



What We Know, and Don't Know, About Portland and the DHS

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In recent days the Department of Homeland Security has dispatched federal law enforcement officers to Portland, scene of more than 50 consecutive nights of protests, which have regularly included damage to the federal courthouse and other major buildings. Oregon Public Broadcasting has reported one protester's account of being pulled off the street by a group of federal officers in camouflage, carried off in a van, asked questions which he eventually refused to answer without an attorney, and later released without charges.

On Friday acting Homeland Security Deputy Secretary Ken Cuccinelli appeared on NPR's *All Things Considered* in an interview with Sarah McCammon, and his answers help narrow down the still disputed allegations on events in Portland. Cuccinelli's comments confirm that what has been happening is disturbing, and badly needs oversight and investigation.

* **Were federal agents operating incognito?** Photos show agents clad in camouflage, with at least some of them wearing a generic "POLICE" label and in at least some cases a patch from the Department of Homeland Security's Customs and Border Patrol. DHS, which houses multiple law enforcement agencies (as does the separate Department of Justice), seems to have organized the federal law enforcement response.

What the federal agents are *not* wearing are badges that identify agents' names. While local police practice may require the use of such identifiers, it may come as an unpleasant surprise for people to learn that federal law does not as a rule require federal law enforcers to wear them.

In a Friday tweet, Customs and Border Patrol official Mark Morgan acknowledged that the agents were not wearing name badges. He said this was in order to protect them from retaliation. But he claimed that the officers did wear unique identifiers. In one photograph, "ZT1" is visible above an officer's agency patch.

The practice in Portland echoed the events of June when the U.S. Department of Justice hastily organized employees from multiple agencies, including the Bureau of Prisons, to counter protests in Washington, D.C. Many of these officers lacked not only badges but any insignia indicating which agency they belonged to. It took days of press questions to get even some of the basics on the record.

* **Whose van is that?** Unmarked police vehicles are not new. In this case, however, it is alleged that the camo-clad teams are picking persons off the street, bundling them into unmarked vehicles, and driving them away from the scene. In the NPR interview, Cuccinelli basically conceded the essentials of this allegation and defended the use of unmarked vans as a way "to keep both the officers safe and also, when crowds gathered, to move people to a safe location for questioning."

* **What are people being arrested for?** In the absence of a warrant, an arrest can be made only for probable cause. On Cuccinelli's telling, the individuals are being arrested on probable cause of having committed crimes involving the federal courthouse in Portland.

In the episode related by OPB and most widely cited in the new reports, a protester named Mark Pettibone alleges that he was picked up at some distance from the courthouse, bundled into a van, and taken to a location for questioning—which turned out to be the U.S. courthouse itself. Then, after Pettibone refused to answer further questions without a lawyer, he claims he was released after 90 minutes, without charges or paperwork of any kind documenting his detention.

Cuccinelli did not address the Pettibone case directly in his NPR interview. But he did acknowledge a case in which agents “believed they had identified someone” who had broken the law at the courthouse, drove the person to a separate location, determined that “they did not have the right person,” and then released the individual.

Even if Cuccinelli's account is accurate and complete, further investigation is badly needed to pin down exactly what probable cause the DHS officers had, what sort of record-keeping is being done concerning these detentions, and whether this kind of thing has happened other times.

* **How far from federal property are federal agents operating?** Cuccinelli said only “We will pick them up in front of the courthouse. If we spot them elsewhere, we will pick them up elsewhere.”

That is unacceptably vague.

* **What are the individuals being told about the reasons for their detainment?** Pettibone alleges that he wasn't informed why he was being detained, and on being released without charges, was given no paperwork documenting that the episode had even happened.

These are among the most disturbing of his claims. To check the validity of probable cause for an arrest, you'd ordinarily look to things like what the arresting officer told the suspect was the reason for it, as well as the paperwork generated during later stages of detention and release. Instead, major elements of the Pettibone story are hard—and perhaps even impossible—to check.

You can read this either way: as a reason to be cautious about taking the Pettibone story at face value, or as evidence of the agents' having set up their tactics in such a way as to evade accountability.

But either way, we need more explanation from DHS.

* **Who invited the feds into Portland in the first place?** It is possible to be alarmed at the allegations of DHS behavior and also understand that there are some legitimate grounds (together with extensive, though not limitless, legal authority) for federal law enforcement to intervene in the Portland disorders.

Despite loose talk about “graffiti” as the main offense, the nightly outbreaks at the Mark O. Hatfield federal courthouse have included repeated arson attempts. The federal government is not required by law to wait until one of these attempts succeeds in burning down the courthouse before dispatching law enforcement to protect it. Nor is DHS required to accommodate the wishes of either the local or state elected officials that it stay away.

Throughout American history there have been instances in which state and local authorities have proved incapable or indulgent in the face of political violence and street disorder. Much of the Civil Rights Era involved agents of the federal government wading into cities and states where the locals did not want them in order to enforce the law.

So while it's part of Washington's political and prudential calculus that Portland and Oregon elected officials want the feds to stay out, it's not dispositive.

To observe that the federal government has vast authority to deploy personnel to ordinarily local law enforcement situations does not mean either that it should *do so in this case* or even that it *should have* so much such power.

On this, Steve Vladeck's new piece in Lawfare (which is worth reading throughout on the legal background) makes a particularly startling observation:

It also appears that the federal government is using Customs and Border Protection officers in Portland—which, like so much of the United States, lies less than 100 miles from an international border (yes, the Pacific Ocean counts). Although federal immigration authorities are generally nationwide, there are a few specific authorities (and some important constitutional exceptions) that come into play “along the border.” Simply put, there are a **ton** of statutory authorities that allow the federal government to use a wide array of federal law enforcement officers to enforce federal law (including destruction or vandalism of federal property). Those authorities don't usually require officers to stay in their regulatory lanes (for instance, immigration officers can arrest for any federal offense committed in their presence). There's a good bet that that's at least part of what's going on here.

As genuine as the problem of violence and disorder in Portland may be, some of the practices being alleged are simply not acceptable ways for the American government to act and, if proven, should not be allowed to stand. That's why it was welcome on Friday when the U.S. Attorney for Oregon, Billy Williams, said he wants an investigation into the actions of the federal agents.

Congress should also investigate and, as appropriate, draw up new legislation to clarify and limit federal police powers and tactics.

Here's my opening bid. We should normally expect police to wear both badges with their names and easy-to-spot agency insignia, not the kind of generic “POLICE” rectangle that random bad guys could readily grind out at home. An average citizen seeing a bundle of poorly-identified men with firearms jumping out of an unmarked van would not be crazy to wonder if they were agents of law enforcement or the kind of cos-play militia-performers we have seen so much of recently.

We should also expect law enforcement officers—whatever the agency—to follow probable-cause standards for arrest and announce and document the grounds for and circumstances of the arrest, label vans used to transport arrestees, and so on down the line with all of the other protections we expect of local law enforcement.

If there are special circumstances where one of these measures isn't feasible, let's hear what they are. Protecting officers from retaliation by concealing their identities may sound plausible, but it's been a rationale offered at many times and places for secret police.

Americans won't, and shouldn't, put up with anonymous, arbitrary, and unaccountable police behavior.

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