

and unwarranted repression of constitutional rights and civil liberties" according to a letter to Attorney General John Ashcroft from AFL-CIO President John Sweeney. The United Steelworkers of America called on the U.S. Congress to investigate the police department and the Sierra Club asked the Department of Justice for an investigation. The AFL-CIO asked both DOJ and the state of Florida to investigate the "intimidation and abuse of peaceful protesters."

In testimony before the Judiciary Committee in December, AFL-CIO chief international economist Thea Lee described the planning by 90 organizations concerned with "global justice issues" for a week of seminars and other events, culminating in a march and rally on November 20. She said the labor organizations and other groups estimated their presence would be between 10,000 and 20,000 persons, but police repeatedly estimated that demonstrators would total up to 100,000. That exaggeration, she said, created concern for the public and permitted the police jurisdictions to essentially "over-prepare" and create an atmosphere of hysteria.

She said the AFL-CIO negotiated for months over arrangements for the permitted march and rally, taking particular concern for the comfort of senior citizens - 25 busloads of seniors were expected at the rally at the Bayside Amphitheater sponsored by the Alliance for Retired Americans. That morning, however, she said they awoke to a "militarized zone" with the entrance to the amphitheater blocked by tanks and water cannon. Buses were prevented from dropping the seniors off near the event, as previously arranged while other buses of seniors from throughout Florida were kept well away from the downtown area. She said previously credentialed AFL-CIO marshals were told their credentials were invalid and participants "were denied access to rental toilets and 10,000 bottles of water we had purchased."

After the rally she described actions by police lines to move rally participants away from the amphitheater down a side street. "Police in riot gear then began firing rubber bullets directly into the crowd." The experience in Miami, she said, "was something beyond any of the previous demonstrations" at trade meetings around the country. While noting the presence of many courteous and professional law enforcement officers, she said, "our quarrel is with police management and the top city officials." The leadership, she said, was responsible for "obstruction; intimidation; harassment; excessive, unnecessary and unprovoked use of force; possibly illegal search and seizure, and arrests."

As of mid-December the ACLU had gathered more than 130 reports of protester injuries, including 19 confirmed head injuries, and indicated plans to file at least three and as many as a dozen lawsuits against the Miami-area police departments, cities, and counties.

Police Department Retrenchment

In recent years as national and local groups have challenged law enforcement actions during demonstrations, police departments have sought to remove rules and regulations that have governed their surveillance of political organizations since the 1960s when police "Red Squads" were faulted for Constitutional violations. Prior to the September 11, 2001 terrorist attacks, police officials in Chicago and New York City sought, and eventually succeeded, in amending procedures agreed to in the wake of domestic spying scandals in the 1960s and 1970s.

Chicago

Antiwar protesters and others filed suit in 1974 accusing the Chicago Police Department and its so-called "Red Squad" of violating the rights of antiwar groups, religious activists, and others based on the content of their speech. A U.S. District Court consent decree resulted, limiting domestic surveillance unless an organization had demonstrated actual criminal intent. In 1999 the city of Chicago and Chicago Police Department asked the U.S. District Court to relax the restrictions negotiated in the 1970s, and in January 2001 the 7th Circuit Court of Appeals ruled that the regulations were an impediment to law enforcement.

In March of that year the U.S. District Court accepted a modified decree that acknowledges First and Fourth Amendment protections, essentially approves "reasonable time, place and manner regulations supported by an appropriate governmental interest," and protects against "government intrusion not justified by an appropriate governmental interest or function." The decree enjoins the Chicago Police Department from violating First Amendment guarantees adding "nothing shall enjoin reasonable investigative or law enforcement activities that are permitted by the First Amendment."

A departmental general order issued in October 2001 restates the language of the court decree. The policy statement includes:

Department members may not investigate, prosecute, disrupt, interfere with, harass, or discriminate against any person engaged in First Amendment conduct for the purpose of punishing, retaliating, or preventing the person from exercising his or her First Amendment rights.

