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The Legal and Political Implications of the NYPD's Counterterrorism Operations Overseas:

The International Liaison Program

By

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Chapter 1. Introduction

“I have my own army in the NYPD, which is the seventh biggest army in the world. I have my own State Department, much to Foggy Bottom’s annoyance. We have the United Nations in New York, and so we have entered into the diplomatic world that Washington does not have.”

Michael Bloomberg, Former Mayor of New York City

“[The] NYPD is in close contact with our international liaison in Paris and the local authorities and are closely monitoring the situation” (“Obama, Cuomo, De Blasio Decry Paris Attacks; NYPD Steps Up Security Citywide”). This was the news report released a few hours after the terrorist attacks in Paris on November 13, 2015. What was interesting about this news is that the New York Police Department (NYPD) international liaison officers were on the scene of the attacks in Paris even before the arrival of any federal agencies. How could the police officers of New York City be at Paris, France, in such a short time and why were they there in the first place? These are the essential questions that this paper will address in later chapters.

On the morning of September 11, 2001, four coordinated attacks happened in the United States (U.S.). Two 110-story World Trade Center towers in New York City collapsed and the west side of the Pentagon building was also destroyed. Around 3000 innocent civilians and military personnel were killed. The impacts of that day were so great that they still influence the different dimensions of policies today. As this paper will later show, not only did that day change the whole landscape of U.S.’s domestic and foreign policy, it also reshaped the way New York City views itself. No longer was New York City just any municipality; it became the landmark

and the symbol of freedom and liberty. This made the City extremely aware of potential threats and even turned itself into a mini counterterrorism battlefield.

This paper will focus on the NYPD's counterterrorism operation, specifically the International Liaison Program (ILP). As the paper will show, its existence has both merits and faults. Chapter 2 provides the background information for the development of the NYPD's counterterrorism program as a whole. It starts with the need for cooperation among different agencies to collect intelligence information and the establishment of the Joint Terrorism Task Force (JTTF) between the Federal Bureau of Investigation (FBI) and the NYPD. It then goes into detail of the problems that existed within such federal-local collaboration and how the mistrust between the FBI and the NYPD gave birth to the ILP.

Chapter 3 continues the discussion of the ILP by focusing on the nature of its activities as conducting surveillance operations. Because the NYPD has conducted very similar activities domestically, it will be useful to review a court case, *Handschu v. Special Serv. Div.* and to discuss its potential applications to the surveillance activities that the NYPD was conducting as part of the ILP. This is because *Handschu Decree* was originally designed to curtail the level of surveillance activities the NYPD has engaged in but was later modified to allow the NYPD to have access to information to combat terrorism after 9/11. This shows that 9/11 was able to change the court's attitudes towards surveillance activities and this could be used by the NYPD to justify its ILP.

Chapter 4 then examines the ILP in detail. It begins with a description of the program and how it expanded over the past decade. It then discusses its potential benefits of enabling the NYPD to collect timely intelligence information to strengthen New York City's security systems and addresses problems with its perceived lack of legitimacy. It then focuses on the type of legal

document the NYPD used – the Memorandum of Understanding (MOU) – to send its police officers from the intelligence department to different countries and collect intelligence information. In particular, this chapter will analyze the nature of MOUs and the specific language used in the MOU between the NYPD and the Philippines National Police (PNP) to demonstrate how it was applied in the case of the ILP.

Chapter 5 discusses the constitutional issues that arise with the use of the MOU. The chapter analyzes the clauses from both the understandings of the framers and the meaning of the text. It then attempts to discuss the applications of these constitutional provisions to the ILP. As the analysis shows, the ILP has both characteristics of being unconstitutional and constitutional. However, as this chapter demonstrates, with insufficient facts and judicial precedents available, the question of whether the NYPD's use of the MOUs is constitutional can be suggested but not definitively determined.

As a result, even though the NYPD's ILP may appear to be illegal and illegitimate at first glance, the intention and the nature of the program make it hard to determine its legality. Because it was born as a result of both the failures of the federal government and the need for global metropolitan policing, its existence did yield potential benefits as a counter-terrorism program. As a result, there is still value for its existence but much more needs to be done at the different levels of the government to ensure the transparency and accountability of such a program.

Chapter 2. Background Information

“In this day and age when we found that those oceans aren’t big enough to protect us from the rest of the world, it is terribly important that we focus on terrorism as well.”

Michael Bloomberg, Former Mayor of New York City

Infrastructural Changes after 9/11

Terrorism has existed long before 9/11 but it only became a domestic concern after the attacks on the World Trade Center and Pentagon (Price 6; Waxman 380-381). What was significant about the events on 9/11 was that it sparked a massive reform of counterterrorism infrastructure on federal, state, and local level. Congress combined 22 federal agencies to form the Department of Homeland Security (DHS) (Homeland Security Act), which became the third largest agency in the federal government (Price 6; The U.S. Census Bureau). The FBI also prioritized terrorism prevention over its regular crime fighting responsibilities (Price 6; Mueller). By 2004, the newly established Office of the Director of National Intelligence (ODNI) became responsible for intelligence sharing among all intelligence agencies, including the Central Intelligence Agency (CIA), the FBI, and parts of DHS and the Department of Defense. At the same time, Congress also created the National Counterterrorism Center (NCTC) to begin information gathering and analysis from all sources (Waxman 389; Price 6; Intelligence Reform and Terrorism Prevention Act).

Furthermore, the federal government also sought to advance its information gathering capacity using state and local law enforcement (Price 6; The National Criminal Intelligence Sharing Plan 43-46). This resulted in the outflow of money from the federal government to local

police agencies in supporting police officers becoming the “eyes and ears” of the U.S. intelligence community (Price 6; Carter 344). In this case, high-risk cities like New York City and Los Angeles significantly altered the mission and structure of their police departments (Waxman 384; Kelling and Bratton 5-6). Before 9/11, the NYPD only had a few officers occasionally investigating terrorism-related crimes, and many of the investigations were in collaboration with the FBI (Ljungkvist 78). Following the events of 9/11, the NYPD redefined itself as “the primary local authority defending against a terrorist attack in New York City” (NYPD “Counterterrorism Units”). In addition to the Joint Terrorist Task Force (JTTF) with the FBI, it also created its own Counterterrorism Bureau (CTB) and reformed the Intelligence Division (NYPD “Counterterrorism Units”).

New York City Council documents reveal that the budget for NYPD counterterrorism activities varied from \$190 million to \$220 million annually between fiscal year 2013 and fiscal year 2015 (Mueller and Steward 223). Though there has been little change in terms of counterterrorism personnel since 2003, estimated at around 1000 police officers, Police Commissioner Bill Bratton added an additional 300 officers in June 2015 (Cohen, Gartland, and Fredericks). This makes the total number of police officers assigned to counterterrorism operations roughly 1300. The City of New York only accounts for a part of the NYPD counterterrorism funding. From 2013 to 2015, the City contributed about \$80 million while the state and federal governments awarded grants of \$97 million, \$142 million, and \$134 million, to the NYPD for counterterrorism purposes (Mueller and Steward 224).

Funding for the NYPD’s counterterrorism operations also came from two private foundations, including the New York City Police Foundation and the NYPD Counterterrorism Foundation. The New York City Police Foundation is responsible for the NYPD’s ILP, which

allows NYPD officers to be deployed overseas to collect intelligence (NYPD “International Liaison Program”). The NYPD Counterterrorism Foundation raised nearly \$180,000 to pay Marc Sageman, a former CIA officer for his year as a “scholar-in-residence” (Levitt).¹ To be better prepared for transnational terrorist attacks, it is evident that the NYPD has transformed its structural infrastructure in terms of its personnel and funding structure to become an “intelligence-led policing [force]” (Price 6; Carter 80). This would enable the NYPD to gather critical information to reveal and respond to potential terrorist plots to effectively prevent attacks before they happen (Price 6; Peterson 4).

The JTTF

In 1979 the FBI’s New York City field office and the NYPD formed a task force to investigate bank robberies. This task force then became the first JTTF in New York City in May 1980. The FBI and the NYPD each committed eleven members in the beginning. The New York City JTTF eventually grew to include additional NYPD officers and other federal, state, and local agencies. Each of the member agencies would sign a MOU with the FBI to identify the task force’s objectives as responding to and investigating terrorist activities and domestic and foreign terrorist groups² (The Department of Justice’s Terrorism Task Forces 15).

Today the New York City JTTF consists of nearly sixty local, state and federal agencies working in squads. These agencies include the Port Authority of New York and New Jersey, the

¹ This is a very interesting case. It seems that the NYPD Counterterrorism Foundation’s only purpose was to fund Marc Sageman. There is no other document available (or existing) to show the existence of this Foundation or any of its other programs.

² There is no MOU between FBI and NYPD available for the public to view. An individual, Shawn Musgrave, has requested the document via the Freedom of Information Law on MuckRock.com but his request has been rejected up until today. According to the Brennan Center “National Security and Local Police” note at p. 37, “the NYPD and Dearborn Police Department are the only two local law enforcement agencies surveyed that claim not to have an MOU with the JTTF.”

New York State Police, and various DHS agencies like the U.S. Customs and Border Protection and the U.S. Coast Guard. This NYC JTTF also has around 100 civilian analysts with advanced degrees or intelligence expertise from other agencies. There are around fifteen squads, each with about twenty people, usually nine to ten FBI agents, seven to eight NYPD detectives and three to four persons with other affiliations. Each squad specializes in different world regions and terror groups, with three of the squads specializing in New York area – one is located in the Hudson Valley, one in Westchester County and one on Long Island (Ljungkvist 76).

An FBI agent and an NYPD sergeant under him or her lead these squads. The NYPD decides which officers are assigned to the JTTF, but after being placed at the JTTF, the NYPD detectives have to agree to operate under the authority of the FBI. The JTTF officers operate under federal guidelines, which drastically differ from local police guidelines. Furthermore, the FBI grants the NYPD detectives the full federal authority of FBI agents. This means that the NYPD officers will be able to, for instance, execute a federal arrest or a federal warrant. These NYPD officers are also given full security clearances, which provide them with access to national-level classified intelligence. As this shows, the NYPD and the FBI are still the major stakeholders of the JTTF, but the FBI is the official leading agency to give command and provide training (Ljungkvist 76).

The Problems with the Federal-Local Counterterrorism Cooperation

A key idea for the formation of the JTTF was to foster greater inter-agency cooperation and to eliminate the “institutional barriers between the participating organizations” (Ljungkvist 76). On the surface, the JTTF does require the NYPD and the FBI to work with approximately sixty local, state and federal agencies side by side on a daily basis. Especially with “colocation,”

the NYPD and the FBI officers have to share both the physically office space and administrative work (Ljungkvist 76). As a result, within the JTTF organization, the NYPD and the FBI have plenty of opportunities working in teams or simply spending time with each other building trust and better relationships, and this did contribute to the improvement of relationships between the NYPD and the FBI.

