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## Note: Watching the Watchmen: Lessons for Federal Law Enforcement from America's Cities

Michael P. Weinbeck

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**NOTE: WATCHING THE WATCHMEN: LESSONS FOR  
FEDERAL LAW ENFORCEMENT FROM AMERICA'S  
CITIES**

Michael P. Weinbeck<sup>†</sup>

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<sup>†</sup> J.D. Candidate, William Mitchell College of Law, 2011; B.A., English, University of Minnesota, 1999. The author was the chair of the Minneapolis Civilian Police Review Authority Board from 2005 to 2008. He gratefully acknowledges the invaluable expertise and advice of Professors Anne Cross, Metropolitan State University, and A. John Radsan, William Mitchell College of Law.

I. DOES POWER CORRUPT? THE EXPANSION OF FEDERAL LAW ENFORCEMENT THROUGH THE USA PATRIOT ACT

A. *Civil Liberties and Police Forces*

The conflict between the need to be secure and the need to be free is not new. When England debated the establishment of its first modern police force in 1829, opponents expressed their fear of an omnipresent police force that would curtail civil liberties and usurp the role of judge and jury.<sup>1</sup>

The concerns arising 180 years ago have since crossed the Atlantic and emerged again and again in American debates about the proper limits of the role of law enforcement.<sup>2</sup> Those debates have remained largely unchanged in form and content over the decades.<sup>3</sup>

While commentators and members of the media debate the balance between liberty and security, the nation's lawmakers are again considering whether to extend statutory provisions that give intelligence agencies sweeping domestic power to encroach on the civil liberties of citizens.<sup>4</sup> The conversations occurring in Washington, D.C., about oversight of federal law enforcement agencies such as the Federal Bureau of Investigation bear striking resemblances to

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1. POLICE ASSESSMENT RES. CTR., REVIEW OF NATIONAL POLICE OVERSIGHT MODELS 5 (2005), available at [http://www.parc.info/client\\_files/Eugene/Review%20of%20National%20Police%20Oversight%20Models%20%28Feb.%202005%29.pdf](http://www.parc.info/client_files/Eugene/Review%20of%20National%20Police%20Oversight%20Models%20%28Feb.%202005%29.pdf) (tracing the development of the principles of limited police power that were later adopted by the New York City Police Department and other American police forces).

2. *Id.* at 6. Among the principles that the British Parliament adopted when it established the police force is one that echoes the civilian oversight values of today: "To recognize the power of the police to fulfill their functions and duties is dependent on public approval of their existence, actions and behavior, and on their ability to secure and maintain public respect." *Id.* at 5-6.

3. See SAMUEL WALKER, POLICE ACCOUNTABILITY: THE ROLE OF CITIZEN OVERSIGHT 20 (Wadsworth 2001) (detailing a history of police actions that have given rise to calls for civilian oversight); see also ZENITH GROSS & ALAN REITMAN, POLICE POWER AND CITIZENS' RIGHTS: THE CASE FOR AN INDEPENDENT POLICE REVIEW BOARD 33 (1966) (pamphlet published by the American Civil Liberties Union, including a history of extant civilian police review boards and the community incidents that gave rise to a movement to install a citizen review board); Mary M. Cheh, *Legislative Oversight of Police: Lessons Learned From an Investigation of Police Handling of Demonstrations in Washington, D.C.*, 32 J. LEGIS. 1, 3-6 (2005) (reviewing the history of police clashes with protestors following meetings of international trade organizations and steps taken to install citizen oversight mechanisms to address critical incidents).

4. See, e.g., Editorial, *Patriot Act Excesses*, N.Y. TIMES, Oct. 8, 2009, at A38; Ellen Nakashima & Carrie Johnson, *Partial Patriot Act Extension is Approved by Senate Panel*, WASH. POST, Oct. 9, 2009, at A1 (advocating a review of the PATRIOT Act, particularly to address missing civil liberties and privacy protections).

longstanding discussions that have occurred in American cities about how to oversee municipal police departments.

America's police officers are subjected to administrative,<sup>5</sup> judicial,<sup>6</sup> and political<sup>7</sup> scrutiny and oversight. In America's largest cities—and now, increasingly in its mid-sized cities—the police are frequently watched over by civilian agencies established to respond to instances of police misconduct.<sup>8</sup>

The purpose of this paper is to present some reflections on what U.S. cities have learned about managing their police departments through the civilian oversight process and whether such a model of law enforcement oversight has any applications for the oversight of federal law enforcement agencies.

This paper examines the successes and failures of America's cities in instituting external civilian police oversight functions. It then looks at the strengths and weaknesses of current mechanisms the federal government has in place to check the powers of federal law enforcement. Finally, the paper ends with a proposal for how a system of civilian oversight—inspired by the models used in American cities—might function at a federal level.

Although civilian oversight of police is not a panacea, this paper proposes that it is a system with several qualities that can be put to profitable use. As policymakers work to create a more robust system of federal oversight, the lessons cities have learned in implementing civilian review suggest helpful solutions and admonish against making certain mistakes.

### *B. The Growing Concern Over Federal Abuses of Power*

On April 27, 2005, then-U.S. Attorney General Alberto R. Gonzales appeared before the Senate Intelligence Committee and assured lawmakers—who were considering whether to approve changes to the USA PATRIOT Act<sup>9</sup>—that “there has not been one verified case of

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5. JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 172 (1993).

6. *Id.* at 193.

7. *Id.* at 185.

8. National Association for Civilian Oversight of Law Enforcement, Resources, [http://www.nacole.org/index.php?option=com\\_content&view=article&id=51&Itemid=57](http://www.nacole.org/index.php?option=com_content&view=article&id=51&Itemid=57) (last visited Mar. 15, 2010) (listing all U.S. cities with a civilian oversight agency as well as foreign nations with some form of civilian oversight).

9. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter the PATRIOT Act].

civil liberties abuse” by federal agents under the provisions of the act.<sup>10</sup> In fact, at the time of the attorney general’s testimony, he had received reports of at least a half-dozen episodes of legal or procedural violations that were enabled by the expanded authority given to federal agents through the PATRIOT Act.<sup>11</sup>

Three months after Gonzales’s testimony, Congress re-upped the PATRIOT Act, making permanent many of the statute’s provisions that had been hastily prepared in response to the terrorist attacks of September 11, 2001.<sup>12</sup> In 2007, an internal audit at the FBI revealed more than 1,000 instances of violations of law or agency rules while collecting data about phone calls, e-mails, and financial transactions.<sup>13</sup> The audit examined only ten percent of the agency’s national-security investigations conducted since 2002, suggesting that the actual number of violations exceeded, by orders of magnitude, those that were known.<sup>14</sup> Moreover, the audit was confined to domestic surveillance investigations, leaving out a generous swathe of other law enforcement activities in which the agency engages.<sup>15</sup>

### C. *The Balance Between Power and Oversight*

It is axiomatic that an increase in a government’s power to affect the civil rights of its citizens will also be accompanied by increased opportunities for abuses of such authority.<sup>16</sup> Through the auspices of the PATRIOT Act, the U.S. government endeavors to “deter and punish terrorist acts in the United States and around the world [and] to enhance law enforcement investigatory tools. . . .”<sup>17</sup> Among the tools employed by the PATRIOT Act to accomplish its purpose is increasing opportunities for government surveillance of electronic

10. John Solomon, *Gonzales Was Told of FBI Violations*, WASH. POST, July 10, 2007, at A1.

11. *Id.* (“The acts recounted in the FBI reports included unauthorized surveillance, an illegal property search and a case in which an Internet firm improperly turned over a compact disc with data that the FBI was not entitled to collect. . . .”).

12. Eric Lichtblau, *Senate Makes Permanent Nearly All Provisions of the Patriot Act, With a Few Restrictions*, N.Y. TIMES, July 30, 2005, at A1.

13. John Solomon, *FBI Finds It Frequently Overstepped in Collecting Data*, WASH. POST, June 14, 2007, at A1.

14. *Id.*

15. *Id.*

16. See WALKER, *supra* note 3, at 8 (describing how the work environment of policing creates ample opportunities for abuses of citizens, either as a result of an honest misjudgment or from evil motives).

17. USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

communications of U.S. citizens,<sup>18</sup> giving government officials greater authority to monitor and intercede in private banking transactions,<sup>19</sup> and allowing government access to citizens' library records.<sup>20</sup> The beneficiaries of the PATRIOT Act's largesse are federal law enforcement and intelligence agencies, including the FBI, which are charged with using their enhanced powers to fight terrorism.<sup>21</sup>

With some exceptions, commentators do not dispute that the United States government was correct in bolstering the power of its law enforcement agencies in light of the threats to national security that have become tragically salient over the last decade.<sup>22</sup> But the expansion of federal law enforcement powers has not been accompa-

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18. Tammy J. Schemmel, *WWW.STOPCYBERCRIME.COM: How the USA PATRIOT Act Combats Cyber-Crime*, 29 WM. MITCHELL L. REV. 921, 926 (2003). Schemmel notes that the PATRIOT Act allows law enforcement enhanced access to electronic communications by eliminating the jurisdictional boundaries of courts that had prevented internet service providers from handing over information. One of the purposes of this paper is to address the risks of misconduct that are raised by the destruction of those jurisdictional boundaries. *Id.*

19. Paul Schott Stevens & Thomas C. Bogle, *Patriotic Acts: Financial Institutions, Money Laundering and the War Against Terrorism*, 21 ANN. REV. BANKING L. 261, 262 (2002).

20. Heather Hillary & Nancy Kubasek, *The Remaining Perils of the Patriot Act: A Primer*, 8 J. L. SOC'Y 1, 7 (2007) ("This clause of [the PATRIOT Act] causes concern among citizens because the government need only claim they are demanding the records because of anything involving terrorism, and the records must be handed over without the citizen ever knowing."). At present, the U. S. Senate is considering revisions to the PATRIOT Act that would curtail the authority of intelligence agencies to request library records and records of consumer purchasing habits without a more thorough accounting for the need to access the information. See Evan Perez, *Patriot Act Redo Clears Split Panel*, WALL ST. J., Oct. 9, 2009, at A4, *infra* note 24 (discussing potential revisions to the PATRIOT act pending before the Senate).

21. Although this paper tends to scrutinize the FBI, as will be discussed below, the problems and principles of misconduct and oversight are not confined to a single federal law enforcement agency.

22. Compare Robert N. Davis, *Striking the Balance*, 29 BROOK. J. INT'L L. 175, 179 (2003) ("[T]he nation's security ultimately must be a priority, and a condition precedent toward securing civil liberties. When the nation is secure, its people are secure and when a nation is under attack, civil liberties become secondary to national security."), with Hillary & Kubasek, *supra* note 20, at 74 ("It is understandably necessary that in times when national security is at risk, the government will be granted more powers, further reach, and access to more information, but there needs to be a limit on these powers and necessary measures in place to prevent an abuse of this power."). But see Anne Uyeda, *The USA Patriot Act May Infringe on Civil Liberties in Cyberspace*, 2002 UCLA J.L. & TECH. 1, n.1 (2002) ("Although ostensibly designed in response to the events of September 11th, most of the bill's provisions actually have more of an impact on the lives of innocent Americans, rather than hostile terrorists. By endowing domestic and national law enforcement agencies with an expansive power to spy on the on-line activities of people, the government may well have sacrificed the privacy rights of individuals in its quest to protect the nation.").

nied by a commensurate expansion in oversight.<sup>23</sup> From involvement in acts of torture to retaliation against whistleblowers, the FBI is increasingly subject to public criticism and efforts by legislators to address and prevent ethical and civil liberties violations by reforming institutional oversight.<sup>24</sup>

Two core assumptions must be challenged and modified to bring oversight to such organizations as the FBI: first, that unobstructed broad authority is required to achieve absolute security; and second, that security considerations are always incompatible with and superior to preservation of individual rights.<sup>25</sup>

But, as discussed below, many American cities have attempted to address analogous assumptions on the local level to bring external oversight to their police departments. The conversations occurring in American cities may provide fruitful information for the national dialogue on intelligence and federal law enforcement oversight.

## II. CIVILIAN OVERSIGHT OF THE POLICE

### A. *The Growth and Current Status of Civilian Oversight in the United States*

Civilian oversight is defined as “a procedure through which the investigation and disposition of citizen complaints against police officers that involves some input from individuals who are not themselves sworn officers.”<sup>26</sup>

23. Electronic Privacy Information Center, *USA Patriot Act*, <http://epic.org/privacy/terrorism/usapatriot/> (last visited Mar. 16, 2010) (“[The PATRIOT Act] introduced a plethora of legislative changes which significantly increased the surveillance and investigative powers of law enforcement agencies in the United States. The Act did not, however, provide for the system of checks and balances that traditionally safeguards civil liberties in the face of such legislation.”).

24. See, e.g., Perez, *supra* note 20, at A4 (“The bill approved Thursday includes new court oversight and additional administrative steps that terrorism investigators have to comply with.”); Charlie Savage, *Panel Votes on Patriot Act*, N.Y. TIMES, Oct. 9, 2009, at A16 (“In its current form, the Senate bill would impose stronger oversight safeguards on the FBI’s use of these and related powers, such as by requiring new audits by the Justice Department’s inspector general. The bill would also cause several Patriot Act powers to expire after another four years without further legislation; a measure intended to ensure that lawmakers will continue to monitor how the powers are being used.”).

25. See ATHAN G. THEOHARIS, *THE FBI & AMERICAN DEMOCRACY: A BRIEF CRITICAL HISTORY* 172 (University Press of Kansas 2004).

26. Justina R. Cintron Perino, *Developments in Civilian Oversight of Law Enforcement*, 36 URB. LAW. 387, 388 (2004) (quoting Samuel Walker’s definition of citizen oversight).

In practical terms, a civilian oversight agency includes a staff of investigators, an ombudsman, or citizen adjudicators who are unaffiliated with the police department.<sup>27</sup> Their role is to determine whether an officer committed misconduct, or to determine whether a misconduct investigation was carried out thoroughly and without bias.<sup>28</sup>

The concept of civilian oversight of the police began in the 1920s<sup>29</sup>—and may have roots even further back than that. In 1928, the Los Angeles Bar Association created a committee staffed by volunteer lawyers who investigated allegations of police misconduct and referred meritorious complaints to the Los Angeles Police Department for further investigation.<sup>30</sup> Civilian oversight agencies emerged in the 1950s and the 1960s, with widespread establishment of the agencies occurring as a reaction to the civil rights movement.<sup>31</sup> However, the luster of civilian oversight began to fade by the late 1960s, when many perceived the approach to be unhelpful and ineffective.<sup>32</sup> Nevertheless, the movement began picking up steam again in the late 1980s and early 1990s.<sup>33</sup> Today, besides being a fixture in most American cities,<sup>34</sup> civilian oversight has spread overseas.<sup>35</sup> The use of civilian oversight of the police in Northern Ireland is widely credited with being a key tool supporting the reconciliation between Protestants and Catholics.<sup>36</sup> Notably, the

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27. See SKOLNICK & FYFE, *supra* note 5, at 223 (noting that the categorization of a civilian review authority depends on whether a police officer or a civilian conducts the initial fact-finding, whether a police officer or civilian reviews the product of the investigation, whether the complainant has the right to appeal, and whether the chief of police is required to impose discipline).

28. *Id.* at 224.

29. WALKER, *supra* note 3, at 20.

30. *Id.*

31. Perino, *supra* note 26, at 387–88.

32. See WALKER, *supra* note 3, at 30–31 (explaining that in New York during the 1960s civilian oversight hampered police efforts, and, consequently, police brutality for the sake of crime control and community safety was deemed tolerable).

