Department of Justice spokeswoman stated that "Portland's actions are not representative of what we're hearing. Fortunately, we're getting a different response from local police around the country." (*Oregonian*, November 22, 2001). The characterization of Portland as alone in its resistance to federal efforts intensified, with critics of the city describing it as "The People's Republic of Portland" and "The Little Beirut." In this way, proponents of the JTTF emphasized the city's scalar position in the national war on terror, and characterized local resistance as a threat to security at the local, regional, and national scales.

Meanwhile, those who opposed the City's participation in the federal investigation increasingly framed the issue in terms of local democratic responsibility. For example, a spokesperson from the Japanese American Citizen's League, Scott Sakamoto, argued that the checks and balances that traditionally kept local law enforcement agents under the oversight of democratically elected officials did not apply to federal bodies such as the JTTF:

Because Portland police officers are deputized by the FBI, their activities may not be regulated by state law and administrative rules that prohibit political surveillance. Among those protections are provisions that require files to be audited and purged if no criminal activity is involved. In contrast, FBI records are permanent and may be shared with other agencies. (*Oregonian*, September 26, 2001)

The city's attorneys successfully blocked participation by local members of the JTTF in the federal investigation. This proved something of a pyrrhic victory, however, since the interviews were ultimately allowed to be carried out by federal agents without participation from the local police (cf. Thacher, 2005). Furthermore, Portland police continued to participate in other investigations and remained active on the JTTF. One year later, in 2002, *The Oregonian* reported that the relationship between the FBI and local police had in fact grown even stronger, stating that participation in the task force had grown to include 40 local law enforcement agents (*Oregonian*, June 2, 2002).

A series of high-profile arrests in the Portland area helped to galvanize positions on both sides of the issue. When FBI agents detained Sheik Mohamed Kariye at Portland International Airport, local law enforcement agents complained that the FBI had cordoned off the area and limited their involvement in the case (*Oregonian*, September 9, 2002). Kariye was initially detained because trace amounts of explosive material were detected on his luggage. However, when tests returned negative, the FBI continued to detain him on charges of social security fraud. This angered the local Muslim community, who felt that federal law enforcement agents were unjustly targeting Kariye. The Islamic Center of Portland mosque emerged as a key voice of opposition to Kariye's detention, and

mobilized two main arguments for his release. The first was the charge that federal agencies like the FBI, operating outside of democratically elected oversight, were engaging in a form of racial persecution of Muslims and using archaic legal statutes to detain average citizens without due process. The second discourse appealed to Kariye's role as a prominent member within the local community. That such a key figure could be detained, critics alleged, illustrated a lack of specific cultural knowledge on the part of federal agents unfamiliar with local Muslim knowledge and practices.

Friends and family of Mike Hawash echoed these discourses when he was charged with assisting the Portland Six in March 2003. The Portland Six were a group of Muslims living in the United States who were charged with attempting to enter Afghanistan during the 2001 offensive with the aim of fighting against U.S. forces. Secrecy by federal law enforcement surrounding the arrests of these accused sympathizers served to strengthen opposition to potential abuses by federally mandated investigation teams. Moreover, the potential that the arrests were premised upon racial profiling exacerbated concerns about the abuse of civil liberties. But proponents of local participation in the "War on Terror" cited these arrests as evidence of the critical role of Portland in the national fight against terrorism. For example, one report situated Portland on an "Al Qaeda Trail" that linked Osama bin Laden with local Muslim religious leaders (*Oregonian*, September 13, 2002). The ability of the FBI and other federal agencies to track the international movements and relationships of terror suspects was repeatedly cited as a necessary complement to local law enforcement, which lacked sufficient resources to make connections at wider scales. "Portland isn't immune from terrorism," Commissioner Jim Francesconi said on September 19. "We must work with the FBI." (*Oregonian*, September 19, 2002).

Opponents of the Joint Terrorism Task Force failed to assert sufficient political pressure as Mayor Katz and other city council members voted unanimously to remain involved with the JTTF in 2003 and 2004. The Mayor and Chief of Police Foxworth did yield to public demand for greater official oversight of police activity. Both promised to apply for secret-level FBI security clearance so that they could monitor the activities of Portland police officers participating in the JTTF. However, only Foxworth eventually earned the appropriate clearance.

