

Council of the District of Columbia Report

1350 Pennsylvania Avenue, NW Washington, D.C. 20004

To: All Councilmembers
From: Kathy Patterson, Chairperson, Committee on the Judiciary
Date: March 24, 2004
Subject: Report on Investigation of the Metropolitan Police Department's Policy and Practice in Handling Demonstrations in the District of Columbia

Executive Summary

The investigation by the Committee on the Judiciary into the policies and practices of the Metropolitan Police Department in handling demonstrations in the District of Columbia has found:

- Metropolitan Police Department use of undercover officers to infiltrate political organizations in the absence of criminal activity and in the absence of policy guidance meant to protect the constitutional rights of those individuals being monitored. (See page 75)
- A pattern and practice of misrepresentation and evasion on the part of leaders of the Metropolitan Police Department with regard to actions by the Department. (See page 88)
- Repeated instances of what appear to be preemptive actions taken against demonstrators including preemptive arrests. (See pages 32 and 50)
- Failure of the Metropolitan Police Department to effectively police its own members for misconduct associated with demonstrations. (See page 34)
- Failure of the Metropolitan Police Department to acknowledge and to protect the rights of individuals to privacy, and to free speech and assembly.
- Repeated instances of violating the Department's own guidelines for handling demonstrations contained in the *Standard Operating Procedures for Mass Demonstrations, Response to Civil Disturbances, and Prisoner Processing* including guidelines on use of force in defensive situations, de-escalation in crowd control, and predicates required for mass arrests. (See page 100)

The Committee recommends legislation setting out clear guidelines for the Metropolitan Police Department with regard to mass demonstrations and police surveillance and infiltration of political organizations (see page 117). The Committee's findings and recommendations follow, and are also contained in bold type within the text of the report.

Case Study: April 2000 and the Convergence Center

On April 15, 2000, officials of the Fire and Emergency Medical Services Department and Metropolitan Police Department closed down the headquarters (convergence center) of the demonstrators using of fire code violations as the rationale.

Findings

- Actions taken by the Metropolitan Police Department and Fire and Emergency Medical Services Department to close the convergence center the day of the anti-globalization demonstrations violate prohibitions on infringement of free speech.
- The circumstances surrounding the inspection of the convergence center raise serious questions as to whether the action was a pretextual criminal law enforcement search in violation of the Fourth Amendment.
- An MPD videotape taken during the convergence center raid highlighted names, phone numbers, and addresses of individuals participating in the anti-globalization activities. While the videotape may have been within legal boundaries pertaining to information in plain and public view, its existence and maintenance raise additional questions about police intent in terms of surveillance of protected political activities.
- MPD officials provided erroneous and misleading information to the public concerning what was found and confiscated at the convergence center, in a manner that suggests an attempt to characterize demonstrators as prone to violence.

Case Study: The 2001 Inauguration, Pepper Spray, and MPD Self-Policing

On Inauguration Day in January 2001, an MPD officer pepper sprayed a group of demonstrators. The officer was exonerated by an incomplete and contradictory MPD internal investigation. Other internal investigations reviewed by the Committee were also incomplete.

Findings

- The Metropolitan Police Department has failed in several instances to demonstrate effective self-policing by either failing to initiate investigations when they are called for by compelling evidence, or by initiating investigations that are themselves incomplete, contradictory, and in some cases not consistent with the facts, with the result that officials are not held accountable for misconduct.
- The Metropolitan Police Department failed to investigate the inauguration day pepper spray incident until well after it occurred and only when forced to take the occurrence seriously by both ongoing litigation and this Committee's oversight, giving rise to the perception that misconduct within the ranks is tolerated.
- The investigation itself ignored the conflicting evidence presented by an amateur videotape that clearly shows Investigator Cumba acting as the aggressor with the crowd in his use of pepper spray. The investigation's report failed to address the point of the discrepancy in the officers' own statements versus the visual record of the videotape.
- The investigation failed to move up the chain of command to ascertain why the officer used pepper spray in this manner and failed to ascertain if this was, as alleged, an instance of serving as *agent provocateur*, a practice the department leadership officially decries.
- The investigation of allegations by Adam Eidinger, Margaret Luck and David Curtis similarly were not carried to their logical conclusion in questioning the policy and practice of conducting surveillance on political activists, the inappropriate use of motorcycles during demonstrations, and the seriousness of making a wrongful arrest of a demonstrator.
- The department failed to initiate its own investigation of the Pershing Park arrests based on highly critical internal after-action reports sent up the chain of command to the General Counsel and Executive Assistant Chief (see "Case Study: The Pershing Park Investigation").
- The failure of the Department to initiate investigations into the pepper spray incident and the Pershing Park arrests gives rise to the perception that misconduct is investigated only when it becomes a political liability for the Department.

Recommendations

- The pepper spray incident should be re-investigated by an independent authority. Options include the Department of Justice (DOJ) Independent

Monitor overseeing implementation of DOJ's memorandum of agreement with MPD on the use of force, or the DOJ Inspector General.

Case Study: The Pershing Park Arrests, September 2002

On September 27, 2002, approximately 400 people were unlawfully arrested during a demonstration in Pershing Park.