The 2001 general order permits "investigations directed toward First Amendment-related Intelligence" that are not part of a criminal investigation with the approval of a senior official, with a time limit of 120 days, and based on having "a proper law enforcement purpose." Examples cited: (1) someone hands out fliers supporting the bombing of targets in the U.S. and an investigation pursues the source of the literature; (2) a website promotes violence in furtherance of pro-life goals and the investigation monitors the number of hits the website receives. The policy permits infiltration approved by the Superintendent of Police

and, if permitted longer than 30 days, progress reports every 30 days. The General Order includes another example of a situation that does not warrant investigation:

An organization advocating worldwide disarmament opens an office in Chicago and a sworn member suggests raiding its offices to determine if it advocates violence. This raid could not be authorized as there is no evidence to even suggest that a violation of any law has or will occur. Additionally, if literature reflecting the group's views can be obtained through other means, the raid would violate this directive's requirement of minimization procedures. Any search of nonpublic areas would also violate the Fourth Amendment if performed without a warrant and in the absence of consent or exigent circumstances.

New York City

The U.S. District Court in New York City ruled in February 2003 that "fundamental changes in the threats to public security" warranted modifying another long-standing court order that restricted the New York Police Department's ability to conduct surveillance of political groups. A 1971 lawsuit, *Handschu v. Special Services Division*, charged harassment of political organizations by the New York Police Department's "Red Squad." In 1972 the U.S. District Court for the Southern District of New York held that the department's intelligence gathering operations involving political activists did constitute injury by creating a chilling effect on First Amendment activities. While noting that informers and infiltrators constituted valid techniques, the court placed restrictions on their use. After that decision the parties negotiated a consent decree known as the *Handschu Guidelines*.

The federal judge last year relaxed but did not terminate the Handschu Guidelines, indicating that the earlier agreement's constitutional protections "are unchanging." The court required the department to adopt internal guidelines, and the department's "Guidelines for Investigations Involving Political Activity" were issued later in the year. According to the cover memorandum issued to all commands in the department, "These guidelines eliminate many of the restrictions of the former Handschu Guidelines and provide the Department with the authority and flexibility necessary to conduct investigations involving political activity, including terrorism investigations."

As is the case with the Chicago policies, the NYPD guidelines state that "matters investigated be confined to those supported by a legitimate law enforcement purpose" and may be initiated "in advance of unlawful conduct." The "general principles" include:

When, however, statements advocate unlawful activity, or indicate an apparent intent to engage in unlawful conduct, particularly acts of violence, an investigation under these guidelines may be warranted, unless

it is apparent, from the circumstances or the context in which the statements are made, that there is no prospect of harm.

The guidelines also stipulate that "investigations shall be terminated when all logical leads have been exhausted and no legitimate law enforcement purpose justifies their continuance."

More recently, however, the same federal judge criticized the New York Police Department for interrogating war protesters and brought the department's surveillance policies back under court review.

The actions in Chicago and New York City to modify consent decrees dating to the 1970s that placed limits on police actions may represent a first step toward loosening similar law enforcement regulations and oversight in other cities. A draft of the federal Domestic Security Enhancement Act of 2003, also known as "Patriot Act II" prepared for introduction in the U.S. Congress, includes a provision that would discontinue all existing consent decrees that place limits on police department surveillance of political organizations on the grounds that such restrictions impede terrorism investigations.

The Congress acted in a similar fashion several years ago to reverse court mandates governing conditions at correctional facilities. The Prison Litigation Reform Act of 1996 which allows court orders addressing past practices that were deemed to be unconstitutional to be lifted unless a correctional facility continued to violate prisoners' constitutional rights. This was the case with regard to the Central Detention Facility (the D.C. Jail) which had been under court order for years until the court oversight, including a population cap and annual health and sanitation inspections, ended as a result of the new federal law. If Congress enacts "Patriot Act II" it would have similar effect: dismantling court oversight of police departments that were challenged in court in the past for violating First and Fourth Amendment rights.

Federal Activities/California Guidelines

The intersection of national anti-terrorist planning and actions with local police practices with regard to demonstrations is evident in both a Federal Bureau of Intelligence directive, and issuance of guidelines on political surveillance issued by the California attorney general.