However, these apparently better relationships between the NYPD and the FBI resulted in worsened intra-agency relationships within the NYPD itself. According to a former CTB senior official, the main problem of the joint task force is that the NYPD officers working for the JTTF (Ljungkvist 104) are considered to be FBI by other NYPD officers. He described it as,

The FBI has much more of a white collar culture, and the NYPDs from the Counterterrorism Bureau that work for the JTTF adopt that type of culture and they really hate the people that work for the Intelligence Division. They truly hate each other. The NYPDs in the JTTF think the Intelligence Division folks have absolutely no rules and that they are acting like they think they are cowboys. They think the people in the Intelligence Division have it much easier, and that they get promoted more easily. But the NYPDs in the JTTF really have a sweet deal; they get their own cars for example (Interview with former NYPD CTB senior official, June 13, 2012, quoted in Ljungkvist 105).

Furthermore, due to security clearance issues, the NYPD officers at the JTTF are also not allowed to share their information with other NYPD officers, and this also generated tensions. A former CIA officer who had been working for the NYPD stated,

The NYPD officers working for the JTTF are not talking to the NYPD officers working for the CTB or the Intelligence Unit. If they did, they would lose their jobs.

They are all enemies. There is zero sharing of information. They have no contact with each other, so in terms of collaboration, it does not work well at all (Interview with former CIA officer, December 3, 2010, quoted in Ljungkvist 105).

Not only was the NYPD getting internally divided because of the JTTF, the notion of interagency cooperation on federal and local level on counterterrorism also did not have its intended results. The NYPD authorities were frustrated over the fact that the federal agencies did not want to share timely information with them regarding potential terrorism threats. One incident that intensified such frustration was a nuclear threat in late 2001. The *TIME* magazine published an article stating that “an intelligence alert” was sent to a few government agencies reporting that terrorists might have obtained “a 10-kiloton nuclear weapon from the Russian arsenal and planned to smuggle it into New York City” (Ljungkvist 101; Calabresi and Ratnesar).

Yet, the report was highly classified, and even the people of New York were not informed (Ljungkvist 101; Calabresi and Ratnesa). Since a 10-kiloton nuclear explosion in Manhattan could potentially kill 100,000 people, injure 700,000 more and destroy virtually all buildings within a half-mile radius, the refusal to share the information with New York City officials triggered furious responses from New York local media and authorities. *New York Daily News* described the incidence as “evidence of gross stupidity [and] of depraved indifference to human life. Eight million human lives” (Ljungkvist 101; “I’ve got a secret is a dangerous game”). Former Police Commissioner Kerik also expressed his frustration, “if they had information like that, that’s appalling... I was never told. I was concerned we weren’t being fed all the information” (Ljungkvist 102; McFadden). In this case, the decision to not share potential terrorism threats with New York City officials by the federal government gave the City the

reason to believe that New York City was on its own to protect its residents and as Kelly said, “[the City] couldn’t rely on the federal government [anymore]” (Ljungkvist 103; Horowitz).

All of the above indicates that the federal-local interagency cooperation on counterterrorism operations did not achieve its desired results. Not only did the division within the NYPD officers come as a result of the JTTF, the FBI and other federal agencies also failed to share intelligence with the New York City local officials with regard to potential terrorism threats. Even within the JTTF, NYPD officers have to follow the command and guidelines of the FBI. In this case, New York City officials began to believe that it had to adopt a “broader view of the world” and become “proactive in securing the city” (Ljungkvist 82-83). This led to the reorganization of the NYPD, including the creation of two new Deputy Commissioner positions, one for intelligence and one for counterterrorism (NYC Press Release 2002, PR-012-02, quoted in Ljungkvist 83). One of the signature programs that Commissioner Kelly created in 2002 was the ILP, of which he authorized NYPD officers from the Intelligence Division to conduct their own surveillance and infiltration operations abroad.

Chapter 3. The Domestic Justification for the NYPD's Surveillance Activities

“The Constitution's protections are unchanging, but the nature of public peril can change with dramatic speed, as recent events show. The *Handschu* Guidelines ... addressed different perils in a different time.”

— Judge Charles S. Haight, United States District Court for the Southern District of New York

With the establishment of the ILP, police officers were able to go overseas to conduct surveillance activities and gather intelligence. Because the NYPD has been adopting similar strategies for its counterterrorism operations domestically, the nature of such activities appeared to align with each other. As a result, this chapter will discuss a relevant case that a United States District Court decided both before and after 9/11 that has significant implications for the NYPD's surveillance activities both domestically and overseas. Arguably, the NYPD can potentially rely on this legal decision – the *Handschu Decree* – to justify its surveillance activities on foreign nationals.

Background Information and Historical Development

Since the turn of the 20th century, local police forces in cities like Boston, Chicago, and New York began to engage in active police surveillance of individuals and groups that sparked mass political protests and dissents. In response to these civil rights abuses, activists all over the country brought lawsuits against various police departments that had allegedly spied on groups

of citizens. Litigation had been on for decades and was finally settled in the form of consent decrees.

Consent decrees, or consent orders, are defined as agreements between litigants of a settlement that have the same impacts as court orders (Steigman 748; Waxman 397; L. Anderson 725). When a court approves a decree, it “places its imprimatur upon a solemn compact between the parties,” committing “the full power of the judiciary to implement effectively the obligations undertaken in the decree” (Steigman 748; L. Anderson 726). Some commentators argue that consent decrees are not a radical concept but more of a creative way to use the courts to achieve justice (Steigman 748; Eisenberg and Yeazall 465). Unlike strict legal rulings, consent decrees are attractive to both defendants and plaintiffs. For defendants, they can contribute to the expedited outcome of a case, while plaintiffs’ rights are protected and the federal courts can help to oversee implementation in case agencies refuse to abide by the law (Steigman 751; L. Anderson 726). Hence, consent decrees are a preferred measure by both parties especially in civil rights cases.

What is special about consent decrees is that courts can modify them if the order is no longer applicable. Specifically, Federal Rule of Civil Procedure 60(b)(5) provides that the court can relieve a party from a final judgment if “it is no longer equitable that the judgment should have prospective application” (Steigman 752; F. R. C. Pro. 60(b)(5)). Courts can also provide relief for “any other reason justifying relief from the operation of the judgment” (Steigman 752; F. R. C. Pro. 60(b)(6)). In practice, the Supreme Court of the United States ruled that it would not shy away from revoking or modifying its orders “if satisfied that what it has been doing has been turned into, through changing circumstances, an instrument of wrong” (Steigman 753; *United States v. Swift & Co.*, (1932), 114-15). This notion that consent decrees can be changed

with a change of circumstances and context implies they are adaptable in nature and either plaintiffs or defendants can use it for their benefits when circumstances change.

The leading case that exemplifies the modification of consent decrees in institutional reform litigation is *Rufo v. Inmates of Suffolk County Jail* (*Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), 378; Steigman 753). The consent decree in *Rufo* was a result of a complaint by inmates in the Suffolk County Jail in Boston, where the plaintiffs alleged, and was later confirmed by a U.S. District Court, that the conditions in the jail violated the prisoners' civil rights (*Inmates of Suffolk County Jail v. Eisenstadt*, 360 F. Supp. 676 (1973), 676; Steigman 754). Seventeen years after the original decree, the defendants sought to modify the decree but their request was denied by both the trial and appeals court. The Supreme Court reversed the decision by lowering the threshold of consent decree modification and ruled that courts should approach modifying consent decrees with a less stringent standard to better achieve the goals of reform litigation (*Rufo*, 502 U.S. 367 at 393; Steigman 754).

The 1987 *Handschu* Decree

The NYPD has a long history of conducting police surveillance activities. Since the 1960s, the NYPD upgraded its surveillance and other investigatory efforts to conduct more undercover investigation of groups that “because of their conduct or rhetoric may pose a threat to life, property, or governmental administration...of malcontents... and of groups or individuals whose purpose is the disruption of governmental activities for the peace and harmony of the community” (*Handschu v. Special Servs. Div.*, 605 F. Supp. 1384 (1985), 1396; Steigman 756). These efforts were “not [only] limited to investigations of crime, but [also] ... any activity likely to result in a serious police problem” (*Handschu*, 605 F. Supp. at 1396; Steigman 757). As a

result of these activities, the NYPD compiled intelligence files on more than 200,000 individuals and groups, including people who were suspected of being communists, Vietnam War protesters, health and housing advocates, education reform groups, and civil rights activists between 1904 and 1985 (Greer 612; Lee).

In 1985, a class-action lawsuit brought by a group of different people in the Southern District of New York led to limitations on the NYPD's surveillance activities. The plaintiffs and the NYPD agreed to a settlement or a consent decree, known as the "*Handschu Decree*," which limited the NYPD's investigations of any political, ideological or religious activities of an individual or group unless the department had "specific information ... that a person or group engaged in political activity is engaged in, about to engage in or has threatened to engage in conduct which constitutes a crime" (*Handschu*, 605 F. Supp. at 1390; Greer 612). The *Handschu Decree* thus only allowed the NYPD to collect information of individuals, groups or organizations that were in conformity with the settlement. If determined the information was not collected according the *Handschu* standards, the authority can submit a report to the Police Commissioner, who was required to initiate appropriate disciplinary measures (*Handschu*, 605 F. Supp. at 1392; Greer 612).

The 2003 Modified *Handschu Decree*

In 2003, the scope of the *Handschu Decree* was drastically changed largely as a response to the terrorist attacks in New York City on September 11, 2001. In the wake of those events, the NYPD sought to modify the terms of the *Handschu Decree* and told the supervising federal district judge that the mandatory guidelines had become too rigid and difficult for the police department to deal with the threat of international terrorism and that it was important to have

increased surveillance for the sake of national security (*Handschu v. Special Servs. Div.*, 273 F. Supp. 2d 327, 333-34 (2003); Harris 152). The judge decided that these changed circumstances justified a substantial reduction of the requirements of the decree since it would “severely [handicap] police efforts to gather and utilize information about potential terrorist activity” (*Handschu*, 273 F. Supp. 2d at 340; Harris 152; Steigman 771). With such reasoning, the *Hanschu Decree* was revised to meet the new threshold of police surveillances.

Under the new guidelines, the police may commence a preliminary inquiry based upon “information indicating the possibility of unlawful activity” (*Handschu v. Special Servs.* 288 F. Supp. 2d 411 (2003), 423; Harris 152; Greer 612). The relaxation of the *Handschu Decree* was first evident at the 2004 Republican National Convention. Without giving prior notice to the public, the NYPD deployed an increased number of surveillance cameras around the City, not just where the Convention was held. It also deployed police officers with hand-held cameras to videotape protesters (Greer 612; N.Y. Civil Liberties Union, “Who's Watching?” 9). Police intelligence officers were also deployed nationally and internationally (Canada and Europe) before the convention, to obtain information about individuals planning to visit New York City during the convention, including those with “no apparent intention of breaking the law” (Greer 612; Dwyer, “City Police Spied Broadly Before GOP Convention”). As this shows, the modified *Hanschu Decree* provided the NYPD with the authorization for conducting surveillance and data collection similar to the ones practiced by the NYPD in the first half of the 20th century. This raised the question of how far governmental institutions could go in terms of infringing on citizens’ rights to protect them from the potential threat of terrorism.