Findings

- Facts on the record point to a decision to make preemptive mass arrests at Pershing Park. Through his public statements and directions to MPD commanders, Chief Ramsey set a tone that allowed for and approved of preemptive arrests. MPD created an expectation of violence, directed individuals into the park, and failed to permit persons to leave.
- The rationale for the arrests at Pershing Park was based on alleged unlawful activity earlier that morning, but MPD commanders did not have probable cause to arrest everyone in the park on the basis of those allegations.
- If the rationale for the arrests is that demonstrators failed to disburse or were on an un-permitted march, the arrests were still unlawful because MPD arrested demonstrators at Pershing Park (as well as at Vermont Avenue and K Streets) without first giving orders or warnings, in violation of MPD policy.
- Chief Ramsey is responsible for the arrests at Pershing Park, though he initially testified before the Judiciary Committee that he was not a part of that decision.
- The official version of what occurred and what went wrong at Pershing Park as presented in the testimony of Executive Branch witnesses fails to acknowledge the fundamental flaws in MPD's execution and interpretation of its mass arrest policy that day. This failure has consequences in terms of MPD's commitment to protecting First Amendment rights during future demonstrations, as well as its ability to objectively review its own policies and procedures.

Case Study: The Pershing Park Investigation

In November 2002, at the prompting of the Council and Mayor Williams, MPD conducted an internal investigation into the arrests at Pershing Park.

Findings

- The Metropolitan Police Department violated its own general orders by failing to promptly initiate a formal investigation of the wrongful arrests and detention when questions about their legality were raised immediately by MPD officials, the Office of Corporation Counsel, the media, and the Council.
- At the direction of Chief Ramsey and in violation of MPD general orders, changes were made to the investigative report after it was completed by the Office of Professional Responsibility. The changes served to weaken criticism of the Department and alter the nature of the arrests.
- The decision to have Executive Assistant Chief Fitzgerald interview Assistant Chief Newsham was a clear conflict of interest given EAC Fitzgerald's role during the arrests. It also appears to have violated a general order giving the right to interview officials to the investigating officers, as well as the MPD's Memorandum of Agreement with the Department of Justice on use of force.
- The interview conducted by EAC Fitzgerald was incomplete.
- The investigation and release of the final report were marked by evasions and misstatements by senior officials including Chief Ramsey, giving rise to the appearance of an attempt to cover up Chief Ramsey's role in ordering the Pershing Park arrests.
- The Department created a conflict of interest by assigning Assistant Chief Newsham, Director of the Office of Professional Responsibility, to an operational role during the September 2002 demonstrations, a conflict that continues to exist.

Recommendations

- Any questions about the legality of mass arrests, excessive force, or information indicating a violation of MPD policies contained in mass demonstration after-action reports should be automatically referred to the Office of Professional Responsibility and investigated immediately and thoroughly. This likely requires a more formalized interaction between the office of the Assistant Chief, Special Services, and the office of the Assistant Chief, Office of Professional Responsibility, following a mass demonstration.
- Investigations of actions of Assistant Chiefs and the Chief of Police should be referred to the Office of the Inspector General and not handled internally by the Department.
- The Assistant Chief of the Office of Professional Responsibility should not have an operational role during mass demonstrations.

- MPD units and individuals outside of the Office of Professional Responsibility (OPR) should not participate in OPR investigations in any operational way.
- Officials reviewing investigative reports should denote, in writing, their comments and recommended changes to reports and requests for further investigation, pursuant to MPD policy.

Emerging Issues: Surveillance and Infiltration of Demonstration Organizations

Since 2000, MPD has used undercover officer to infiltrate political organizations.

Findings

- MPD assigned undercover officers to conduct surveillance of political organizations and activists in the absence of criminal activity.
- MPD assigned undercover officers to conduct surveillance of political organizations and activists without giving those officers any relevant training or policy guidance. MPD did not issue any guidelines in this area until December 2002, over two years after it started using undercover officers for this purpose. Current guidelines are not sufficient.
- The Committee found no clear evidence that MPD maintains dossiers on individual political activists, but MPD does document political activity in the absence of policy guidance.
- The Committee found no evidence that MPD has a *policy* of using *agents provocateur*, though specific allegations of this kind of activity have not been sufficiently investigated.

Recommendations

- MPD should conduct intelligence operations solely for a legitimate law enforcement purpose.
- Before police undertake surveillance of any group engaging in constitutionally protected expression or freedom of association, there should be reasonable suspicion to believe that the group is engaging in, planning to engage in, or about to engage in criminal activity.

- MPD should be prohibited from using undercover officers to conduct surveillance of individuals or organizations based solely on the content of their political speech or ideology.
- Surveillance in this context should be expressly approved by the Assistant Chief for Special Services, be time-limited in duration, and be conducted in a manner that is not more extensive or intrusive than is justified by its purpose.
- MPD should be required to have an internal oversight mechanism once an undercover operation is underway that, on a regular basis, reviews the activity of and information gained by undercover officers and determines whether undercover surveillance is still warranted.
- Officers engaged in surveillance should report regularly to the Assistant Chief for Special Services. MPD should immediately cease such surveillance once facts made known to officers no longer support reasonable suspicion.
- MPD should be prohibited from maintaining files or dossiers on individuals in the absence of criminal activity and be required to purge files unrelated to criminal activity.
- MPD should be expressly prohibited from using *agents provocateur*.