Local elections in 2004 changed the composition of the City Council and brought Tom Potter into the Mayor's office. These changes caused a shift in focus back to an assessment of the role of city police in the JTTF. In February 2005, *The Oregonian* began reporting that Council Member Randy Leonard and Mayor Potter were opposing continued city involvement and asking the FBI for increased oversight of taskforce activities. On March 23, it was announced that Potter was requesting top-secret-level clearance for himself and Police Chief Foxworth to provide more rigorous supervision of local police resources. Portland FBI Agent Robert Jordan opposed any civilian involvement on the task force, echoing earlier arguments that Portland was alone in its opposition to federal oversight of the JTTF. On March 24, he told *The Oregonian* that the demands by

the mayor were "simply not feasible or reasonable... No other mayor in the country has been granted the top-secret clearance that Potter wants." (*Oregonian*, March 24, 2005). As debate intensified, local proponents of participation in the JTTF argued that Portland's exceptionalism would harm regional security and the relationship of other neighboring counties with the federal government. In a letter to the mayor, Police Chief Foxworth argued that "Nonsupport of the JTTF would cause long-term damage to our reputation and credibility within the law enforcement community. This will likely weaken our relationships with remaining law-enforcement partners and break down lines of communication." (*Oregonian*, April 23, 2005). An e-mail distributed to local law enforcement agencies in Oregon by the Department of Homeland Security threatening to withdraw funding for local training partnerships demonstrated that there was some substance to the chief's concerns. Despite this, the City Council voted on April 29 to withdraw support from the Joint Terrorism Task Force and reassign those police officers to new roles within the Portland Police Bureau.

In their analysis of the relations between federal and local law enforcement agencies, Geller and Morris (1990) outlined some of the primary incentives and disincentives for local participation in task forces, many of which emerged in the Portland case. In terms of incentives, Geller and Morris cite the access to sophisticated investigative and prosecutorial tools as one draw for local community police involvement. Proponents of Portland's participation in federal investigations regularly expressed the need for local police to retain their top-secret clearance in order to have access to FBI computers and crime labs where critical information was exchanged. Similarly, budgetary considerations have been traditionally cited as powerful motivators for local involvement in federal task forces. Proponents of city participation on the JTTF also emphasized the need to share information between jurisdictions, and the possibility that local police forces could benefit from federal preparedness training.

The Portland case is also illustrative of both traditional and new disincentives to local partnership with federal law enforcement agencies. Certainly the FBI's unwillingness to share sensitive information with elected politicians and local police caused frustration and suspicion among members of the public. There was also a very strong mistrust of centralized federal authority among many Portland citizens, particularly those in the Muslim community. As a result, progressives on the left found themselves in the unusual position of supporting the need for localized government and oversight of police practices, even though the city and the police bureau had a recent history of civil liberties violations and abuse of investigative power. Critics of the task force repeatedly framed Portland's participation as a hindrance to local community policing efforts, because citizens' mistrust of the federal mandate created a rift between community members and law enforcement agents. Mayor Potter and the City Council mobilized these tropes and committed additional material support to community policing efforts once they withdrew support from the JTTF. "I don't think whether we stay in or out of the JTTF will determine the safety of Portland citizens," Potter said after the City Council vote, "I think what will determine the

safety of Portland citizens is when we work together, when we watch out for each and care for each other, that our society is safer." (*Oregonian*, April 29, 2005)

Unsurprisingly, opponents of the mayor's position saw the move by City Council as a knee-jerk reaction that did more symbolic damage to national unity than material good to the citizens of Oregon. While mocking members of the City government, one commentator chillingly evoked a similar period in this country's history when civil liberties were threatened by far-reaching federal surveillance power: "What [this ruling] basically says is that Portland is a very politically correct and very naive city that is also very paranoid. I'm not sure that's going to surprise anyone, but it might surprise the City Council to know that J. Edgar Hoover is dead." (*Oregonian*, April 28, 2005).

### **Conclusion: Calibrating the Scales of Justice**

J. Edgar Hoover may well be dead, but the tensions he irritated by expanding federalized crime control efforts persist. Even if Portland's resistance to the JTTF was unusual in these terror-obsessed times, the City's opposition relied upon well-worn discourses that simultaneously condemned intrusive centralized authority and validated local control of policing. And this resistance to the probing eye of the federal state is hardly unique to Portland; numerous state and local governments have expressed disquiet about, and open resistance to, aspects of the Patriot Act (Cambanis, 2004).