33. Perino, *supra* note 26, at 388.

34. *Id.*

35. *Id.*

36. See NORTHERN IRELAND POLICING BOARD (Belfast, N. Ir.), THE LIFE AND TIMES OF THE FIRST NORTHERN IRELAND POLICING BOARD 4 NOVEMBER 2001 – 31 MARCH 2006 (2006), available at <http://www.nipolicingboard.org.uk/achievementdoc-2.pdf> (observing that civilian oversight of the police has played a particularly prominent role in Northern Ireland); see also Shannon McNulty, *Building Trust in Northern Ireland: The Role of Civilian Review of the Police*, 12 IND. INT'L & COMP. L. REV. 219, 231–40 (2002) (discussing the status of the national civilian review authority shortly after it had been implemented, and how reconciliation between the Catholic and Protestant populations has been linked to the successful operation of the Northern Ireland

Northern Ireland Policing Board has a national jurisdiction and its duties extend to monitoring anti-terrorist investigations by the national police, serving as evidence that civilians can oversee national police agencies and have access to sensitive information.<sup>37</sup>

Civilian oversight comes in two general types: the investigatory model and the audit model.<sup>38</sup> These models are further divided into classes. Class I agencies (which are always investigatory-model agencies) are completely independent of the police department—receiving, investigating, and adjudicating complaints of police misconduct.<sup>39</sup> Class I agencies are staffed by non-sworn personnel and are fiscally and statutorily separate from the police department.<sup>40</sup> Class II, III, and IV agencies have varying levels of connection to the police department.<sup>41</sup> These types of agencies are usually classed as audit-type agencies because they rarely conduct independent investigations.<sup>42</sup> Instead, audit-model agency personnel review individual complaints investigated by the police department's internal affairs unit, serve as appellate bodies for citizens dissatisfied with the internal affairs investigation, and monitor the policies and procedures of the police department, providing recommendations for improved operation.<sup>43</sup> Class V agencies use a hybridized version of an audit and investigative model, where non-sworn personnel are hired and housed within the police department to adjudicate misconduct complaints.<sup>44</sup>

The individual powers of the oversight agencies vary from city to city.<sup>45</sup> Some civilian oversight agencies have the authority to issue subpoenas, although this tends to be a rare power.<sup>46</sup> At least one review authority, although lacking subpoena power, requires police

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Policing Board).

37. *Id.*

38. See Merrick Bobb, *Civilian Oversight of the Police in the United States*, 22 ST. LOUIS U. PUB. L. REV. 151, 163 (2003) (explaining the different models of civilian review boards for police oversight).

39. Perino, *supra* note 26, at 388.

40. *Id.*

41. *Id.* at 388–89.

42. See *id.* at 389 (stating that these agencies “review, monitor, or audit the police department’s complaint process.”).

43. *Id.*

44. *Id.*

45. PETER FINN, NATIONAL INSTITUTE OF JUSTICE, CITIZEN REVIEW OF POLICE: APPROACHES AND IMPLEMENTATION (2001), <http://www.ncjrs.gov/pdffiles1/nij/184430.pdf> (describing the major models of civilian oversight agencies and reviewing which cities have adopted which models).

46. See Perino, *supra* note 26, at 389–90.

officers to comply with investigations as a condition of employment.<sup>47</sup>

*B. The Perceived Benefits of Civilian Oversight*

There are more than 100 civilian oversight agencies in the United States covering about eighty percent of the largest cities and serving nearly one-third of the American population.<sup>48</sup> As Jerome Skolnick and James Fyfe observe, the underlying attraction to civilian oversight is plain:

[W]hen citizens ask for review of police conduct by civilians, they do so because they don't trust the police to investigate themselves. The demand for civilian review thus implies a failure of police administration that . . . probably cannot be put right simply by employing more responsive administrators. . . . Like the institution of the jury, which arose not because judges were incompetent to hear and evaluate evidence and reach verdicts, but because judges were mistrusted, so too with civilian review of police misconduct.<sup>49</sup>

A police department's internal affairs unit, operating on its own, lacks the credibility to conduct an independent investigation that is satisfactory to the community.<sup>50</sup> Minneapolis city council members, in an attempt to assuage community members and preserve their own political futures, established the city's review authority.<sup>51</sup> In theory, at least, a system of civilian oversight inserts into the police investigation process a watchman without allegiance to the police who will ensure that the investigation is conducted without bias.<sup>52</sup> This, in turn, generally supports a perception by the community that its police department is operating with a proper respect for individual rights.<sup>53</sup> As a result, a greater level of trust develops between the police and the

47. See MINNEAPOLIS, MINN., CODE OF ORDINANCES ch. 172.180 (2005).

48. WALKER, *supra* note 3, at 6.

49. SKOLNICK & FYFE, *supra* note 5, at 224.

50. See *id.* ("Cops are not trusted to investigate other cops, even when they are perfectly capable of doing so . . . Mistrust of authorities has less to do with their *competence* than with their values, inclinations, and prior commitments, and with how these are perceived by those outside their organizations.")

51. MICHAEL K. BROWNE, A STUDY OF THE POLICY AND PROCESS OF THE MINNEAPOLIS CIVILIAN POLICE REVIEW AUTHORITY 6 (2006) (on file with the author).

52. DOUGLAS W. PEREZ, COMMON SENSE ABOUT POLICE REVIEW 125 (1994) ("[T]he central theme of the discussion of those who favor civilian review is intuitively persuasive; some external perspective should be brought to bear on the investigation and deliberation of allegations of police misconduct, or the police will be left to police themselves.")

53. *Id.*

community that ultimately greases the cogs of crime detection and prevention.<sup>54</sup>

There are other benefits that municipalities enjoy when establishing a system of citizen oversight. Chief among them is the political coverage that the city's elected officials receive when establishing the agency.<sup>55</sup> For example, the Minneapolis Civilian Police Review Authority came into being in 1990 after police officers identified the wrong house in a drug raid.<sup>56</sup> During the course of the botched raid, the police killed an elderly couple who lived in the house.<sup>57</sup> In another episode not long after, the Minneapolis Police Department broke up a peaceful party of college-aged African Americans at a Minneapolis hotel.<sup>58</sup> In response to both incidents, outraged community members engaged in vehement and highly publicized demonstrations.<sup>59</sup>

Besides providing a measure of political coverage, citizen oversight may also operate as a mechanism for saving cities money.<sup>60</sup> Wronged citizens, instead of bringing their grievances to court, enter the civilian oversight system where they may achieve redress that ends up costing the city nothing more than the administrative costs of the investigation.<sup>61</sup>

Civilian oversight also plays another important role for U.S. police departments: it helps departments avoid, or end up being subject to, consent decrees that hand over departmental management to the U.S. Department of Justice.<sup>62</sup> Under federal law, it is unlawful for a

54. Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1159–60 (2000) (“[P]opular mistrust of government undermines the perceived legitimacy of the law, which in turn reduces public compliance with legal commands . . . . A government that cannot inspire obedience will likely be impotent in all but its ministerial functions. . . .”).

55. Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department “Pattern or Practice” Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3, 20 (2003).

56. MICHAEL K. BROWNE, A STUDY OF THE POLICY AND PROCESS OF THE MINNEAPOLIS CIVILIAN POLICE REVIEW AUTHORITY 6 (2006) (on file with the author).

57. *Id.*

58. *Id.*

59. *Id.*

60. See Samuel Walker & Vic W. Bumphus, *The Effectiveness of Civilian Review: Observations on Recent Trends and New Issues Regarding the Civilian Review of the Police*, 11 AM. J. POLICE 1, 19 (1992).

61. *Id.*

62. See, e.g., ROBERT C. DAVIS, NICOLE J. HENDERSON, & CHRISTOPHER W. ORTIZ, CAN FEDERAL INTERVENTION BRING LASTING IMPROVEMENT IN LOCAL POLICING? THE PITTSBURGH CONSENT DECREE 40 (2005), available at [http://www.vera.org/download?file=87/277\\_530.pdf](http://www.vera.org/download?file=87/277_530.pdf) (discussing efforts made by the City of Pittsburgh to end federal oversight of its police department).

governmental authority to “engage in a pattern or practice of conduct by law enforcement . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.”<sup>63</sup> If the attorney general concludes that cities are violating the law, he may seek injunctive relief.<sup>64</sup> If the court finds that the municipality has engaged in a pattern or practice of illegal conduct, it issues an order that places some or all aspects of the police department’s operation under the Department of Justice.<sup>65</sup>

This authority of the federal government to take control of the operations of a local police department has been likened to the intervention of the federal government in civil rights cases involving school desegregation, employment discrimination, and prison-condition cases.<sup>66</sup> Since Congress adopted 42 U.S.C. § 14141 in 1994, the Department of Justice has used the authority granted it by the statute sparingly to correct police malfeasance,<sup>67</sup> opting instead to use the threat of injunctive relief to exact compliance and reforms from local police.<sup>68</sup>

Threatening a lawsuit has become such a fixture of § 14141 that some commentators suggest the Department of Justice formally institutionalize the practice.<sup>69</sup> American cities, reluctant to tangle with the expansive authority of the Department of Justice, are often eager to establish or strengthen existing civilian oversight agencies in order to be able to present plausible evidence of a concern for the constitu-

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63. 42 U.S.C. § 14141 (2005).