Emerging Issue: Failures in Leadership Accountability

During the course of the Committee's investigation, members of the senior ranks of the Department sought to evade direct answers to important questions and, in some instances, misrepresented the record and their role in Departmental actions.

Findings

- In February 2003 testimony before the Council Chief Ramsey denied that he had a role in the decision to arrest individuals in Pershing Park in September 2002.
- There has been a persistent effort by MPD leadership to exaggerate the numbers of and threat posed by anti-globalization demonstrators.
- Both Chief Ramsey and Assistant Chief Alfred Broadbent, Jr. expressly denied that the Department directed protesters into Pershing Park, yet the record shows that the opposite is the case.

- Chief Ramsey testified that following the Office of Professional Responsibility investigation into the Pershing Park arrests, he implemented certain requirements in MPD policy and procedure, but some of those requirements have existed in MPD policy since 1976.
- Assistant Chief Brian Jordan testified that he did not participate in discussions among command staff members prior to the arrests at Pershing Park, information contradicted by four witnesses, including three MPD officials in their sworn testimony.
- Chief Ramsey and Assistant Chief Broadbent in Council testimony denied or sought to diminish the seriousness of alleged violations of the rights of political activists.
- Senior officials in the Department displayed a pattern of evasion in their depositions by claiming not to recall certain events – claims that are implausible on their face.
- Several MPD officers and officials provided truthful and careful testimony, some perhaps at risk to themselves and their careers and despite a climate of fear within the department that does not encourage such cooperation.

Emerging Issue: Departing from Best Practice in Managing Demonstrations

The Committee evaluated MPD's policies and practices generally in handling demonstrations.

Findings

- Under current leadership, the Metropolitan Police Department has failed to effectively manage controversial political demonstrations, giving rise to concern about its ability to manage these events in the future.

Recommendations

- Consistent with the original Office of Professional Responsibility Pershing Park report as submitted to Chief Ramsey, all police executives need to be Civil Defense Unit (CDU) trained or re-trained. It is important that those charged with incident command during demonstrations be those most experienced in crowd management.
- MPD should streamline its communication structure during mass demonstrations so that one Incident Commander is consistently making field command decisions.

- MPD should evaluate its technological capacity for handling a large volume of prisoners, include information technology staff in planning prior to events with a potential for mass arrests, and periodically conduct exercises to test this capacity.
- MPD should release people charged with offenses for which citation and immediate release are appropriate within a reasonable period of time. If prisoners are held beyond four hours, MPD should document the reasons for the delay.
- MPD should provide arrestees with written descriptions of release options that include a complete range of options provided by District of Columbia law and regulation, arrestees' rights under the law, and accurate information about fine amounts.
- MPD should follow its policy and District of Columbia law regarding the collection, maintenance and distribution of prisoner property.
- The Committee endorses the Citizen Complaint Review Board's recommendation that MPD modify its arrest procedure to ensure that all citizens who pay to resolve their arrest through post and forfeit are provided with written notice about the collateral forfeiture process and its consequences and that they sign an acknowledgment of their choice to pay the collateral.
- MPD use of physical restraints against individuals arrested during demonstrations should be limited to what is necessary to secure and control them.
- The MPD General Counsel and an attorney from the Office of Corporation Counsel should be on the scene of mass demonstrations that have the potential for mass arrests.
- MPD should issue a clear, written policy on the treatment of media during mass demonstrations and this policy should be incorporated into the SOPs and training curriculum on mass demonstrations.
- Consistent with MPD policy, police officers should honor press credentials and not make ad hoc judgments as to press legitimacy. As is the case with other persons, credentialed reporters should not be arrested unless they are specifically observed breaking the law.

Conclusion: The Need for Statutory Guidelines

The Committee recommends legislation containing guidelines for Metropolitan Police Department practice in two areas: conducting surveillance and infiltration of political organizations and handling problematic mass demonstrations

Recommendations:

- Prior to each mass demonstration, the police chief should issue a directive saying that MPD's overall mission during mass demonstrations is to protect demonstrators' First Amendment right to assemble and protest, and that in the event that individuals engage in unlawful behavior, those individuals shall be arrested without abridging the rights of others lawfully assembled.
- Consistent with current MPD policy, MPD should not disperse nonviolent demonstrators in the absence of unlawful activity.
- Consistent with current MPD policy, MPD should not arrest nonviolent demonstrators for failure to disburse or failure to obey an order without first giving multiple and clearly audible warnings and an opportunity for demonstrators to comply with police orders.
- MPD should not arrest nonviolent demonstrators solely for failure to have a parade permit unless 1) there is another permitted demonstration planned for the same location 2) the demonstrators are blocking buildings or traffic 3) the demonstrators are acting disorderly.
- MPD should not use police lines to surround and detain nonviolent demonstrators.
- Consistent with current MPD policy, when conducting arrests during a mass demonstration, MPD should, through the use of field arrest forms and commander event logs, contemporaneously record facts necessary to establish probable cause for the arrests.
- Individuals arrested during mass demonstrations should receive copies of their field arrest forms.
- Consistent with current policy, when conducting mass arrests, when practical, MPD should film police actions in their entirety, including giving warnings and dispersing or arresting demonstrators, in accordance with existing regulations governing the use of Closed Circuit Television cameras.
- MPD should not conduct a mass arrest based on the unlawful conduct of a few demonstrators. When arrests are necessary, MPD should only arrest those demonstrators responsible for the unlawful conduct.

