

THE STATE OF SURVEILLANCE:

Government Monitoring
of Political Activity
in Northern & Central
California



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A Report by the ACLU of Northern California
Written by Mark Schlosberg, Police Practices Policy Director
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EXECUTIVE SUMMARY

During one week in late December 2005, Americans learned about three separate federal government surveillance programs, raising great concern about civil liberties in this country. We heard for the first time that the President had authorized the National Security Administration (NSA) to monitor thousands of phone conversations, without court approval as required by law.¹ We learned of a massive Pentagon anti-terrorism database that contained information on several anti-war demonstrations.² And we saw new evidence that the FBI is collecting information on activist organizations across the country.³ A few months later we learned that the NSA was collecting private citizens' phone records.⁴

These revelations reignited the national debate over government surveillance of political activity, a debate reminiscent of one from nearly four decades ago. The 1960s and '70s was an era of extensive political activity—and of wide-ranging clandestine government surveillance. During that period, and in the revelations of surveillance that followed in subsequent years, we learned that protest is an activity to be protected rather than feared. As a nation, the experience of dissent and surveillance of the 1960s and '70s taught us many lessons. Today, some in law enforcement appear to be in danger of forgetting them.

Recent political events have led to renewed levels of political activity, with law enforcement often inappropriately conflating legitimate political dissent with terrorism. Law enforcement at all levels—federal, state, and local—has received extensive funding for expanded intelligence activities, including surveillance. With inadequate regulation and an insufficient understanding of the protections afforded to protest and dissent, law enforcement has overstepped its bounds in monitoring political activity.

While the public debate has largely focused on spying at the federal level, information has been mounting about surveillance abuses by state and local law enforcement agencies. From local participation in federal FBI programs, to the state Office of Homeland Security, to county sheriffs, California law enforcement has been gathering information on individuals and organizations engaged in political activity. They have done so without adequate regulation or sufficient understanding of the ways in which this activity is protected by U.S. and California law.

This report documents surveillance of political activity in Northern and Central California. It tells the stories of individuals and organizations that have been targets of surveillance, analyzes current law enforcement policy, and recommends specific policy reforms to safeguard Californians' rights to privacy and free speech.

Since September 11, 2001, the federal government has spent over \$500 million building state and local police intelligence

functions nationwide. In California, intelligence functions have grown dramatically at both the state and local level. California now has a central anti-terrorism center and plans to develop four regional intelligence clearinghouses.⁵ Police and sheriff's departments throughout the state have developed their own homeland security, anti-terrorism, and intelligence units. Over 20 California police departments have joined an FBI Joint Terrorism Task Force.⁶

The American Civil Liberties Union of Northern California (ACLU-NC) has consistently cautioned against the dangers of expanding the surveillance infrastructure without sufficient regulation to protect civil liberties and guard against abuses. California's constitutional right to privacy prohibits law enforcement from monitoring or compiling information on individuals or organizations engaged in activity protected by the First Amendment unless there is reasonable suspicion of a crime. The incidents of law enforcement surveillance detailed in this report raise serious constitutional concerns. These law enforcement abuses and the lack of regulation that allows them to occur threaten our cherished principles of free speech, free association, and privacy.

As early as November 2001, the ACLU-NC urged California Attorney General Bill Lockyer to adopt strict guidelines regulating the California Anti-Terrorism Information Center.⁷ In 2002, we urged Northern and Central California law enforcement agencies to institute regulations protecting privacy rights in the context of the war on terrorism.⁸

As this report documents, in just the last five years, multiple peaceful political organizations have been targeted for monitoring or infiltration by law enforcement agencies in Northern and Central California. Tactics have ranged from compiling and disseminating information about planned protest activities to undercover officers covertly posing as organization members, even leaders, to gather information or influence decisions.

Political gatherings of all types—meetings, vigils, demonstrations, and speeches—have been targeted by surveillance operations. Entirely law-abiding protesters have been videotaped without cause or suspicion. Political Web sites have been monitored. Demonstrations have been called crime scenes. Undercover officers have lied to protect their covert status. Law enforcement has equated protest with terrorism. State agencies have instructed local officials to monitor and report on citizens' peaceful, lawful participation in the democratic process.

These are not isolated incidents. While the character and scope of surveillance may not be the same as that of the 1960s, these incidents represent a disturbing trend in law enforcement that is fueled by greater funding, a national climate of fear, and a troubling lack of regulation.

If history is any guide, the stories documented in this report represent only the tip of the iceberg. The expansive surveillance programs of the 1960s and '70s—monitoring hundreds of thousands of Americans, prying into the personal lives of civil rights leaders like Martin Luther King, Jr., and attempting to disrupt the civil rights movement and other groups creating social change—were not fully revealed until years after they occurred. In fact, we continue to learn more about that surveillance to this day.

Surveillance activities are, by nature, secret. The subjects of surveillance and the general public learn about these incidents largely through happenstance, as was the case with the stories documented in this report: reading an infiltrator's obituary in the newspaper, a police chief bragging about his use of undercover officers, documents obtained in litigation over a related incident, an inadvertent response to a Public Records Act request. Thus, the number of documented incidents and their paper trail are all the more significant.

While surveillance has increased, few California law enforcement agencies have any policies, let alone clear and comprehensive regulations, protecting the privacy and free speech rights of those engaging in lawful protest from government surveillance. In September 2003, California Attorney General Bill Lockyer released a manual instructing state law enforcement officials that monitoring or infiltrating political organizations without reasonable suspicion of criminal activity violated the California Constitution.⁹ Nearly three years later, an ACLU-NC survey found that local law enforcement agencies have failed to develop policies implementing those standards. Violations of California privacy law have taken place without local officials acknowledging—or, in some cases, even realizing—that their actions were wrong.

This report contains a number of policy recommendations for state and local government to protect the privacy and free speech rights of Californians engaging in political activity. They include:

- The California Attorney General should issue specific guidelines to local law enforcement and actively encourage their adoption by sheriff's and police departments throughout the state.
- The state should adopt legislation regulating surveillance by the National Guard, the State Terrorism Threat Assessment Center, and the state Office of Homeland Security that protects privacy and free expression.

- The legislature should require local police and sheriff's departments to regularly report on their policies and surveillance activities to the Legislative Analyst's Office.
- Local law enforcement agencies should adopt strong policies, following the state attorney general's recommendations, to restrict surveillance of individuals and organizations participating in lawful protest activity. A "best practices" policy is included as Appendix A.

This report is divided into seven sections. Part I provides a brief overview of the history of government surveillance of political activity and a discussion of California's constitutional right to privacy. Part II outlines the expansion of government power after September 11, 2001. Part III describes instances of surveillance by federal and state agencies. Part IV contains examples of surveillance by local police and sheriff's departments. Part V discusses the current inadequacies of local police policies. Part VI offers specific recommendations for reform. Part VII is a conclusion. Appendix A is a "best practices" surveillance policy.

The chilling effect of surveillance has a detrimental impact on political debate, discourages membership in organizations, and breeds distrust of law enforcement. While many of the organizations highlighted in this report have not altered their message—in fact, some have helped expose the monitoring—the impact on other individuals and organizations cannot be underestimated.

With the war in Iraq continuing into its fourth year and the country divided over its merits, whether to continue, and how to get out, it is vitally important that people representing all perspectives on the political spectrum are free to express their views. Individuals must be able to exercise their constitutional rights to free speech and dissent without fear of being watched, without threat of their name or organization landing in a terrorism database or police file.

Law enforcement resources certainly must be devoted to investigating terrorism and prosecuting criminals, but this does not require sacrificing core civil liberties in the process. Intelligence activities must be undertaken responsibly, in a manner that ensures we are both safe and free.

PART I. GOVERNMENT SURVEILLANCE & PRIVACY RIGHTS: A BRIEF HISTORY

The government has consistently used law enforcement agencies to investigate and stifle political dissent. This is true of the last five years, and of the last 50 years. This monitoring stands at odds with California's strong protections for privacy rights, which are briefly chronicled here. A historical context is essential to understand current government surveillance of political activity. The 1976 U.S. Senate Church Committee's chronicling of surveillance and warnings of its dangers are particularly relevant today. A historical perspective serves not to equate the events of today with the offenses of decades past, but rather to show a continuum of government surveillance in America and the ways in which California responded through protections to privacy and dissent.

CHURCH COMMITTEE

In 1976, the United States Senate Select Committee to Study Operations with Respect to Intelligence Activities chaired by Senator Frank Church, known as the Church Committee, conducted a comprehensive survey of government monitoring of political activity. The committee found a pattern of abuses dating back to 1936. It warned that unchecked intelligence gathering on political activists could chill legitimate political speech and result in further government abuse.

According to the Church Committee, "Since the re-establishment of federal domestic intelligence programs in 1936, there has been a steady increase in the government's capacity and willingness to pry into, and even disrupt, the political activities and personal lives of the people."¹⁰ The Committee noted "vaguely defined" missions to "collect intelligence about 'subversive activities'" in the 1930s and 1940s, a widening of the "scope of investigations" from the 1940s through the early 1960s, and a raft of abuses during the 1960s and early 1970s.¹¹

The Church Committee docu-

mented massive clandestine surveillance from the 1930s through the 1970s. Targeting political activists and diverse social movements, the surveillance activities were perpetuated by virtually every federal law enforcement agency of the time, including:

- U.S. Army Intelligence compiled files on over 100,000 Americans
- FBI COINTELPRO Program monitored and disrupted political organizations
- FBI mounted an intensive campaign to "neutralize [Martin Luther King, Jr.] as an effective civil rights leader."¹²

The Church Committee's 1976 report concluded with a series of recommendations to ensure that government agencies limited their surveillance activities to legitimate criminal investigations.¹³ Ultimately, several reforms were implemented at the federal level, including the Foreign Intelligence Surveillance Act, which limited and regulated domestic surveillance for foreign intelligence purposes, and guidelines from then-Attorney General Edward Levi regulating FBI surveillance activities.¹⁴

Although the Church Committee concentrated on intelligence abuses at the federal level, it also discussed implications at the local level, a focus of this report. The Committee found that

encouraging local law enforcement to establish their own intelligence units without sufficient direction or regulation "greatly expanded the domestic intelligence apparatus, making it harder to control."¹⁵

The federal agents often used local law enforcement to do their dirty work. Police and sheriff's departments were allowed, even encouraged, to acquire information wanted at the federal level without fear of criticism or reprisal for using "covert techniques." According to the report, "These federal policies contributed to the proliferation of local police intelligence activities, often without adequate controls."¹⁶

BY THE END OF 1973,
THE SAN FRANCISCO
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ANTI-WAR ACTIVISTS.

LOCAL POLICE SURVEILLANCE IN NORTHERN CALIFORNIA DURING THE 1960s & '70s

The largest police intelligence sections of the 1960s and 70s were located in places such as Chicago and Los Angeles, but unregulated monitoring of innocent activities was prevalent in Northern California as well. By the end of 1973, the San Francisco Police Department had amassed intelligence files on over 100,000 people, including civil rights demonstrators and anti-war activists.¹⁷ The department had a large budget and staff with a broad mandate to “gather information and maintain files on known and suspected activities in the community, subversive groups, and individuals whose activities might threaten the welfare of the community.”¹⁸

Smaller police departments also exchanged information with larger departments throughout the '60s and '70s. Chicago had the largest police intelligence unit, with files on over 14,000 organizations and 258,000 individuals in 1975.¹⁹ Several Northern California law enforcement agencies cooperated in the Chicago spying effort. Police and sheriff's departments in San Jose, Oakland, Palo Alto, Newark, and San Mateo traded information on church groups, civil rights groups, and anti-war organizations with the Chicago intelligence unit.²⁰

THE RIGHT TO PRIVACY IN CALIFORNIA

Even though most surveillance activity was hidden from the public during the 1960s and '70s—the public did not learn about most of this era's surveillance activities for at least a decade—California voters began to push for additional privacy protections in 1972.