The Aftermath of the Modified 2003 *Handschu Decree*

Four years after the modification of the *Handschu Decree*, the plaintiffs went back to court to challenge the NYPD's routine videotaping of people at public gatherings with no indication of them engaging in any unlawful activity (Harris 152; Dwyer, “Judge Says Police Violated Rules in Videotaping Public Gatherings”). Judge Haight - the same judge who modified the *Handschu Decree* in 2003 - issued an order limiting the taping, but did not change the requirements to a stricter standard (*Handschu v. Special Servs. Div.*, 475 F. Supp. 2d 331 (2007); Harris 153). The litigation shed new light in early 2016 when a settlement was reached between the NYPD and the plaintiffs of *Handschu*. Both of the cases were brought in 2013 as a response to the NYPD’s “discriminatory and unjustified surveillance” on Muslim community (N.Y. Civil Liberties Union, “Landmark Settlement”). The proposed settlement consists of modification of the guidelines to “[incorporate] new safeguards and [install] a civilian representative within the NYPD to reinforce all safeguards” (N.Y. Civil Liberties Union, “Landmark Settlement”). Even though it was a substantial victory for the plaintiffs in the case, the final modification of the decree is still pending until this day because it needs to be approved by a federal judge.

The Relationship between the *Handschu Decree* and the ILP

Broadly speaking, both the ILP and the modification of the *Handschu Decree* were the result of 9/11 terrorist attacks. They were both designed for the NYPD to collect intelligence information in hope of effectively protecting citizens from potential terrorist threats. However, the ILP has not been linked directly to the *Handschu Decree* because it is more international in nature while *Handschu* is a domestic legal settlement specifically in New York City, and in turn, New York state.

Interestingly enough, even though theoretically the *Handschu Decree* is only limited to the residents of New York, the NYPD has interpreted the modification and the relaxation of the guidelines to permit the enlargement of its surveillance activities regardless of whether they are national or international. This was evident in the case of the 2004 Republican National Convention where the NYPD actively engaged in domestic investigations of the individuals, groups, and organizations that planned to come to New York, it also sent undercover NYPD officers to Canada and Europe to conduct “covert observations” of individuals who might protest at the convention (Dwyer, “City Police Spied Broadly Before G.O.P. Convention”). Because of the scope of the NYPD’s surveillance and intelligence gathering activities following the relaxation of the *Decree*, it can be argued that the *Handschu Decree* can be used as a legal basis for the ILP. In this regard, the NYPD would be able to collect intelligence all over the globe as part of the ILP based on “information indicating the possibility of unlawful activity,” or in this case, potential terrorist threats (*Handschu*. 288 F. Supp. 2d at 423). However, since the evidence of the NYPD officers were sent overseas to conduct investigations of alleged protesters was only mentioned in one news articles, it is hard to know the amount of people being spied on internationally and how they were being monitored. This was especially true since the NYPD did not actively engage in investigations but adopted silent and “covert observations.” As such, even though the *Handschu Decree* is arguably a way for the NYPD to claim its international surveillance, it is not clear whether it can actually be used for such transnational operations. Hence, it is useful to look at the legal document- MOUs- that the NYPD used to understand the specific claims and mechanisms of such operations, which will be further discussed in the next chapter.

Chapter 4. The ILP and Its Legal Basis

“[The] threat of terrorism is a global phenomenon... Thus, while the NYPD has a great deal of knowledge of local extremist, radical, and militant individuals and groups, we are equally interested in indicators of terrorist activity elsewhere in the country and around the world.”

Richard Falkenrath, Former NYPD Deputy Commissioner of Counterterrorism

The Background of the Program

The NYPD had some experience of overseas investigations in the beginning of the 20th century. During that time, most overseas criminal investigations were the responsibilities of the local police departments, which were the most skilled and experienced at these functions (Okochi 80; Nandelmann 81-93). In 1983, NYPD detectives also participated in the criminal investigations of the Gambino crime family in Kuwait (Okochi 80; Raustiala 163). As a result, it was not uncommon for NYPD officers to conduct investigations abroad and it also shows that the NYPD is “in many ways the more formidable global investigatory agency” (Okochi 80; Raustiala 163). In this case, the ILP should not be seen as a brand new idea but instead as having some kind of roots to be traced back.

Specifically, the NYPD International Liaison officers are stationed in twelve cities across eleven foreign countries for intelligence gathering (Falkenrath). They are deployed in London (the United Kingdom), Lyon and Paris (France), Madrid (Spain), Tel Aviv (Israel), Amman (Jordan), Abu Dhabi (the United Arab Emirates), Singapore (Singapore), Toronto and Montreal (Canada), and Santo Domingo (the Dominican Republic) and Australia. There are also shorter stationing sites, such as Guantanamo Bay (Cuba), Afghanistan, Bali (Indonesia), Germany,

Kuwait, Malaysia, Pakistan, Beslan (Russia), Manila (Philippines), Istanbul (Turkey), and Mumbai (India) (Comiskey 70). The ILP is funded through the New York City Police Foundation, a non-profit funded by JP Morgan, Goldman Sachs, Barclays, News Corp., and others. It costs about \$1 million per year (Ljungkvist 72; Fischer).

What distinguishes the ILP and other NYPD overseas criminal investigations is that the NYPD liaison officers have no investigation capacity when they are abroad. These NYPD officers travel to countries with tourist visas, staying at hotels or apartments. They are also not armed and cannot be directly involved with investigations in host countries (Ljungkvist 72; Evans). All of their activities in foreign territories also have to be performed with the host country's consent. In fact, David Cohen, the Deputy Commissioner of Intelligence, wanted the NYPD officers to stay overseas mainly to know their foreign counterparts personally and collect information from these "day-to-day and minute-to-minute operational details" (Dickey 146). These International Liaison officers thus establish relationships with the foreign law enforcement authorities to gather terrorist-related information and share best practices with their foreign counterparts (Ljungkvist 73).

a. The Chronology of Events

To understand better how the ILP is expanded, it is important to establish a timeline of different events. The ILP was created in 2002 as a response to the failures of relying on the federal government to share potential terrorism information. The program started as a pilot project which a NYPD detective was sent to Toronto, Canada, to collaborate with Canadian law enforcement on threats to New York City (Ljungkvist 72; Kjungkvist 10). The program became more formalized when the NYPD sent its detectives for intelligence and law enforcement duties

to “strengthen anti-terror cooperation” in early 2003. One of the reasons for this initial post was that “[a] Hamburg al-Qaida cell is believed to have been central to planning the Sept. 11 attacks” (“Police Detectives Work Abroad”). Specifically, the detectives will be stationed in Hamburg, Germany, Tel Aviv, Israel, and London Britain for six months to a year. In term of the specific time for their initial posts, Judith Miller from New York Times reported that a veteran NYPD detective took the position in Israel since March 2003 (Miller). This can imply the approximate time for the NYPD detectives to station in Germany and London respectively. This report also confirms the beginning of the program by stating that, prior to the posting in 2003, there were already detectives in Toronto, Canada and Lyon, France (“Police Detectives Work Abroad”).

Since then, the program has shown impressive accomplishments and has been developing exponentially. In fact, the NYPD liaison offices have been on the scene of some of the most prominent terrorist attacks within a short period of time and also appeared to have shared timely information with New York City to learn from their foreign partners and strengthen its security measures against potential terrorist attacks.

1. Madrid, Spain, Train Bombings, March 11, 2004

There were ten synchronized explosions on four commuter trains detonated by an Islamic fundamentalist allegedly related to Al-Qaeda. One hundred and ninety one people were killed and around 1800 were injured. There was a report that transit workers saw terrorists in action but failed to report. A NYPD officer was on the scene and dispatched the information back to the City and led to the reemphasis of “if you see something, say something” campaign (Comiskey 73; Okochi 81).

2. London, England, Terrorist Bombings, July 7, 2005

Four bombs- three on the London Underground public transportation and one on the

double-decker bus- killed fifty-six people and injured more than seven hundred. During that time, a NYPD liaison officer was taking the Tube and he was able to obtain real-time information from his Scotland Yard counterparts. He was thus able to provide details from the scene to the NYPD that led to the NYPD Transportation Container Inspection Program that allows NYPD officers to randomly inspect packages in subways and ferry terminals (Comiskey 72-73; Okochi 80).

3. The Mumbai, India, Hotel Bombings, November 26, 2008

The Mumbai attacks involved ten Islamic terrorists taking over Taj Mahal Hotel and the Oberoi Trident. The terrorists used an offsite operational control that monitored media coverage and police operations. They came to Mumbai via sea, hijacking an Indian fishing trawler in the Arabian Sea. The attack lasted over sixty hours and resulted in at least one hundred seventy deaths and over three hundred injuries. Within a few days, the NYPD sent a team of senior officers headed by Captain Brandon Del Pozo and was able to collect real-time information on the nature of the attacks. In response, the NYPD established a Critical Incident Response Capacity to supplement its Emergency Service Unit and updated its active shooter procedures. This information was deemed so valuable that the Police Commissioner Kelly also gave a testimony before the Senate Committee on Homeland Security and Governmental Affairs on January 8, 2009 (Comiskey 70-72; Okochi 80; Kelly).

4. Jakarta, Indonesia, Hotel Bombings, July 17, 2009

Two synchronized bomb attacks at the Ritz Carlton and J. W. Marriott hotels took place in Jakarta. The attacks resulted in seven deaths and around fifty injuries. “Within thirty minutes of the attacks,” police cars and officers were deployed by the NYPD CTB to the Marriott, the Ritz Carlton, and dozens of other hotels in New York City (Okochi 80). The NYPD sent its

International Liaison Unit in Singapore Lieutenant John Daly to the scene to work with local authorities and obtain a video that captures the bombers entering the hotel and the bomb detonation. He was then able to call an NYPD Shield conference and provide an on-scene assessment (Comiskey 72; Okochi 81).

Other than these cities, the NYPD has also deployed its officers to other places in the world, including a number of al-Qaeda bombings on Jewish synagogues and HSBC in November 2003 in Istanbul; the Metro blasts by Chechen rebels that killed thirty-nine people in February 2004 in Moscow; the attacks on Taba Hotel in October 2004 and Sharm el-Sheikh resort in July 2005 in Taba, Egypt; Amsterdam where Hofstad, an Islamist group whose members murdered the Dutch filmmaker Theo Van Gogh, in November 2004 (Okochi 81).