- MPD should follow its current use of force policy that: 1) the use of force, including riot batons, OC spray and chemical agents be used according to strict standards; 2) force should only be used as authorized by the highest ranking official on the scene, or, in the case of chemical agents, only as authorized by the chief of police; 3) the use of force should be documented and such documentation should be made available to the public consistent with the reporting requirements of MPD's Memorandum of Agreement with the Department of Justice.
- MPD should follow its current policy of using riot gear only at the authorization of the highest ranking official on the scene and only when there is reason to anticipate violence.
- During mass demonstrations, all uniformed officers should be plainly identified by their badge numbers, which should be displayed in large numbers emblazoned on their jackets so as to be clearly visible to the public.
- Uniformed officers should never remove their badges or any other identifying emblem, and supervisors should never authorize such removal, or be subject to disciplinary action.
- Consistent with current MPD policy, plain-clothes officers should be required to identify themselves before taking any police action.
- MPD should notify the Office of Citizen Complaint Review (OCCR) in advance of demonstrations in which mass arrests may be reasonably anticipated. OCCR should monitor each such demonstration, and should then issue a public assessment of police performance, identifying any police misconduct.

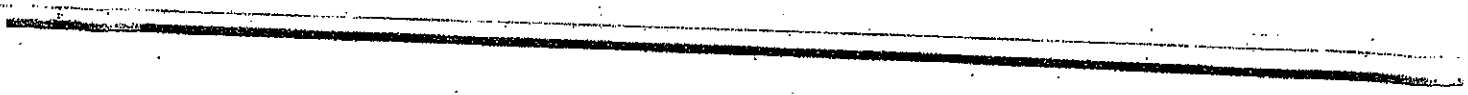
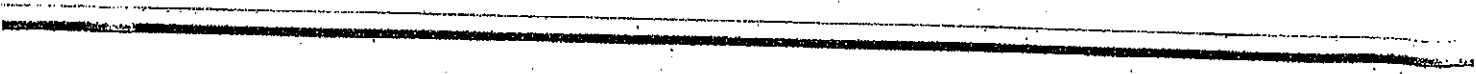


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INTRODUCTION

The Committee on the Judiciary initiated an investigation into the policies and practices of the Metropolitan Police Department in handling demonstrations based on police actions that appeared to violate the U.S. Constitution starting in April 2000 and continuing into early 2003. The Committee stepped in with an investigation because other branches of government – the U.S. District Court and the Executive Branch of the District government, respectively -- have not been in a position to, or failed to act timely, on matters before them. Lawsuits filed in U.S. District Court in the wake of questionable police actions in April 2000 had not yet even gone to trial four years after the fact. The Williams Administration has continually voiced its support for police actions that appeared to others to clearly violate the U.S. Constitution as well as D.C. law and Metropolitan Police Department regulations.

With regard to such matters the Council of the District of Columbia has an added responsibility: all of the same law enforcement issues were raised in the 1970s. As recounted in the *Context* section of this report, the massive May Day 1971 anti-war demonstrations in Washington led to two major lawsuits against the District based on charges of wrongful arrest and police overreactions. Accusations of domestic spying against D.C. political leaders by local and federal law enforcement were raised in the same period of time. In the 1970s and 1980s the Council and the courts relied on the Executive Branch to right the wrongs that were proven on the public record. In 2004 the Council cannot make the same assumptions and the same mistakes of omission that were demonstrated by Council predecessors in the earlier era.

The Committee approved the investigation, which authorized the issuance of subpoenas, by resolution on April 28, 2003. The committee found that "allegations made on the public record concerning preemptive actions in April 2000, wrongful arrests made on September 27, 2002, and excessive use of force in April 2003 by the Metropolitan Police Department warrant the conduct of an investigation by the Committee to ascertain the validity of the allegations."

The resolution set out issues for examination including:

Issues raised in media reports, testimony, court filings, and other information concerning the period in April 2000 when demonstrations were scheduled to protest policies of the International Monetary Fund and World Bank during meetings of those organizations in the District including actions allegedly taken by the Metropolitan Police Department to preemptively prevent the exercise of freedom of speech and assembly.

Issues raised by the September 27, 2002, arrests of persons assembled in Pershing Park and their detention including the findings of the MPD

Office of Professional Responsibility as to failure of department officials to follow the law and Departmental orders...

Whether Metropolitan Police Department policies reflect best practices in managing large demonstrations such that public safety and individual civil rights and civil liberties are protected, including a comparison of current practice with policies and practice in the 1970s and 1980s when the Department had a national reputation for effectiveness in this area of law enforcement.

