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Brennan Center for Justice
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120 Broadway, Suite 1750
New York, NY 10271
646.292.8310 Fax 212.463.7308
www.brennancenter.org

**Testimony of Michael German, Fellow,
Brennan Center for Justice at New York University School of Law,
Liberty and National Security Program;
Former Special Agent, Federal Bureau of Investigation**

**Before the
Portland City Council
April 18, 2018**

Mayor Wheeler and Council Members,

It is my pleasure today to testify on behalf of the Brennan Center for Justice's Liberty and National Security Program. We believe that national security policies and practices are most effective when they respect constitutional values and the rule of law, are subjected to stringent oversight, and public accountability. My 16 years as an FBI special agent taught me this was true. I worked undercover on domestic terrorism investigations overseen by Joint Terrorism Task Forces (JTTF) in Los Angeles and Seattle in the 1990s. In those cases, I operated under Attorney General's Guidelines that required me to have a reasonable indication that each person I investigated was engaging in or likely to engage in a violation of federal law. This standard was essentially the same as that imposed by Oregon's criminal intelligence statute.¹ Both were enacted for the same purpose: to protect the privacy and civil liberties of innocent persons and ensure law enforcement activities are based on evidence of wrongdoing rather than bias. As a working agent, I also found this reasonable standard made my investigations more effective, by focusing my efforts and resources where the evidence directed.

Unfortunately, after the 9/11 attacks, the Justice Department and Congress altered the FBI's authorities significantly, giving it power to conduct electronic surveillance, gather intelligence, and investigate people and organizations it does not suspect of engaging in criminal activity. As a result, Portland police officers assigned to the JTTF would find it extremely difficult, if not impossible to comply with Oregon law while conducting routine operations under the FBI's current counterterrorism authorities and practices. Moreover, the FBI exercises these expanded powers in nearly complete secrecy, giving overseers, the public, and victims of abuse few opportunities to challenge them for legality or effectiveness.

Congress passed the USA PATRIOT Act weeks after the attacks, easing the use of secret foreign intelligence powers to amass enormous databases containing information about persons two and three degrees separated from individuals who are merely "relevant" to an authorized inquiry.²

Congress continued reauthorizing its most problematic provisions even after Justice Department Inspector General audits began revealing widespread abuse in 2007, including the use of illegal “exigent letters” to gather telephone toll records of journalists based on faked emergencies.³ It wasn’t until National Security Agency (NSA) whistleblower Edward Snowden provided journalists with documents revealing the government’s secret interpretation of the PATRIOT Act that allowed the FBI to gather the phone records of virtually all Americans that even members of Congress realized how expansively the bureau was using these authorities.⁴ The FBI also claims the authority to sift through the NSA’s vast trove of intercepted international communications without warrants to seek evidence for use in routine criminal investigations against Americans, though it won’t say how often it conducts these backdoor searches.⁵ Portland police officers assigned to the JTTF have routine access to most of these data bases when conducting counterterrorism investigations or intelligence gathering activities.

The Justice Department also amended the Attorney General’s Guidelines that govern the FBI’s investigative authorities several times after 9/11, lastly and most significantly by Attorney General Michael Mukasey in December 2008.⁶ The Mukasey guidelines created a new type of investigation called an “assessment,” and expanded the scope of preliminary investigations, neither of which require reasonable suspicion in order to initiate. Assessments permit physical surveillance, commercial and government database searches, overt and covert interviews, racial and ethnic mapping, and the recruitment and tasking of informants without any factual predicate, that is, without any objective basis to suspect the target of the investigation has violated any law or is likely to in the future.⁷

Agents open assessments by claiming they have an “authorized purpose,” like preventing crime or terrorism, but such subjective criteria allow agents immense discretion. Over 82,325 assessments of individuals and organizations that the FBI opened from 2009 to 2011, only 3,315 found information that warranted opening preliminary or full investigations, according to data the FBI released to *The New York Times*.⁸ Assessments can be opened for the purpose of finding information to coerce a person to become an FBI informant. Again, no factual predicate suggesting wrongdoing is required.