64. *Id.*

65. Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 493 (2008) (“In practice, DOJ has initiated what some experts consider only a ‘paucity’ of lawsuits, all of which have been resolved via court-enforced consent decrees.”).

66. Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1402 (2000).

67. Walker, *supra* note 55, at 4–5.

68. *Id.* at 4–6. Walker discusses several American cities (including Pittsburgh, Los Angeles, Cincinnati, and Washington D.C.) that entered into consent decrees or memoranda of understanding with the Department of Justice when faced with a threat of injunction. Minneapolis also went through a similar process of dealing with the specter of a Department of Justice suit under 42 U.S.C. § 14141, and it responded by agreeing to federally mediated negotiations with community representatives to come up with a multi-year agreement to achieve police reforms. David Chanen, *Police Mediation Pact to Be Signed: The Agreement Between Police and Mediators Covers Issues Between Law Enforcers and Community Groups*, STAR TRIB. (MINNEAPOLIS), Dec. 4, 2003, at 1B.

69. Simmons, *supra* note 65, at 490.

tional rights of their citizens.<sup>70</sup>

Municipalities can also face liability for police misconduct under a claim made pursuant to 42 U.S.C. § 1983.<sup>71</sup> In *City of Canton v. Harris*, the U.S. Supreme Court interpreted § 1983 to make cities liable when there is evidence of “deliberate indifference” in the training schemes of the police department to the rights of the citizens.<sup>72</sup> Lower courts have interpreted *Harris* to mean that police departments not only must avoid a deliberate indifference in training, but they must also avoid a deliberate indifference in investigating allegations of police misconduct.<sup>73</sup> Again, civilian oversight has been seen as a way of protecting municipalities from the burden of federal litigation or oversight.<sup>74</sup>

### C. *The Challenges and Flaws of Civilian Oversight*

Perhaps the most illuminating and damning weakness of the civilian oversight system has been its inability to prove that its efforts actually result in a decrease in police misconduct.<sup>75</sup> And a corollary flaw of civilian oversight agencies is their inability to require discipline.<sup>76</sup> Few, if any, civilian review agencies have the power to require the imposition of discipline. Instead, the agencies send the result of their investigation and adjudication to the chief of police, who makes the final determination as to whether the police officer should be

70. CHRISTOPHER STONE, TODD FOGLESONG, & CHRISTINE M. COLE, *POLICING LOS ANGELES UNDER A CONSENT DECREE: THE DYNAMICS OF CHANGE AT THE LAPD 2* (2009), *available at* [http://www.hks.harvard.edu/criminaljustice/publications/Harvard\\_LAPD\\_Report.pdf](http://www.hks.harvard.edu/criminaljustice/publications/Harvard_LAPD_Report.pdf).

71. 42 U.S.C. § 1983 (2003) (holding government agencies liable for “the deprivation of any rights, privileges, or immunities secured by the Constitution and laws. . .”).

72. *City of Canton v. Harris*, 489 U.S. 378, 388 (1989).

73. Hazel Glenn Beh, *Municipal Liability for Failure to Investigate Citizen Complaints Against Police*, 25 *FORDHAM URB. L. J.* 209, 225 (1998) (“Lower courts instantly extended *Canton* . . . to claims based upon a municipality’s inadequate system of . . . reviewing police misconduct. When challenging the adequacy of citizen complaint procedures, plaintiffs typically allege that the failure to . . . resolve citizen complaints . . . amounts to a policy of deliberate indifference to the need for police supervision.”).

74. *Id.*

75. Walker, *supra* note 55, at 22–23 (“Many external oversight agencies have been weak, ineffective, poorly led, and have not provided either satisfactory service to individual complainants or had any scientifically measurable effect on police misconduct.”).

76. Debra Livingston, *The Unfulfilled Promise of Citizen Review*, 1 *OHIO ST. J. CRIM. L.* 653, 653 n.12 (2004).

held accountable for his or her misconduct.<sup>77</sup> However, scholars tend to agree that this approach is appropriate because it does not disrupt the important command structure of a police department where the chief of police retains his or her authority, in part, by being seen as the powerful, final arbiter of acceptable police conduct.<sup>78</sup> Chiefs of police exercise their independent judgment liberally, using their authority to trump the investigations of the oversight agency.<sup>79</sup>

Another challenge often faced by civilian oversight agencies is the inability to disclose the results of their investigations and adjudications.<sup>80</sup> It is frequently the case that a police officer's personnel records are considered non-public data and the allegations against the officer and the contents of the investigation fall under the legally protected categories of private information.<sup>81</sup> Investigations, hearings, and adjudications are usually kept away from the public except in cases of very egregious misconduct.<sup>82</sup>

For example, the California Supreme Court held in 2006 that it was a violation of state statute to publicly disclose information contained in administrative appeals of discipline imposed on police officers—operating to cut off nearly all public disclosure of the decisions of civilian oversight boards.<sup>83</sup> California's civilian oversight agencies<sup>84</sup> lobbied the California legislature to pass a statute that would reverse the ruling, but those efforts failed when law enforce-

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77. Bobb, *supra* note 38, at 163.

78. Livingston, *supra* note 76, at 653 n.12 (“Most scholars who have considered the subject have concluded that this limitation on the scope of citizen involvement is appropriate, lest the authority of the police chief and the chief's responsibility for officer performance be undermined in a way that could ultimately prove detrimental to accountability. . . .”).

79. Rachel Fields & Steve Miletich, *Cities Diverge in How They Police the Police*, SEATTLE TIMES, July 22, 2007, at A1 (drawing analogies between the chiefs of police of Minneapolis and Seattle having failed to issue adequate discipline on police officers guilty of misconduct).

80. Perino, *supra* note 26, at 392.

81. *Id.*

82. *Id.*

83. *Copley Press, Inc. v. Superior Court*, 141 P.3d 288, 288 (Cal. 2006). Although Copley Press argued that public scrutiny of disciplinary decisions fostered public confidence in the law enforcement system, the court reasoned that other public policy interests were also at stake favoring confidentiality, including “protecting complainants and witnesses against recrimination or retaliation, protecting peace officers from publication of frivolous or unwarranted charges, and maintaining confidence in law enforcement agencies by avoiding premature disclosure of groundless claims of police misconduct.” *Id.* at 305.

84. National Association for Civilian Oversight of Law Enforcement, Resources, *supra* note 8.

ment unions launched a counter-effort.<sup>85</sup>

In some instances, the outcome of a case is not even disclosed to the person who filed the complaint, as he or she is considered a member of the public and ineligible to access the police officer's private personnel information.<sup>86</sup> For example, the Minnesota Department of Administration, an agency charged with interpreting and enforcing the state's data practices laws, has held that "it would violate an officer's rights if the [Minneapolis Civilian Police Review Authority] disclosed to a complainant, absent the data subject's consent, that his/her complaint was in whole or in part not sustained."<sup>87</sup>

Commentators have suggested that such a lack of transparency has a chilling effect on the complainant's willingness to go through the effort of filing a complaint with the agency.<sup>88</sup> However, citizen oversight agencies are not barred from releasing summary data about the outcomes of cases.<sup>89</sup> Such disclosures usually take the form of data and statistics about trends within the police department—information that is so broad in scope that it cannot be tied back to a single police officer.<sup>90</sup> Such disclosures can be distributed to the media and to community groups; and they often serve as a report card on the police department that police chiefs and municipal lawmakers use to inform policy decisions with regard to the police department.<sup>91</sup>

Community faith in civilian oversight also appears to be hampered by community perceptions of the oversight agencies themselves. Swearing-contest complaints (where both the officer and the complainant allege foul language) often land at civilian oversight agencies, and the complaint often comes down to one party's word against the other's.<sup>92</sup> Without dispositive evidence, the agency is

85. Patrick McGreevy, *Effort to Open Files on Police Thwarted*, L.A. TIMES, June 27, 2007, at 1.

86. See, e.g., CIVILIAN POLICE REVIEW AUTH., CITY OF MINNEAPOLIS, ANNUAL REPORT 2007, at 32 (2007), available at <http://www.ci.minneapolis.mn.us/cra/docs/CRAAnnualreport2007.pdf>.