In June the Committee secured the services of two special counsel to assist in the investigation: Mary Cheh, professor of law at the George Washington University Law School and an expert in constitutional law and criminal procedure, and David Schertler, an attorney in private practice and former head of the homicide division of the Office of the U.S. Attorney for the District of Columbia. As the investigation proceeded over the summer Mr. Schertler's law practice demanded his full-time and his participation in the investigation ceased.

The Committee also set out to evaluate MPD's policies and practices, generally, in handling and preparing for demonstrations. To assist this process, the Committee reviewed all of MPD's related written policies, researched relevant constitutional case law, related legislative history, and national best practices. To get a better understanding of the nature of the current complaints against MPD in this area, the Committee reviewed all of the relevant litigation currently pending against the city.

The investigation proceeded through the use of case studies including the alleged preemptive closing of demonstrators' headquarters, "the convergence center" on April 15, 2000; the allegation of an undercover officer using pepper spray against demonstrators during the 2001 inauguration parade; the UNLAWFUL arrest of nearly 400 persons at Pershing Park in September 2002; and the MPD investigation into those arrests. The case studies were presented at the hearings and are included in this report.

The Committee issued a series of document subpoenas beginning in July and reviewed over 5000 pages of documents. The Committee began conducting a series of oral depositions in executive session in the fall and issued subpoenas for written depositions to MPD Chief Charles Ramsey and Department of Fire and Emergency Medical Services Chief Adrian Thompson. On December 4, 2003, the Committee met in executive session under Committee and Council rules and reported out of executive session certain documents, testimony and information that are now part of the public record.

The Committee held two days of investigative hearings on December 17 and 18, 2003, and information placed on the record in the hearings as well as information gleaned from the depositions and subpoenaed documents is reflected

in this report. The Committee met again in executive session on March 4, 2004 and voted certain other information onto the public record and that information, also, is included in this report.

In addition to the case studies presented in the hearing and in the sections that follow, three other, related issues emerged from the Committee's work: (1) the surveillance and infiltration of political organizations by the Metropolitan Police Department; (2) a pattern and practice of misrepresentation and evasion on the part of Chief Ramsey and others in senior command; and (3) a serious weakening in the Department's professionalism in managing controversial political demonstrations, giving rise to concerns that public safety and First Amendment rights could be at risk in future events. Each of these is addressed in the *Emerging Issues* section of the report.

It should be noted that, while the investigation's authorizing resolution referenced MPD's handling of "demonstrations," the majority of the Committee's work has been focused on a small number of demonstrations where MPD has used tactics that merit Council review. The Committee primarily examined MPD's policies and practices handling anti-globalization and anti-war demonstrations since April 2000. Since January 2000, MPD has managed approximately 500 demonstrations. According to testimony, in 2003 alone, MPD managed 291 demonstrations, and there were permits for only 49 of them. The vast majority of demonstrations in the nation's capital take place without incident and are handled well by MPD. When there has been a breakdown in policy and procedure, it has occurred during the more provocative demonstrations where police believe there is a likelihood of civil disobedience and the potential for civil disturbance. These are the demonstrations that the Committee has reviewed in detail.

It should also be acknowledged that the Committee, in its criticism of MPD's handling of demonstrations in recent years, is not ignoring the challenges created for law enforcement by large protests that include participation by individuals prone to breaking the law. Much has been made of the violence that occurred during the World Trade Organization meetings in Seattle in November 1999 – violence largely the result of poor planning on the part of the police department and other government entities. In the wake of public concern over the management of mass demonstrations following Seattle, the Metropolitan Police Department had clear responsibility to prepare for subsequent mass demonstrations to the best of its ability.

The Committee is also cognizant of the specific problems that have been faced by MPD during anti-globalization mass demonstrations in the District in recent years. For example, Lt. Jeffery Herold, who commands the Special Operations Division's Security Operations Branch, testified that in April 2000, a burning dumpster was "hurled at a police line." He also testified about a group that broke off during the main demonstration and "broke into the dorms at George

Washington University, emptied these dorms of all furnishings, put them in the street, blocked streets to prevent police access." Sergeant Keith DeVille, who supervises the civil disturbance training unit, testified:

We've had M80s, fire crackers thrown at us. I, personally, was struck with a bottle in the face at the Inaugural.....I know a sergeant from SOD that had her jaw broken by an iron pipe, and I witnessed that.

The United States Attorney's Office sought to prosecute twenty-six arrests made during the April 2000 demonstrations, including nine charges of possession of implements of a crime conspiracy, eleven unlawful entry charges, one charge of dumping, three charges of assault on a police officer, one charge of theft, and one charge for possession of a molotov cocktail. The individual arrested for possession of a molotov cocktail entered into a plea agreement and was sentenced to time served, a term of supervised probation and psychological treatment and counseling in June 2001. In addition, the Office of Corporation Counsel papered 54 misdemeanors as a result of the arrests made on September 27, 2002.