Furthermore, though the specific timing for the NYPD Jordanian office was not clear, the NYPD officers in Amman, Jordan was able to provide first-hand intelligence when its capital was attacked in 2005 (“American Airlines Donates Roundtrip Air Travel for NYPD’s ILP”). There was an office opened in Abu Dhabi in October 2008 after the UAE’s formation of Critical National Infrastructure Authority (“CNIA”) in 2007 (Matt). Few years later, the NYPD opened a second office in Tel Aviv, Israel in 2012 (“NYPD in Israel”) and also formalized its agreement with the French Police in 2013 (NYPD, “NYPD and the International Cooperation Department of Ministry of the Interior of the French Republic Establish Liaison Agreement”). Most recently, the NYPD opened a new branch in Australia in June 2015, increasing its presence in the Asia Pacific (Paybarah). All of these have shown the expansiveness and entrenchment of the ILP, and in turn, display the audacity and ambitions of the NYPD counter-terrorism operations as a whole.

b. Legitimacy

However, despite the legacy that the ILP claims to have, its legitimacy was questioned by some of its federal and foreign counterparts. For example, Thomas V. Fuentes, who headed the FBI's Office of International Operations between 2004 and 2008, was quoted in the *Washington Post* criticizing the ILP, saying that "several NYPD officers ran into the tunnel and showed their badges" in the London Tube just moments after the 2005 bombings, without any official approval from British authorities to participate in the investigation (Ljungkvist 73; Stein). Fuente said that the British were furious and asked the FBI: "What's the story? Who are these guys? Are they with you?" But the answer they got was "[the NYPD officers] were independent" (Ljungkvist 73; Stein). Similarly, as federal officials described when the NYPD showed up on the scene in the Bali attacks in 2005, the Indonesian National Police "were astonished and irritated" (The Stream Team). As these events show, even though the NYPD was able to gather credible intelligence from these scenes of terrorist attacks abroad, it appeared to have lacked the political legitimacy and authorization to do so, creating unnecessary confusion and chaos. However, unlike these newspaper columnists suggest, the NYPD does have a basis of authority and legal standing to go overseas, as evident in its use of MOUs. The next section of this chapter will thus further investigate the basis that the NYPD used to send its officers abroad.

Memorandum of Understanding

Though there has not been a known comparable case where a MOU is used to deal specifically with foreign intelligence collection with regard to terrorist threats, MOUs have been used for the purpose of transnational crimes by U.S. agencies. As such, this chapter will focus on

using MOUs for international trade and security investigations to discuss the meaning and implications behind this type of legal document in its extraterritorial applications.

As early as the 1980s, the U.S. Securities and Exchange Commission (SEC) has been using MOUs to obtain evidence for international insider trading violations (Kehoe 359; Beard 275; “Memorandum of Understanding to Establish Mutually Acceptable Means for Improving International Law Enforcement Cooperation in the Field of Insider Trading” Aug. 31, 1982, U.S.-Switz., 22 I.L.M. 1 (1983)). Generally speaking, MOUs are non-binding statements of intent between countries that share similar conceptual ideas of securities violations and the enforcement of such violations (Kehoe 359; Beard 275; Mann and Lustgarten 511, 543). As such, MOUs are bilateral agreements that call for informational exchanges and mutual cooperation in investigating potential securities violations (Kehoe 359; Beard 275; Mann and Lustgarten 543).

One of the principal drawbacks of MOUs is that they do not require the signatory countries to provide information or cooperation. In this regard, compliance with MOUs is typically completely voluntary on the part of the contracting parties unless the parties intend to make such cooperation binding. Nevertheless, countries generally fulfill their commitments under these agreements to strengthen diplomatic relations (Kehoe 359; Mann and Lustgarten 543).

Specifically, MOUs can be regarded as the first step in the development of a comprehensive formal agreement between the SEC and the securities regulators in a foreign country. The effectiveness of MOUs, especially in situations like collaboration on investigating international crimes, is shown in its provisions of:

(1) a framework for cooperation; (2) greater experience in addressing international securities law issues; (3) improved communications; and (4) improved working relationships [between the SEC and its foreign counterpart] (Kehoe 359; Mann and Lustgarten 543).

One example of the value of MOUs as a useful precursor for the development of binding agreements is between the U.S. and France. The U.S. and France have been cooperating within France based on the established MOUs to investigate international securities violations (Kehoe 367). But with the limitations of MOUs being non-binding documents, both parties have been trying to negotiate and reach agreements on the formation of the Mutual Legal Assistance Treaty (MLAT), a bilateral agreement aimed to provide mutual assistance between contracting parties for criminal violations (Kehoe 362; Beard 273). Just like other treaties, it requires the U.S. Senate to give advice and consent (U.S. Constitution Article II, Section 2, Clause 2). Because of this, the MLAT only became effective after Congress passed the International Securities Enforcement Cooperation Act (ISECA) in 1990, which gave the SEC the power to enter into binding agreements with international securities regulators (Kehoe 360; Beard 277; ISECA of 1990). This shows that existing MOUs enabled the U.S. and France to negotiate on a binding mutual assistance agreement. Hence, MOUs' usefulness can be seen as a foundational step for the formulation of binding bilateral treaties.

MOUs are also important in their own right. One of the essential benefits for such arrangements is that these agreements generally provide for direct information sharing between the SEC and a foreign securities agency. This exchange gives an “alternative to the sometimes cumbersome and ineffective procedures” of the MLATs, which require that requests for assistance under the treaty be made only by a designated U.S. authority (Kehoe 360; Erwin 485).

Moreover, since the SEC and its foreign counterpart would be directly involved in the negotiation process, they will be able to outline and address issues specific to their concern without interference with other U.S. authorities.

It is also important to note that MOUs do not have the “dual criminality” element generally found in criminal mutual assistance treaties (Kehoe 360; Beard 275; Mann and Lustgarten 534). Such a provision requires that the violation being investigated must be applicable to the laws of both countries that are parties to the treaty for a country to be eligible for assistance (Kehoe 360; Beard 275; Mann and Lustgarten 530). For example, the U.S. and Switzerland entered into treaty, known as the Swiss Treaty, on January 1977. This treaty authorized the U.S. SEC to request direct assistance from its Swiss counterpart to conduct investigations abroad (Kehoe 363; Mann and Lustgarten 530; *The Treaty on Mutual Assistance in Criminal Matters Between the Swiss Confederation and the United States*). Because the treaty limited the parties to only investigate offenses that were considered as criminal violations under the laws of both countries, it prevented the U.S. from requesting help from Swiss authority for insider trading violations since the Swiss government did not recognize insider trading as a criminal violation (Kehoe 364; Mann and Lustgarten 544-545).

To counter such a “dual criminality” problem, the U.S. and Swiss government signed an MOU to specifically commit efforts to combat insider trading (Thomas 8). This MOU helped to shape the Swiss law substantively, and the Swiss legislature incorporated insider trading into the Swiss Penal Code in December of 1987, which went into effect on July 1, 1988 (Kehoe 364; Mann and Lustgarten 544-545). This then solved a major frustration and allowed the U.S. to investigate insider trading offenses in Switzerland without any difficulties. In this case, MOUs can provide not only more freedom for the parties to seek assistance from their foreign partners

in investigating alleged crimes in other countries but can also further facilitate the formation of legally binding laws both domestically and bilaterally.

One should also note that, while MOUs are mostly voluntary, they do have the potential to be binding if the parties intend for them to be so. One of the most famous examples is the signing of the MOU during the Cold War between the United States and the Soviet Union for the establishment of the Standing Consultative Commission (1972 Memorandum of Understanding). It was an important step for the eventually finalized Anti-Ballistic Missile (ABM) Treaty. Even when the Cold War ended, the treaty still served as foundational document for the former Soviet states and the United States to continue the nuclear disarmament commitments when they signed the 1997 Memorandum of Understanding (1997 Memorandum of Understanding). As stated in the MOU Article IX, 4,

Each State that has ratified or approved this Memorandum shall also be bound by the provisions of the First Agreed Statement of September 26, 1997, Relating to the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitations of Anti-Ballistic Missile Systems of May 26, 1972, and the Second Agreed Statement of September 26, 1997, Relating to the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems of May 26, 1972.

As this shows, MOUs can be either voluntary or legally binding depending on the specific parties' intent. Hence, it is essential to examine the specific provisions and language in the MOU to understand its potential legally binding force.

a. The Use of MOUs between the State Department and the NYPD

One of the ways that MOUs are used to facilitate international policing in areas of transnational crimes is through the authorization of the U.S. Department of State (State Department). One of the most recent examples was the signing of a MOU between the State Department and the NYPD to facilitate international police training in Haiti. Specifically, on January 21, 2010, Assistant Secretary of State for the Bureau of International Narcotics and Law Enforcement Affairs (INL) signed an MOU with the NYPD Police Commissioner Raymond Kelly to establish a relationship in providing assistance for international police training. In particular, the MOU gave a framework for the NYPD, together with other police forces, to provide the Haitian National Police with training and technical assistance (Signing of Memorandum of Understanding for Police Training with NYPD).³

The agreement was renewed again in late 2011 between the INL and the NYPD and provided more details about NYPD officers' deployment in Haiti. According to the Media Note, NYPD officers have been working with Haitian National Police Officers in and around Port-Au-Prince, "advising them on community policing, patrol and other best practices in investigating and solving crime" (Agreement Extended between the Department of State and New York Police Department). Since the establishment of the agreement in 2010, five teams of five police officers and one supervisor have rotated through their three-month deployments in Haiti. The MOU also stressed that the NYPD officers in Haiti were acting as mentors "with no law-enforcing capacity," which was very similar to the deployment of NYPD officers in the ILP (Agreement Extended between the Department of State and New York Police Department).

³ The text of this MOU is not available for the public. I have submitted a request to obtain the specific MOU on the State Department website but my request is still pending approval.

The reason the State Department was able to authorize the NYPD to conduct police training in Haiti was because of the existence of bilateral agreements. As indicated on the Haiti Country Report 2015, “Haiti maintains several core legal agreements in support of drug control goals, and often cooperates effectively with the United States on narcotics cases” (2015 International Narcotics Control Strategy Report- Country Report: Haiti). This shows that the legal standing for the State Department to provide assistance and cooperation with Haiti existed in bilateral agreements and this in turn, provided the legal basis for the State Department to authorize the NYPD to provide training in Haiti.

b. The Use of MOUs between the NYPD and Other Nations

(i) The Context for the Use of MOUs

The emergence of transnational criminal organizations provides great challenges to traditional police forces. No longer are criminal actors limited to a confined local space to conduct their criminal activities, but could instead tend to formulate their own international networks and expand their illegal activities transnationally. One such example is the global Islamic jihad, where they usually work according to “theaters of operation,” where some are responsible for gathering intelligence and share with their global network while others conduct ground-based operations. To respond effectively and counter such threats “demands extremely close coordination and integration between and within police, intelligence, military, development, aid, information, and administrative agencies” (Sullivan and Wirtz 1; Kilcullen 607).

Such demands were realized after the 9/11 terror attacks where national police forces all over the world as well as international police agencies started to develop new strategies to

respond the growing threats of terrorism. With the changing nature of the threat, many of these policing activities require greater international cooperation. This requires the national police agencies to act more independently as compared to their own national governments (Sullivan and Wirtz 3; Deflem 338). The increased bureaucratic autonomy provides more opportunities for the local police forces to share “systems of knowledge” with fellow professionals across the globe (Sullivan and Wirtz 3; Deflem 339). These activities usually involve different kinds of international crimes, or local and national enforcement tasks. It primarily takes the form of bilateral liaison activities that focused on specific, short-term collaborative investigations (Sullivan and Wirtz 1; Deflem 339). Arguably, these developments did not lead to “the formation of a supranational police force,” but rather “[an] emergence of a global metropolitan network and global metropolitan policing” (Sullivan and Wirtz 3).

Global metropolitan policing includes both national and metropolitan law enforcement agencies as well as participation of intelligence organizations, nongovernmental organizations, and private security entities. This collaboration requires the construction of security-intelligence networks where information is shared among its members. Because of its interconnected and globalized nature, information is shared among state, private, and other informal actors rather than purely state-based entities. Furthermore, these networks also include informal relationships between social agents and agencies with equal relationships. These informal links will in turn contribute to the formation of formal networks among security agencies in the form of treaties or other types of legal agreements (Sullivan and Wirtz 3).