That such debates rage on shows clearly that the scales of justice can never be brought to a restful balance. No easy resolution is possible because plausible arguments exist for both centralizing *and* devolving political power. This is true in the context of law enforcement, and in numerous other policy arenas. This reality enables political activists to argue for centralization in one context and devolution in another. The ideologies of scale are fluid and ever-changing; yesterday's Great Society liberal arguing in favor of strong national oversight of civil rights and anti-poverty initiatives is today's Patriot Act opponent arguing against strong national authority to mount national security investigations that threaten basic civil liberties.

Yet even if the ideologies of scale are fluid, they are simultaneously quite potent. Those who support local participation in federal task forces can cite the virtues of a centralized authority that can best protect a vulnerable nation through its efficient practices. Their opponents cite the equally-valued virtues of local control of law enforcement, the better to assure proper oversight of the police's coercive authority and surveillance powers. Each of these broad ideological positions—favoring centralized or decentralized authority—is considered legitimate in American political discourse, in the context of law enforcement and other policy areas. Each can thus be drawn upon in debates about the police power, and other powers, of the state.

In short, geographic scale is a contradictory political object: it is a discursive signifier that is both strong and elusive; both ideologically-charged and ideologically-promiscuous. This is not inherently problematic, because there is no necessary reason why one should advocate solely for one scale to the complete exclusion of others. It is simply that resting one's political argument on the grounds of scale, however robustly, will likely prove an unstable position. Despite the ideological significance often attached to scale, it is a fickle political arrow to fire--it may reverse itself in flight as one moves to a different context.

As the Portland case illustrates, debates about the scale of governance can become especially impassioned when they come to the issues of crime and terror. Political debates about crime and terror are necessarily highly charged, often pursued with moral fervor. As these politics touch upon pre-existing concerns about the scale balance of political power, they become even more enflamed. Critics of Portland's decision to withdraw from the JTTF may cite its exceptionalism, but we see this story as anything but exceptional. Rather, it is another chapter in an ongoing saga about the politics of the scale of governance. Other chapters remain to be written, but the story they tell will always be inconclusive, because the scales of justice refuse to be equilibrated.

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<sup>i</sup> This is not to suggest, however, that these tensions emerge solely in the area of law enforcement, just that they are often especially impassioned when discussions revolve around the coercive capacity of the police.

<sup>ii</sup> U.S. Const. art. VI, Cl. 2.

<sup>iii</sup> U.S. Const. amend. XIV, Section 1.

<sup>iv</sup> U.S. Const. amend. X.

<sup>v</sup> U.S. Const. amend. XI.

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<sup>vi</sup> [INSERT LAW REVIEW CITATION] provides a concise overview of the complex field of federalist jurisprudence that has arisen from over two centuries of judicial constitutional interpretation.

<sup>vii</sup> 17 U.S. (4 Wheat.) 316, 4 L. Ed. 579 (1819).

<sup>viii</sup> *Id.* at

<sup>ix</sup> *Wabash, St. Louis & Pacific Railroad v. Illinois*, 118 U.S. 557 (1886) (invalidating state regulation of railroad rate discrimination).

<sup>x</sup> *Swift & Co. v. United States*, 196 U.S. 375 (1905).

<sup>xi</sup> *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1 (1937).

<sup>xii</sup> 347 U.S. 483 (1954).

<sup>xiii</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>xiv</sup> *Cumming v. Richmond County Board of Education*, 175 U.S. 528 (1899).

<sup>xv</sup> *United States v. Lopez*, 514 U.S.549 (1995), *United States v. Morrison*, 529 U.S. 598, 618 (2000). But see, *Gonzales v. Raich*, 125 S. CT. 2195, 2211-2215 (2005).

<sup>xvi</sup> *New York v. United States*, 505 U.S.144 (1992), *Printz v. United States*, 521 U.S. 898 (1997),.

<sup>xvii</sup> 125 S. Ct. 2195 (2005)(upholding the application of the federal Controlled Substances Act criminalizing the manufacture, distribution, or possession of marijuana, to intrastate cultivators and users of marijuana for medical purposes).

<sup>xviii</sup> *Id.* at (O'Connor, J., dissenting)

<sup>xix</sup> Pub. L. 107-56, § 215.

<sup>xx</sup> *Id.*

<sup>xxi</sup> *Id.* at § 701.

<sup>xxii</sup> *Id.* at § 816.

<sup>xxiii</sup> *Id.* at § 908.

<sup>xxiv</sup> *Id.* at § 1010.

<sup>xxv</sup> *Id.* at, § 1005.

<sup>xxvi</sup> *Id.* at, § 1013.

<sup>xxvii</sup> *Id.* at § 1015.