An account in the November 23, 2003, *New York Times* detailed a memorandum sent to local law enforcement officials by the Federal Bureau of Investigation, marking the first corroboration of "a coordinated, nationwide effort to collect intelligence regarding demonstrations." The memorandum, according to the Times, urged local police to "be alert to these possible indicators of protest

activity and report any potentially illegal acts" to the Bureau's joint counterterrorism task forces throughout the country.

One month earlier California Attorney General Bill Lockyer moved in a different direction and issued guidelines to police and sheriffs' offices throughout the state recommending limits on law enforcement surveillance and infiltration of political organizations. The guidelines, entitled "Criminal Intelligence Systems: A California Perspective," were a response to controversy and litigation that arose from law enforcement actions targeting antiwar activities. One such event occurred in Oakland on April 7, 2003 at the start of the war in Iraq. According to press accounts, police seeking to disperse demonstrators fired wooden dowel projectiles, bean-bag rounds and other "less than lethal" ammunition into a crowd of demonstrators at the Port of Oakland.

In June two lawsuits were filed in U.S. District Court seeking monetary damages and court ordered-policy changes to preclude such actions in the future. The American Civil Liberties Union claimed that the Oakland Police Department took such drastic action against unarmed demonstrators based on information provided by the California Antiterrorism Information Center within the state attorney general's office, which the ACLU contended was an illegal assault on First Amendment rights. In response to the Oakland case and other instances in which local authorities apparently used "tips" from the state-level anti-terrorism office against political activists, in October Lockyer issued the new guidelines in an apparent effort to draw "the appropriate balance between public safety and fundamental rights such as free speech, assembly, and privacy."

**CONTEXT:
DEMONSTRATIONS IN THE DISTRICT OF COLUMBIA**

A copy of a general order dated October 24, 1863 from the Office of Superintendent of Police in Washington, D.C. to the Sergeants of the force announced an upcoming procession in the city. The general order stated:

The whole thing is entirely new in our community, and fears have been expressed that proper protection would not be accommodated to those engaged, because of their being colored men. I am very desirous to show that their fears are unjust, and that in this District all persons behaving themselves in an orderly manner will be protected, and to this end you are hereby directed to place your men on the beats along the line of the proposed procession, in such a way as to afford the most complete protection, and guard against any and every kind of disturbance¹.

This snapshot from the history of demonstrations in the nation's capital is illustrative of one of the Committee's most significant findings – that of history repeating itself. Over many years, the District of Columbia has experienced the ebb and flow of judicial and legislative scrutiny of the police department and its handling of First Amendment issues. In particular, the Judiciary Committee's investigation has raised constitutional issues concerning the handling of mass demonstrations and the use of undercover officers to monitor political activists that are almost identical to those that were examined by the courts and the Council during the Vietnam war era thirty years ago. The following is a brief summary of this local historical context and how it relates to today's debate.

Handling Mass Demonstrations

As noted earlier in this report, MPD Assistant Chief Alfred Broadbent testified that after the protests against the World Trade Organization in Seattle in 1999, "the face of demonstrations in this country changed forever." This sentiment was repeated several times by MPD officials interviewed by the Committee, including Chief Charles Ramsey, who used anti-globalization activists' threats to "shut down the city" as a justification for why anti-globalization demonstrations in recent years have demanded preemptive treatment from MPD.

In fact, throughout its history, Washington, D.C. has hosted demonstrations whose organizers have threatened to disrupt the city in different ways, and in several instances, MPD's reaction has tested the constitutionality of its policies and practices for handling mass demonstrations. As Lucy Barber,

¹ A copy of this general order was provided to the Committee by Robert Klotz, former Deputy Chief of Police, Commander, Special Operations and Traffic Division.

author of Marching On Washington: the Forging of An American Political Tradition, testified before the Committee, anti-globalization demonstrators' threats to shut down the city do not represent a new paradigm in the history of demonstrations in this country. While the anti-globalization movement may represent a new sophistication in its level of organization and use of technology, its anti-authoritarian rhetoric and reliance on civil disobedience are not without precedent.

