



ACLU Backgrounder February 2011

Joining the FBI Joint Terrorism Task Force Is Still a Bad Idea

Operating under the principle that no civil liberties victory ever stays won, at the end of 2010 the Portland City of Council decided to revisit the City's 2005 decision to withdraw from the FBI Joint Terrorism Task Force (JTTF). Despite a call for immediate action by Portland City Commissioner Dan Saltzman for Portland to re-join the JTTF after the November Pioneer Square incident, Mayor Sam Adams decided to handle this question in a more deliberative process that has included the ACLU of Oregon.

Starting in 1997, the City of Portland signed an annual Memorandum of Understanding (MOU) with the FBI authorizing Portland police officers to be deputized as JTTF officers and operate under the authority of the FBI. However, we did not become aware of this until 2000 when it came before City Council in the form of an ordinance. That was when the ACLU of Oregon and our coalition partners began urging City Council to end direct participation in the FBI task force.

The original 2000 mission of the JTTF (or as referred to in the ordinance the PJTTF) made clear that the FBI was focusing its efforts based on political activity and was set forth in both the City ordinance and MOU and included the following:

"The mission of the PJTTF is to identify and target for prosecution those individuals or groups who are responsible for Right Wing and/or Left Wing movements, as well as acts of the anti-abortion movement and the Animal Liberation Front/Earth Liberation Front."

Needless to say, it was a bit alarming to see lawful political activity apparently targeted. As then-Commissioner Charlie Hales suggested at the time some may consider the Portland City Council a "left wing movement." However, despite his objection, the Council reauthorized the City's continued participation in the JTTF each year until 2005 (although they amended the "mission" statement).

When Mayor Tom Potter took office in January of that year, he began to ask the same questions that had concerned us for years. Among the most important was whether and what type of city oversight there was of the Portland officers participating in the JTTF.

Mayor Potter agreed with us that city oversight of PPB officers is critical for many reasons:

- First, in any police department the chain of command is paramount. In Portland, that chain leads to the Police Chief and the Commissioner in charge of the Bureau, currently the Mayor. If individual officers operate outside the chain of command, there can be no accountability to elected officials and city residents;
- Second, Oregon law and the Oregon Constitution impose limits on police activity that are designed to protect the exercise of the core liberties of political, religious and associational activities so that we can all be free of improper surveillance by law enforcement;
- Third, Portland has had a long history of police officers having engaged in improper surveillance;
- Fourth, it is essential for police intelligence activities to be regularly reviewed by the Portland City Attorney to ensure that Oregon law is being followed; and
- Fifth, police officers need to be able to consult with the City Attorney when they have questions about the restrictions of state law and the Oregon Constitution.

Mayor Potter learned from his conversations with the City Attorney, the FBI and the U.S. Attorney that none of those safeguards was in place because local law enforcement officers are deputized as Special Federal Officers and are given the highest level of FBI security clearance. Day-to-day operations of the JTTF are the responsibility of the FBI and investigations are federal investigations subject only to federal law. That meant that as participants in the JTTF, Portland police officers could not comply with the stricter requirements of Oregon law and Oregon Constitution.

In addition, since the Chief and Mayor could not have top secret clearance, the officers could not share their activities or their work product within their supervisors. After unsuccessful attempts by Mayor Potter to negotiate a solution with the FBI and the U.S. Attorney, the City Council voted in 2005 to formally withdraw from the JTTF. Instead, as set forth in the Council's resolution, the City and FBI agreed to work together on a case-by-case basis when criminal investigations arise in Portland. Indeed this was a compromise because it still turns over our officers to the FBI without the necessary oversight. But this was a far better solution than the more permanent participation sought by the FBI on the task force.

Some have asked why this debate arises in Portland and not elsewhere across the country. First, it has come up elsewhere in the country. In San Francisco, the ACLU and its coalition partners are currently raising the same issues. Second, Portland has had a public process as a result of the JTTF Memoranda of Understanding coming before the City Council. In

many places, police bureaus enter into these agreements without a vote by the local elected body or any public notice.