Surveillance of dissent has been an issue of concern from the 1960s to the present day.

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During this time, revelations about government surveillance of political activity were mounting. The FBI's COINTELPRO program had been exposed in 1971.²¹ In March 1972, Solicitor General Erwin M. Griswold acknowledged that the Army “went too far” in its surveillance efforts.²² Also that year, lawsuits charged Southern California police with illegally spying on students at UCLA and several Los Angeles community colleges.²³

Californian voters overwhelmingly passed a 1972 ballot initiative to add the right to privacy to the California Constitution. Although police surveillance was not the sole motivation behind the privacy amendment, the ballot argument in favor of the amendment specifically cited “the proliferation of government snooping and data collecting that is threatening to destroy our traditional freedoms.”²⁴

Three years later, in *White v. Davis*, the California Supreme Court set new standards for police surveillance of political activity.²⁵ Filed just before the 1972 election, the *White* case concerned police surveillance of student organizational meetings and lectures at UCLA. The 1975 landmark decision found that the alleged surveillance constituted “government snooping in the extreme,” and ran afoul of the new constitutional right to privacy.²⁶ *White* established the standard for legal governmental surveillance that holds to this day: In California, law enforcement officers are prohibited from conducting undercover operations or engaging in surveillance of political activity in the absence of reasonable suspicion of a crime.²⁷

In future decades, reforms were slowly instituted though further abuses were also revealed.²⁸ On the whole, however, at the close of the millennium, law enforcement was moving in the direction of greater professionalism and regulation.²⁹

PART II.

DISSENT IN TIMES OF CRISIS: SEPTEMBER 11, 2001 & THE REMOVAL OF REGULATIONS

In its 1976 report, the Church Committee warned of the government's tendency to target dissent in times of crisis:

The crescendo of improper intelligence activity in the latter part of the 1960s and the early 1970s shows what we must watch out for: In time of crisis, the Government will exercise its power to conduct domestic intelligence activities to the fullest extent. The distinction between legal dissent and criminal conduct is easily forgotten.³⁰

The tragic events of September 11, 2001 constituted just this type of crisis. The urge to respond quickly and forcefully led to a dramatic expansion of surveillance powers and the drastic increase in government resources for intelligence gathering at the federal, state, and local levels. These developments took place without sufficient regulation.

Within two months, Congress passed the USA PATRIOT Act and the President signed it into law. The PATRIOT Act expanded the power of federal agents to monitor email, Web sites, library and school records, all without meaningful judicial review.³¹ Then—Attorney General John Ashcroft directed governmental agencies to restrict disclosure of Freedom of Information Act information and promulgated regulations allowing certain attorney-client conversations to be monitored.³²

Concerns about civil liberties were brushed aside as unpatriotic. Testifying before Congress, Ashcroft criticized those who voiced concern for “lost liberties” in the war on terror, saying that dissenting voices “only aid terrorists for they erode our national unity and diminish our resolve.”³³ History had been forgotten; the Church Committee’s warnings ignored.

In May 2002, the U.S. Justice Department made it even easier to monitor political and religious activity. Gutting the FBI’s guidelines on General Crimes, Racketeering Enterprise, and Terrorism Enterprise Investigations, Ashcroft and his team removed protections put in place following the Church Com-

mittee hearings that had restricted government monitoring of political activity.³⁴ Under the new guidelines, still in use today, FBI agents can attend open political meetings, rallies, and demonstrations, monitoring who is saying what and who is associating with whom without any suspicion of criminal activity:

For the purpose of detecting or preventing terrorist activities, the FBI is authorized to visit any place and attend any event that is open to the public, on the same terms and conditions as members of the public generally.³⁵

The rapid expansion of federal surveillance powers was mirrored at the state and local level. On September 25, 2001, then—Governor Gray Davis and Attorney General Bill Lockyer created the California Anti-Terrorism Information Center (CATIC). Described as “part of the state’s effort to respond effectively to the directive by U.S. Attorney General John Ashcroft to establish state and local counter-terrorist task forces,” the center was instituted to collect and disseminate terrorist related information to local law enforcement.³⁶

Over \$500 million in federal Department of Justice and Homeland Security funds flowed to local law enforcement across the nation to create locally based intelligence units. These new units were charged with gathering and analyzing information, but they were not required to adopt any specific regulations safeguarding civil liberties.³⁷ A number of local police departments in Northern and Central California formed their own homeland security or counter-terrorism units, or joined the FBI’s Joint Terrorism Task Forces (JTTFs), which placed local police officers under the control and jurisdiction of the FBI.³⁸

Law enforcement’s efforts to improve investigative capabilities and increase effectiveness were laudable. However, dramatically increased surveillance capabilities, coupled with a lack of regulation and pressure to focus resources on terrorism investigations, have led to intelligence abuses at all levels of law enforcement—federal, state, and local.

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FORGOTTEN.”

—CHURCH COMMITTEE,
1976

PART III. BLURRING DISSENT & TERRORISM: SURVEILLANCE BY STATE & FEDERAL AGENCIES

In Northern and Central California, several layers of governmental agencies have been conducting surveillance and collecting and disseminating information regarding protest activities. At the federal level, the Defense Department has collected information about various anti-war protests, and the FBI conducts anti-terrorism investigations individually and with other law enforcement agencies through Joint Terrorism Task Forces (JTTFs). At the state level, the State Terrorism Threat Assessment Center (STTAC), formerly known as the California Anti-Terrorism Information Center (CATIC), and the state Office of Homeland Security (OHS) analyze and disseminate intelligence information. Locally, several police and sheriff's departments have monitored or infiltrated organizations engaging in activity protected by the First Amendment. This section addresses surveillance abuses by federal and state agencies while Part IV describes activity by local law enforcement.

SEVERAL LAYERS
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CATIC AND THE OFFICE OF HOMELAND SECURITY: Monitoring Protest Activities

From its inception in 2001, the California Anti-Terrorism Information Center dispatched advisories to local law enforcement agencies regarding protest activities throughout California. Billed as a “powerful weapon in the war to protect our people and property from the enemies of freedom,” CATIC bulletins were often used to alert law enforcement about legitimate protest activity at the local level.⁴⁶

On April 7, 2003, CATIC issued a bulletin warning of violence by demonstrators at an anti-war demonstration at the Port

of Oakland. Police responded in an excessive manner, firing wooden dowels at protesters and injuring over 50 people (see page 7). Following this incident, Justice Department Spokesperson Mike Van Winkle equated the demonstrators’ protest activity with terrorism, telling the *Oakland Tribune*:

You can make an easy kind of a link that if you have a protest group protesting a war where the cause that’s being fought against is international terrorism you might have terrorism at the [protest].... You can almost argue that a protest against that is a terrorist act.⁴⁷

Although Van Winkle’s statement was quickly repudiated by California Attorney General Bill Lockyer, for the first year and a half of CATIC’s existence, Van Winkle’s view of protest activity was reflected in numerous bulletins issued by the anti-terrorism agency.

On November 7, 2001, in what appears to be one of CATIC’s first advisories, CATIC issued a bulletin with the heading “Anti-Terrorism, Terrorism Advisory for Law Enforcement Use Only, Sensitive Information.” The bulletin warned of “possible war protests” and stated that “the International Action Center, an anti-war, anti-globalization, and anti-corporation protest advocacy group founded by former U.S. Attorney General Ramsey Clark, is encouraging individuals to protest the war in Afghanistan in San Francisco.” The bulletin also referenced possible protests in Los Angeles and Sacramento.⁴⁸

In April 2002, the agency issued an “Anti-Terrorism, Law Enforcement Advisory,” discussing “California’s vulnerability to violence based on current Middle East Conflict.” While an analysis of terrorist threats linked to conflicts in the Middle East would certainly be an appropriate function for CATIC, this particular bulletin also listed “events involving Middle Eastern festivities,” including “the Afghan

OAKLAND POLICE TURN VIOLENT AT PORT OF OAKLAND ANTI-WAR DEMONSTRATION

On the morning of April 7, 2003, members of Direct Action to Stop the War and others opposed to the war in Iraq gathered at the entrance to the Port of Oakland. Their goal was to form a picket line at the Port to highlight the role of two shipping companies operating out of the Port. The protesters believed that the shipping companies helped facilitate the war by transporting weapons and operating Iraq's Port of Umm Qasr. The Direct Action Web site advertising the protest specifically stated that the protest was not a "civil disobedience" action and that the purpose of the protest was "to maintain the picket line not to get arrested."³⁹

The demonstration began as planned, with protesters maintaining a peaceful picket at the Port of Oakland entrance. Then, with little warning, police moved in to disperse the protest. Police used an array of "less lethal" weapons, departing from traditional crowd-control practices. Oakland police fired wooden dowels, shot filled beanbags, and sting-ball grenades at the crowd. Officers continued firing as protesters fled. The *New York Times* reported "the clash was the most violent between protesters and the authorities anywhere in the country since the start of the war in Iraq."⁴⁰ In total, over 50 people were injured, including 9 dockworkers, members of the International Longshore and Warehouse Union (ILWU), who were not involved in the protest.⁴¹

In response, the ACLU-NC joined the National Lawyers Guild in filing an excessive force class-action lawsuit against the City of Oakland and its police department on behalf of the Longshoremen's Union members who were injured. The incident ultimately cost Oakland over \$2 million and resulted in a new Oakland Police Department crowd control policy.⁴² With all the attention paid to police violence, weapons, and subsequent policy reforms, the subject of the "intelligence" acquired by the Oakland Police Department prior to the April 7 protest received less public scrutiny.

Investigation later revealed that, even before the protest took place, its organizers were monitored by both a state agency—the California Anti-Terrorism Information Center—and local police. An act of political dissent—a planned picket line—set off overzealous warning systems and may have influenced the choice of police response tactics.

Through a Public Records Act request, the ACLU-NC learned that the Oakland Police Department had gathered information not only about Direct Action's planned picket line, but in fact about unrelated anti-war activities by the ILWU. The OPD had entered the ILWU's Yahoo newsgroup and printed out postings issued months earlier about the Union's opposition to the war in Iraq.⁴³ Then, just days before the protest, Oakland police received a warning from CATIC, the state's anti-terrorism information center, about "potential violence"⁴⁴—a warning that one law enforcement official from a neighboring agency indicated had "extra weight."⁴⁵

The Port incident and the events leading up to it illustrate how inappropriate surveillance affects governmental agencies at multiple levels. The bulletin issued by the California Anti-Terrorism Information Center prior to the incident also demonstrates the danger of conflating political dissent with terrorism. By the time the CATIC bulletin was revealed in the Oakland case in April 2003, CATIC had already been issuing terrorism advisories on protests to local law enforcement agencies throughout the state for more than a year and a half without public or media knowledge.

New Year's Festival in Pleasanton at the Alameda County Fairgrounds" and a "march against 'War and Racism'" in San Francisco.⁴⁹ A follow-up bulletin issued a month later detailed "demonstrations on California college campuses by pro-Israeli and pro-Palestinian groups."⁵⁰

Beyond issuing bulletins, in at least one instance, CATIC also directed local law enforcement to report protest activity to the FBI's Joint Terrorism Task Force. On November 8, 2002,

CATIC issued a "Law Enforcement Advisory" about a "rally" at Lawrence Livermore National Laboratory:

A civil disobedience rally has been called by members of the Bay Area Pledge (Not In Our Name, NION). Demonstrators plan to meet on Monday, November 11, 2002 at 12:00 p.m. at the West Gate of Lawrence Livermore National Laboratory's (LLNL) lab on Vasco Road, Livermore, California. They will represent themselves as a model weapons inspection team

demanding inspection of LLNL. Rally attendees are encouraged to support international weapons inspections. This rally is expected to be non-violent and participants have been asked to bring or wear banners, clipboards, cameras, weapons inspector jackets (light blue preferred), uniform (if in the military), robes (if belonging to a religious order), or appropriate props and apparel.