Indeed, the Committee does not take issue with MPD responding to actual illegal activity with arrests. But there have been instances in recent years when MPD has taken preemptive action based on the *potential* for illegal activity, or on provocative political speech, rather than on law breaking. As Art Spitzer of the American Civil Liberties Union of the National Capital Area testified:

We are not suggesting that there is any legal right to engage in civil disobedience. Violating a valid law exposes the violator to arrest, prosecution, conviction and punishment. But non-violent civil disobedience does not justify police violence, and it certainly does not justify the arrest of hundreds of people who have *not* broken any law. Nor does the *threat* of civil disobedience, or even the threat of some vandalism, justify the *preemptive* arrest of people who have not broken any law.

It is these latter instances cited by Mr. Spitzer that are of concern to the Committee, and that prompt the Council to review MPD's policies and practices in handling demonstrations.

What follows in this report are sections that provide both the national context and the historical context in the District of Columbia including a discussion of MPD's handling of the 1971 May Day demonstrations and resulting litigation. The report includes sections on the case study of the closing of the convergence center; the case study of the pepper spray incident as an example of MPD failure at self-policing; the case study of the unlawful Pershing Park arrests in September 2002; and a section detailing the department's investigation of the

Pershing Park arrests, with Committee "findings" at the end of each section. The three "emerging issues" noted above are then addressed, followed by a conclusion to the report that sets out the Committee's recommendation for legislation to provide statutory guidelines on handling demonstrations and political surveillance. The report includes a series of appendices with additional background on these issues.

The Judiciary Committee has been assisted in this investigation by George Washington University law professor Mary Cheh, who served throughout as Committee special counsel, and to whom the Council owes its profound thanks. The Committee has also been ably assisted by John Hoellen, assistant general counsel in the Office of the General Counsel. The Committee staff lead for the investigation has been Amy Mauro with staff assistance also provided by Tamera Lewis and Committee Clerk Renee McPhatter. The panel was also assisted by two law school interns, Josh Harris and Alina Morris, and the Committee extends its thanks to them as well.

Obstacles to the investigation

In conducting this investigation, the Committee's work has been hindered throughout by the refusal of the Williams Administration to respond timely and completely to Judiciary Committee subpoenas. From the issuance of the first subpoena in July 2003 to date the Committee has granted extensions of time, rescheduled depositions, and granted requests that information not be placed on the public record though such action is within the Committee's discretion. Beyond the lack of timeliness and completeness, the Williams Administration has consistently withheld information, citing "law enforcement privilege" even though such privilege is not relevant to a Council investigation. The lack of respect for the law evidenced in the Williams Administration's actions with regard to this investigation mirror the Committee's findings with regard to the actions of the Metropolitan Police Department in violating constitutional rights as well as D.C. law.

Prior to the December hearings the Committee chair reiterated the need for certain documents included in subpoenas but provided only in heavily redacted form. In an exchange of emails, the Office of Corporation Counsel, speaking on behalf of the Williams Administration, raised a concern that if materials are provided to the Committee they could be sought and received by parties in litigation against the District. While the Council General Counsel opined that the OCC was in error as a matter of law in this instance, Councilmember Patterson agreed to present clarifying legislation to the Council to address the administration's concern. That legislation, the "Disclosure of Information to the Council Emergency Act of 2004," was approved on an emergency basis by the Council on February 3, 2004.

Notwithstanding this good faith action by the Council, the Williams Administration continued to withhold documents from the Committee. Having no other option, the Council on February 17, 2004, approved a resolution authorizing the general counsel to go to D.C. Superior Court to seek enforcement of the document subpoena. In moving the resolution to enforce the document subpoena, Councilmember Patterson noted the record of the Judiciary Committee's request, the receipt of heavily redacted documents, and the assertion of privilege by the administration, an assertion rejected by counsel. The Council approved the resolution unanimously.

At close of business the same day the Office of Corporation Counsel provided additional documentation to the Committee, far short of the total of five documents for which subpoena enforcement was approved. In good faith, again, Committee Chair Patterson reviewed the documentation, and, again, reduced the amount of material required for completion of the investigation, and offered to refrain from court action if certain materials were made available to the Committee. Following the intercession of City Administrator Robert Bobb on March 4, 2004, certain additional documents were made available, though the administration continued to assert "law enforcement privilege" with regard to items redacted. The information newly available permitted the Committee to complete its report, while continuing to consider whether the items withheld constitute sufficient ground to seek court action to enforce the subpoenas.

It is the Committee's view that the failure to respect the Council's authority throughout eight months of an investigation is part of a larger whole that includes the violation of constitutional rights of political activists through infiltration, surveillance, preemptive actions and wrongful arrests. Failing to acknowledge the rights and responsibilities of the elected legislature is not as egregious as bringing physical and emotional harm to District residents, but it is nonetheless an egregious executive branch failure on the part of Mayor Williams and his subordinates.

II. CONTEXT: ACROSS THE COUNTRY

The Judiciary Committee has reviewed Metropolitan Police Department policy on demonstrations against a national backdrop of efforts by law enforcement agencies, state and local officials, and the Bush Administration to change both law and practice in the name of safety and security, all in the continuing shadow of the September 11, 2001 terrorist attacks. Local and federal actions to monitor, investigate, and in some instances prohibit activities long protected by the First Amendment have prompted widespread concern over the potential negative impact on civil liberties.