Third, Oregon law provides *unique* protections that do not exist in any other state. Specifically, ORS 181.575, which the ACLU of Oregon helped pass in 1981, prohibits any state or local law enforcement agency from collecting or maintaining information about the political, religious, social views, or associations or activities of any individual, group, or organization unless “such information directly relates to an investigation of criminal activities, and there are reasonable grounds to suspect the subject of the information is or may be involved in criminal conduct.”

When Portland police officers are turned over to the FBI, which does not need to comply with this or any other Oregon law, the City abdicates both civilian and police bureau oversight responsibility over the individual police officers participating in the JTTF.

Portland’s past abuses were a significant reason that ORS 181.575 was passed in 1981. The ACLU of Oregon received our *first* Portland police bureau file in 1975, and at that time the Police Bureau informed us that surveillance of ACLU should not have happened and would not continue. But continue it did and in 2000, through the release by the Portland Tribune which was the recipient of thousands of files collected by Portland police officers reflecting surveillance of lawful political activity, we received our *second* Portland police bureau filed from 1975 to 1985, four years after the passage of the Oregon law prohibiting this kind of activity.

Unfortunately, illegal monitoring of lawful political activity has continued to occur in Portland. Under the auspices of the Criminal Intelligence Unit (CIU), the same unit that was tasked with participating in the JTTF, Portland monitored the lawful planning activities of organizations meeting to organize around strengthening the civilian police review process. That document is dated 1992. The same unit also created a report on an anti-Iraq war protest. That was 1998. Our “history” of abuses in Portland is not that historic.

As a result of these abuses, the Portland City Attorney has been charged with providing the necessary oversight to prevent these abuses. The City Attorney provides legal advice to the officers at the front-end of investigations and reviews the files created by the CIU and ensures that nothing is retained related to protected activities if there is no criminal investigation. That critical and necessary oversight is completely abandoned when CIU officers join the FBI JTTF. The City Attorney is not allowed to provide advice to the officers if they are asked to do anything that might violate the Oregon law nor can the City Attorney review the files created by Portland JTTF officers because those are FBI, not Portland, files.

As noted, there are two prongs to the Oregon law. The first is the prohibition on collecting information on a person or organization based on the political, religious or associational activities unless there is a criminal investigation and the second is a prohibition on maintaining this information if, after investigation, there is no evidence of criminal wrongdoing.

A good example is the egregious experience of Brandon Mayfield in 2004 who was wrongfully suspected of participating in criminal activity in Spain. The FBI's affidavit submitted to the courts included significant details about Mr. Mayfield's religious activities, including when he traveled to his mosque. But as we now know, Mr. Mayfield was completely exonerated of any wrongdoing. If the information on his religious activity had been collected by Portland police officers and the files were retained in Portland police files, his religious activity would have been purged. However, not only does the FBI not purge such information, it widely distributes it across numerous federal agencies.

The federal government asserts that Portland can participate in the JTTF and still comply with Oregon law. They argue that we should trust the Portland officers to not cross any lines violating Oregon law. That is a complete disconnect with the reasons we have civilian oversight. Even assuming we did not have the evidence of past abuses, participating in the JTTF automatically leads to an end-run around Oregon law because the files that Portland police officers would create for the FBI could never be reviewed by other City officials and purged when appropriate.

When Mayor Tom Potter led the effort, along with Commissioner Randy Leonard, to pass the 2005 resolution withdrawing Portland police from the JTTF he eloquently summarized the core issues:

"If I'm going to be asked to put our officer's lives at risk, I need to know why. If there are serious threats to our citizens' security, I want our police chief to know about them, and I want him to be able to tell me. If we are going to be the guardians of individual freedoms, we must have faith in the checks and balances that have served our country so well."

Those reasons remain as true today as they did six years ago. Some have suggested that because we now have a different federal administration since 2005 – under President Obama – that we have a very different federal approach and we should rejoin the JTTF. But has anything changed at the FBI since 2005? The answer is yes, but...things have actually gotten *worse* inside the FBI with regard to the protection of civil liberties. First, there has been no change in leadership at the FBI since President Obama took office.