Despite the innocuous nature of the demonstration, the bulletin advised law enforcement to contact either the local FBI Joint Terrorism Task Force or CATIC's Situation Unit with "any additional information regarding this rally, potential problems occurring with this rally or information regarding any similar situations."⁵¹

CATIC continued to issue bulletins on anti-war and other political protests throughout the state until the Port of Oakland incident in April 2003. The public disclosure of that bulletin, a significant follow-up investigation by the *Oakland Tribune*, and advocacy by the ACLU led Attorney General Bill Lockyer to commission a review of the agency. As a result, CATIC was prohibited from gathering information or issuing bulletins on individuals or organizations engaging in protected activity.⁵²

As Attorney General Lockyer was instituting these reforms in one agency, the state Office of Homeland Security (OHS) was being developed to coordinate "the activities of all state agencies pertaining to terrorism-related issues." Then-Governor Gray Davis created the office by executive order in 2003. OHS initially functioned largely as a clearinghouse for disbursing federal homeland security grant money to local agencies.⁵³ More recently, however, California's OHS appears to have played a larger role in intelligence analysis.

In January 2005, the OHS, the California Attorney General's Office, and the California Highway Patrol finalized a memorandum of understanding to create a new agency called the State Terrorism Threat Assessment Center (STTAC). According to the Homeland Security Strategy, a policy document from OHS, "The new STTAC is tasked with the collection, analysis and dissemination of terrorism-related information and the investigation of terrorism-related information, in full and complete collaboration with federal, state and local agencies charged with a counter-terrorism mission." The new STTAC also "encompasses duties formerly addressed separately by the CATIC."⁵⁴

While OHS has a significant role in STTAC, it lacks indepen-

dent oversight, and there are no statutes governing its functions. OHS employs a number of "contract analysts" to support intelligence gathering related to terrorism. The analysts, however, are not peace officers.⁵⁵ According to a California Department of Justice memorandum, allowing OHS access to intelligence information raises a number of legal concerns.⁵⁶ Worse, the state OHS may have advanced several surveillance proposals that would violate the rights of individuals under both the California and federal Constitutions.

As early as 2004, Ed Manavian, then the head of CATIC, began raising concerns about the legality of OHS's role in intelligence gathering and analysis.⁵⁷ In a 2005 email to the director of the Justice Department's Division of Law Enforcement, Manavian

described Senior Assistant Attorney General John Gordnier's concerns about OHS's intelligence gathering, particularly the contract analysts' role: "Whose authority would these analysts work under? Under what rules and guidelines were they going to operate under in the area of intelligence, especially in the retention and dissemination portions? Under what statutory authority would they operate under?"⁵⁸

According to a whistleblower complaint recently filed with the state, Manavian claims he was demoted for not being complicit in privacy violations and for speaking out forcefully in interagency meetings to oppose OHS policies that would threaten civil liberties.⁵⁹ Manavian raised civil

liberties issues regarding a number of OHS programs and proposals. He advocated withdrawal from a federal database program that did not abide by California privacy protections and claims he spoke out about a number of inappropriate ideas floated by the OHS, including a proposal to bug the offices of Muslim imams who work in prisons.⁶⁰

Manavian isn't the only Justice Department employee voicing concerns regarding the scope of OHS activities. In an April 21, 2006 memorandum Allen Benitez, Assistant Chief of the Criminal Intelligence Bureau of DOJ, wrote:

OHS is assigning tasks in areas outside the mission of STTAC. OHS Contract Analysts have been tasked by OHS management with researching and collecting information on street gangs, outlaw motorcycle gangs, political groups, protests, and other areas that do not meet the mission of the STTAC and may not be allowed under the law.⁶¹

THE CALIFORNIA
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On July 1, 2006, the *Los Angeles Times* provided evidence supporting this assessment. The *LA Times* gained access to OHS reports detailing information about political demonstrations throughout California, including:

- An animal rights rally outside a Canadian consulate office in San Francisco to protest the hunting of seals
- A demonstration in Walnut Creek at which U.S. Rep. George Miller (D-Martinez) and other officials spoke against the war in Iraq
- A Women's International League for Peace and Freedom gathering at a courthouse in support of a 56-year-old Salinas woman facing federal trespassing charges⁶²



This Walnut Creek anti-war march was referenced in an Office of Homeland Security bulletin.

Following the revelation of the bulletins by the *Los Angeles Times*, both Attorney General Bill Locker and representatives of OHS spoke out against the tracking of information on demonstrations. A representative from Gov. Arnold Schwarzenegger's office called the tracking of such information "totally inappropriate and unacceptable."⁶⁵ While these statements are heartening, many questions remain as to why the bulletins were issued and what regulations govern the actions of OHS and its contract analysts.

On July 6, 2006, the three California ACLU affiliates filed Public Records Act requests seeking detailed information from the attorney general and OHS about the issues raised in Manavian's complaint, the Benitez memo, and the *Times* report. As this report goes to press, we await the results of the requests. Still, the information we have points to the need for additional regulation to safeguard the privacy rights of Californians exercising their First Amendment rights through public protest.

CALIFORNIA NATIONAL GUARD: Monitoring Protesting Grandmothers

The California Anti-Terrorism Information Center and the Office of Homeland Security are not the only state agencies that have focused on First Amendment protected activity in the name of stopping terrorism. Last Mother's Day, Code Pink, Gold Star Families for Peace, and the Raging Grannies organized an anti-war protest at the Vietnam Veterans Memorial in Sacramento. The May 8, 2005 protest was peaceful, attended by approximately 50 people, some of whom had lost family in combat. Lasting less than two hours, it included songs and a peace proclamation. Surprisingly, this small gathering drew the attention of the California National Guard.⁶⁶

On May 5, 2005, Jennifer Scoggins, a member of Gov. Arnold Schwarzenegger's press office, sent an email to the California National Guard giving officials a "heads-up" that members of Code Pink, Gold Star Families for Peace, and others were planning to "mark Mother's Day urging the Governor and Legislature to support bringing California National Guardsmen home from Iraq by Labor Day." The email was forwarded up the chain of command to then-Adjutant General Thomas Eres and other senior National Guard staff. On May 6, Colonel Floyd J. ("Jeff") Davis replied that he was forwarding the information to his "Intell. Folks who continue to monitor."⁶⁷

Among the people copied on Davis's email was Colonel Robert J. O'Neil, who had recently been tapped to head up a new intelligence program called the Information Synchronization, Knowledge Management and Intelligence Fusion program. The Fusion program was billed as a "one-stop shop for local, state and national law enforcement to share information."⁶⁸

The Guard's monitoring of the protest was publicly reported a month later in the *San Jose Mercury News*, and immediately drew criticism from leading law enforcement and intelligence experts. Christopher Pyle, a former Army Intelligence Officer who first exposed the military's domestic spying programs in 1970, told the *Mercury News*, "The National Guard doesn't need to do this. Its job is not to investigate individuals, but to clear the streets, protect facilities and help first responders."⁶⁹

California Attorney General Bill Lockyer questioned the Guard's action saying, "You have to wonder how monitoring the activities of soldiers' widows and orphans advances the anti-terrorism effort."⁷⁰ The ACLU-NC urged the dismantling of the Guard unit responsible for the spying, and State Senator Joe Dunn opened an investigation.⁷¹

The Guard initially defended its effort, claiming it would be "negligent" to not track anti-war rallies since they have the potential to degenerate into riots. According to Guard



The National Guard monitored this Sacramento Mother's Day anti-war rally organized by Code Pink, Gold Star Families for Peace, and the Raging Grannies.

spokesperson Lt. Col. Stan Zezotarski, the monitoring effort was “nothing subversive, because who knows who could infiltrate that type of group and try to stir something up. After all, we live in the age of terrorism, so who knows?”⁷²

The Guard tried to quell criticism by inviting members of the groups involved in the protest to tour their facilities. This public-relations attempt backfired when Code Pink members saw and photographed an anti-Muslim poster in Guard offices. The poster depicts an incident in which “General Black Jack Pershing” and his unit slaughtered 49 Muslims with bullets soaked in pigs’ blood. The poster asks: “Maybe it is time for this segment of history to repeat itself, maybe in Iraq? The question is where do we find another Black Jack Pershing.”⁷³ The Guard initially defended the poster as being “historically accurate,” but later told the *San Jose Mercury News* that it had been removed.⁷⁴

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—CHRISTOPHER PYLE,
FORMER ARMY INTELLIGENCE
OFFICER

The Army conducted its own internal investigation of the incident and Guard unit. Its report, which purported to clear the Guard, was issued in August 2005 but never released publicly. Senator Dunn, who did view the report, said that the report “refers to additional protests and demonstrations” and “labeled as questionable Guard involvement surrounding them.”⁷⁵

Although Senator Dunn encountered problems during his investigation of the National Guard—including the fact that Colonel Davis’s hard drive was erased upon his retirement despite the senator’s request that all information related to the incident be preserved—he uncovered evidence that other states had similar Fusion programs and may be engaged in comparable spying efforts.⁷⁶ As Dunn explained:

Because the [Fusion programs] were all created at about the same time and to the best of our knowledge thus far seemingly engaged in similar activity, including domestic surveillance activities, we could only conclude that it had been part of a concentrated or coordinated effort to create such units around the country.⁷⁷

In November 2005, in response to pressure from Senator Dunn and others, the California National Guard dismantled the Fusion program. Senator Dunn hailed the decision as an important step: “It means that, at least for now, the Guard leadership won’t be tempted to engage in domestic surveillance activities in California, which are barred by federal law.”⁷⁸

A June 2006 review by the state auditor found that the Fusion intelligence unit was created in violation of state law, circumventing the normal budget process.⁷⁹ Senator Dunn has introduced legislation to would prevent the Guard from engaging in domestic surveillance activities without express approval by the legislature.⁸⁰

THE PENTAGON & THE FBI: Monitoring Local Protests

Federal agencies are also engaged in monitoring political activism in Northern and Central California. In December 2005, NBC News reported on the existence of the previously secret Department of Defense (DOD) Threat and Local Observation Notice (TALON) database. The database contained information from TALON reports filed by Defense Department personnel over at least a 10-month period.⁸¹

The anti-terrorism database included information on numerous anti-war and counter-recruitment protests, including campus demonstrations by UC Santa Cruz Students Against War and the UC Berkeley Stop the War Coalition, a Sacramento

protest organized by military veterans, and a San Francisco demonstration organized by local activists.⁸² The TALON database also designated the level of concern posed by the protest activity. For example, the Santa Cruz student protest was deemed “credible” and a “threat,” while the Berkeley campus protest was considered a “threat” but “not credible.”⁸³

The disclosure of the database drew criticism and questions from political leaders nationally, including Sen. Dianne Feinstein and U.S. Rep. Zoe Lofgren (D-San Jose).⁸⁴ Further media investigations revealed additional aspects of the DOD program, including the Defense Department’s failure to purge database information on a timely basis.⁸⁵

Under pressure, the Defense Department conceded that including information about anti-war protesters in the database was inappropriate. According to a letter written to Congress by Deputy Undersecretary of Defense Robert W. Rogalski:

Although the TALON reporting system was intended to document suspicious incidents possibly linked to foreign terrorist threats to DOD resources, some came to view the system as a means to report information about demonstrations and anti-base activity.... CIFA (Counterintelligence Field Activity) has removed the TALON reports on demonstrations and anti-base activity from the database.⁸⁶

While these assurances are heartening, it is still not clear how much information on legitimate protest activity was collected, why it was collected, and whether the TALON information was transmitted to other databases or agencies.