Preliminary investigations can last up to 18 months and require only “information or an allegation.” A 2010 Inspector General inquiry regarding FBI investigations of domestic advocacy groups like the Thomas Merton Center for Peace and Justice, Greenpeace, Catholic Worker, and People for the Ethical Treatment of Animals found FBI agents often make the required allegations, based on the agents’ speculation that the subjects might commit a crime in the future.⁹ Importantly, though the Inspector General found these investigations problematic, he determined they would be authorized under the Mukasey guidelines. Only full investigations, which allow electronic wiretaps and search warrants, require the reasonable suspicion of criminal activity that Oregon law requires.¹⁰

The abuse that results from these low standards is not hypothetical. Despite the excessive secrecy shrouding most JTTF activities, substantial public evidence shows the FBI has repeatedly used its post-9/11 powers to harass political dissidents, immigrants, and minority communities. The Portland Police can be proud of the fact they led resistance to this federal overreach when Attorney General Ashcroft ordered FBI agents to conduct “voluntary” interviews of thousands of

Middle Eastern immigrants based on nothing but their national origin. This broad racial and ethnic profiling has not stopped. In 2009 the FBI initiated a nationwide program of mapping American communities by race and ethnicity, and tracking so-called “ethnic behaviors,” which the Justice Department specifically authorized in 2014.¹¹ FBI documents obtained by *The Intercept* reveal agents regularly exploit immigration records, scour Facebook and infiltrate Muslim Students Associations or local mosques to recruit informants.¹² On the eve of the 2016 presidential elections FBI agents conducted at least 109 interviews of American Muslims across the nation, asking generalized questions about potential threats to polling places, and potentially suppressing voter turnout from these communities.¹³

In August 2017, the FBI circulated an intelligence assessment to its local networks, including thousands of local police officers assigned to the JTTF. The document warned of the threat posed to law enforcement by so-called “Black Identity Extremists,” a movement it describes as responding to “*perceptions* of police brutality against African Americans.”¹⁴ Local law enforcement has adopted this thinly veiled allusion to the Black Lives Matter movement as a threat to be prioritized in investigations.¹⁵ Indeed, the FBI has previously targeted Black Lives Matter activists with intimidating visits to their homes and workplaces, as they have done with environmental activists across the country and here in Portland.¹⁶ These harassing activities do not make us safer.

Portland is the first city to refuse to participate in the JTTF in 2005, but others have now followed this lead. In 2012, the San Francisco City Council passed an ordinance requiring the SFPD to submit annual public reports about its work with the FBI, a process modeled on the Portland ordinance passed in 2011.¹⁷ As in Portland, the JTTF resisted efforts to fully comply with the public reporting requirements. Instead of submitting its report in 2017 as required, the SFPD suspended its participation in the JTTF.¹⁸ Following this action, the Oakland City Council unanimously passed an ordinance requiring that Oakland Police Department officers assigned to the JTTF follow state and local law, submit annual public reports, and obtain approval from the city’s Privacy Advisory Committee before signing any Memoranda of Understanding with the FBI JTTF.¹⁹

These ordinances imposed reasonable and necessary measures to ensure that local police comply with state and local laws and protect their constituents from federal overreach and abuse. JTTF officials’ failure to fully comply with them reveals such measures are insufficient, however. By withdrawing from the JTTF, the City of Portland would rejoin the frontlines of a movement to uphold the constitutional rights of its constituents and hold federal agencies accountable to the law. Ensuing public safety includes protecting against unwarranted government interference with the free exercise of our civil rights and liberties.

¹ Or. Rev. Stat. § 181A.250, https://www.oregonlegislature.gov/bills_laws/ors/ors181a.html.

² Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, 107 P.L. 56, 115 Stat. 272.

³ OFFICE OF INSPECTOR GEN., DEP'T OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF EXIGENT LETTERS AND OTHER INFORMAL REQUESTS FOR TELEPHONE RECORDS (2010), available at <http://www.justice.gov/oig/special/s1001r.pdf>

⁴ Glenn Greenwald, "NSA collecting phone records of millions of Verizon customers daily," *The Guardian*, June 5, 2013, <http://www.guardian.co.uk/world/2013/jun/06/nsa-phone-records-verizon-court-order>.

⁵ Louise Matsakis, "Congress Renews Warrantless Surveillance – And Makes It Even Worse," *Wired Magazine*, Jan. 11, 2018, at: <https://www.wired.com/story/fisa-section-702-renewal-congress/>.

