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The Voices of Washington's Legal Community



When the Feds Came to Town: An Interview with Former Oregon Federal Public Defender Steve Wax

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Officials with the state of Oregon and city of Portland—the site of recent clashes between protesters and unidentified and uninvited federal law enforcement agents—recently reached an agreement with the federal government to withdraw its agents after protracted clashes with protesters and allegations of indiscriminate and overly-aggressive use of force.

Oregon Attorney General Ellen Rosenblum asked a federal judge for a restraining order against the federal agents, which was denied, and additionally announced a criminal investigation alongside Multnomah County District Attorney Rod Underhill into one of the more notable arrests by federal agents when a protester was whisked away by camouflaged officers in an unmarked minivan.

Steve Wax, legal director for the Oregon Innocence Project and Oregon federal public defender from 1983 to 2014, has also called for the district attorney and United States attorney to convene a grand jury inquiry into the many events captured on

video. NWSidebar spoke with Wax to better clarify the questions behind such legal actions and the unusual federal response in Portland.

NWSidebar: Are you aware of any precedent for federal agencies going into cities uninvited?

Steve Wax: ... Federal troops were deployed to Little Rock, Arkansas, in 1957, and perhaps to some of the other places in the late '50s and '60s when there were problems integrating public schools and colleges. Whether or not federal law enforcement officers, as opposed to National Guard or other troops, were sent to quell disturbances is a different question. And I'm not aware of that happening—I cannot say that it has never happened.

NWS: What are the big legal questions to be asking here?

Wax: There are additional questions for the presence of federal law enforcement officers that go beyond the presence of, and actions of, local police. The law is clear that the federal government has the right to protect federal property. As a general proposition, that is handled at such entities as courthouses by a special group called the Federal Protective Service. If the Federal Protective Service does not feel as though it can adequately handle a situation in which there is a threat to federal property, there is no impediment that I'm aware of to them requesting the assistance of other federal forces. That does not, however, mean that they have the right to engage in policing generally. Federal authority is limited to the protection of federal property. ...

Whether or not a federal law enforcement officer can engage in more general law enforcement or policing activities is a question that is going to be governed primarily by state law. In Oregon, for example, [Oregon Revised Statute] ORS 133.245 authorizes federal law enforcement authorities to make arrests for crimes under state law that are committed in the presence of the federal agents. However, the Oregon law also requires that any federal law enforcement officer engaging in that type of conduct must meet certain requirements, including certification by the state of his or her right to engage in that type of law enforcement activity. Absent compliance with Oregon state law, a federal person making an arrest, a seizure, or taking aggressive action against an Oregonian on state land may well be acting unlawfully and may well be committing crimes.

Another area in which the federal law enforcement people routinely act is in areas in which there is concurrent jurisdiction. For example, bank robbery is defined as a crime over which the federal government has jurisdiction when the bank is federally insured. ... The federal government and state governments also regularly operate in task forces, so that the Portland police or the Seattle police will often work hand in hand in joint task forces with the FBI or the DEA or ATF or Customs and Border Protection to investigate, arrest, prepare for prosecution of crimes. Generally, those would be crimes where there is concurrent jurisdiction. ... But all of those situations are distinct from what has been happening in Portland and what is reported to be planned and perhaps is happening in other cities as well—that is the presence of federal agents not in task forces, not at the invitation of the state governor, but against the wishes of the local authorities at the direction of, it would appear, the president.

NWS: Outside of a state filing a lawsuit against the federal officers, is there a process in place to hold them accountable for things like policing a protest?

Wax: There are several mechanisms that can be used to hold federal law enforcement officers accountable, if they are overstepping their authority. First, as has happened here in Oregon, the people who are protesting have filed multiple lawsuits saying, among other things, the indiscriminate use of tear gas and other what are so-called non-lethal munitions—bean bags, rubber bullets, and things of that ilk—that the indiscriminate use of those is unlawful, violates the First Amendment rights of the protesters. Lawsuits have been filed with media people specifically as plaintiff saying that targeting them and/or not making efforts to exclude them from the effect of tear gas and/or bullets is an infringement of the First Amendment right of the media to be present and report on what is taking place. ...

The attorney general in Oregon announced that she was seeking an injunction against the use by the federal agents of the tactics of going out and dispersing the crowds. I have called on the county district attorney and the United States attorney to convene a grand jury to inquire into the actions of the federal agents that have been captured on video and other actions that have taken place that may not have been captured on video—videos that on their face show non-lethal, so-called, rounds

being fired at and hitting protestors who were not engaged in any aggressive action toward the federal courthouse, or the federal agents' videos that show people walking away from protests, being seized, thrown into cars, driven around, held, and then let go without there being any indication that there was probable cause for the agents to seize that particular individual. Those types of acts are defined under Oregon law and undoubtedly under Washington law as potentially attempted murder, serious assault, kidnapping, and undoubtedly some other crimes. In convening a grand jury, the district attorney and the U.S. attorney should, in my judgment, inquire into the acts not only of the individuals who made the seizures or fired the rounds, but also those people they directed the actions. Were directions given to disperse crowds without considering whether any individual was committing any [criminal] act? ...

And when one looks at the federal law, one will see that all of the different federal law enforcement agencies are given specific charges by Congress. They don't have overlapping jurisdictions. And the authority of the Customs and Border Protection people to act to protect a federal courthouse is something else that should be inquired into. ... They're not enforcing any law related to protecting the borders of the country. And I think that there is a very important question to be asked about the authority of that agency to be here at all, doing this type of work as contrasted, perhaps, with the Federal Protective Service or the United States Marshals. ...

I think it is particularly important for us all to reflect on the importance of protest in a democracy, the importance of inclusiveness in a democracy and the legacy of people such as John Lewis, who came to national attention when his skull was fractured on the Edmund Pettus Bridge in the Selma to Montgomery march. He reminds us of the importance of speaking up when federal or state law enforcement people overstep their bounds.

About the Author



Steve Wax. Steve is legal director for the Oregon Innocence Project and served as Oregon's federal public defender from 1983 to 2014, and was one of the longest-serving public defenders in the country. He was a key part of the Brooklyn, NY, district attorney's prosecution of David Berkowitz, AKA "The Son of Sam." Steve and his federal defender team successfully represented six men formerly held as "enemy combatants" in Guantanamo. His book, *Kafka Comes to America*, about his representation of prisoners in Guantanamo and Portland attorney Brandon Mayfield, won four national awards. Steve has taught at Lewis & Clark Law School, serves as an ethics prosecutor for the Oregon State Bar, and lectures throughout the country

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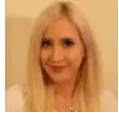


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