In February 2006, in coordination with several other ACLU affiliates and the national ACLU office, the ACLU-NC and the *San Francisco Bay Guardian* filed Freedom of Information Act (FOIA) requests with the Defense Department seeking information collected on students at UC Berkeley and Santa Cruz and documents on the TALON system. The ACLU-NC sought documents on an expedited basis because of the information’s time-sensitive nature.⁸⁷

When the Pentagon denied the ACLU-NC’s request for expedited processing, the ACLU-NC filed a lawsuit in federal court to compel speedy production of the documents. On May 25, 2006, U.S. District Court Judge William Alsup granted the ACLU-



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Students from UC Berkeley and UC Santa Cruz ended up in a Defense Department anti-terrorism database for participating in demonstrations against military recruitment.

NC’s request and ordered the Defense Department to expedite the search for responsive documents.⁸⁸

The FBI’s Joint Terrorism Task Forces have also been gathering information on people and organizations engaging in constitutionally protected activity. In September 2004, the ACLU-NC filed a FOIA request with the Northern California FBI offices seeking policy information on their surveillance practices. Nearly two years later, the FBI has yet to provide documents in response.

Documents obtained by the ACLU from FBI offices in other regions suggest that the FBI may be gathering information on organizations engaging in protected activities. One document obtained by the national ACLU relates to a May 2002 conference held at Stanford University entitled “Third National Organizing Conference on Iraq.” The heavily redacted document appears to contain “a contact list” of attendees and a number of references to the American-Arab Anti-Discrimination Committee, including the organization’s Washington, D.C. address, phone number, and email.⁸⁹

FBI documents obtained in other states are more explicit. Documents obtained by the ACLU national office show that the FBI was investigating People for the Ethical Treatment of Animals, a national animal rights organization.⁹⁰ A November 2002 document obtained by the Pennsylvania ACLU reports on the “results of investigation of Pittsburgh anti-war activity.” The activities at issue were entirely peaceful leafleting conducted by the Thomas Merton Center for Peace and Justice, which the FBI described as “a left-wing organization advocating, among many political causes, pacifism.”⁹¹

As the Church Committee warned us decades earlier, in times of crisis, law enforcement and intelligence agencies blur the line between legal dissent and criminal conduct. Lack of regulation only facilitates governmental overreach.

The monitoring of political groups and free-speech protest activities should come as no surprise in light of the vast resources committed to intelligence gathering post-9/11 and the gutting of regulations protecting political and religious activity from unwarranted government surveillance. Yet, the extent to which the government took advantage of a climate of fear and a time of unease merits widespread notice and opposition.

PART IV. SURVEILLANCE ABUSES BY LOCAL AGENCIES IN NORTHERN & CENTRAL CALIFORNIA

Monitoring of political activists has occurred at the local level as well. From Fresno to Santa Cruz, Oakland to Sacramento, police agencies have infiltrated organizations or monitored individuals engaging in political activity protected by the First Amendment.

In most cases, the local police or sheriff's department did not have regulations prohibiting such activity. In other instances, the surveillance violated established policies. All of the incidents represent local law enforcement's failure to protect their communities from unwarranted government surveillance.

OAKLAND POLICE DEPARTMENT: Infiltrating a Protest Against Police Brutality

While the 2003 Port of Oakland incident illustrates inappropriate use of the California Anti-Terrorism Information Center (CATIC), subsequent Oakland Police Department actions related to the incident demonstrate the misuse of undercover police officers to spy on political activists.

The April 7, 2003 police action described above (see sidebar, page 7) sparked outrage. Community members and others believed it was important to “stand up to police brutality and to affirm the constitutionally protected rights of free speech and assembly.” So, they chose May 12, 2003 to return to the Port for a demonstration against the police response to the April 7 protest.⁹²

The protest went smoothly as approximately 400 protesters marched from the West Oakland BART station to the Port. There was no police interference and there were no arrests. According to Patrick Reinsborough, a Direct Action to Stop the War volunteer, “[The protest] was a victory... It showed that we're not going to tolerate the kinds of police brutality and attacks on civil liberties we saw on April 7.”

In their public statements, the Oakland Police Department concurred that the May demonstration was a success, a validation of proactive communication strategies. “This time was different,” Daniel Ashford, the Oakland Police Department spokesperson, told the *San Francisco Bay Guardian*. “You just learn

from each event, and we definitely learned from April 7. We're not experts in this, but we know now that communication is important and effective.”⁹³

What organizers did not know at the time, and what the Oakland Police Department did not tell the press, was that the protest had been infiltrated—and partially directed—by members of the Oakland Police Department posing as demonstrators. Documents obtained by the ACLU-NC during litigation over the original April 7 incident revealed that two undercover Oakland police officers were elected to “plan the route of the march and decide where it would end up and some of the places that it would go.”⁹⁴

Infiltrating the protest would have been highly inappropriate in and of itself. Officers taking leadership roles and helping direct the protest is even more invasive, approaching the tactics used by law enforcement during the 1960s.

The OPD's actions were far more insidious than other alternatives, such as open communication between the police and organizers (ironically, the protest organizers believed this was accomplished) or gathering information from public sources such as Web sites and newspapers.



After anti-war protesters at the Port of Oakland were targets of police brutality, demonstrators organized another Port demonstration, which was infiltrated by undercover officers.

In his statement to the Oakland Police Department's Board of Review on the April 7 incident, then-Captain Howard Jordan espoused the benefits of police infiltration:

So if you put people in there from the beginning, I think we'd be able to gather the information and maybe even direct them to do something that we want them to do. An example would be if we wanted to march to the dark station or march to the police department. If we have our people near it we can say, "We don't think that's a good idea, let's go somewhere else." So those are some of the things I think we should consider for future. I think it will help us in the long run if we had that information available, or at least have some intelligence as to what's happening at that place.⁹⁵

Jordan also told the Board of Review that the OPD should have a unit available for such undercover operations, and that these tactics are common in other police departments:

I think we need to have a group of officers available at all times, any time of the day, so if this information becomes available they can follow up on it. So we could get officers into that group for their meetings. We could get people there in advance. They advertise that stuff on the Internet. It's not that difficult. San Francisco does it, Seattle, a lot of large agencies do it. And we need to make sure that the next time something like this happens, that we're way ahead of the curve—that we're in there.⁹⁶

This approach to protest activity, if followed, would constitute a wholesale violation of the state constitutional right to privacy. California law prohibits police infiltration or monitoring in the absence of reasonable suspicion of criminal activity. Unfortu-

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—HOWARD JORDAN, DEPUTY
CHIEF, OAKLAND POLICE

nately, as Jordan noted, the use of undercover officers to monitor activist groups is not unique to Oakland; it is increasingly widespread. Jurisdictions throughout the state lack policies restricting surveillance activity to cases where officers have reasonable suspicion of a crime, as required by California law.

FRESNO COUNTY SHERIFF'S DEPARTMENT: Spying on Peace Protesters

On August 31, 2003, as she was reading her copy of the *Fresno Bee*, something strange caught Fresno schoolteacher Camille Russell's eye. She noticed a picture of Aaron Michael Kilner above his obituary. The write-up noted that Kilner was a deputy sheriff in the Fresno County Sheriff's Department and a member of its "anti-terrorist team." Camille noticed the picture because she recognized the man as Aaron Stokes, a person she knew as a fellow member of Peace Fresno, a local anti-war and social justice organization.⁹⁷

For the previous several months, Kilner had attended Peace Fresno meetings and rallies, taking minutes for the group on one occasion and traveling to a demonstration in Sacramento on another. He passed out flyers and participated in street protests. He told members his name was Aaron Stokes and that he was not working due to a small inheritance he had received.⁹⁸

After Camille Russell noticed his picture, she circulated copies of the obituary to Peace Fresno members, telling them, "Don't say anything to anyone else. Just look at this picture, and see if you recognize him." People quickly realized that the Aaron Stokes Peace Fresno members had known was in fact Aaron Kilner, a Fresno County Deputy Sheriff who had infiltrated the peace group.⁹⁹ Feeling betrayed and violated, Peace Fresno members sought the assistance of local attorney Catherine Campbell.

Campbell sent a letter to Fresno County Sheriff Richard Pierce demanding to know why the group had been infiltrated. His response claimed that the department did not have any files on Peace Fresno, but he neither confirmed nor denied that Kilner had been directed to spy on Peace Fresno meetings for the sheriff's department. Parroting the FBI guidelines written by then-Attorney General John Ashcroft, Pierce claimed the right to send his members to organizational meetings:

For the purpose of detecting or preventing terrorist activities, the Fresno County Sheriff's Department may visit any place and attend any event that is open to the public on the same terms and conditions as members of the public generally.¹⁰⁰

“AT A TIME WHEN THE SHERIFF IS SAYING HE NEEDS MORE MONEY FOR OFFICERS WE QUESTION USING DETECTIVES’ TIME TO MONITOR A POLITICAL GROUP LIKE PEACE FRESNO WITH APPARENTLY NO EVIDENCE OF CRIMINAL ACTIVITY. THIS CERTAINLY RAISES QUESTIONS ABOUT THE SHERIFF’S PRIORITIES.”

—FRESNO BEE

After being stonewalled by the sheriff’s department, Peace Fresno went public with their story, which drew widespread attention from concerned members of the local community and from the media. The *Fresno Bee* provided extensive coverage of the story and questioned the sheriff’s actions in an editorial:

The nation’s concern about personal liberties vs. national security has become exceedingly personal recently, as members of Peace Fresno found when they realized that an undercover sheriff’s detective had been attending their meetings. We share their concerns... At a time when the sheriff is saying he needs more money for officers we question using detectives’ time to monitor a political group like Peace Fresno with apparently no evidence of criminal activity. This certainly raises questions about the sheriff’s priorities.¹⁰¹

Unfortunately, the questions raised were not answered. After attempting to obtain additional information from the department and the FBI for several months, on April 21, 2004, the ACLU-NC filed a complaint with Attorney General Bill Lockyer on behalf of Peace Fresno.¹⁰²

The complaint urged the attorney general to use his constitutional authority to direct the sheriff to adopt a policy prohibiting the infiltration and surveillance of community organizations. It also asked for full disclosure of how and why the infiltration was ordered and any information Kilner had collected. Two months later, the attorney general agreed to open an investigation.¹⁰³

Nearly two years after the complaint was initially filed, on

February 10, 2006, Lockyer confirmed that the infiltration of Peace Fresno had been an officially sanctioned sheriff’s department action. According to Lockyer, “There is no disagreement about the facts.”¹⁰⁴

Lockyer’s office also confirmed what members of Peace Fresno already knew—that no members of Peace Fresno had engaged in criminal activity “other than jaywalking.” According to Nathan Barankin, Lockyer’s spokesperson, “The Attorney General has very serious concerns about methods used by the Fresno Sheriff’s Department with Peace Fresno.”¹⁰⁵

Despite this determination, no public report has been released and no enforcement action taken. The attorney general’s office has been in negotiations for some time with the Fresno Sheriff’s Department about a new policy limiting undercover surveillance. The attorney general is also considering filing a lawsuit against the sheriff for violating Peace Fresno members’ rights.¹⁰⁶ What is unclear, however, is why the attorney general has not simply used his power—authorized by the California Constitution—to direct the sheriff to stop using undercover officers to spy on political activists.¹⁰⁷

Three years after Aaron Kilner began attending Peace Fresno’s meetings, members are thankful that their case is being investigated, but they still wonder how and why they were investigated. They also worry that, in the absence of sufficient regulation, it could happen again. As Camille Russell told the *Fresno Bee*:

I’m totally convinced no one ever thought Peace Fresno was a terrorist organization. When we have law enforcement surveilling people for their political views, it’s really scary. We need Lockyer to take a stand for us. We should all take a stand.¹⁰⁸



Lisa Solomon, Camille Russell, and Dan Yaseen (l-to-r) of Peace Fresno were the targets of clandestine surveillance by an undercover Fresno deputy sheriff posing as a fellow peace group member.