According to Peter Gill, the space where the police and security networks emerge is both symbolic and physical. On the one hand, they are sharing information and intelligence through a virtual space but on the other hand, they are using this information to support traditional policing

of people and spaces. Global metropolitan policing thus involves a “stretching” of spatiality based on the idea that “developments in one part of the globe can have immediate and world-wide impact” (Sullivan and Wirtz 3; Gill 30). As Gill argued, these networks routinely cross the boundaries between different agencies, and “mediating between, if not transcending, different local, state, and national sovereignties” (Sullivan and Wirtz 3; Gill 39). As a result, global metropolitan policing has created a network of hundreds and thousands of agents collaborating on tasks daily and in doing so, breaking down boundaries of national sovereignty and other kinds of jurisdictional lines.

In the context of the development of global metropolitan policing, the NYPD developed its own global liaison network, trying to link its municipal jurisdictions to other major municipal jurisdictions in the world. The program is based on the premise that the NYPD has to operate globally because counterterrorism efforts should have no national boundaries (Sullivan and Wirtz 3). Specifically, the NYPD uses the MOU as one of its foundational document to form legal agreements with other metropolitan police departments in the world. This allows the NYPD to send its officers to station all over the world through the ILP.

(ii) The Language of the MOU

To understand the specifics of the MOU, it is important to examine its language in detail. In this case, the MOU between the Philippine National Police (PNP) and NYPD is a good example for analysis.⁴ Essentially, this MOU is designed to promote partnership and cooperation

⁴ Even though there are more than a dozen MOUs existing, the majority of them are either not available to the public or inaccessible on the Internet. The MOU between the PNP and NYPD is the only MOU I was able to find for this research. Since the purposes for these MOUs are very similar in nature, the MOU between the PNP and the NYPD can reasonably be treated as representative in this case. The MOU between the PNP and the NYPD is attached to this thesis as Appendix A.

between the NYPD and the PNP in developing effective law enforcement tools and preventing transnational crimes (MOU between the PNP And NYPD Article 3, 2).

After outlining the background information for the MOU, the agreement starts with the definitions of terms on which the two parties are interested in collaborating on. This includes “transnational crime,” “intelligence information,” and “joint activities” (2). Article 2 states the general provisions for the agreement. Some of the most important elements in this section are respect for the territorial integrity of each party and non-interference with domestic affairs when implementing the agreement. It also states that this agreement cannot “conflict with the provisions of any treaty negotiated between the governments of the United States and the Republic of the Philippines” (2). This article implies that when conflicts arise as a result of this MOU, domestic law and existing treaties between the two countries will take priority and this agreement will comply with these existing standards.

Article 4 specifies the areas of cooperation between the two parties. Many of the areas concern cross-border trafficking, terrorism, cyber and identity crimes, among others (3). Article 5 details different forms of cooperation, with an emphasis on exchanging criminal intelligence information and joint police exercises and education. It also describes the establishment of a Joint Committee to be responsible for the implementation of the MOU (3). These two articles provide a framework of what is expected of the two parties to the agreement and the specific actions that may be taken in achieving its desired purposes.

Article 6 is designated to explain the specifics of sharing of intelligence information. Similar to Article 2, Article 6 again stresses the importance of carrying out the exchange of information in accordance with “existing laws, rules, and regulations governing or affecting the Parties” (4). The article also emphasizes the confidentiality of the intelligence information, and

“may not be disclosed to the public or media, or to other entities that do not have a need to know that information for a legitimate law enforcement purpose” (4). It also states that unless it is during an emergency situation, the information shared “will not be transferred to a third party without written approval of both Parties” (4).

Another important aspect of this Article is that in case either party is required by a court to produce and share intelligence, the compelled party needs to provide “written notice” to the other party while the compelled party seeks any available “protective order or other appropriate remedy” (4). If such remedies are not available or the compelled party chooses to comply, the compelled party has to “furnish only that portion of the information which the compelled party is advised by written opinion of counsel is legally required and to exercise reasonable efforts to obtain confidential treatment of such information” (4). This Article emphasizes the confidentiality of the intelligence shared and the necessary measures to guard its most important information if a party is required by law to do so.

Articles 10 and 11 again stress the importance of the MOU not violating the sovereignty of any party, not prejudicing any party’s “crucial interests,” “laws and regulations,” as well as “international agreements to which the republic of the Philippines or the United States is a party to” (6). If violations happen, each party will be able to “derogate some areas of this memorandum of understanding or suspend cooperation altogether” after giving written notification (6). Article 13 provides the mechanism of settling disputes with regard to “the interpretation, application or implementation” of the MOU (6). In particular, the disputes should be referred to the “Joint Committee” first and if the Committee is unable to solve the problem, it will be “elevated to the Chief of the PNP and the Commissioner of the NYPD for resolution” (6). This Article implies that the framework of solving disputes is based on consensus and

consultation between the two Parties as compared to using other legal methods to solve the problems.

The last section details the terms of the MOU, including its implementation, duration, and termination. The MOU enters into force at the time of its signing, which was December 14, 2012. It will be valid for five years with potential extension upon both Parties' consent. If any party wants to terminate this agreement, it must provide written notice at least three months before and termination will not affect any existing bilateral relations between the two Parties (7). Since this MOU was signed in late 2012, it is still in effect. As a result, using this MOU as a representative of the NYPD ILP will most likely reflect the recent policy on this issue.

(iv) The Implications of Using the MOU for the ILP

As beginning of this chapter demonstrates, MOUs are used to facilitate cooperation in matters related to international crimes by the SEC. Although the example used was the SEC, MOUs between the U.S. agencies and between the NYPD and the foreign municipal police agencies share similar functions. Using the same analysis, the MOUs used between the NYPD and their foreign counterparts were most likely non-binding in nature and were designed to establish some sort of preliminary framework of cooperation on counterterrorism operations. However, since they were initiated by the NYPD and the police department of foreign countries, these agreements would most likely stay as MOUs and not be more formalized in any way, such as becoming a MLAT or other kind of international treaty.

Moreover, as this chapter also demonstrates, politically speaking, the NYPD's global liaison program falls under the context of the emergence of global metropolitan policing. It emphasizes the establishment of networks between governmental and non-governmental actors as well as national and municipal entities to share security and intelligence information to

counter transnational threats like terrorism. Needless to say, as one of the largest and most advanced municipal police forces in the world, the NYPD has taken the lead to show other police forces the new ways to conduct its police activities as a globalized metropolitan police force with its ILP. However, no matter how expansive the responsibility of global policing laid on the NYPD's shoulders, it is still a local municipal police force in New York City. In this regard, it is important to investigate whether using a MOU as a way to reach international agreements with other countries' municipal police forces is constitutional under the American system.

Chapter 5. Constitutional Issues

“The power to make treaties with other nations is an inherent attribute of the sovereign power of an independent nation.”

Chandler P. Anderson, Former Counsel to the Department of State

As shown in the previous chapter, the NYPD, a municipal police agency of New York State, by means of a MOU, entered into international agreements with other municipal police departments in foreign countries. Through these agreements, the NYPD was able to station liaison police officers in host countries to collect counterterrorism intelligence information. Since the nature of the program is totally unprecedented, there are no judicial cases or precedents that are even remotely similar to this case. Hence, this chapter will focus on the language of relevant constitutional clauses to analyze the legality of the ILP.

The Constitutional Text

To examine whether the NYPD’s ILP has violated the United States Constitution, it is important first to list the relevant clauses of the Constitution dealing with the treaty-making power. They are as follows:

1. Article I, Section 10, Clause 1

“No State shall enter into any treaty, alliance, or confederation...”

2. Article I, Section 10, Clause 3

“No State shall, without the consent of Congress... enter into any agreement or compact with another State, or with a foreign power...”

3. Article II, Section 2, Clause 2

“He [the President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur...”

4. Article III, Section 2, Clause 1

“The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority...”

5. Article VI, Clause 2

“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.”

Articles I and II specifically deal with prohibiting states from entering into treaties or agreements with other states or foreign countries. Article II designates the treaty-making power to the Executive branch of the government though it needs to be confirmed by the Senate. Article III further decentralizes treaty-making power by giving the judicial branch the ability to interpret treaties, just as the courts are responsible to interpret domestic laws. Article VI gives a special status to the treaties made by the President as the “supreme law” of the country, making them different from state laws or statutes.

At first glance, it appears that the NYPD has violated the U.S. Constitution because it is a municipal entity, under the jurisdiction of a state, and it did make agreements with other countries through the use of MOUs. Under the New York Criminal Procedure Law § 1.20(34)(d), “police officers” are individuals who are “sworn [officers] of an authorized police

department or force of a city, town, village or police district” (New York CPL§ 1.20). In the context of the NYPD, it is an authorized police department of New York City under New York State law. However, when taking a closer look, I will argue that the analysis of the significance of these constitutional clauses is more complicated than it might first appear. In particular, there are two categories of questions to think about when deciding the constitutionality of the NYPD’s ILP. The first is with respect to the understanding of the framers when they drafted the Constitution and the second is the meaning of specific provisions.

Interpretation of the Clauses

First of all, it is important to know why framers incorporated the treaty-making clauses in the Constitution. The questions that are associated with this are: 1) what did they want to achieve by drafting such clauses? Is there a fundamental value that the framers wanted to advocate in the case of treaty-making? It might not be as clear in the beginning, but thinking about the context for which these clauses were drafted and debated, the answer would be to protect the ideal of federalism. When the Constitution was drafted, it was at a time when the nature of federal government was still being conceived as seen in *The Federalist* No. 39.

In this paper, Madison discusses that no other form of government is suited to the genius of American people than a republican form of the government. This is because a republican government derives its powers directly or indirectly from the people and is administered by persons who hold public office for a limited period of time or during good behavior. He argues that these are the essential principles that the Constitution conforms to, in which the people directly elect the House of Representatives while the people indirectly elect the senators and the president. At the same time, the principle of federalism, which is the sharing of power between

the states and the national government, is reflected in the Constitution's ratification and the equal representation of senators. All of these show that the structure of the U.S. government is both national and federal where it is national in the operation of its powers but it is federal in the extent of power (*The Federalist* No. 39).

In *The Federalist* No. 64, treaty-making power is specifically discussed. Jay defends the constitutional provision that grants power to the president to make treaties with the consent of two thirds of the Senate. He argues that it was important to give this power to the president and Senate, because it will consist of "most enlightened and respectable citizens," given the minimum age requirements for their office and other factors. With respect to the idea of delegating the responsibilities to the Senate rather than the House, Jay contends that the Senate suits the job better because its members are elected less frequently and to longer terms and that would allow them to acquire the necessary knowledge for matters like international treaties. Jay also discusses the other advantage of granting the President the power to make treaties is that he can conduct negotiations in secrecy and then get the advice of the Senate at a later appropriate point. Jay also provides reasoning for why treaties should not be amendable by legislative acts. He argues that treaties be binding on the American people not just because of the way they are made, but also to instill trust in other nations who want to enter into long-term relationships with the U.S. (*The Federalist* No. 64).