The most obvious parallel in recent history can be found in the May Day demonstrations in 1971 that protested the Vietnam war. Prior to those demonstrations, organizers similarly threatened to shut down and disrupt the city with acts of civil disobedience. In 1971, MPD preemptively dispersed the demonstrators who had converged on Haines Point the night before the major demonstrations; rounded up thousands of individuals, including uninvolved bystanders, and arrested them without cause; and held those arrested for unreasonable periods of time under harsh and unsanitary conditions. In addition, the police chief at the time suspended MPD's use of the field arrest form, so demonstrators were arrested without any documentation of the circumstances. Costly and protracted lawsuits were filed against the city following the May Day arrests that alleged unconstitutional policies and practices.

A review of the May Day era litigation reveals striking similarities between MPD practices that were found to be unconstitutional in the 1970s and MPD practices used to handle anti-globalization demonstrations in recent years. In the case *Lyle Tatum, et al v. Rogers C.B. Morton, et al*, the United States District Court for the District of Columbia found MPD's arrest of 144 individuals demonstrating in front of the White House on April 25, 1971 to be unconstitutional. MPD Inspector William Trussell testified that the demonstrators were "apparently a law abiding group and there was no indication there would be any police problems at all really." Two other officials also testified that there was no violence before the establishment of the police lines.

Nonetheless, Inspector Trussell "concluded there was justification for establishing police lines due to the imminent danger of property damage and personal injury due to the influx of 'outsiders' into the vigil lines." He believed that the "outsiders" were some of the same anti-war demonstrators who were responsible for destruction of property earlier in the day at the Washington Monument, although he did not actually observe any of those arrested destroy any property or commit any other illegal acts. The court found that "as a matter of law, based upon the undisputed facts of this case, this Court is unable to find that Inspector Trussell acted with a reasonable belief of impending violence such as to necessitate the imposition of police lines."

Thirty-one years later, a similar rationale was given for approximately 400 arrests made in Pershing Park during a protest against the policies of the IMF/World Bank on September 27, 2002. Assistant Chief Newsham, who gave

the order to arrest that day, testified that although the demonstrators in the park were not violent or committing any property damage immediately prior to the arrests, he based the order on the fact that the demonstrators, as a general group, did not have a permit, had broken windows several blocks away earlier in the morning, and had then broken traffic laws on their way to the park. Yet Assistant Chief Newsham could not be sure that all of the individuals arrested in Pershing Park were responsible for the earlier violations of law. In the end, he gave the order out of concern over what the demonstrators would have done had they been allowed out of the park. The following is an excerpt from Assistant Chief Newsham's deposition before the Committee:

Another thing that was weighing heavily on my mind when I made that decision was the intelligence that I received that this particular group was intent on doing destructive things. I felt that if they were able to leave the park I think they would have gone out and did some of these things because of their behavior before entering the park.

As discussed in more detail later in this report, an MPD internal investigation subsequently found that the Pershing Park arrests were made in violation of MPD policy and that bystanders not even involved in the demonstrations were arrested that day. The District has initiated settlement discussions in some of the lawsuits filed against the city over the Pershing Park arrests.

This comparison between the *Tatum* case and Pershing Park arrests is helpful in making the point that the courts have repeatedly found that demonstrators cannot be arrested based on what police may fear is a *potential* for law breaking.

The courts have also reviewed MPD policy and practice in handling demonstrations more broadly. In the case *Washington Mobilization Committee, et al v. Maurice J. Cullinane, et al*, in 1974, the U.S. District Court found several aspects of MPD's handling of the May Day demonstrations to be unconstitutional and took particular exception to the department's use of a police line ordinance to disperse crowds: It found the ordinance "unconstitutional as applied to demonstration activities in which First Amendment rights are being asserted."