87. Minnesota Department of Administration Advisory Opinion: 08-020 (2008), available at <http://www.ipad.state.mn.us/opinions/2008/08020.html>.

88. Perino, *supra* note 26, at 392.

89. Walker & Bumphus, *supra* note 60, at 20.

90. See, e.g., 2009 MPLS. CIVILIAN POLICE REV. AUTH., 3RD QUARTER REP., available at [http://www.ci.minneapolis.mn.us/cra/docs/CRA\\_2009\\_3rd\\_Quarter\\_Report.pdf](http://www.ci.minneapolis.mn.us/cra/docs/CRA_2009_3rd_Quarter_Report.pdf).

91. Bobb, *supra* note 38, at 161. "The public monitoring reports, which address the fundamental excessive force and integrity issues in policing, are calculated to foster a constructive, task-oriented, and problem-solving dialog [sic], stripped of ideology and rhetoric." *Id.*

92. Walker, *supra* note 55, at 24.

reluctant to sustain the citizen's complaint and the agency's record of holding officers accountable begins to look no more impressive than the police department's internal affairs unit.<sup>93</sup>

Douglas Perez also observes that civilian review boards may fall short of their potential because the citizen adjudicators—after spending time with police officers—may begin to adopt the police officer's perspective in the same way that internal affairs investigators supposedly do, leading to leniency with errant cops.<sup>94</sup>

Further complicating the reputations of civilian review boards is the chance that the adjudicators may be made up of “vociferous, radical elements of the community . . . [who use] complaint hearings and policy hearings as platforms to espouse political rhetoric aimed at the police department, at police in America, and even at ‘the establishment’ generally.”<sup>95</sup>

Annette Gordon-Reed notes that civilian oversight is also challenged merely by its status as an overseer of another agency: it is only natural to chafe at being “overseen,” because this imputes an assumption that the person under scrutiny is prone to dishonesty or incompetence.<sup>96</sup> She observes further that “only a minority of agencies are ever subjected to this type of outside scrutiny.”<sup>97</sup>

The unique nature of law enforcement seems to deepen the sting of oversight: not only are police officers highly trained practitioners, they work in a field where they regularly face life-threatening dangers to keep the public safe.<sup>98</sup> Rebelling at the idea of non-sworn watchmen—who presumably have never faced the dangerous situations that police officers face on a daily basis—appears to be both natural and justifiable.<sup>99</sup>

#### *D. A Halftime Summation*

As the foregoing suggests, civilian oversight is not a cure-all. But the numerous and serious flaws of civilian review have not operated to

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93. *Id.*

94. PEREZ, *supra* note 52, at 155.

95. *Id.* at 155–56.

96. Annette Gordon-Reed, *Watching the Protectors: Independent Oversight of Municipal Law Enforcement Agencies*, 40 N.Y.L. SCH. L. REV. 87, 98 (1995).

97. *Id.*

98. See ANTHONY BOUZA, *POLICE UNBOUND: CORRUPTION, ABUSE, AND HEROISM BY THE BOYS IN BLUE* (2001); MICHAEL W. QUINN, *WALKING WITH THE DEVIL: THE POLICE CODE OF SILENCE* (2005) (offering excellent narrative accounts of the dangers of policing).

99. BOUZA, *supra* note 98, at 257-59.

stem its growth. About eighty percent of the police departments in the fifty largest American cities have some form of oversight,<sup>100</sup> and civilian review continues to expand domestically and internationally.<sup>101</sup>

Further expansion of civilian review would likely benefit from an approach that is more responsive to the mistakes of the past. Many of the challenges discussed above that have burdened civilian review appear to be avoidable simply by taking certain steps at the front end: selecting the civilian overseers with great care, mandating a robust disciplinary requirement, and creating systems that can track the success of the oversight agency.

As Sam Walker has noted, federal law enforcement agencies have been “conspicuously absent from the oversight movement.”<sup>102</sup> Could the federal exception to civilian review be overcome if oversight agencies had a better arsenal of fail-safes? Regardless of the reason for federal non-participation in civilian review, it appears that the current approach to addressing misconduct by federal officers is inadequate.

### III. FEDERAL LAW ENFORCEMENT OVERSIGHT TODAY

#### A. *Misconduct is Present*

The FBI has been at the center of many firestorms for agent misconduct. A 2004 study by the bureau revealed that FBI agents had been found to have committed rape, attempted murder, bribery, and extortion.<sup>103</sup> Other reports have revealed a disparity between how discipline is imposed when senior-level agents commit acts of misconduct versus junior-level agents.<sup>104</sup>

The agency has also gained notoriety for its approach to whistleblowers, and the need for reform has been well publicized, especially by Iowa Senator Charles Grassley.<sup>105</sup> In 2007, a federal jury in Minneapolis awarded Jane Turner, a 25-year veteran of the FBI,

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100. WALKER, *supra* note 3, at 40.

101. *Id.* at 41.

102. *Id.*

103. Jerry Seper, *FBI Disciplined 77 Agents Over 14-Year Period: Crimes Included Bribery and Rape*, WASH. TIMES, Feb. 20, 2004, at A5.

104. Dan Eggen, *Report: Brass Behaving Badly: Most Managers Got Lighter Discipline Than Subordinates*, WASH. POST, Nov. 14, 2003, at A8.

105. See, e.g., Dan Browning, *Accounting Sought from FBI Director: Iowa Sen. Grassley Wants to Know How Many Supervisors Have Been Disciplined for Retaliation, and if Three in Particular Played a Part in a St. Paul Agent's Case*, STAR TRIB. (MINNEAPOLIS), Feb. 28, 2007, at 4B.

\$565,000 after she prevailed on claims of retaliation by superiors.<sup>106</sup> Turner alleged that her superiors required her to transfer to another office in retaliation for an equal-employment opportunity lawsuit she had filed, and for reporting an FBI agent who took a Tiffany crystal globe found in the wreckage of the World Trade Center towers after September 11, 2001.<sup>107</sup>

Advocates of whistleblower reform have been disappointed by the actions of President Barack Obama, who promised to reform federal whistleblowing policies when he was elected president.<sup>108</sup> But when the president signed an economic stimulus package in February 2009, whistleblower provisions had been stripped from the law.<sup>109</sup>

### *B. How FBI Oversight is Currently Carried Out*

The FBI has nearly 33,000 employees, almost 14,000 of which are special agents.<sup>110</sup> The agency's system for handling complaints is aimed almost exclusively at complaints arising from within the agency (that is, complaints raised by other FBI employees).<sup>111</sup> The agency's website provides no information for a member of the public to file a complaint.<sup>112</sup>

When an FBI employee raises a concern about another employee's conduct, the complaint triggers a multi-step investigative process.<sup>113</sup> When an FBI official receives a complaint, the agency's policy requires that the complaint be sent to the Department of Justice's Office of Inspector General (OIG).<sup>114</sup> Normally, the OIG will refer the case back to the FBI to carry out the investigation, unless the complaint involves criminal misconduct or high-level FBI administra-

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106. Jerry Seeper, *Senator Presses FBI for Disciplining*, WASH. TIMES, Feb. 28, 2007, at A4.

107. *Id.*

108. Joe Davidson, *Whistleblower Advocates Disappointed but Determined*, WASH. POST, Feb. 17, 2009.

109. *Id.*

110. Federal Bureau of Investigation, About Us—Quick Facts, <http://www.fbi.gov/quickfacts.htm> (last visited Mar. 16, 2010).