While acknowledging that there are at times tradeoffs between public safety and freedom of speech and assembly, the Committee concurs with the view of the Gilmore Commission (the congressionally appointed Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction) that what is needed today is "a long-term sustainable approach to security that protects not just lives but also our way of life." [Appendix E: Civil Liberties in a Post-9/11 World]. The Gilmore Commission, in its final report in December 2003, revisited the views of the original framers of the U.S. Constitution, who "recognized that civil liberties and security are mutually reinforcing." The Commission continued: "Security clearly ensures the freedom to exercise our liberties, but it is also true that the exercise of our civil liberties and our way of life contributes to our strength and security."

Through legislation and litigation U.S. police entities, including the Federal Bureau of Investigation, are blurring the distinction between intelligence and law enforcement as an outgrowth of the war against terrorism. This important and wide-ranging development includes questioning the continuing validity of the requirement, heretofore, that criminal activity or the reasonable suspicion of criminal activity must precede police use of certain types of investigation. Earlier prohibitions on creation of dossiers on individuals based on their political activities have been weakened in the name of an expanding definition of "law enforcement." Some police departments apparently are following the lead of the FBI in using "disruption" techniques, borrowed from intelligence practices overseas and applied locally to prevent or minimize protest activity. Some local jurisdictions, as well as the Secret Service, have used buffer or "no protest" zones at public events as a security tool, a practice that has been challenged for having a chilling effect on civil liberties.

On Sunday, February 8, 2004, the *Washington Post* ran a 3-paragraph wire service story from Des Moines, Iowa, about a federal court ordering Drake University to refrain from disclosing information about a federal investigation into an antiwar seminar held on the college campus the previous fall. Des Moines press accounts described four antiwar activists called before a federal grand jury. The local United States attorney declined to comment on the nature of the investigation. Also targeted: the National Lawyers Guild, which has participated

in scores of lawsuits against police departments around the country based on alleged violations of constitutional rights of political activists. Within a matter of days the prosecutor clarified that the sole issue under investigation was allegations of trespassing on National Guard property, leaving unclear why the federal prosecutor was interested in an on-campus political rally.

News stories like the one from Iowa are part of the national context within which the Judiciary Committee has conducted its investigation of police practices here. That context includes changing policies throughout the country both prior to, and in the wake of, the September 11, 2001 terrorist attacks. It includes litigation arising from major events that drew protests and police responses in Seattle, San Francisco, Philadelphia, Los Angeles, and – most recently – Miami.

The national backdrop includes a movement by law enforcement to move away from policies adopted in the aftermath of controversies over police use of “Red Squads” to infiltrate political organizations in the 1960s and 1970s. Local officials in Chicago and New York City have recently petitioned the courts to rescind or weaken orders governing police activities seen to infringe on civil liberties. That movement was given new energy after September 11 through enactment of the federal Patriot Act and other policies by the Department of Justice and Federal Bureau of Investigation that have had the effect of limiting the exercise of free speech and free assembly. This section surveys the landscape for those specific events that make up the wider national debate.

Protests & Litigation

San Francisco

On April 28, 1992, a southern California jury acquitted Los Angeles police officers in the beating of Rodney King. The next day a demonstration in downtown San Francisco led to several violent injuries. The city reacted by imposing restrictions on demonstrations in the downtown area. Part of the mayor’s order required officers to, among other things, implement a policy of custodial arrests instead of citations in order to disperse gatherings whenever the officer had reason to believe the gathering would endanger, or was likely to endanger, persons or property. The next day a group assembled in downtown San Francisco. Police ordered dispersal. As people moved away from the central area they were surrounded and arrested. Between four and five hundred persons were arrested; some were held up to 55 hours.

A class action lawsuit, *Collins v. Jordan*, was filed in U.S. District Court charging the city, county, mayor, police chief and individual police officials with violating the First and Fourth Amendment rights of those gathered in the downtown area and subsequently arrested. The court found that the earlier violence fell far short of “the type of occurrence that could have led any reasonable official to believe that it would be constitutional to impose a city-wide

ban on all demonstrations and that the law to that effect was clearly established." The *Collins* decision underscored earlier decisions that unlawful conduct must be addressed after it occurs, and that acting before demonstrators broke a law was presumptively a violation of First Amendment rights.

Seattle

In his deposition before the Judiciary Committee, Assistant Chief Alfred Broadbent said, "everything changed with Seattle." He referred to the World Trade Organization meetings in Seattle, Washington from November 29 to December 3, 1999. Broadbent assumed his duties overseeing the MPD's special services in January 2000. He told the Committee that an immediate task was preparing for the meeting here of the International Monetary Fund and World Bank in anticipation that the anti-globalization protests evident in Seattle would move next to the nation's capital for the IMF-World Bank meetings. The international organizations had held twice-yearly meetings in Washington for several years.

In his testimony before the Committee in December, Chief Broadbent referred to the events in Seattle:

The face of demonstrators, the organization's planning, and the tactics exhibited by the demonstrators changed dramatically from the department's experience with such events over the last 25 years. The department subsequently learned that the history of the demonstrators in Seattle 1999 was a direct result of political actions transpiring throughout Europe during the past several decades. Such large-scale disruptive civil disobedience had not been experienced by law enforcement in this country....