The ordinance (Article VI Section 5(a) of the Police Regulations of the District of Columbia) includes language that "every person present at the scene of such occasion shall comply with any necessary order or instruction of any police officer." The court noted, "the scope of the ordinance is expansive, to say the least. Limits on police discretion are virtually nonexistent." It gave a police officer "unfettered discretion to issue any order he thinks reasonable and then is allowed to initiate criminal proceedings against a person who disobeys the order," and harkened to Justice Hugo Black's concurrence in *Gregory v. Chicago*, "to let

a policeman's command become equivalent to a criminal statute comes dangerously near making our government one of men rather than laws."

The Court enjoined the department from erecting police lines and initiating sweeps of areas during demonstrations "until the police department or the District of Columbia government specifies the scope and limits on the department's power to clear a public area, sufficient to inform both the police and the public of their responsibilities." In addition:

- MPD was "enjoined from attempting to regulate the conduct of persons exercising their First Amendment rights by ordering them to 'move on' unless a breach of the peace involving a substantial risk of violence has occurred or will occur";
- MPD was "enjoined from instituting mass arrests without the contemporaneous completion of field arrest forms or other administrative device or procedure for recording information necessary to establish probable cause for the arrest";

The Court also:

- Ordered all relevant arrest records destroyed;
- Invalidated all the May Day arrests; and
- Ordered MPD to formulate a "comprehensive, written plan (preferably in the form of a manual or handbook) which clearly states the policies and procedures to be followed by the police department in mass demonstration situations."²

Other points made in the 1974 U.S. District Court decision that resonate today:

- "Criticism of police activities originating from outside the department is handled in a variety of ways. Information critical of the CDU³ which is presented by the news media or litigation is never made the subject of an internal, disciplinary investigation," a point made in testimony by Police Chief Jerry Wilson on April 8, 1974.
- With regard to charges of disorderly conduct, the Court said, "The fact that police officers sometimes seem to be unwilling to enforce these laws in a proper manner does not necessitate the conclusion that the law is so poorly drafted as to be incapable of constitutional application." The Office of Citizen Complaint Review just recently took the MPD to task for making charges of disorderly conduct when the elements necessary, under law, had not been met.

² 400 F.Supp 186, 218-219

³ Civil disturbance unit

- The Court revisited the issue of whether an officer acting in good faith serves to nullify any other wrong in an arrest. "The mere assertion of good faith by an arresting officer does not obviate the need to also prove the reasonableness of his belief that his actions were constitutional."

After a three-judge panel of the U.S. Court of Appeals reversed the District Court's ruling, plaintiffs in the case challenged the action, asking the full nine-member U.S. Court of Appeals to rehear the case and to reinstate the District Court's ruling. In a September 1977 decision, five of the nine judges issued opinions taking issue with some aspects of the three-judge panel's reversal. Rather than having a rehearing, however, they decided to rely on new leadership at MPD to change its mass demonstration policies and practices

Judge Bazelon concurred with many if not most of the U.S. District Court's findings, including "its unchallenged findings that the police used excessive force and made unlawful arrests" which were "more than sufficient grounds for the injunctive relief it ordered."

Bazelon and Leventhal directed scathing criticism toward the leadership of the MPD, citing the lower court ruling. "These findings of the District Court amply support its crucial factual conclusion that 'many examples of misconduct by CDU and PCC officers were the direct result of policies and procedures authorized by defendants and of defendants' failure adequately to train, supervise and coordinate the activities of subordinates,'" Bazelon wrote. He also noted that the case concerned police misconduct in handling demonstrations and that "there is likely to be a chilling effect on individuals' protest activities unless the police are restrained from similar misconduct in the future." Leventhal said the case "presented evidence of either participation by the police chief and supervising officials or knowing toleration of misconduct."

The Court sought to explain its decision to deny a new hearing while essentially concurring that the Department should move forward with reforms.

Judge Leventhal wrote:

Whether to exercise en banc discretion is particularly likely to turn on whether recurrent problems are visualized. With indications that the police department has been advancing its low-key approach, and with the reasonable expectation that it will reflect on the various decisions involving mass arrests, it makes sense on prudential grounds to let the smoke clear so far as the court en banc is concerned.