111. GRIFFIN B. BELL & LEE COLWELL, STUDY OF THE FBI'S OFFICE OF PROFESSIONAL RESPONSIBILITY 12 (2004), available at <http://www.fbi.gov/publications/opr/bellreport.pdf>.

112. FBI, Federal Bureau of Investigation Homepage, <http://www.fbi.gov> (last visited Jan. 28, 2010).

113. OFFICE OF THE INSPECTOR GEN. EVALUATIONS AND INSPECTIONS DIV., U.S. DEP'T OF JUSTICE, Office of the Inspector General Evaluation and Inspections Division, REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S DISCIPLINARY SYSTEM, (May 2009), at ii, available at <http://www.justice.gov/oig/reports/FBI/e0902/final.pdf>.

114. *Id.* at 2.

tors.<sup>115</sup> Cases that are referred back to the FBI are sent to the agency's Internal Investigations Section in the Inspections Division, where the investigation is carried out by either internal affairs staff or by staff members in the field who are assigned to the special investigation.<sup>116</sup> Upon completion of the investigation, the case is sent to the FBI's Office of Professional Responsibility (OPR) and the OPR decides what—if any—discipline to impose.<sup>117</sup>

The FBI's complaint investigation process structurally resembles the process that a local police department would follow for an internal affairs investigation.<sup>118</sup>

Congressional oversight has been another, frequently employed method of overseeing federal intelligence and law enforcement agencies.<sup>119</sup> However, congressional review of the work of federal agencies has been problematic: first, because it tends to be political; and second, because it tends to be unpredictable. As Sidney Shapiro notes in his commentary on reduced effectiveness of congressional oversight of regulatory policy:

Congress employs a variety of monitoring and reporting methods, but the efficacy of those approaches has been limited because . . . they have been tied to a fire alarm approach. . . . In fire alarm oversight, legislators depend on third parties to call to their attention agency policies that

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115. *Id.*

116. *Id.* at 3.

117. *Id.*

118. *See, e.g.,* MINNEAPOLIS POLICE DEPT. INTERNAL AFFAIRS UNIT, CITY OF MINNEAPOLIS, 2008 ANNUAL REPORT 9 (2008), available at <http://www.ci.minneapolis.mn.us/police/about/docs/IADAnnualReport2008.pdf>. In Minneapolis, a complaint to internal affairs is first reviewed by the city attorney to determine whether the alleged misconduct merits criminal charges. *See id.* at 11. If the city attorney declines pursuing charges, the case goes back to internal affairs where officers assigned to the unit conduct an investigation. *Id.* Upon completion of the investigation, the internal affairs unit may propose discipline. *Id.* Imposition of discipline must be approved by the chief of police or an administrator selected by the chief. *Id.* The process used by the FBI is also roughly similar to the oversight process used by the Central Intelligence Agency (CIA). *See* A. John Radsan, *Sed Quis Custodiet Ipsos Custodes: The CIA's Office of General Counsel?*, 2 J. NAT'L SEC. L. & POL. 201, 210 (2008). The CIA complaint process differs from the FBI internal oversight process because a complaint to the CIA's Office of General Counsel may lead the complaining employee to being called to testify before a congressional committee. *See id.* at 211.

119. Douglas Kriner, *Can Enhanced Oversight Repair "The Broken Branch"*, 89 B.U. L.REV. 765, 773 (2009) ("Congress has repeatedly turned to the oversight and investigative powers of its committees to police the executive branch. And, at least anecdotally, when Congress wields its oversight powers forcefully, it can lead to genuine changes in public policy.").

deviate from congressional preferences. . . . Fire-alarm oversight has the potential to generate favorable publicity without requiring a substantial time commitment from legislators, which permitted them to emphasize more politically profitable activities such as passing legislation. This approach did not result in systematic oversight, however.<sup>120</sup>

Political partisanship is also thought to contribute to the unpredictability of congressional oversight.<sup>121</sup> In December 2005, the *New York Times* reported on unauthorized wiretaps by the National Security Agency (NSA).<sup>122</sup> At the time, a Republican president occupied the White House and a Republican majority operated in both houses of Congress.<sup>123</sup> Political pressure exerted by both the executive branch and Republican party leaders stifled congressional oversight of the NSA's actions.<sup>124</sup> Congress eventually passed the Terrorist Surveillance Act of 2006, which greatly loosened the restrictions on the NSA to seek approval before conducting a wiretap.<sup>125</sup>

In some respects, Congress operates as a form of civilian oversight since congressional representatives are not law enforcement agents;<sup>126</sup> they are non-sworn civilians who are in a position (by virtue of their power to control commerce and declare war) to oversee the law enforcement and intelligence-gathering activities of the government.<sup>127</sup> However, Congress's interest in providing robust oversight has ebbed and flowed throughout history, with robust congressional

120. Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1, 10 (1994).

121. Kriner, *supra* note 119, at 784.

122. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

123. Although this incident involved a Republican president and a Republican Congress, I found no literature that would suggest that intelligence misconduct has anything to do with whether either party controls both the executive and legislative branches and, if so, which party controls.

124. Tara M. Sugiyama & Marisa Perry, *The NSA Domestic Surveillance Program: An Analysis of Congressional Oversight During an Era of One-Party Rule*, 40 U. MICH. J. L. REFORM 149, 171 (2006).

125. *Id.*

126. See PATRICK LEAHY, CHARLES GRASSLEY & ARLEN SPECTER, FBI OVERSIGHT IN THE 107TH CONGRESS BY THE SENATE JUDICIARY COMMITTEE: FISA IMPLEMENTATION FAILURES, 4-5 (2003), available at <http://www.cdt.org/security/usapatriot/030200fisafailures.pdf> (FBI and the individual liberties of citizens are both benefited by the external oversight of Congress).

127. David Everett Colton, Comment, *Speaking Truth to Power: Intelligence Oversight in an Imperfect World*, 137 U. PA. L. REV. 571, 590 (1988) ("Congress's right to oversee the Executive's conduct of intelligence activities is rooted in the congressional powers enumerated in the Constitution, and in Congress's broad investigatory power as recognized by the Court.").

action usually coming in reaction to cataclysmic failures of the law enforcement (and intelligence) community.<sup>128</sup>

Although the judicial branch of government may offer some measure of oversight to the FBI, its reach is often limited by statutory deference to security-based priorities.<sup>129</sup> Constitutional challenges to legislation, such as the PATRIOT Act, may curb law enforcement wrongdoing by bringing about systemic change.<sup>130</sup> But other types of efforts to seek judicial redress—through tort litigation, for example—often fail to work as preventative measures because governmental leaders usually lack the coordination to respond systemically to the lawsuits.<sup>131</sup> As Samuel Walker observes, “Academic studies of the strategy [of tort litigation] have generally found little direct impact on police reform. The flaw in the strategy appears to be the assumption that public officials will act in a rational and coordinated manner in response to rising litigation costs.”<sup>132</sup>

Moreover, criminal prosecutions of errant law enforcement officers are also considered to be ineffective.<sup>133</sup> Prosecutors—by the nature of their work—have close relationships with law enforcement

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128. Compare Christopher M. Ford, *Intelligence Demands in a Democratic State: Congressional Intelligence Oversight*, 81 TUL. L. REV. 721, 725 (2007) (“[The past instances] of congressional action followed a similar pattern: long periods of executive autonomy punctuated by short bursts of congressional oversight grounded in public revelations of impropriety or illegality in the Intelligence Community.”), with Colton, *supra* note 127, at 582–89 (describing three phases of congressional oversight from the 1970s to the 1990s that roughly correspond to the three phases of the interrelationship between the executive and congressional powers described by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring)).

129. See, e.g., Stephen J. Schulhofer, *The New World of Foreign Intelligence Surveillance*, 17 STAN. L. & POL’Y REV. 531, 559 (2006) (observing that judicial oversight of document-production regimes available to the FBI under the PATRIOT Act largely bar judicial oversight because the only threshold requirement for a document demand is the FBI’s self-certification that it is acting in good faith); Daniel J. Solove, *Reconstructing Electronic Surveillance Law*, 72 GEO. WASH. L. REV. 1264, 1296 (2004) (observing that electronic surveillance laws do not give the judicial branch enough oversight authority).