FRESNO STATE POLICE DEPARTMENT: Undercover Surveillance of Student Activists

While Attorney General Lockyer's office was investigating the Peace Fresno incident, the Fresno County Sheriff was engaging in another undercover operation, this time at California State University, Fresno. On November 10, 2004, the Cal State Fresno student group Campus Peace and Civil Liberties Coalition (CPCLC) hosted an on-campus lecture by a speaker formerly employed by People for the Ethical Treatment of Animals (PETA) named Gary Yourofsky. He addressed approximately 60 people about the benefits of a vegan diet. Six of those 60 attendees were undercover police officers—three from the county sheriff's department and three from the campus police department.¹⁰⁹

CPCLC leaders learned about the undercover law enforcement presence through a December 2004 campus task force meeting on outside speakers and events. When discussion turned to the CPCLC lecture, someone asked why there were no uniformed police officers at the event. Fresno State Police Chief David Huerta responded by asking, "How do you know that there were no officers present?" Huerta also stated that Mr. Yourofsky was of concern because the Department of Homeland Security [had] classified PETA as a terrorist organization.¹¹⁰

After unsuccessful attempts to quietly learn why undercover officers were at the CPCLC lecture and what information they collected, students went public with what happened. The university initially defended the undercover officers' spying, stating that it was common practice. According to Fresno State's Director of Public Safety David Moll:

I don't understand what the problem is. There's undercover police everywhere. They're gathering intelligence to keep order, not to repress anybody. They could be at a school or a church, or Big Hat Days.¹¹¹

Moll also claimed the use of undercover officers was necessitated by the speaker's controversial views and the surrounding community's possible reaction:

"I DON'T UNDERSTAND WHAT THE PROBLEM IS. THERE'S UNDERCOVER POLICE EVERYWHERE. THEY COULD BE AT A SCHOOL OR A CHURCH, OR BIG HAT DAYS"
-FRESNO STATE DIRECTOR OF PUBLIC SAFETY DAVID MOLL



Ruth Obel-Jorgenson and other Cal State Fresno students protested undercover surveillance of their campus group's lecture on the benefits of a vegan diet.

The person they had speaking was fairly controversial, an animal rights activist that had been on campus before. You know, there's always the possibility, being a big ag community as we are, there are some people who see that as possibly affecting their livelihood.¹¹²

The Fresno Sheriff's Department continues to claim the right to monitor protected activity. Assistant Sheriff Tom Gattie said, "If there is an open meeting, we can listen."¹¹³

The students, however, did not take the violation of their rights lightly. They contacted the ACLU-NC, which wrote letters to the

Fresno State President and Fresno County Sheriff on their behalf. Students also held press conferences and staged a 48-hour hunger strike in front of the campus administration building. Ruth Obel-Jorgenson, President of the CPCLC, described how surveillance impacts people's willingness to express their views: "That kind of monitoring is wrong and it's sneaky. Even when you are doing nothing wrong, it makes you feel like you are, just to know someone is watching you."¹¹⁴

In May 2005, Fresno State University President John Welty issued a directive to Fresno State's Director of Public Safety David Moll and Fresno State Police Chief David Huerta prohibiting the use of undercover surveillance at campus events "unless they are required by law and have been expressly approved."¹¹⁵ Welty's order mandates that the university's vice president or president must be informed of any outside law enforcement agencies' on-campus investigations and requires the Fresno State Police Department to inform the event's organizers if they intend to use undercover officers for safety purposes.¹¹⁶

While this policy change was undoubtedly a success, it was tempered by the fact that Fresno State inexplicably refuses to allow public access to documents pertaining to the CPCLC event. Furthermore, to this day, the Fresno Sheriff's Department maintains the right to engage in this type of surveillance activity.¹¹⁷

CONTRA COSTA COUNTY SHERIFF'S DEPARTMENT: Secretly Monitoring Labor Rally

When Southern California Safeway store workers went on strike in 2003–2004, reaching an impasse on health care issues raised in contract negotiations, demonstrators voiced their opinions at Northern California Safeway venues as well. A delegation of religious leaders planned a pilgrimage to the home of Safeway CEO Steve Burd, located in the Contra Costa County city of Alamo, to deliver postcards supporting the striking workers.¹¹⁸ At the same time, the Contra Costa Sheriff's Department used its Homeland Security Unit to monitor the activity of labor activists in San Francisco.

On January 23, 2004, two men identifying themselves as members of the Contra Costa County Sheriff's Homeland Security Unit went to the United Food and Commercial Workers Union (UFCW) offices in Martinez, the union representing Safeway workers, to ask about the pilgrimage. UFCW staff told them that they were not organizing the event and directed them to a contact number on a flyer.¹¹⁹

The next day—despite the fact that the sheriff's department had been in contact with the pilgrimage organizers—union leaders saw the same sheriff's deputies in plainclothes attending a demonstration at a Safeway store in San Francisco. California Labor Federation Leader Art Pulaski approached the deputies and asked them if they were law enforcement. They denied it. One of the deputies said, "My brother is in Iraq and my father is a union oil worker. I'm just here to support the strikers."¹²⁰

When a UFCW staff member confirmed that the two men

USING A HOMELAND
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—LABOR LEADER
ART PULASKI

were in fact from Homeland Security, Pulaski asked them again—several times. The men finally admitted that they were sheriff's deputies in the Homeland Security Unit. Pulaski responded by telling the deputies, "We are alarmed at having undercover officers at a union rally. I have to tell you that I am greatly offended that you wouldn't give your name[s] and that you continued to lie about being in law enforcement."¹²¹

The Labor Federation went public about the surveillance. At a press conference denouncing the clandestine monitoring of the rally, Law Professor and former California State Supreme Court Justice Joseph Grodin said, "The kind of infiltration has the inevitable consequence of chilling the participation of innocent people in what is otherwise a constitutionally protected activity."¹²² Lutheran Pastor Carol Bean, one of the organizers of the pilgrimage, wondered, "When did priests and postcards become a threat to national security?"¹²³

Representatives from the ACLU-NC and its Mt. Diablo Chapter, the local League of Women Voters, the San Francisco Labor Coalition, and Reverend Phil Lawson (a clergy leader involved in the pilgrimage) met with and wrote letters to Sheriff Warren Rupf expressing concern about the monitoring.

Sheriff Rupf claimed that his deputies were not there to spy on labor leaders and were not performing "homeland security" functions. The deputies were attending the rally, he said, to learn about crowd management from the San Francisco Police Department.¹²⁴

Sheriff Rupf refused to release any police reports or other documents on the decision to send the deputies to the rally or the information they gathered. Rupf declared that the labor leaders had no privacy rights in their public activities.¹²⁵ The department had previously asserted that it was justified in monitoring protests because terrorists could use legal demonstrations

for cover.¹²⁶ The ACLU-NC filed a Public Records Act request with the San Francisco Police Department. The agency had no documents referencing any inquiries from or coordination with the Contra Costa County Sheriff's Department about the Safeway rally.

Shortly after the incident, the department changed the name of the Homeland Security Unit and the full extent of the unit's activities remain shrouded in secrecy. This incident may represent only the tip of the iceberg with regard to the department's practices. What is clear, however, is that the department still lacks a policy regulating the surveillance of peaceful demonstrations, paving the way for possible future abuses. As labor leader Pulaski explained, using a homeland security justification to monitor lawful activity "is sending a chilling and intimidating message to all of us."¹²⁷

SANTA CRUZ POLICE DEPARTMENT: Spying on Parade Planning Meetings

Police departments both large and small have run afoul of state privacy protections. In early 2006, the city of Santa Cruz had its own police spying scandal when undercover officers attended planning meetings for the Do It Yourself (DIY) New Year's Parade.

For the past several years, Santa Cruz had held a "First Night" parade on New Year's Eve to create a safe environment for celebrating the holiday. When Santa Cruz decided to cancel the parade, Wes Modes and fellow community activists decided to create their own parade, in part to protest the cancellation but largely to offer a forum for art and ideas. Among the intended purposes of the event were "free expression, empowerment, blowing minds, revolution, political involvement, developing alternative community, showing the power of the people, seeing more whimsy in our town, developing DIY culture, community."¹²⁸

Organizers decided not to seek parade permits, a decision they explained on their Web site:

Our institutions can barely manage their own affairs. And now, First Night, our little city-sponsored humdrum New Year's safe-and-

sane event, has finally imploded. It has never been clearer that we can't rely on anyone but ourselves. But after all, we make this city. And we create communities. Us. We are the force that has always made our communities connected and vital and full of life.¹²⁹

Police found out about parade plans in late October. Rather than contacting the organizers to facilitate the event or learn more about their plans, Santa Cruz Deputy Police Chief Kevin Vogel and Lieutenant Rudy Escalante decided to infiltrate the group's parade planning meetings instead.¹³⁰

The Santa Cruz Police Department sent in undercover officers with no consideration for potential privacy concerns and no information suggesting that the group was likely to engage in destructive or violent behavior. As explained by Santa Cruz Independent Police Auditor Bob Aaronson, the undercover operation "was not perceived to be 'a big deal.'"¹³¹

When parade organizers learned that their meetings had been infiltrated, they informed the press. Santa Cruz City Council members expressed their concern and demanded answers. Police Chief Howard Skerry promised a complete investigation. Rather than conducting the inquiry himself, or using officers not involved in the initial decision however, Chief Skerry tapped Deputy Chief Vogel—the very person who authorized the infiltration—to investigate whether the authorization was appropriate. Not surprisingly, Vogel's report cleared the Santa Cruz Police Department of any wrongdoing.¹³²

Community activists and the ACLU-NC denounced the investigation, highlighting the clear conflict of interest. Santa Cruz's Independent Police Auditor Bob Aaronson objected in a letter to the Santa Cruz City Manager, stating:

I regret to say that this Internal Investigation, for my purposes, is incomplete and flawed for a very predictable reason.

It violates one of the most basic investigative precepts by having been compiled and written by the very individual whose decisions are/should be under investigative scrutiny.¹³³

The city manager then authorized Aaronson to conduct his own investigation. In a 34-page report, the auditor analyzed the actions of the department and the constitutional right to privacy. Aaronson's report concluded that the parade organizers' rights were violated:

"THE SANTA CRUZ POLICE
DEPARTMENT VIOLATED
THE . . . PARADE ORGANIZERS'
RIGHTS TO PRIVACY,
FREEDOM OF SPEECH AND
FREEDOM OF ASSEMBLY."

-SANTA CRUZ POLICE
AUDITOR BOB AARONSON

The Santa Cruz Police Department violated the Last Night DIY Parade organizers' rights to privacy, freedom of speech and freedom of assembly in the manner in which they went about obtaining information about the organizers' activities. While the Department was obligated to collect information about the event, it was not free to choose the means without due consideration of the rights of the people involved. Less intrusive alternatives were available, but none were tried.¹³⁴

Aaronson found that the root of the problems that led to the incident was a lack of policy and training on the protections afforded by California's privacy provisions and *White v. Davis*, the landmark California Supreme Court case interpreting the state's constitutional right to privacy. Aaronson suggested that the incident presented the city with an opportunity to come together as a community to develop a clear policy addressing the obligations of law enforcement under the state constitutional right to privacy.¹³⁵

In April 2006, with the backing of the city council, the Santa Cruz City Manager convened a working group to begin crafting a new police department policy, seeking input from the ACLU. The new policy, which was issued on July 5, 2006, represents a significant improvement.¹³⁶ The policy now prohibits the use of undercover officers to investigate organizations in the absence of reasonable suspicion of a crime and requires the department, when feasible, to open dialogue with organizations rather than conducting surveillance.