Judge Bazelon noted:

Although I agree with Judge Leventhal that the proposed police manual may not be able to guarantee appropriate police behavior when 'coping with a massive shutdown effort,' this limitation is no justification for vacating the District Court's order. Without written policies, there is even less hope that the Civil Disturbance Unit will avoid these same errors in the future⁴...

Following this decision, in January 1978, MPD issued a handbook on mass demonstrations. The Committee has reviewed several versions of the manual that have been produced since 1978, and the same handbook, designed to respond to the concerns of the courts in the mid-1970s, are essentially in effect today.

In the 22 years following issuance of the manual, MPD handled thousands of demonstrations without major controversy and, in the process, gained an international reputation for handling demonstrations well, without incident or civil disturbances. Among the more provocative demonstrations handled by MPD during this time were a group of farmers who drove their tractors around the Capitol and parked them on the Mall in 1978 "in defiance of traffic regulations";⁵ regular anti-abortion marches that attract counter marches; a Ku Klux Klan march in 1991; and the Million Man March on the Mall in 1995. Each of these events caused anxiety within government and the community over the potential for disruption or violence, real or perceived, but each was handled without mass arrests or major controversy. A review of court records over this time period reveals no litigation filed against the District over MPD's handling of demonstrations prior to the April 2000 anti-globalization demonstrations.

After the demonstrations against the World Trade Organization in Seattle in November 1999, MPD's handling of anti-globalization demonstrations would bring about a new era of critical opinion of MPD's performance in this area: harsh criticism on the part of the activist community and international acclaim within law enforcement for preventing the kind of civil disturbances that have followed international trade meetings elsewhere in the world.

Use of Undercover Officers to Monitor Political Activists

The Committee's review of MPD's current use of undercover officers to conduct surveillance of political activists also has a historic precedent. In 1975, the Washington Post reported that during the late 1960s and early 1970s, MPD used undercover officers to monitor and keep files on local political activists and politicians, including former Councilmembers Marion Barry, Julius Hobson and

⁴ 566 F.2d 107

⁵ p. 224, Lucy Barber, Marching on Washington: the Forging of an American Political Tradition, 2002

Sterling Tucker and former D.C. Delegate to Congress Walter Fauntroy.⁶ An unnamed source of the Post claimed that undercover agents sought details on activists' sexual habits, drug use and finances. A former police informant reported that he was instructed to act as an agent provocateur and to steal mail, break into buildings, and "disrupt legitimate demonstrations of the anti-war movement."⁷ Police officials at the time admitted to the surveillance but denied that agents recorded information about activists' personal lives or engaged in illegal activity, and said that all of the questionable files were shredded.

A civil action, *Hobson v. Wilson*, was filed against the District and MPD by several Washington-area protestors alleging that members of the MPD Intelligence Division served as *agents provocateur* as part of a joint FBI-MPD conspiracy, in furtherance of its stated mission to gather information on "persons, groups, and organizations whose activities might be detrimental to the proper functioning of local, state or national governments." In a 1984 decision, the D.C. Court of Appeals overturned a lower court ruling by finding that there was insufficient evidence that the MPD or the District of Columbia participated in a conspiracy to violate plaintiffs' constitutional rights either within MPD itself or between MPD and the FBI. The court did affirm liability against the FBI, ruling that there was enough evidence that the FBI actively participated in unlawful COINTELPRO activities to justify the lower court's finding of liability, and noted four categories of illegal activity on the part of the FBI.

The Council held several public hearings on the issues reported in *The Washington Post* and considered three pieces of legislation intended to prevent similar surveillance from occurring in the future. Council Chairman Sterling Tucker introduced Bill 1-76, "the Police Intelligence Safeguards Act of 1975," which established a temporary Police Intelligence Policy Commission to conduct a review of the policies and procedures employed by MPD for intelligence gathering activities and recommend to the Council new guidelines as it deemed necessary. The bill also prohibited three classes of information from being maintained by MPD on individuals, including non-criminal personal information, financial information and any information related to political, religious or social views. It also allowed individuals to request to review MPD files on themselves.