As a result, *The Federalist* indicates the framers' understandings when they drafted the Constitution. The framers wanted the United States to be a country where power was decentralized among the federal governments, state governments, and local governments but at the same time, with a centralized federal government. In this way, the hierarchy of power would be established where the federal government would be the supreme government of the land while

the laws and treaties made by the federal government would be the supreme law of the United States (U.S. Constitution, Article VI, Clause 2). Moreover, because the framers did not want power to be concentrated in one branch of the central government, they wrote the Constitution to delegate different powers to different branches of the federal government. This was the reason why in the case of treaty-making powers, the president was given the power to make treaties with foreign countries, but he or she needed to obtain advice and consent from the Senate when making such decisions. Then after the treaties being made, the judiciary will be responsible to interpret the meaning of the treaty. In this way, all three branches of the federal government can share the responsibility of making treaties with foreign countries and the decisions made by them will be regarded as the supreme decisions of the U.S.

This was especially important for foreign policies because treaty-making power was seen as “an inherent attribute of the sovereign power of an independent nation” (L. Anderson 636) and that the United States would be seen as a sovereign country by itself. As a result, only the federal government of the United States, and in this case, the executive branch of the federal government could make treaties with other countries (The U.S. Constitution, Article II, Section 2, Clause 2). In other words, the reason why states were prohibited from making treaties or alliances with other countries was because they were not recognized as independent entities and would not be recognized as such. They were only subsidiary governmental entities and thus would not be able to make decisions for the country as a whole.

Second, it is also essential to look at the specific language behind these constitutional provisions on treaties to understand its meaning. In this context, some of the important questions that need to be addressed are: 1) what are the important words and phrases in these treaty-making clauses? 2) What was the meaning behind the treaty-making clauses when the framers drafted,

adopted, and later enforced them? In Article I, the terms in question would be “State,” “treaty, alliance, or confederation,” “agreement, or compact,” and “foreign power.” When the framers were drafting the Articles of Confederation, they meant to create an independent nation, known as the United States, out of the 13 states that were in alliance. As a result, “State” would refer to the territory or the political bodies that would make up Federalist America. Since treaty, alliance, and confederation were grouped as a phrase, they should be considered as a unit with similar meaning. In this regard, they would refer to some kind of formal agreements between countries that would signify a relationship or share of interests in areas like politics, commerce, among others. Similarly, agreement and compact would have the same indication as treaty, alliance, or confederation at the time when the Constitution was made while “foreign power” would mean other independent nation or nations.

For Article II, the terms that need to be defined are “He,” “advice and consent,” “Senate,” “make treaties,” and “two thirds of the Senators present concur.” From the preceding passage of the Constitution, it was clear that “He” was referring to the President, or the Executive branch. “Advice and consent” would mean to seek opinion or guidance and also to get approval from. “Senate” would point to the Senate part of the Congress and as shown from the debate of the Constitution, the House of Representatives were intentionally left out in this treaty-making clause (Burr 278). “Make treaties” would then have similar meaning to the phrase of “treaty, alliance, or confederation,” which was to make formal agreements with other countries. Last but not least, “two thirds of the Senators present concur” would signify the amount or percentage of Senators that were needed to approve the treaties that the President made and that they must be present and also voice their approval to be considered as voted.

Implications for the ILP

With the interpretation of the constitutional treaty-related clauses discussed, it will be easier now to show how these provisions relate to the case of the NYPD's ILP. To begin with, if the NYPD officers who were overseas were approved or authorized by the federal government, there would not be issues of legitimacy. This could be in the forms of the Department of State gave authorization to the NYPD as part of existing international treaties as shown in the previous chapter or the FBI gave authorization to the NYPD as the extension of the Attorney General's Guidelines for the FBI. Specifically, 18 U.S.C. § 2332b(e) provides the Attorney General and the FBI the primary investigative authority for all "federal crimes of terrorism" defined in § 2332b(f), which are terrorist activities both within and outside the U.S. national territories (Bjelopera 1). This means that the FBI was delegated by the Congress to be responsible for terrorism-related investigations and entities authorized by the FBI to conduct such investigations would be legitimate and constitutional.

However, as being discussed before, only a group of the NYPD officers were delegated by the FBI to form the JTTF to perform intelligence collection tasks. This implies that for this small group of the NYPD officers, they were legitimately authorized by the federal government to conduct the counterterrorism duties. On the other hand, this group of NYPD officers was not the group who performed the liaison duties overseas as part of the ILP and the ILP came as a result of the resentment and mistrust between the FBI and the NYPD. Since it seems that the NYPD did not get a separate authorization from the Congress or other Congress-designated agencies individually, the liaison officers who were deployed in other countries did not have official federal authorization to justify their stationing.

Similarly, there are other facts and issues that have shown the questionable nature of the ILP. Since the text used in this Constitution specifically refers to “States,” to say that the NYPD violated the Constitution would not be enough since it only represents the city within the State. From the facts of the case, it appeared that the NYPD made the decision by itself since the program was funded by a private foundation and did not need funding from either the city or the state government. The funding did not seem to satisfy what was suggested in the text because it was not directly funded by the state or local department and thus would indicate an absence of involvement of the state government.

However, when looking at the New York Constitution, the story may be different. According to the New York Constitution Article IX §2(c), local government is empowered to (1) [t]o adopt or amend local laws relating to its “property, affairs or government” that are not inconsistent with the provisions of the Constitution or of any general law; and (2) [t]o adopt or amend local laws that are not inconsistent with the Constitution or any general law, relating to ten enumerated subjects, whether or not they relate to its “property, affairs or government” subject, except when the Legislature restricts the adoption of such a local law not relating to property, affairs or government (“Adopting Local Laws in New York State”; New York Constitution Article IX §2(c)). In this regard, the relevant subject is described in subsection 10, which states “[the] government, protection, order, conduct, safety, health and well- being of persons or property therein” (New York Constitution Article IX §2(c)(10)). In the context of the ILP, this means that New York City, unless rejected by the New York State Legislature, can enact laws that protect the safety, health and well-being of persons or property from the threats of terrorism.

Likewise, under Article XII §1, it states that, “[the] defense and protection of the state and of the United States is an obligation of all persons within the state. [And the] legislature shall provide for the discharge of this obligation and for the maintenance and regulation of an organized militia” (New York Constitution Article XII §1). This implies that when New York State or the United States is being attacked, an organized group of military or paramilitary can be discharged to protect the country. When applying to the context of New York City, it can mean that in light of the terrorist attacks in New York City and the Pentagon on 9/11, the NYPD has taken the responsibility to protect its residents from future terrorist attacks by forming specialized counterterrorism and intelligence units. The ILP was thus a product of such obligation aiming to gather intelligence overseas to help better prevent future terrorist attacks. In this regard, the New York State Constitution can be argued to have indirectly authorized the NYPD, a municipal police department, to engage in international activities with other municipal police forces.

Secondly, the term specifically used “foreign power” to refer to other nations but in this case, the party that signed these agreements with the NYPD were still municipal police departments. This raised the question that whether signing agreements with municipal agencies could meet the criterion of “entering into agreement...with foreign [powers]” (The U.S. Constitution, Article I, Section 10, Clause 3). In this regard, even though municipal police forces were the party to sign the agreements with the NYPD, the effects of these agreements allowed the NYPD to enter and station in foreign countries for many years. As a result, a reasonable conclusion is that by making agreements with these municipal police departments, the NYPD has established a special relationship with these countries.

However, when we examine the constitutionality of the ILP using the MOUs, it appears to be less problematic. What was interesting about this case was that the agreements were only used by the NYPD and other countries' municipal police departments. This means that none of the countries' highest levels of government were involved in this process. Because of this, it is clear to see that these international agreements (in the form of MOUs) are not meant to exercise the rights of an independent nation but more of a collaborative effort in times of crisis situation. This is also confirmed by the specific clauses of the MOU⁵, such as Articles 10 and 11, which state that the MOU would not violate the sovereignty and laws and regulations of any party. Hence, the intention of these agreements was not to authorize these municipal police departments to act independently but rather to facilitate cross-boundary collaboration on specific transnational crimes like terrorism. It can therefore be argued that the understanding of the framers in keeping federalism as the guiding principle of the government was not violated and that the sovereignty and legitimacy of the United States as a country were still maintained.

Moreover, it is also questionable whether these MOUs can be regarded as international treaties or formal agreements. As discussed previously, the language of these clauses signifies that "treaty, alliance, and confederation" would mean some kind of formal agreements between countries that demonstrate a relationship or share of interests in areas like politics, commerce, among others. In the context of today, it would mean international treaties, or agreements that have legal binding power. However, as shown in the previous chapter, MOUs are usually not the same as international treaties. They tend to be used as the first step during the negotiation process between the two countries that have the intention of forming a formal legally binding international treaty or agreement. Because of this, they are often voluntary in nature. Even

⁵ The MOU between the NYPD and the PNP is used here.

though this is not to say that MOUs cannot be binding legal documents, they usually state their intentions of making the MOU legally binding clearly in the MOU that the countries seek to commit. In the case of the ILP, the NYPD and the PNP do not indicate any intent to use this as a legally binding document and thus, it is reasonable to assume that the MOU used in this context is not meant as a treaty agreement.

As a result, while the NYPD's ILP appears to be unconstitutional at first glance, it is difficult to determine whether the ILP is constitutional in definite terms. On the one hand, it did not have proper authorization from the Congress to conduct such activities, but on the other hand, it was not designed to "break away" from the United States' federalism but mainly to help to protect its residents or citizens from the threats of terrorism. Even though it can be argued that the NYPD was authorized by the state to conduct such intelligence activities overseas, it is not sure whether it can be used in this way practically. What might also have happened was that the NYPD did get consent from the Congress or any other federal government for its operations but it was not open to public. Without all the information available or even judicial precedents to help to dissect the legality and constitutionality of such issue, it is hard to have a definite answer.

Chapter 5. Conclusion

“[T]he local government must fill the void of lost statehood in relation to security provision due to the failure of the federal government. In relation to this, the local policy regime practices can in many respects be described as *autonomous*...”

— Kristin Ljungkvist

The NYPD’s ILP is a hybrid entity. It was not a recognized federal counterterrorism program but it has yielded substantial benefits for counterterrorism efforts. It was a product of mistrust between federal and local agencies in the U.S., but it is also an exemplar of global metropolitan cooperation. It was a municipal police program but it was sustained by private foundations. It was created for a transnational problem, but it was needed for New York City. Hence, it is critical to realize that as a creative way to respond to terrorist threats, it carries value and potential just by simply existing.

On the other hand, this program also raises substantial problems related to its legitimacy and legality. As Chapter 2 illustrates, the NYPD could be able to use the revised *Handschu Decree* to defend its overseas surveillance programs since it has been practiced on foreign citizens before. This is not to suggest that the NYPD’s extensive surveillance activities are legal but rather to serve as a potential legal basis that the NYPD might use. Yet, the *Handschu Decree* is still mainly used for domestic surveillance operations and without any judicial decisions that discuss its relationship to overseas intelligence gathering, it will be hard to determine decisively.