Collaboration and communication toward a new policy represents an ideal solution. However, it will lead to positive change only if all parties commit to open dialogue and a shared goal of developing and implementing a comprehensive policy.

Despite the changes, the Santa Cruz policy still does not regulate monitoring organizations beyond the use of undercover officers, does not define First Amendment protected activity, and does not provide sufficient guidance to officers. Santa Cruz officials have promised additional dialogue, including another city council hearing. Although it is too soon to tell what the ultimate outcome of the process in Santa Cruz will be, it is clear that collaborative solutions offer the greatest promise in bringing about substantial reform.

SAN FRANCISCO POLICE DEPARTMENT: Policies Work Only When They Are Followed

Many police departments have no policies whatsoever regulating the use of undercover officers to monitor political activities. Other departments have regulations, but do not always follow them.



JEFF PATERSON

Undercover San Francisco police officers secretly monitored anti-war demonstrations like this one, in violation of department policy.

The San Francisco Police Department's policy on undercover officers includes the strongest protections for First Amendment activity in Northern and Central California, if not the nation. The San Francisco regulations were written and adopted following a police spying scandal in the 1990s. The policy stands as a model for other jurisdictions.

However, even the best policies are ineffective if they are not followed. That is exactly what happened when San Francisco saw huge protests against the war in Iraq between October 2002 and February 2003. During these demonstrations, several San Francisco police officers posed as protesters to monitor crowd activities. One officer even wore a pin of Cuban revolutionary Che Guevara on his hat. This undercover protest monitoring was never authorized by the chief of police, representing a failure to follow San Francisco's Guidelines for First Amendment Activities.¹³⁷

The violations came to light during a routine audit of police practices by the Office of Citizen Complaints (OCC). Under a section entitled "Critical Concerns," the audit noted the violation, finding that "certain officers, supervisors and command staff involved in requesting, providing or authorizing undercover surveillance were not trained or were not responsive to training on the Guidelines for First Amendment Activities."¹³⁸ After the OCC report was made public, the police department conducted an internal investigation that resulted in minor disciplinary action.¹³⁹

What happened in San Francisco demonstrates that even the strongest policies must be vigorously followed and monitored. The independent audit by the OCC proved critical in exposing the SFPD's failure to follow its own regulations. It serves as an important reminder of the value of

independent oversight and review of intelligence operations, a practice that is far too uncommon in police and sheriff's departments.

SACRAMENTO POLICE DEPARTMENT: Protest as "Crime Scene"

Police videotaping is another means of conducting surveillance of dissent that represents intimidation and chills protest activity. Sometimes police legitimately videotape demonstrations for training purposes or to document specific acts of unlawful activity. However, when the videotaping is used to identify members of a crowd who are peacefully exercising their First Amendment rights, it raises significant privacy concerns.

On February 15, 2003, peace and justice organizations held a demonstration in Sacramento to protest the then-impending war in Iraq. Approximately 10,000 people attended the peaceful anti-war demonstration at the state capitol. The Sacramento Police Department provided security for the event. They also sent a police department employee to videotape the demonstration. The videotaper wore a jacket labeled "Identification Specialist" and was accompanied by two uniformed officers.¹⁴⁰

Demonstrators were alarmed to see the employee videotaping protesters and members of the crowd. Maggie Coulter, a demonstration organizer, said, "I think it's intimidation. What in God's name are the police doing here, walking through the crowds in their black uniforms filming everyone. It sends chills through you." Coulter asked the "Identification Specialist" why she was videotaping the crowd. The police employee responded, "This is a crime scene."¹⁴¹

Sacramento Police Sergeant Justin Risley confirmed that taping of the protest was at least partially intended to modify protesters' behavior. As Risley told the *Sacramento Bee*, "What happens in a crowd is that there is a sense of anonymity, a lessening of personal responsibility. A riot mentality can develop. But if somebody feels they're being filmed, their behavior suddenly improves."¹⁴²

According to Professor Kevin Johnson of the University of California Davis Law School, such police actions are intimidating and raise significant privacy concerns:

Under the current climate, with civil liberties being limited in the name of national security, such conduct by police

may well cause concern among peaceful protesters. Political activists may feel threatened, especially immigrants who may be subject to deportation for political activities. The whole setup is designed to intimidate at some level.¹⁴³

Sacramento's videotaping practices may also be inconsistent with past policy agreements by the city. In 1983, in response to a lawsuit brought by the ACLU-NC, Sacramento agreed to limit their use of video surveillance of individuals at political events.

According to the settlement, individuals may only be singled out for filming where the person is engaged or beginning to engage in criminal activity: "Individuals who are speaking at rallies, or handing out literature, or engaging in other peaceful, constitutionally protected activities shall not be singled out for photographing or recording."¹⁴⁴

It is intimidating to be videotaped by a uniformed police employee or have a lawful protest viewed as a crime scene. It is unsettling in the extreme to find out that a fellow organization member—perhaps even an organization leader—is actually an undercover police officer.

In San Francisco we saw the consequences of having a policy, even an exemplary policy, that is not consistently followed. In Fresno, we saw what happens when no policy is in place at all. In Santa Cruz, we see a department moving toward reform with a new policy that represents some progress but still contains significant deficiencies.

To protect the rights of those engaging in lawful political activity, police departments must have policies in place that restrict surveillance of dissent and regulate the use of undercover officers monitoring activities protected by the First Amendment. Mechanisms must also be established to ensure that those policies are followed and enforced, including adequate auditing measures. These policies are needed to protect rights constitutionally guaranteed to all Californians. Unfortunately, those rights have been inadequately understood and disseminated throughout the ranks of California law enforcement.

"THIS IS A CRIME
SCENE."
-SACRAMENTO POLICE
EMPLOYEE DESCRIBING
AN ANTI-WAR MARCH

PART V: CALIFORNIA LAW AND THE LACK OF SURVEILLANCE REGULATION

The monitoring of political activity at the state and local level has not occurred for lack of constitutional protection. In fact, California's constitutional right to privacy provides greater protections than the federal Constitution. It is California law that prohibits surveillance of free speech activity in the absence of reasonable suspicion of a crime. Although this right exists as a legal principle in California, there is little regulation in place to enforce it.

ATTEMPTS AT REGULATION: The Lockyer Manual

Following the April 2003 Port of Oakland incident and subsequent disclosures about the California Anti-Terrorism Information Center (CATIC), the ACLU-NC urged Attorney General Bill Lockyer to issue guidelines for local law enforcement.

The resulting Lockyer Manual states that law enforcement must have reasonable suspicion of a crime to engage in surveillance of political activity. It outlines California's constitutional privacy protections and the state Supreme Court decisions interpreting and confirming those privacy rights. According to the manual, which was distributed to California local law enforcement agencies:

[A]bsent an articulable criminal predicate for the gathering of information it will not be possible to justify it under the general heading of intelligence activity. Specifically, White [the leading California Supreme Court precedent on this issue] teaches that there must be some connection between the information gathered and unlawful activity. Put another way, White is a warning to law enforcement in California that it cannot operate from the premise that it can gather intelligence on citizens' activities regardless of any articulable connection to unlawful action.... [W]here there is no indication that the information relates to acts which impact the safety of the public or individual members of the public it should not be collected."¹⁴⁵ (emphasis original)

Lockyer emphasized the need for privacy protections in several public statements and explained the importance of educating local law enforcement on these protections:

We hope to do a variety of things to be sure that our agents

and allies in law enforcement don't interpret it in ways that would allow spying on political groups or infiltrating mosques or things of that sort that I guess some believe could be done under the federal guidelines. We explicitly reject any work of that sort in California. It doesn't have a criminal predicate and that's the basis of our investigative activities.¹⁴⁶

Nathan Barankin, Lockyer's spokesperson, also spoke to the Lockyer Manual's policy and education goals:

This report, we hope, will help law enforcement agencies understand the complex rights and responsibilities of both law enforcement and the public. What the [attorney general] hopes is that they'll get it, and they'll read it, and take a look at their own policies to make sure they have effective and good ones in place.¹⁴⁷

Clarifying and communicating policies around surveillance and privacy protections to local law enforcement is imperative, and the ACLU-NC was pleased to see Attorney General Lockyer agree. However, we were curious to what extent the Lockyer Manual had in fact effected changes in policy and practice.

LOCKYER MANUAL IMPLEMENTATION: A Survey of Efficacy

The ACLU-NC surveyed 103 police and sheriff's departments across California in 2005 to assess local law enforcement implementation of the Lockyer Manual. (More information on survey methodology is available at www.aclunc.org/surveillance_report.) The survey asked for the following information:

- All policies, bulletins, and training materials implementing the Lockyer Manual
- All documents governing the circumstances under which law enforcement may or may not monitor or gather intelligence on individuals or organizations engaged in political or religious activity
- Whether the law enforcement department is a member of an FBI Joint Terrorism Task Force, and, if so, what rules govern that membership

The survey revealed a profound lack of regulation and a disappointing level of familiarity with the Lockyer Manual. Of the police and sheriff's departments surveyed, 94 provided some documents or a substantive response. Not one department of the 94 respondents had policy or training materials that referenced the Lockyer Manual. Only eight departments said they were aware of the document, used it for guidance, or distributed it to their members. The vast majority of respondents provided no documents. At least one department, the Westminster Police Department, had never heard of the manual:

I was not aware of the Lockyer Manual until its mention in this letter. I have searched the web briefly, and have

been unsuccessful in locating it. Therefore, I am also not aware of any "orders, bulletins, guidelines, policy statement, training materials, manuals or any other documents relating to the Lockyer Manual."¹⁴⁸

Other departments refused to respond to our survey in any substantive way. The Torrance Police Department suggested that fulfilling our request for information "could assist those who are considering or planning to engage in terrorist activity." This response provides another salient example of a tendency among some in law enforcement to blur the line between legitimate political activity and terrorism.¹⁴⁹

Policies were similarly deficient in enumerating privacy protections. Out of the 94 responding departments, only

ACLU-NC SURVEY OF LOCKYER MANUAL
IMPLEMENTATION BY CALIFORNIA POLICE
& SHERIFF'S DEPARTMENTS*

Number of departments surveyed: 103

Number of departments that responded: 94

Number of departments participating in,
having a liason to, or ad hoc membership
in a Joint Terrorism Task Force: 30

Number of departments that have regulations governing
the creation of intelligence files: 22

Number of departments that used, distributed,
or indicated an awareness of the Lockyer Manual: 8

Number of departments that have restrictions
on surveillance activities: 6

Number of departments that have policies referencing
California's constitutional right to privacy: 1

*2005 survey

one agency had a direct reference to the California constitutional right to privacy, and that was in a references section at the end of the policy.¹⁵⁰ A few departments' policies had vague references to the right to privacy, but even those lacked the strong language of the Lockyer Manual.