Second, federal law has never adequately prohibited the FBI or other federal agencies from spying on the lawful political, religious or associational activities of innocent Americans. Such restrictions were imposed by the Attorney General Guidelines adopted in 1976, but those guidelines were successively weakened during the Reagan, Bush I and Bush II administrations. The revisions adopted by Attorney General John Ashcroft in 2002 once again permitted FBI employees and informants to attend any event open to the public as well as to browse internet chat rooms and web sites.

The Ashcroft guidelines, under which the FBI operated in 2005, were loosened even further over the proceeding years and finally, consolidated and revised in the waning days of

the Bush Administration in December 2008. These guidelines have *not* been changed by the Obama Administration and allow the FBI to even more easily monitor lawful political and religious activity.

The FBI has three separate but intertwined missions: law enforcement, national security (including counter-terrorism and counter-intelligence), and foreign intelligence collection. The latter two do not require *any* criminal nexus before collection activities are allowed. Also, the 2008 Guidelines give the FBI the authority to conduct "assessments" without any factual predicate and "preliminary investigations" based on a mere allegation of wrongdoing or the possibility of criminal activity. The U.S. Department of Justice Office of Inspector General (OIG) concluded in a September 2010 report that this "possibility of criminal activity standard" is "easily attainable and speculative."

As the Inspector General wrote in analyzing FBI investigations of lawful political groups in Pittsburgh: "The FBI had information that could be interpreted to indicate the *possibility* that [individuals monitored] might be planning with others to engage in activities that *could* include federal crimes." While we cannot understand what that means, one thing is clear: it takes very little for the FBI to begin collecting information on lawful political and religious activity.

On our website, www.aclu-or.org, we have posted material related to this topic, including links to the full OIG Report. Despite the well documented monitoring of lawful groups, including the investigation of PETA and Greenpeace as possible terrorist organizations, the OIG concluded that much of the FBI's surveillance was legal under the Guidelines. Worse, the report documents an attempted cover-up by the FBI when the OIG began its review of these specific activities.

In one case where a JTTF officer attended a 2002 peaceful anti-war leafleting event in Pittsburgh, the officer was acting within the Guidelines by attending the event, taking a photo and collecting information on the sponsoring organization. The OIG noted that the 2002 Attorney General Guidelines "did not require any demonstration of an articulable suspicion to attend the event. It simply required the agent ordering the activity have an *antiterrorism purpose* in mind".

While under the 2002 Guidelines no information the officer collected should have been retained, the OIG concluded that under the 2008 Guidelines it would now be permissible for JTTF officer to attend the event, take the photo, do Internet research on the sponsoring organization, and retain all of that information permanently in the FBI files despite there being no evidence of criminal activity.

And if all of this were not enough, after the 2008 Guidelines were put in place, the FBI assured Congress it would conduct training and take steps to ensure knowledge and understanding of the Guidelines, including a written exam for FBI agents. Another September 2010 OIG report looked into suspected cheating on that exam between spring 2009 and January 2010. The OIG found "a significant number of FBI employees engaged in some form of

improper conduct or cheating” on the Guideline exam. This included several supervisors, two Assistant Special Agents in Charge, two Supervisory Special Agents, and a legal advisor as well as numerous other agents and attorneys within the FBI.

We think it is abundantly clear that there is even more justification today for Portland and other jurisdictions to stay out of the JTTF than there was in 2005. Since Mayor Sam Adams announced the process for reexamining whether Portland should rejoin the JTTF, we have joined many of our coalition partners and individuals in the community to express our objections. The Mayor invited the ACLU of Oregon, along with the FBI and the Oregon U.S. Attorney to present before City Council at a special work session on this issue on February 15. We are pleased to let you know that we will be joined at that presentation by Mike German from the National ACLU. Mike is a former FBI agent and we look forward to the opportunity for him to share his expertise with the City Council. As of this writing, the Council is expected to hold a public hearing and possibly vote on February 24.

We are hopeful that the City of Portland will not rejoin the JTTF and that other state and local agencies will also reconsider their direct involvement with the FBI.