Similarly, even though this paper has attempted to interpret its constitutional applications, without any precedent and court cases, it is very hard to present a conclusive picture.

Nevertheless, there are still problems that can be solved in the near future without being involved with formal legal challenges. It is evident that the FBI and the CIA, and in turn, the federal government, have known of the existence of the NYPD's ILP for at least a decade. Ironically, the federal government chose to ignore its existence rather than come up with solutions to deal with the problem. Speculatively, it is not likely for the federal government to terminate the ILP since it has been operating successfully for an extended period. In this regard, the federal government should establish some kind of oversight mechanism to regulate the International Program rather than just let it develop independently. By doing so, both the federal government and the NYPD would benefit. For the NYPD, the ILP would finally become a federally authorized program, which resolves the lingering legitimacy problems. For the federal government, it would be able to also monitor the program's sources of finance and other logistical support and make the process more transparent. Finally, for both parties, this collaboration can help to coordinate each party's overseas activities and may help to build more trust through working together, which will be helpful in the future.

Bibliography

Chapter 1

“Obama, Cuomo, De Blasio Decry Paris Attacks; NYPD Steps Up Security Citywide.” *CBS New York*. 13 Nov. 2015. Web. 21 Apr. 2016.

Chapter 2

Calabresi, Massimo and Romesh Ratnesar. “Can we stop the next attack?” *CNN.com*. March 11, 2002. Web. 21 Apr. 2016.

Carter, David L. “Law Enforcement Intelligence: A Guide for State, Local, and Tribal Law Enforcement Agencies.” *The U.S. Department of Justice* (2009): 1-471. 21 Mar. 2016.

Cohen, Shawn, Gartland, Michael, and Bob Fredericks. “NYPD to add over 1,000 cops in budget deal.” *NYpost.com*. June 22, 2015. Web. 21 Apr. 2016.

Homeland Security Act of 2002. Pub. L. No. 107-296, 116 Stat. 2135.

Horowitz, Craig, “The NYPD’s War on Terror.” *New York Magazine*. 3 February 2003. Web. 21 Apr. 2016.

Intelligence Reform and Terrorism Prevention Act of 2004. Pub. L. No. 108-458, § 1021(3)(d), 118 Stat. 3638, 3673. 21 Mar. 2016.

“I’ve got a secret is a dangerous game.” *NYDaily News*. 2 March 2002. Web. 21 Apr. 2016.

Kelling, George L. and William J. Bratton. Policing Terrorism. *Civic Bulletin No. 43* (Sept. 2006). 21 Mar. 2016.

Levitt, Len. "The NYPD 'privately' funded war on terrorism." *Huffington Post*. January 7, 2012. Web. 21 Apr. 2016.

Ljungkvist, Kristin. *Global City 2.0: From Strategic Site to Global Actor*. Routledge, 2015. Print.

McFadden, Robert D. "A Nation Challenged: Tip on Nuclear Attack Risk Was Kept From New Yorkers." *New York Times*. March 4, 2002. Web. 21 Apr. 2016.

Mueller, John and Mark Stewart. *Chasing Ghosts: The Policing of Terrorism*. Oxford University Press, 2015. Print.

Mueller, Robert. "Terrorism in a Post-9/11 World." *Address at Stanford Law School* (Oct. 18, 2002). 21 Mar. 2016.

NYPD. "Counterterrorism Units." [Nyc.gov, 2016](#). Web. 21 Mar. 2016.

NYPD. "International Liaison Program." [Nyc.gov, 2016](#). Web. 21 Apr. 2016.

Peterson, Marilyn. "Intelligence-Led Policing: The New Intelligence Architecture." *Presentation at the International Association of Chiefs of Police* (2005). Web. 21 Apr. 2016.

Price, Michael. "National Security and Local Police." *Brennen Center for Justice* (2013): 1-41. 21 Mar. 2016.

"The Department of Justice's Terrorism Task Forces." *Department of Justice*. June 2005. Web. 21 Apr. 2016.

"The National Criminal Intelligence Sharing Plan." *Office of Justice Programs, U.S. Department of Justice* (2003): 43-46. 21 Mar. 2016.

U.S. Census Bureau. "Federal Civilian Employment by Branch and Agency: 1990 to 2010." *Statistical Abstract of the United States: 2012* (2012). 21 Mar. 2016.

Waxman, Matthew C. "Police and National Security: American Local Law Enforcement and Counterterrorism After 9/11." *3 J. Nat'l Security L. and Pol'y* (2009): 377-407. Web. 21 Mar. 2016.

Chapter 3

Anderson, Lloyd C.. "Implementation of Consent Decrees in Structural Reform Litigation." *1986 U. ILL. L. REV.* (1986): 725- 778. Web. 21 Apr. 2016.

Dwyer, Jim. "City Police Spied Broadly Before G.O.P. Convention." *New York Times*. Mar. 25, 2007. Web. 21 Apr. 2016.

Dwyer, Jim. "Judge Says Police Violated Rules in Videotaping Public Gatherings." *New York Times*. Feb. 16, 2007. Web. 21 Apr. 2016.

Eisenberg, Theodore and Stephen C. Yeazall, "The Ordinary and the Extraordinary in Institutional Litigation." *93 Harv. L. Rev.* (1980): 465-517. Web. 21 Apr. 2016.

Greer, Olivia J. "No Cause of Action: Video Surveillance in New York City." *18 Mich. Telecomm. and Tech. L. Rev.* (2012): 589-626. Web. 21 Apr. 2016.

Handschu v. Special Servs. Div., 605 F. Supp. 1384 (S.D.N.Y. 1985).

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

Handschu v. Special Servs. 288 F. Supp. 2d 411 (2003).

Handschu v. Special Servs. Div., 475 F. Supp. 2d 331 (S.D.N.Y. 2007).

Harris, David. "Law enforcement and intelligence gathering in Muslim and immigrant communities after 9/11." *34 N.Y.U. Rev. L. & Soc. Change* (2010): 123-190. Web. 21 Apr. 2016.

Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676 (1973).

Lee, Chisun. "The NYPD Wants to Watch You." *Village Voice*. Dec. 17, 2002. Web. 21 Apr.

2016.

N.Y. Civil Liberties Union. "Who's Watching? Video Camera Surveillance in New York City and the Need for Public Oversight." *N.Y. Civil Liberties Union 2006*: 1-17. Web. 21 Apr.

2016.

N.Y. Civil Liberties Union. "Landmark Settlement Protects American Muslims From Discriminatory NYPD Surveillance." *N.Y. Civil Liberties Union, 2016*. Web. 21 Apr.

2016.

"Relief from a Judgment or Order." Federal Rule of Civil Procedure Rule 60.

Rufo v. Inmates of Suffolk County Jail. 502 U.S. 367 (1992).

Steigman, Jerrold L. "Reversing Reform: The Handschu Settlement in Post-September 11 New York City." 11 *J. L. & Pol'y* (2003): 745-799.

United States v. Swift & Co.. 286 U.S. 106 (1932).

Chapter 4

2015 International Narcotics Control Strategy Report- Country Report: Haiti. *Department of State*. Web. 21 Apr. 2016.

"ABM Treaty: 1972 Memorandum of Understanding." *Treaty Compliance, 2016*. Web. 16 Apr.

2016.

"Adopting Local Laws in New York State." Division of Local Government Services of New York State. May 1998. Print.

"Agreement Extended between the Department of State and New York Police Department." *U.S. Department of State*. 07 Oct. 2011. Web. 16 Apr. 2016.

Anderson, Chandler P. "The Extent and Limitations of the Treaty-Making Power Under the

- Constitution." *The American Journal of International Law* 1.3 (1907): 636-70. Print.
- Andreas, P. and Mandelmann, E.. *Policing the globe, criminalization and crime control in international relations*. Oxford University Press. 2008. Print.
- "American Airlines Donates Roundtrip Air Travel For NYPD's International Liaison Program." *The Official Website of the City of New York*. 20 Dec. 2007. Web. 15 Apr. 2016.
- Beard, Elliott M. "Other Internaitonal Issues: A Critical Analysis of the Effects of Colello v. Sec on International Securities Law Enforcement Agreements." *Symposium: The United Nations, Regional Organizations, and Military Operations*. 7 *Duke J. Comp. & Int'l L.* 271 (Fall 1996): 271-295. Web. 21 Apr. 2016.
- Bjelopera, Jerome P.. "The Federal Bureau of Investigation and Terrorism Investigations." *Specialist in Organized Crime and Terrorism Report. Congressional Research Service* 7 5700. April 24, 2013. Web. 21 Apr. 2016.
- Bradley, Matt. "NYPD Sends Officer to Abu Dhabi as Part of Intelligence Agreement." *The National*. 27 Aug. 2008. Web. 13 Apr. 2016.
- Comiskey, John G.. "Effective state, local, and tribal police intelligence: the New York City police department's intelligence enterprise-a smart practice." March 2010. *Naval Postgraduate School Thesis*. Web. 21 Apr. 2016.
- Deflem, Mathieu. "Europol and the Policing of International Terrorism," in *The Encyclopedia of Criminology*, ed. Richard A. Wright and J. Michell Miller (New York: Routledge, 2005). Print.
- Dickey, C. 2009. *Secure the City: Inside America's Best Counterterror Force—The NYPD*. New York: Simon & Schuster. Print.

Evans, Zenon. "Federal Officials say NYPD Foreign Meddling is Wasteful and Monstrous."

Reason.com. January 13, 2014. Web. 21 Apr. 2016.

Erwin, Philip O. "The International Securities Enforcement Cooperation Act of 1990: Increasing International Cooperation in Extraterritorial Discovery?" 15 *B.C. Int'l and Comp. L. Rev.* (1992): 471-500. Web. 21 Apr. 2016.

Falkenrath, R. A. *Prepared Statement of Testimony Before the Committee on Homeland Security and Governmental Affairs, United States Senate*. September 12, 2006. Web. 21 Apr. 2016.

Fischer, Rob. "What will Bill de Blasio's Foreign Policy Be?" *The New Yorker*. December 31, 2013. Web. 21 Apr. 2016.

ISECA of 1990. Pub. L. No. 101550, 104 Stat. 2714.

Jay, John. *The Federalist* No.64. March 7, 1788. 16 Apr. 2016.

Kehoe, James A. "Recent Development: Exporting Insider Trading Laws: The Enforcement of U.S. Insider Trading Laws Internationally." 9 *Emory Int'l L. Rev.* (1995): 345-375. Web. 21 Apr. 2016.

Kelly, Raymond W. "Lessons from the Mumbai Terrorist Attacks." *Presentation at the Senate Committee on Homeland Security & Governmental Affairs*. January 8, 2009. Web. 21 Apr. 2016.

Kilcullen, David J. "Countering Global Insurgency," *Journal of Strategic Studies* 28.4 (August 2005): 597-617. Web. 21 Apr. 2016.

Ljungkvist, Kristin. "Fighting Global Terrorism in the 21st Century- The New Role and Responsibility of Local Governments." September 2012. *Working Paper for Christian Regenhard Center for Emergency Response Studies (RaCERS)*. Web. 21 Apr. 2016.

Madison, James. *The Federalist* No.39. Web. 16 Apr. 2016.