The vast majority of law enforcement agencies did not have policies regulating the circumstances under which officers may monitor or gather information on individuals engaged in political activity. Out of the 94 responsive police and sheriff's departments, only 6 departments had any policies regulating the monitoring of protected activity. The strongest policy in the state was from San Francisco, which provides broad protections for individuals and guidelines for officers in addition to auditing and reporting procedures designed to guard against abuses.¹⁵¹ The Los Angeles Police Department also has detailed procedures.¹⁵²

Some local law enforcement did have regulations on creating intelligence files. Several major police and sheriff's departments, including San Jose, San Diego, Modesto, and Long Beach, require that there be reasonable suspicion before opening an intelligence file on an individual. Still, among the 94 departments responding to our survey, only 22 agencies had any policies restricting the creation of intelligence files.

Regulations were even more scarce controlling joint operations between local and federal law enforcement. Over 20 of the 94 responding departments said they are members of or affiliated with the FBI's Joint Terrorism Task Force (JTTF). Yet, these collaborative activities appear to be conducted without policies or adequate training to ensure that California's constitutional protections are understood and followed.

Attorney General Lockyer has frequently emphasized that the California Constitution is more protective of privacy than federal law. Unfortunately, it appears that this distinc-

THE SURVEY REVEALED
A PROFOUND LACK OF
REGULATION AND A
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LOCKYER MANUAL.

tion has not been conveyed to local law enforcement effectively. None of the task force members responding to our survey provided specific guidance on California privacy protections to its task force members.¹⁵³ At least one JTTF partner believes that its members are obligated to follow the less protective federal law, even though they are California officers. In his response to our survey, Sanford A. Toyen, Legal Advisor to the San Diego County Sheriff, said:

The FBI and not the Sheriff's Department dictates policy statements, general orders, manual, and other material covering the functions and duties of JTTF members.¹⁵⁴

The ACLU-NC survey findings mirror Santa Cruz Independent Auditor Bob Aaronson's conclusions, enumerated in his report on undercover officers infiltrating Santa Cruz parade planning meetings. He found that the issue of limitations on government surveillance of political activity is "inadequately addressed, to the extent that it is addressed anywhere. As well, neither Santa Cruz nor the vast majority of other law enforcement agencies, large

THE VAST MAJORITY OF LAW
ENFORCEMENT AGENCIES DID NOT
HAVE POLICIES REGULATING THE
CIRCUMSTANCES UNDER WHICH
OFFICERS MAY MONITOR OR GATHER
INFORMATION ON INDIVIDUALS
ENGAGED IN POLITICAL ACTIVITY.

or small, have explicit policies which adequately deal with the issue."¹⁵⁵

PART VI. RECOMMENDED REFORMS FOR LAW ENFORCEMENT SURVEILLANCE ACTIVITIES IN CALIFORNIA

History has shown that acute problems develop when surveillance of political activity is allowed to continue without regard for privacy protections. The increase in inappropriate government surveillance of the past five years, combined with a lack of regulation, oversight, and accountability, mandates a response at both the state and local level.

Policies are not only vital for preserving civil liberties, they also represent good law enforcement practice that leads to effective results. In the words of California Attorney General Bill Lockyer: “We can protect our freedoms and our public safety... If people don’t trust the police, it makes it much harder to get the job done. If you respect people’s civil liberties, you’re more likely to get assistance.”¹⁵⁶

The International Association of Chiefs of Police (IACP) discussed the importance of policies at length in its 2005 report, “Intelligence-Led Policing: The New Intelligence Architecture.” The IACP argued that although intelligence functions are critical to solving crimes, intelligence gathering must nevertheless be specific and regulated.¹⁵⁷

Having learned from the abuses of the 1960s and ‘70s, the IACP specifically highlights the need for privacy protections. As the report states, all agencies should “ensure that privacy issues are protected by policy and practice. These can be done without hindering the intelligence process and will reduce your organization’s liability concerns.”¹⁵⁸

Unregulated intelligence gathering simply is not effective policing, the IACP stressed. It emphasized the importance of understanding what intelligence actually is, and warned of the perils of confusing information with intelligence. Collecting excessive amounts of irrelevant information does not improve law enforcement’s effectiveness. Useful intelligence is produced through targeted information collection and good analysis. As the IACP instructed, “To be effective, intelligence collection must be planned and focused; its methods must be coordinated, and its guidelines must prohibit illegal methods of obtaining information.”¹⁵⁹

In light of these recommendations from the law enforcement community and the examples of surveillance abuses described in this report, the ACLU of Northern California recommends the following reforms for law enforcement surveillance activities in California.

1. ADOPT AND IMPLEMENT LOCAL LAW ENFORCEMENT REGULATIONS. Most of the state’s local law enforcement agencies have no policies regulating when officers can monitor or infiltrate groups engaging in First Amendment protected activity. California Attorney General Bill Lockyer had the right idea when he issued the Lockyer Manual. However, local law enforcement policies have not incorporated Lockyer’s manual or his instructions about privacy rights.

To remedy this lack of guidance and information, the following actions should be taken:

a. California Attorney General Bill Lockyer should issue specific guidelines to local law enforcement on California’s constitutional right to privacy and state law’s limits on collecting information and undercover monitoring of political activity. The current Lockyer Manual, while helpful, is lengthy and covers several topics. Because it is not written as a policy or bulletin, it is not well suited for training. The new guidelines should clarify what the attorney general has asserted in the past: “We can’t do surveillance or investigate without reasonable suspicion.” Given law enforcement agencies’ failure to implement his 2003 manual, Lockyer’s new guidelines need to be specific and direct.

b. Attorney General Lockyer must actively promote implementation of the guidelines. The California Constitution charges the attorney general with supervising all local sheriffs. Lockyer should utilize this authority and direct local sheriffs to implement these new surveillance guidelines. Although the attorney general does not have the same authority over local police departments, his position as California’s top law enforcement officer accords him a great deal of persuasive power. The attorney general should utilize his position and actively push for regulations governing surveillance in California.

c. The California Legislature should pass legislation requiring local law enforcement agencies to report on their surveillance activities to the Legislative Analyst's Office (LAO) annually. Reports by local police and sheriff's departments should include copies of their policies, the number of times the agency investigated or used undercover officers to monitor organizations engaging in protected activity, the circumstances surrounding the monitoring, and any violations of department surveillance policies. The LAO should release the reports' policy and statistical information to the public annually.

d. Local law enforcement and local governments should proactively adopt policies protecting the privacy rights of individuals. Local regulations should clearly state that law enforcement may not monitor or infiltrate organizations engaged in First Amendment protected activity in the absence of reasonable suspicion of a crime. Fortunately, several good policies already exist. The best of these surveillance policies are combined into a "best practices" policy that is attached as Appendix A. We recommend that every law enforcement agency adopt and implement a policy similar to this one.

2. THE CALIFORNIA LEGISLATURE SHOULD PASS LEGISLATION REGULATING STATE INTELLIGENCE AGENCIES.

The California Anti-Terrorism Information Center and the California National Guard have both recently been involved in inappropriate monitoring of political activity. Current reports indicate that the state Office of Homeland Security (OHS) lacks sufficient regulation and may have attempted to implement several programs with serious civil liberties concerns. The California Legislature should act to regulate these agencies by doing the following:

a. The California Legislature should pass Senator Joe Dunn's SB 1696 and the governor should sign it. Dunn's legislation prohibits the California National Guard from engaging in domestic surveillance without express approval from the state legislature. This piece of legislation mirrors the federal Posse Comitatus Act, which prohibits the military from engaging in domestic policing activities.

b. The California Legislature should pass legislation regulating the state's intelligence agencies.

The legislature should create an Inspector General position to audit and investigate complaints against OHS and other state-level intelligence agencies. The Inspector General should be required to issue regular reports delineating activities that could potentially impact individuals' constitutional rights. An Inspector General will act as a control on OHS, which is currently insufficiently regulated, and has broad authority over significant intelligence functions.

3. INSTITUTE REGULATIONS, REVIEW, AND TRAINING PROTECTING THE RIGHT TO PRIVACY IN LOCAL LAW ENFORCEMENT'S JOINT OPERATIONS WITH FEDERAL AGENCIES.

California's Constitution provides greater protection than federal law, but local agencies do not provide FBI Joint Terrorism Task Forces (JTTF) members with instructions or regulations to safeguard those protections. Agencies at both the state and local level should take action to prevent California officers from becoming entangled in federal programs that may violate California law. Documents obtained by the ACLU nationally suggest that the JTTFs are gathering information about political organizations in a manner that may violate California's constitutional right to privacy.

a. Both the state attorney general and local law enforcement executives should issue specific guidelines to state and local law enforcement serving on FBI Joint Terrorism Task Forces. These guidelines should outline the differences between state and federal requirements and highlight an officer's responsibility to follow California law. Local officials should not participate in JTTF assignments that violate California law.

b. Local city councils and boards of supervisors should hold annual hearings to review their jurisdiction's participation in Joint Terrorism Task Forces. At the hearings, officials should carefully examine local JTTFs' roles in surveillance of political activity and any racial, ethnic, or religious profiling being used or suspected of being used. These hearings follow the model used by Portland, Oregon, which held hearings on the local JTTF for years, and by the Contra Costa County Board of Supervisors, which passed legislation last year requiring annual JTTF review hearings.¹⁶⁰

PART VII. CONCLUSION

Over the last several years, increased intelligence funding, an inadequate understanding of privacy laws and protections for political activity, and a profound lack of regulation have all led to inappropriate monitoring of organizations and individuals engaged in constitutionally protected political activity.

We have become aware of the stories in this report largely by chance. If history is any guide, they are only the tip of the iceberg.

At this moment in our history, state and local officials possess a unique opportunity. They must take action now and protect Californians' privacy, before even greater abuses occur.

Thirty years ago, the U.S. Senate-appointed Church Committee investigating government surveillance wrote: "In time

of crisis, the government will exercise its power to conduct domestic intelligence activities to the fullest extent. The distinction between legal dissent and criminal conduct is easily forgotten." That lesson is as salient now as it was then.

Again and again, Californians expressed strong support for individual privacy rights. Historically and today, political activity, dissent, and freedom of expression occupy a vital place in our state.

Government officials and law enforcement have the elected duty to institute policies, educate officers, and conduct reviews to ensure that California maintains a clear distinction between dissent and criminal conduct. Their actions are essential to protecting political activity and free expression in California.

IF HISTORY IS ANY GUIDE,
[THE STORIES IN THIS
REPORT] ARE ONLY THE TIP
OF THE ICEBERG.

APPENDIX A.

BEST PRACTICES GUIDELINES FOR FIRST AMENDMENT ACTIVITIES

These guidelines come from policies in use by law enforcement agencies throughout Northern and Central California. Although this may not represent a truly “model policy,” it does gather together some of the best policies on First Amendment activities currently employed by regional law enforcement agencies. This policy focuses on issues relating to First Amendment activities, privacy, and oversight; it is not intended as a comprehensive policy covering all aspects of criminal intelligence.

I. STATEMENT OF PRINCIPLES

- A. The Santa Cruz Police Department supports the right of citizens to freely associate without government interference, respects the protections afforded Americans by the First and Fourth Amendments to the Constitution of the United States and respects the right of privacy guaranteed to individuals under the State and Federal Constitutions. (Santa Cruz Police Department Departmental Directive, section 610 Undercover Operations, July 5, 2006))

II. DEFINITIONS

- A. **First Amendment Activity:** All speech associations and/or conduct protected by the First Amendment and/or California Constitutions Article I, section 2 (Freedom of Speech) and/or Article 3 (Right to Assemble and Petition the Government, including but not limited to expression, advocacy, association or participation in expressive conduct to further any political or social opinion or religious belief). Examples include speaking, meeting, writing, marching, picketing or other expressive conduct protected by the First Amendment. (San Francisco Police Department General Order 8.10, Guidelines for First Amendment Protected Activities, June 30, 1999)
- B. **Articulate and Reasonable Suspicion:** The standard of reasonable suspicion is lower than probable cause. This standard requires members to be able to articulate specific facts or circumstances indicating a past, current, or impending violation, and there must be an

objective basis for initiating an investigation. A mere hunch is insufficient.