⁶ See Emily Berman, "Domestic Intelligence: New Powers, New Risks," *Brennan Center for Justice at New York University Law School*, January 18, 2011, <https://www.brennancenter.org/publication/domestic-intelligence-new-powers-new-risks>.

⁷ U.S. Department of Justice, Office of the Attorney General, *The Attorney General's Guidelines for Domestic FBI Operations* (2008), <https://www.justice.gov/archive/opa/docs/guidelines.pdf>.

⁸ Charlie Savage, "F.B.I. Focusing on Security Over Ordinary Crime," *The New York Times*, August 23, 2011, sec. U.S., <https://www.nytimes.com/2011/08/24/us/24fbi.html>.

⁹ OFFICE OF THE INSPECTOR GEN., DEP'T OF JUSTICE, A REVIEW OF THE FBI'S INVESTIGATIONS OF CERTAIN DOMESTIC ADVOCACY GROUPS (2010), <http://www.justice.gov/oig/special/s1009r.pdf>

¹⁰ Or. Rev. Stat. § 181A.250.

¹¹ The Department of Justice, *Guidance for Federal Law Enforcement Regarding Their Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation*, December 2014,

<https://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf>. See also, Federal Bureau of Investigation, *Domestic Investigations and Operations Guide (DIOG)*, December 16, 2008.

¹² Cora Currier, "The FBI Wanted to Target Yemenis Through Student Groups and Mosques," *The Intercept*, September 29, 2016, <https://theintercept.com/2016/09/29/the-fbi-wanted-to-target-yemenis-through-student-groups-and-mosques/>; and Cora Currier, "Revealed: The FBI's Secret Methods for Recruiting Informants at the Border," *The Intercept*, Oct. 5, 2016, <https://theintercept.com/2016/10/05/fbi-secret-methods-for-recruiting-informants-at-the-border/>.

¹³ Mazin Sidahmed, "FBI Pre-election Sweep of Muslim Americans Raises Surveillance Fears," *The Guardian*, Jan. 16, 2017, <https://www.theguardian.com/us-news/2017/jan/16/fbi-muslim-americans-visits-surveillance-cair>.

¹⁴ Jana Winter and Sharon Weinberger, "The FBI's New U.S. Terrorist Threat: 'Black Identity Extremists,'" *Foreign Policy*, October 6, 2017, <https://foreignpolicy.com/2017/10/06/the-fbi-has-identified-a-new-domestic-terrorist-threat-and-its-black-identity-extremists/>.

¹⁵ Martin De Bourmont, "Is a Court Case in Texas the First Prosecution of a 'Black Identity Extremist'?", *Foreign Policy*, January 30, 2018, <https://foreignpolicy.com/2018/01/30/is-a-court-case-in-texas-the-first-prosecution-of-a-black-identity-extremist/>; Will Parrish, "Documents: Police Targeted Leftists Before 'Unite The Right' Rally," *Shadowproof*, March 7, 2018, <https://shadowproof.com/2018/03/07/documents-reveal-police-targeting-anti-racists-charlottesville/>.

¹⁶ Adam Federman, "Lawyer for Environmental Group 'interrogated Repeatedly' at US Border," *the Guardian*, July 6, 2015, <http://www.theguardian.com/us-news/2015/jul/06/environmental-group-lawyer-interrogated>.

¹⁷ San Francisco, Calif., Admin. Code § 2A.74 (2012); Brandon E. Patterson, "Are Police Targeting Black Lives Matter Activists Ahead of the GOP Convention?", *Mother Jones*, June 30, 2016, <https://www.motherjones.com/politics/2016/06/cleveland-protesters-rnc-police-fbi-visits/>

¹⁸ "SFPD Suspends Participation with the Joint Terrorism Task Force," news release, February 1, 2017, <http://sanfranciscopolice.org/article/sfpd-suspends-participation-joint-terrorism-task-force>.

¹⁹ Oakland, Calif., City Council Ord. 13457, § 2 (October 3, 2017), https://library.municode.com/ca/oakland/codes/code_of_ordinances?nodeId=TIT9PUPEMOWE.