130. See Hillary & Kubasek, *supra* note 20, at 66 (discussing a constitutional challenge to section 215 of the PATRIOT Act).

131. Alison L. Patton, Note, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 is Ineffective in Detering Police Brutality*, 44 HASTINGS L.J. 753, 775–76 (1993) (“[C]ity governments approach civil suits against individual officers or the police department defensively, rather than addressing the larger social issues underlying the suits. Local officials are constrained by social, political and economic factors that militate against any active pursuit of police reform.”).

132. Walker, *supra* note 55, at 18.

133. Walker, *supra* note 55, at 19.

officers.<sup>134</sup> Proving criminal intent beyond a reasonable doubt is a difficult task given the easy defense for a law enforcement agent that he or she faced a physical risk.<sup>135</sup> And, finally, juries and judges tend to be highly deferential to law enforcement officers.<sup>136</sup>

*C. The President's Intelligence Oversight Board: A Closer Fit?*

According to Amnesty International, the FBI is not subject to any civilian oversight.<sup>137</sup> While this is functionally true, it is technically incorrect in at least one respect: in 1956, President Dwight D. Eisenhower established the President's Foreign Intelligence Advisory Board (PFIAB),<sup>138</sup> and, in 1976, President Gerald Ford established a subcommittee of the board known as the Intelligence Oversight Board.<sup>139</sup> PFIAB's purpose is to assess the "quality, quantity, and adequacy of intelligence collection, of analysis and estimates, and of counterintelligence and other intelligence activities."<sup>140</sup>

The Intelligence Oversight Board was a reaction by President Ford to public disclosure of domestic spying operations by the CIA aimed at disrupting antiwar efforts during the Nixon administration.<sup>141</sup> After the disclosures, President Ford appointed Vice President Nelson Rockefeller to head a commission charged with investigating the CIA's domestic spying operations.<sup>142</sup> The Rockefeller Commission reported back to the President with several recommendations for

134. *Id.*

135. *Id.*

136. *Id.*

137. AMNESTY INT'L, UNITED STATES OF AMERICA: RIGHTS FOR ALL 25 (1998), <http://www.amnesty.org/en/library/> (go to bottom of page and type "AMR 51/035/1998" into the "AI Index" search field).

138. Christine E. Hinrichs, Student Essay, *Flying Under the Radar of an Unnecessary Intelligence Watchdog: A Review of the President's Foreign Intelligence Advisory Board*, 35 WM. MITCHELL L. REV. 5109, 5110 (2009).

139. Exec. Order No. 11,905, 3 C.F.R. § 90 (1976).

140. Exec. Order No. 12,863, 3 C.F.R. §§ 632, 632-33 (1993). Just as the Intelligence Oversight Board has been accused of suffering from shortcomings, the PFIAB also has been under fire because it has no requirement of regular meetings, the appointees to the board are political allies of the President and do not necessarily have a particular skill in the intelligence field, and it has a history of tension with members of the intelligence community. Hinrichs, *supra* note 138, at 5113-14. Because the Intelligence Oversight Board is a subcommittee of the PFIAB (and because its members not only have oversight of intelligence-gathering operations, but also the more controversial issue of acts of intelligence-gathering misconduct), it is unlikely to have a reputation better than that of the PFIAB as a whole.

141. *See* Ford, *supra* note 128, at 739.

142. Ford, *supra* note 128, at 745.

bringing more oversight to the intelligence committee.<sup>143</sup> As a consequence, the President signed an executive order regulating multiple aspects of American intelligence-gathering services.<sup>144</sup>

Any member who qualifies to serve on the President's Foreign Intelligence Advisory Board can also serve on the Intelligence Advisory Board.<sup>145</sup> To be appointed to the foreign intelligence board, "one must only be a trustworthy and distinguished citizen and be appointed by the President—knowledge of intelligence issues is not a prerequisite."<sup>146</sup> The purpose of the Intelligence Advisory Board is to inform the President and the Attorney General of intelligence misconduct.<sup>147</sup>

During the Clinton administration, the board disapproved of the administration's policy of allowing arm shipments from Iran to Bosnia, and it complained that the CIA had a policy of employing known torturers and killers as informants in Latin America.<sup>148</sup> During the first two years of the administration of President George W. Bush, the Intelligence Oversight Board was mute because the President had not appointed its membership.<sup>149</sup>

President Bill Clinton armed the Intelligence Oversight Board with the authority to report misconduct by intelligence officers directly to the Attorney General, but that authority was removed by President Bush in February 2008 and, instead, misconduct was reported directly to the President.<sup>150</sup> To the satisfaction of some commentators, President Obama recently signed an executive order restoring the board's power to report misconduct directly to the

143. *Id.*

144. *Id.* ("[Executive Order 11,905 was] the first publicly known regulation concerning the operation and function of the Intelligence Community.").

145. Exec. Order No. 11,905, *supra* note 139.

146. Hinrichs, *supra* note 138, at 5110. Executive Order 11,905 calls for the members of the three-member Intelligence Oversight Board to "be from outside the Government and be qualified on the basis of ability, knowledge, diversity of background and experience." Exec. Order No. 11,905, *supra* note 139.

147. John Solomon, *In Intelligence World, A Mute Watchdog*, WASH. POST, July 15, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/14/AR2007071400862.html>.

148. *Id.*

149. *Id.* (reporting that once the members of the Intelligence Oversight Board were appointed by President Bush, the body issued no findings for five-and-a-half years, despite public revelations by the FBI of hundreds of acts of intelligence-gathering misconduct).

150. Charlie Savage, *Obama Order Strengthens Spy Oversight*, N.Y. TIMES, Oct. 30, 2009, at A16.

Attorney General.<sup>151</sup> However, once misconduct is reported to the Attorney General by the Intelligence Oversight Board, no investigative action is required by the Justice Department.<sup>152</sup> Moreover, the board was appointed nearly a year after President Obama took office, and it is still unclear what its modus operandi will be.<sup>153</sup>

#### IV. CIVILIAN OVERSIGHT AT THE FEDERAL LEVEL

##### A. *Civilian Oversight Has Been Met With Suspicion But Has Promise*

With the expansion of the authority of federal law enforcement agents, the federal government's authority to affect the rights of U.S. citizens has expanded greatly. As noted above, this expansion in power has been accompanied by what appears to be an increase in violations of individual rights. Few Americans would have believed a decade ago that today our society would be engaging in a serious debate about the efficacy of torture and the legitimacy of wiretaps. Issues that had long appeared to have been settled in favor of individual rights are in play again.

The national security arguments for the expansion of federal law enforcement authority are persuasive. But as the balance of power shifts away from the people and towards the policymakers at Langley and Quantico, calls for greater oversight are also persuasive. Federal policymakers have been remiss in not establishing new avenues of oversight and strengthening existing avenues.

Historically, civilian oversight of law enforcement has been treated with suspicion by the FBI. J. Edgar Hoover, the former head of the FBI, said that he thought communists were behind civilian review boards.<sup>154</sup> The Intelligence Oversight Board has largely operated as window dressing; although President Obama has restored

151. *Id.* ("Suzanne E. Spaulding, a former deputy counsel at the Central Intelligence Agency . . . praised Mr. Obama for partly rolling [President Bush's changes] back. 'What this does is to restore some of the independence to this advisory board, and that's very important,' she said.").

152. *Id.*

153. Josh Gerstein, *Under the Radar: Where's the PIAB*, POLITICO, Jan. 7, 2010, [http://www.politico.com/blogs/joshgerstein/0110/Wheres\\_the\\_PIAB.html](http://www.politico.com/blogs/joshgerstein/0110/Wheres_the_PIAB.html).