The demonstrations, which occurred in Seattle, sent a clear message to law enforcement. There was widespread looting, uncontrolled civil disobedience and over 3 million dollars in property damage and destruction to downtown Seattle... There was a loss of confidence by the community that the government could not protect innocent citizens from unwarranted disruption of their livelihoods....

Because of the Seattle unrest, the department was uncertain what to expect, and wisely prepared for the worst possible scenario, which would be a repeat of demonstrators planned civil unrest in Seattle.

Because the events in Seattle loom large in the Metropolitan Police Department's approach to demonstrations, particularly anti-globalization demonstrations, the committee sought to gain a better understanding of what actually took place in December 1999. What emerges from the record in several after-action reports is a complicated blend of poor planning, a local police force

overwhelmed by the number of anti-globalization activists, a small number of violent actions by a minority of demonstrators, and broad overreaction by both civilian and police authorities.

The WTO conference "became one of the most disruptive events in Seattle's history" according to the Seattle City Council's World Trade Organization Accountability Review Committee final report. That report describes what happened in Seattle as "the disastrous week of tear gas, burning dumpsters, and injured citizens." The Seattle Police Department's after-action report said there were 631 arrests associated with the demonstrations, most of them for obstruction of traffic and failure to disperse. Local newspapers put the financial costs at \$3 million in property damage and \$17 million in lost sales during the 5-day conference.

The Seattle Accountability Review Committee report notes that prior to the WTO decision to meet in Seattle, local officials were briefed about "the riots that occurred at the 1998 WTO Conference in Geneva," but appeared to dismiss that information. "If SPD believed the threat assessments," the report notes, "then they would know that 600 commissioned police officers would not be enough to adequately monitor 50,000 demonstrators, much less prevent violent activities and/or arrest and detain those who participated in civil disobedience."

The Review Panel found that:

The WTO Conference deteriorated into chaos and violence due to: (1) Poor planning and preparation; (2) Limited coordination among Mayor Paul Schell, the Seattle Police Department, and the Seattle Host Organization; and (3) A pattern of leaders at every level abdicating their responsibilities throughout the planning process.

With specific reference to the police department, the report concludes: "Chief Stamper's failure to provide leadership and to ensure fiscal accountability contributed to the lack of proper planning, which placed the lives of police officers and citizens at risk and contributed to the violation of protestors' constitutional rights."

More than a dozen lawsuits resulted from the events in Seattle. One case brought against King County by two individuals who were pepper sprayed while seated in their car was settled at a cost of \$100,000 for the two plaintiffs. Two other litigants, also claiming to have been pepper sprayed by police, settled for \$2,500 each. Several press photographers settled for from \$25,000 to \$32,000 each in cases arising from use of tear gas and, in one instance, a photographer being knocked to the ground and arrested. In the major class action arising from the WTO conference events, *Victor Menotti, et al., v. City of Seattle, et al.*, a U.S. District Court essentially sustained the Seattle Police Department's use of "no-protest zones" and the plaintiffs appealed that decision to the 9th Circuit Court of

Appeals where the case is pending. The same court required the department to reform its policies for public disclosure of information. In terms of other outcomes from the Seattle demonstrations: the police chief resigned under fire and the mayor failed to gain reelection two years later.

Political Conventions: Los Angeles and Philadelphia

In the weeks leading up to the Democratic National Convention in Los Angeles in August 2000 a group of political activists including unions sought an injunction to prevent the Los Angeles Police Department from enforcing a "secured zone" of more than the 8 million square feet around the Staples Center, site of the convention. The city and convention planners proposed that all demonstrations take place in a protest site some 260 yards from the center, based on security concerns. In *Lawyers Guild v. City of Los Angeles*, the U.S. District Court granted the injunction, finding that "the sidewalks and streets contained within the designated 'secured zone' are traditional public fora for the exercise of First Amendment rights." The Court also found that municipal regulations were unconstitutional because they constituted a lengthy pre-filing requirement and gave officials "unbridled discretion" on an "impermissible content-oriented basis."

In a later settlement in Los Angeles, journalists who had been hit with police batons and rubber bullets during the convention received damages and the Los Angeles Police Department agreed to policies assuring journalists the right to cover events even after police issue orders to disperse.

A lawsuit, *International Action v. the City of Philadelphia et al.*, stemming from the 2000 Republican National Convention in Philadelphia led to a federal court order in July 2003 that Philadelphia refrain from enforcing regulations on permits for special events when marches, demonstrations and rallies are protected by the First Amendment.

Miami 2003

A *Washington Post* report from Miami published November 21, 2003, stated, "Police in riot gear fired rubber bullets and canisters of chemical spray Thursday to disperse thousands of demonstrators gathered in the shadow of downtown skyscrapers to protest the proposed formation of a Western Hemisphere free-trade zone." Diplomats from western countries gathered in Miami for trade discussions, hosted by the Bush Administration, and the Miami community reportedly sought to display its suitability as a possible permanent home for a new trade organization. The Congress approved \$8.5 million in federal funds to support the meeting, including reimbursements for security costs.

In the days following the Miami meetings a host of national organizations called for Justice Department and/or Congressional inquiries into "the massive