Mann, Michael D. and Lise A. Lustgarten. *Internationalization of Insider Trading Enforcement A Guide to Regulation and Cooperation in White Collar Crimes*. American Bar Association (1991). Print.

“Memorandum of Understanding to Establish Mutually Acceptable Means for Improving International Law Enforcement Cooperation in the Field of Insider Trading.” Aug. 31, 1982, U.S.-Switz., 22 I.L.M. 1 (1983). Web. 21 Apr. 2016.

“Memorandum of Understanding Relating to the Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems on May 26, 1972.” *Treaty Compliance, 2016*. Web. 16 Apr. 2016.

Miller, Judith. “On the Front Line in the War on Terrorism.” *City Journal*. Summer 2007. Web. 21 Apr. 2016.

Nandelmann, E.. *Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement*. Pennsylvania State University Press. 1993. Print.

New York Constitution Art. IX, Section 2, Clause c.

New York Constitution Art. XII.

“NYPD In Israel: Police Department Opens Branch In Kfar Saba With Lone Detective Charlie Ben-Naim.” *The Huffington Post*. 6 Sept. 2012. Web. 15 Apr. 2016.

NYPD. “NYPD and the International Cooperation Department of Ministry of the Interior of the French Republic Establish Liaison Agreement.” *Nyc.gov*. 28 June 2013. Web. 21 Apr. 2016.

Okochi, Mika. “Anti-Terrorism Measures Implemented by the New York City Police Department.” *Journal of the Tokyo University of Marine Science and Technology* 8

(2012): 77-86. Web. 21 Apr. 2016.

Paybarah, Azi. "NYPD to Station Detective in Australia." *POLITICO New York*. 20 May 2015.

Web. 15 Apr. 2016. Web. 21 Apr. 2016.

Peter Gill, "Not Just Joining the Dots But Crossing the Borders and Bridging the Voids:

Constructing Security Networks after 11 September 2002," *Policing and Society* 16, no. 1

(2006): 27-49. Web. 21 Apr. 2016.

"Police Detectives Work Abroad." *Times Daily*. November 13, 2002. Web. 21 Apr. 2016.

Raustiala, Kal. *Does the Constitution Follow the Flag? The Evolution of Territoriality in*

American Law. Oxford University Press. 2009. Print.

Stein, Jeff. "NYPD Intelligence Detectives Go Their Own Way." *Washington Post*. 10

November 2010. Web. 21 Apr. 2016.

"Signing of Memorandum of Understanding for Police Training with NYPD." *U.S. Department*

of State. 22 Jan. 2010. Web. 16 Apr. 2016.

The Stream Team. "NYPD's overseas presence criticized by federal officials." *Al Jazeera*.

January 7, 2014. Web. 21 Apr. 2016.

"The Treaty on Mutual Assistance in Criminal Matters Between the Swiss Confederation and the

United States." May 25, 1973. U.S.-Switz., 27 U.S.T. 2019.

Thomas, Barbara S. "Insider Trading: An Internal Problem with International Implications."

Conference of the International Faculty for Corporate and Capital Market Law. Paris,

France. 11 March 1983. Web. 21 Apr. 2016.

U.S. Const. art. I Section 10, Clause 1.

U.S. Const. art. I Section 10, Clause 3.

U.S. Const. art. III Section 2, Clause 1.

U.S. Const. art. II, section 2, Clause 2.

U.S. Const. art. VI Section 2.

Wirtz, James and John Sullivan, 2009. "Global Metropolitan Policing: An Emerging Trend in Intelligence Sharing." *Homeland Security Affairs* 2:1-7. Web. 21 Apr. 2016.

Appendix A

**MEMORANDUM OF UNDERSTANDING
BETWEEN
THE PHILIPPINE NATIONAL POLICE
AND
NEW YORK CITY POLICE DEPARTMENT
ON COOPERATION IN PREVENTING AND COMBATING
TRANSNATIONAL CRIMES**

The New York City Police Department ("NYPD") and the Philippine National Police, ("PNP") hereinafter referred to as "the Parties";

DESIRING to further develop cooperation between the Parties in the spirit of partnership and in the framework in preventing and combating transnational crime;

CONCERNED by the increasing threat of transnational crime;

REALIZING the need for cooperation between the Parties for effective law enforcement in preventing and combating transnational crime;

PURSUANT to the prevailing laws and regulations in their respective countries, the Parties have reached the following understanding:

Article 1

DEFINITIONS

For the purpose of this Memorandum of Understanding, the following terms are defined as indicated:

1. "Transnational Crime" refers to crime that takes place in whole or in part across national borders, to include: illicit drug trafficking, terrorism, arms smuggling, human trafficking, maritime fraud, cyber crimes, money laundering, commercial crimes, bank offenses, credit card fraud, and the production, distribution and use of fraudulent travel documents.

2. "Intelligence Information" means information that tends to prove or disprove the existence of criminal activity, identify those engaged in criminal activity, identify their methods of operation, reveal evidence of the criminal activity, and is necessary for and the detection and prevention of transnational crime

3. "Joint activities" means any activity engaged in jointly by the Parties in order to prevent detect and deter transnational crime.

Article 2

GENERAL PROVISIONS

It is in the interest of public safety for the citizens of New York and citizens of the Republic of the Philippines that the Parties enter into this Memorandum of Understanding in order to facilitate a cooperative approach to promote more effective law enforcement and prevent transnational crime.

The implementation of this Memorandum of Understanding will respect the principles of sovereignty, territorial integrity, non-interference in internal affairs, equality, and mutual benefit to the Parties.

In deference to national sovereignty and principles of international law, neither Party will exercise in the other Party's territory any competence or function that exclusively belongs to the latter's authority.

This agreement cannot and is in no way meant to conflict with the provisions of any treaty negotiated between the governments of the United States and the Republic of the Philippines.

Article 3

OBJECTIVES

The objective of this Memorandum of Understanding is to promote cooperation between the Parties, particularly with respect to training and the prevention of transnational crime.

Article 4

AREAS OF COOPERATION

The parties shall cooperate in preventing and combating transnational crime, in particular, criminal acts relating to:

1. Illicit Drug Trafficking;
2. Terrorism;
3. Arms Smuggling;
4. Human Trafficking;
5. Maritime Fraud;
6. Commercial Crime, Bank Offenses, and Credit Card Fraud;
7. Cyber-crime;
8. Money Laundering;
9. Fraudulent Travel Documents; and
10. Other types of crime not specifically addressed in this MOU that the Parties may subsequently determine to be necessary.

Article 5

FORMS OF COOPERATION

For the implementation of this Memorandum of Understanding, the Parties may:

1. Exchange criminal intelligence information and materials consistent with the terms of this Memorandum of Understanding in compliance with all relevant legislation and regulations and within the limits of their authority;
2. Undertake coordinated police activities in accordance with existing laws and regulations and within the limits of their authority to prevent and combat transnational crime;
3. Cooperate in capacity building, including the exchange of personnel for training and education;

4. Establish a Joint Committee responsible for the implementation of this Memorandum of Understanding; and
5. Cooperate in other forms of activity as may be mutually agreed upon by the Parties.

Article 6

EXCHANGE OF INTELLIGENCE INFORMATION

The exchange of criminal intelligence information will be in accord with existing laws, rules, and regulations governing or affecting the Parties. Unless otherwise indicated, the information shared will in all cases be considered confidential and therefore may not be disclosed to the public or media, or to other entities that do not have a need to know that information for a legitimate law enforcement purpose.

Each Party will take all reasonable measures to ensure the confidentiality of all intelligence information in accordance with the objectives of this Memorandum of Understanding.

Any intelligence information received within the framework of this Memorandum of Understanding will not be transferred to a third party without written approval of both Parties. In case of an emergency situation the disclosing Party will notify the other Party that it has or is about to disclose confidential information and no written consent will be required.

In the event that either Party becomes legally compelled by depositions, interrogatories, subpoena, civil investigative demand, or similar process to disclose any confidential information that was provided by the other Party, the compelled Party will provide the disclosing Party with a prior written notice of such requirement so that the disclosing Party may seek a protective order or other appropriate remedy. If such protective order or remedy is not obtained or if the disclosing Party waives in writing compliance with this term, the compelled Party agrees to furnish only that portion of the information which the compelled Party is advised by written opinion of counsel is legally required and to exercise reasonable efforts to obtain confidential treatment of such information.

Article 7

CONSULTATION

The Parties may conduct consultations at least once a year at a mutually agreeable time and place to be determined by the Parties. Consultations may be conducted by any senior officers designated and authorized by the Parties. The purpose of consultations will be:

1. To formulate policies and procedures to enhance counter terrorism measures and combat transnational crime;
2. To coordinate and monitor activities conducted within the framework of this Memorandum of Understanding; and
3. To evaluate policies, programs, and activities implemented for the purpose of enhancing and improving future programs.

Article 8

PUBLICATION TO THE MEDIA

Any publication to the media, individually or jointly, will be coordinated and agreed upon in advance of such publication in order to safeguard the interests of both Parties.

Approved publication to the media shall be for the limited purpose of enhancing public awareness regarding the efforts of both parties to prevent, detect, and deter the commission of criminal acts.

Article 9

FUNDING

Each Party will be responsible for any expenses incurred by that Party in the implementation of this Memorandum of Understanding.

Article 10

REFUSAL OF COOPERATION

In the event that the implementation of this Memorandum of Understanding violates the sovereignty of any Party, poses a threat to its security, prejudices its crucial interests or violates its laws and regulations, each Party can derogate some areas of this Memorandum of Understanding or suspend cooperation altogether after providing written notification detailing the conflict to the other Party.

Article 11

INTERNATIONAL OBLIGATION

The Provisions of this Memorandum of Understanding will not prejudice any international agreement to which the Republic of the Philippines or the United States is a party to.

Article 12

AMENDMENT

This Memorandum of Understanding may be revised or amended in writing by the mutual consent of the Parties. Such revision or amendment shall enter into force on such a date as may be determined by the Parties.

Article 13

SETTLEMENT OF DISPUTES

Any matter arising from the interpretation, application or implementation of this Memorandum of Understanding shall be resolved during consultations between members of the "Joint Committee". In the event that an issue(s) cannot be resolved by the Joint Committee, that issue(s) shall be elevated to the Chief of the PNP and Commissioner of the NYPD for resolution.

Article 14

ENTRY INTO FORCE, DURATION, AND TERMINATION

1. This Memorandum of Understanding will enter into force on the date of its signing.
2. This Memorandum of Understanding shall remain in force for a period of five (5) years and may be renewed by mutual consent in writing by the Parties.
3. Either Party may terminate this Memorandum of Understanding at any time before its expiration by giving written notice to the other party at least three (3) months prior to such termination.
4. Termination of this MOU will not adversely affect any valid or subsisting arrangement concluded or entered into pursuant to the same.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments, have signed the present Memorandum of Understanding.

DONE in the City of New York, this 14 day of Dec, Two Thousand and Twelve.

FOR THE:

PHILIPPINE NATIONAL POLICE

PDG NICANOR A. BARTOLOME
Chief, PNP

FOR THE:

NEW YORK CITY POLICE DEPARTMENT

RAYMOND W. KELLY
Police Commissioner