1. **Demonstrations.** The Department shall not conduct an investigation in connection with a planned political demonstration, march, rally or other public event, including an act of civil disobedience, unless the prerequisites of Section [III A] are met. Nothing shall preclude the Department, however, from openly contacting organizations or persons knowledgeable about a public event to facilitate traffic control, crowd management or other safety measures at the event. (San Francisco Police Department General Order 8.10, Guidelines for First Amendment Protected Activities, June 30, 1999)

III. INVESTIGATIVE STANDARDS

- A. **When a Criminal Investigation That Involves First Amendment Activities Is Permitted.** The Department may conduct a criminal investigation that involves the First Amendment activities of persons, groups, or organizations when there is articulable and reasonable suspicion to believe that:

1. They are planning or engaged in criminal activity
 - a. Which could reasonably be expected to result in bodily injury and/or property damage in excess of \$2500
 - b. Or which constitutes a felony or misdemeanor hate crime
2. And the First Amendment activities are relevant to the criminal investigation. (San Francisco Police Department General Order 8.10, Guidelines for First Amendment Protected Activities, June 30, 1999)

B. When These Guidelines Apply

1. The Department must follow these guidelines in every criminal investigation that involves the First Amendment activities of a person, group or organization. These guidelines do not apply to criminal investigations that do not involve First Amendment activities.
2. These guidelines are intended to regulate the conduct of criminal investigations that involve First Amendment activities by requiring
 - a. Written justification for the investigation and
 - b. Written approval by the commanding Officer of the Special Investigations Division, Deputy Chief of Investigations and the Chief of Police.
3. These guidelines, however, are not intended to interfere with investigation into criminal activity. Investigations of criminal activities that involve First Amendment activities are permitted provided that the investigation is justified and document as required by these Guidelines. (San Francisco Police Department General Order 8.10, Guidelines for First Amendment Protected Activities, June 30, 1999)

IV. AUTHORIZATION OF INVESTIGATIONS

- A.** A member of the Department may undertake an investigation that comes within these guidelines only after receiving prior written authorization by the Commanding Officer of the Special Investigations Division (SID), the Deputy Chief of the Investigations Bureau and the Chief of Police. (San Francisco Police Department General Order 8.10, Guidelines for First Amendment Protected Activities, June 30, 1999)

V. USE OF UNDERCOVER OFFICERS

A. Undercover Investigation: Authorization

No undercover investigation shall be commenced without the written approval of the Chief of Police and Committee.

Exception: In an emergency involving a life threatening

situation and the Undercover Committee is unavailable, an undercover investigation may be commenced with the approval of the Chief of Police. Telephonic notification to the Undercover Committee shall be made as soon as possible and written approval from the Undercover Committee shall be requested within 72 hours. (Los Angeles Police Department ATD Anti-Terrorism Division Standards and Procedures, March 18, 2003)

B. Less Restrictive Alternatives

Absent exigent circumstances that require an undercover investigation to commence immediately, the Police Department will not undertake any such undercover investigation unless it has first sought to gather information it seeks through direct and open communication with the subject of the investigation or the subject's membership. Authorized undercover investigations shall use the least intrusive techniques possible given the circumstances. Examples of less intrusive techniques include tactics such as researching departmental records or researching public records, the Internet, or other information sources accessible by the general public. When covert surveillance becomes necessary, the Police Department whenever feasible shall conduct that surveillance from a public location before undertaking surveillance from private property with or without the property owner's consent. (Santa Cruz Police Department Departmental Directive, Section 610 Undercover Operations, July 5, 2006)

C. Conduct of Undercover Officers

Tactics employed by police personnel will comply with existing law, will not entail entrapment, and will not further criminal acts. Undercover officers shall not assume leadership positions in the organizations under surveillance and shall not attempt to direct organizational activities. (Santa Cruz Police Department Departmental Directive, Section 610 Undercover Operations, July 5, 2006)

D. Time Duration

No undercover investigation instituted per this policy shall extend for more than thirty days without the Police Chief or Deputy Police Chief's authorization to extend the investigation. Extension authorizations may not exceed thirty days in duration. (Santa Cruz Police Department Departmental Directive, Section 610 Undercover Operations, July 5, 2006)

E. Continuing Need for Reasonable Suspicion

Any such undercover investigation shall immediately cease when the investigation or other information reveals that the reasonable suspicion which prompted the investigation is unfounded. (Santa Cruz Police Department Departmental Directive, Section 610 Undercover Operations, July 5, 2006)

VI. INTELLIGENCE FILES

A. Creation of Intelligence Files: Restrictions

1. Only criminal intelligence information concerning an individual or group may be collected and maintained if there is "reasonable suspicion" that the individual or group is involved in criminal conduct or activity, the information is relevant to that criminal conduct or activity, and relates to activities that present a threat to the community.
2. Criminal intelligence information shall not be collected or maintained about the political, religious, or social views, associations, or activities of any individual or any group, association, corporation, business, partnership, or other organization, **UNLESS** such information directly relates to criminal conduct or activity **AND** there is reasonable suspicion that the subject of the information is or may be involved in criminal conduct or activity. (Modesto Police Department General Order 5.02, May 1, 2005, emphasis in original)

B. Information Dissemination

1. The dissemination level is the classification of information and how it is to be shared with agencies, if at all. If more than one agency submits information on the same subject and the information is linked in the automated database, the dissemination level viewed in the system must reflect the most restrictive dissemination level...
2. Only authorized personnel shall disseminate criminal intelligence information and only where there is a need-to-know and a right-to-know the information in the performance of a law enforcement activity.

3. Criminal intelligence information shall be disseminated only to law enforcement or criminal investigative authorities that shall agree to follow procedures regarding information receipt, maintenance, security, and dissemination that are consistent with this General Order. This shall not limit the dissemination of an assessment of criminal intelligence information to a government official or any other individual, when necessary, to avoid imminent danger to life or property.

4. An audit trail or dissemination record is required when information is disseminated from the database. The record shall contain the following information:

- a. The date of dissemination of the information
- b. The name of the individual requesting the information
- c. The name of the agency requesting the information
- d. The reason for the release of the information (need-to-know/right-to-know)
- e. The information provided by the requester
- f. The name of the staff member disseminating the information (Modesto Police Department General Order 5.02, May 1, 2005)

C. File Review and Purge

Information stored in the Criminal Intelligence files should be reviewed periodically for reclassification or purge in order to ensure that the file is current, accurate, and relevant to the needs and objectives of our department; safeguard the individuals' right of privacy as guaranteed under federal and state laws; and, ensure that the security classification level remains appropriate...Reclassifying and purging information in the intelligence file should be done on an ongoing basis as documents are reviewed. In addition, a complete review of the Criminal Intelligence file for

purging purposes will be undertaken every five years.... Materials purged from our Criminal Intelligence file will be destroyed in accordance with applicable laws, rule, and state/local policy. (San Jose Police Department Criminal Intelligence Unit, Operating Procedures, October 20, 2004)

VII. VIDEOTAPING

A. Authorization

It is the policy of the Department to videotape and photograph in a manner that minimizes interference with people lawfully participating in First Amendment events. Video or photographic equipment shall not be brought or used without the written authorization of the Event Commander. (San Francisco Police Department General Order 8.10, Guidelines for First Amendment Protected Activities, June 30, 1999)

B. Purpose

The Department shall videotape or photograph only for crowd control training or evidentiary purposes. Evidentiary purposes shall include only:

1. Evidence that is reasonably likely to be used in administrative, civil, or criminal proceeding or investigations.
2. Evidence related to allegations against members of the Department. (San Francisco Police Department General Order 8.10, Guidelines for First Amendment Protected Activities, June 30, 1999)

VIII. AUDIT AND REVIEW

A. Police Commission Review

On an annual basis, the Police Commission shall conduct or request an outside auditor to conduct an audit of the Department's files, records and documents to determine whether the Department is in compliance with the guidelines. In addition, the Police Commission may conduct such an audit unannounced at any time.

1. In conducting the yearly audit, the Police Commission shall review the following:

- a. All current guidelines, rules and memoranda interpreting the guidelines
- b. All documents relating to investigations subject to Section III, and undercover techniques to Section [V] of these guidelines
- c. All Agency Assisted Forms or other documentation relating to the transmittal of documents to other criminal justice agencies, as described in Section [VI B].

2. The Police Commission shall prepare a written report concerning its annual audit, which shall include but not be limited to:

- a. The number of investigations authorized during the prior year.
- b. The number of authorizations sought but denied.
- c. The number of times that undercover officers or infiltrators were approved.
- d. The number and types of unlawful activities investigated.
- e. The number and types of arrests and prosecutions that were the direct and proximate cause of investigations conducted under the guidelines.
- f. The number of requests by members of the public made expressly pursuant to these guidelines for access to records, including:

- i. The number of such requests where documents or information was produced.

- ii. The number of such requests where the documents or information did not exist.

- iii. The number of requests denied.

- g. The number of requests from outside agencies, as documented by an Agency Assist Form, for access to records of investigations conducted pursuant to these guidelines, including:

- i. The number of such requests granted.
 - ii. The number of such requests denied.
- h. A complete description of violations of the guidelines, including information about:
- i. The nature and causes of the violation and the sections of the guidelines that were violated.
 - ii. Actions taken as a result of discovery of the violations, including whether any officer has been disciplined as a result of the violation.
 - iii. Recommendations of how to prevent recurrence of violations of the guidelines that were discovered during the prior year.
 - iv. The report shall not contain data or information regarding investigations that are ongoing at the time of the report's creation. The data and information, however, shall be included in the first report submitted after the completion of the investigation.

(San Francisco Police Department General Order 8.10, Guidelines for First Amendment Protected Activities, June 30, 1999)

IX. VIOLATIONS OF GUIDELINES

A. If the Police Commission determines that an actual violation of these guidelines and/or First Amendment has occurred, the Commission shall:

- 1. Notify the parties about whom information was gathered or maintained in violation of the guidelines pursuant to the following:
 - a. When information is released to individuals or organizations, the names and identifying information concerning private citizens other than the individual notified shall be excised to preserve their privacy.
 - b. There shall be no disclosure if the information is reasonably likely to endanger life,

property or physical safety of any particular person. However...if the information may be segregated, such that a portion of the information can be disclosed without endangering the life or physical safety of one particular person, that portion of the information that the Police Commission concludes can be disclosed without endangering the life or physical safety of any particular person will be disclosed.

- c. There shall be no disclosure if disclosure is prohibited by local, state or federal law.
- d. The Commission may deny disclosure if disclosure is exempt under San Francisco's Sunshine Ordinance ... with the following exceptions:
 - i. The...exception for personal and otherwise private information shall not be applied unless that information would reveal the identity of an individual other than the requesting party.
 - ii. The (exemption)...of "secret investigative techniques or procedures" shall not be allied to the fact that a particular procedure occurred, but only to a description of how that procedure was executed, and shall apply only if the information would jeopardize future law enforcement efforts....

e. No disclosure is required if an investigation is ongoing, but disclosure may be made during an ongoing investigation within the discretion of the Commission.

- 2. Refer the violation to the Chief of Police for a recommendation concerning discipline of the members involved. (San Francisco Police Department General Order 8.10, Guidelines for First Amendment Protected Activities, June 30, 1999)

ENDNOTES

- ¹ James Risen and Eric Lichtblau, “Bush Let U.S. Spy on Callers Without Courts,” *New York Times*, December 16, 2005.
- ² Lisa Myers et. al., “Is the Pentagon Spying on Americans?” *msnbc.com*, December 14, 2005.
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