154. PEREZ, *supra* note 52, at 125 ("As Hoover put it, 'Their altruistic mouthings are a front and a sham[,] for they have already prejudged law enforcement as an enemy to their nihilistic cause. Their real objective is to intimidate and harass police.'"). It is ironic, however, to consider Hoover's comments in light of the role that the FBI often plays today investigating claims of police officer misconduct that have been referred to the bureau by local prosecutors wary of appearing to have a conflict of interest.

some of its prior power, even at the zenith of its authority, the board commanded little respect.<sup>155</sup>

However, an oversight scheme that takes into account the pitfalls that have befallen municipal agencies may have a greater chance of success. Unfortunately, there has been a paucity of commentary on creating a mechanism for civilian oversight of federal intelligence and law enforcement.<sup>156</sup> One commentator, in proposing a model of civilian oversight for the U.S. Immigration and Naturalization Service, suggests a “bipartisan commission made up of Presidential appointees [that] would be responsible for investigating individual complaints of civil rights violations by immigration officials or customs agents and making disciplinary and policy recommendations.”<sup>157</sup>

### B. *The Need for Civilian Oversight*

The individual rights being threatened by the expansion of federal law enforcement authority are deeply personal. Installing a robust system of civilian oversight makes philosophical sense: when the most precious individual rights are being affected, it becomes imperative for the citizens to be at the table to influence the conversation.

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155. Daniel B. Silver, *The Uses and Misuses of Intelligence Oversight*, 11 HOUS. J. INT'L L. 7, 14–15 (1988) (“To date, however, the public image of [the Intelligence Oversight Board] fails to inspire confidence that it is a strong organ of internal executive branch oversight. The Board is made up of part-time members and has virtually no staff. It is hard to conceive, given the limitations on its resources, that it can play a forceful role.”). Notably, Silver’s comments about the Intelligence Oversight Board echo the complaints that commentators often have about local civilian oversight boards. See, e.g., Walker, *supra* note 55, at 23–24 (“External oversight agencies fail for a variety of reasons unrelated to the underlying concept of citizen oversight. Some fail because they lack the authority to accomplish their stated objectives. . . . Others fail because of a lack of resources: e.g., not having sufficient number of investigators relative to the size of the police department and the complaint caseload. . . . Others fail because of a lack of political support. . . .”).

156. But see Stephen A. Rosenbaum, *Keeping an Eye on the I.N.S.: A Case for Civilian Review of Uncivil Conduct*, 7 LA RAZA L.J. 1, 5 (1994) (describing a scheme for installing a system of civilian oversight at the U. S. Immigration and Naturalization Service).

157. *Id.* at 16–17. Ultimately, Rosenbaum concludes that civilian review would serve as a good solution for the Immigration and Naturalization Service if it is perceived as “accessible, confidential, prompt, impartial and even-handed.” *Id.* at 42. These standards compare favorably with the code of ethics that the National Association for Civilian Oversight of Law Enforcement calls for in a civilian oversight agency. National Association for Civilian Oversight of Law Enforcement Code of Ethics, <http://nacole.org/images/stories/pdf/nacolecodeethics.pdf> (last visited Mar. 16, 2010). Among the requirements it includes are: outreach, confidentiality, professional excellence, and respectful and unbiased treatment. *Id.*

The current system of confronting FBI misconduct appears to operate with a pre-9/11 mindset. And even by that standard, it is still lacking.

While civilian oversight does not offer a perfect solution, it does offer some signposts. Foremost, civilian oversight is a means of bolstering the faith of citizens in the functions of their government. If the federal government were to establish an agency unconnected with, and un-beholden to, any federal law enforcement agency, it would likely contribute to a reduced cynicism about the anti-terrorist efforts of government.

### *C. A Proposed System of Federal Civilian Oversight*

A federal system of civilian oversight should exploit the best practices of the municipal oversight models and abandon—or at least minimize—the practices that have burdened the local systems. Recalling the discussion above, civilian oversight appears to be at its zenith when it operates to call attention to gross misconduct, encourage political pressure for reform, and create the perception of unbiased, direct citizen oversight. And civilian review is hampered when public disclosure is limited, discipline for misconduct is lax, and the board members are unqualified for the work.<sup>158</sup> With these attributes in mind, what might a civilian oversight model look like at the federal level?

Ideally, the agency would be made up of a board of citizens who have been thoroughly trained in the work of the agency. The board would be structured to allow for areas of specialization, and the members would be given security clearances to view classified information that may be contained in the complaints.

To prevent the political conflicts that have sometimes plagued municipal boards,<sup>159</sup> board members would be selected for four-year terms, and the terms would expire in odd-numbered years. These changes avoid the politicization of the major election cycles. Half of the members would be congressional appointees and half would be appointed by the President.

To aid in systematic data-gathering and reporting, the agency would be an arm of one of the government's auditing functions—possibly the Government Accounting Office. Funding for the

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158. See WALKER, *supra* note 3, at 186–87 (discussing the attributes of effective civilian oversight).

159. *Id.* at 9.

oversight agency would be statutorily guaranteed.

Alternatively, a system of civilian oversight might be achieved by expanding the auspices of the Intelligence Oversight Board. Since the board is established through an enabling executive order, legislative wrangling is avoided and an operational system could be implemented more quickly. However, without a legislative mandate, the Intelligence Oversight Board rests on the goodwill of the President. A board created by statute (negotiated between the White House and Congress) may have a better base for long-term survival and effectiveness.

Given the complex and specialized nature of the complaints, it would probably be infeasible for any civilian oversight agency to have its own investigative staff. Instead, the civilian oversight board would serve as an auditor to investigations being carried out by the law enforcement and intelligence agencies. All complaints under investigation would be dual-filed with the board, and the members would select which cases would undergo a board review.

As noted above, the imposition of discipline is a key consideration. If the board finds an investigation or an imposition of discipline inadequate, it should have the authority to require the law enforcement or intelligence agency head to reconsider the case. If the agency head makes no changes to the disposition, he or she would be required to provide the board with an explanation of the decision. If the board is still dissatisfied with the outcome, it would have the authority to refer the case to the President and to the appropriate congressional committee for further action.

The board would also establish a federal system for filing citizen complaints. No matter which federal law enforcement agency the citizen interacted with, the board would serve as a one-stop clearinghouse for complaint filing. Complaints could be filed on the web. All individuals who are taken into federal custody or subjected to federal investigation would be apprised of the existence of the board and given an opportunity to file a complaint.

#### *D. Applying Civilian Oversight to Intelligence Services*

In the post-9/11 world, the U.S. government has deliberately attacked the traditional wall of separation between federal law enforcement and intelligence-gathering activities.<sup>160</sup> Today, the FBI

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160. Craig S. Lerner, *The USA Patriot Act: Promoting the Cooperation of Foreign Intelligence Gathering and Law Enforcement*, 11 GEO. MASON L. REV. 493, 496 (2003).

regularly engages in intelligence-gathering work to protect national security and has run into corollary problems with abuses of power.<sup>161</sup>

A former general counsel to the CIA and the National Security Agency has concluded that, absent major changes to the congressional approach to oversight, progress on oversight reforms are unlikely to be realized: “Nor can progress be achieved as long as the Congress misuses its oversight role as a point of attack on executive branch primacy in foreign relations, and misuses the oversight committees as the forum for partisan foreign policy disputes with the Administration.”<sup>162</sup>

Consequently, it bears mentioning that, while civilian oversight has traditionally been applied strictly to law enforcement, there is little to suggest that its use could not extend to oversight of intelligence-gathering activities. Indeed, given the blurring of lines within the FBI between its traditional law enforcement roles and its developing intelligence-gathering roles, it would seem counterintuitive not to apply an oversight model holistically.

## V. CONCLUSION

Civilian oversight has been met with many challenges in America's cities. But, with more than 100 civilian oversight agencies in the United States, it appears to be a solution that provides enough community satisfaction to justify its continued existence.

In addition, oversight mechanisms that the federal government currently employs are insufficient to stand up to the expansive authority that has been granted to America's law enforcement agencies. Given the inconsistent results that come from each branch of the government when trying to oversee the nation's law enforcement and domestic intelligence-gathering activities, new approaches are needed. A system of civilian oversight will provide some measure of satisfaction to a public deeply concerned for the stewardship of its civil liberties.

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161. See Solomon, *supra* note 10, at A1.

162. Silver, *supra* note 155, at 17.