Councilmember Julius Hobson introduced Bill 1-287, "the Non Criminal Police Surveillance Act of 1976," which defined "unlawful surveillance," proscribed limitations on the interception of conversations, and prohibited any official or agent of the District from disrupting lawful activities or inciting others to engage in unlawful activities. It provided a cause of action for anyone injured by a violation of the legislation.

Councilmember Hobson then introduced Bill 1-362, "the Police Records Act of 1976." This act attempted to control what types of records MPD could

⁶ "Files on Politicians Kept, Police Admit," *The Washington Post*, February 13, 1975

⁷ *Ibid*

maintain and disseminate and established a Records Review Board, charged with enforcing limitations on police records-keeping practices through semi-annual auditing procedures; promulgating regulations; and making determinations on whether individuals should be able to review records about themselves unless there was clear and convincing evidence that such inspection would threaten the integrity of an ongoing investigation.

All three bills were criticized by law enforcement and some provisions were even criticized by the local chapter of the ACLU as unworkable and too broadly written. According to press reports, in response to the controversy, then police chief Maurice Cullinane conducted a review of the practice of MPD's Intelligence Unit and established new policies and procedures for police surveillance with a July 1976 general order. The new general order mandated that all intelligence be obtained through lawful methods and be related to criminal activity or persons or events that present threats to life or property. It expressly prohibited the maintenance and collection of intelligence information related to social, religious or political views, family associates and finances unless directly related to criminal conduct. After the issuance of Chief Cullinane's order, the Council apparently decided to allow MPD to regulate itself in this area, much as the federal courts had done. Each of the bills died in committee.

During the course of its current investigation, the Judiciary Committee subpoenaed any current or former general orders that may have been related to the 1976 Cullinane general order, but MPD responded that no such policies could be located. The Committee can only assume that the Cullinane order was at some point repealed by MPD. Ironically, the *Washington Post*, while commending the issuance of the general order, warned of this possibility at the time. In a July 23, 1976 editorial, the Post noted:

There are, of course, limits to the force of any internal directive, even one that attempts to spell out policies and officers' obligations so carefully. For one thing, an order is not a law; its weight depends almost entirely on the chief's commitment and the department's ability to police itself. Future commanders could change or ignore the rules at any time⁸.

Another editorial expressed a similar sentiment:

There will be, no doubt, trouble again some time in the future with police intelligence operations... with the passage of time, some of the lessons learned from the last decade will be forgotten. But, it seems to us, Chief Cullinane is in the process of getting the police department off the wrong road and channeling its intelligence efforts into places where they can be more productive and less troublesome. The real test is whether the community pays enough

⁸ "Controlling Police Surveillance," *The Washington Post*, July 23, 1976

attention to make sure that shift is completed and, once completed, maintained⁹.

In the 1970s, both the courts and the Council discovered serious problems with MPD's handling of important issues related to First Amendment activity -- primarily its handling of mass demonstrations and its undercover surveillance of political activists. In each instance, following debate and consideration of the issues, discretion was left to MPD to fix problems internally and to self-regulate. With the passage of time, it seems that critical and hard-learned lessons were indeed forgotten. Considering the District's history in this area and the increasing threats to civil liberties across the nation caused by post-September 11th local and federal security policies, now, more than ever, the Council has a responsibility to act, through both oversight and legislation.

⁹ "Intelligence Work and the District Police," *The Washington Post*, March 14, 1975.



III. CASE STUDY: APRIL 2000 AND THE CONVERGENCE CENTER

In April 2000, thousands of demonstrators converged on Washington, D.C. for a weekend of protests against the policies of the International Monetary Fund and World Bank. Since this was the first major anti-globalization demonstration since the November 1999 meetings of the World Trade Organization in Seattle, there was much concern expressed by District government officials, law enforcement, and residents, about the potential for violence in the District similar to that experienced in Seattle. The Metropolitan Police Department responded to this concern by preparing for the IMF-World Bank meetings for months in advance, seeking and securing significant federal funding for security including a closed-circuit television system, getting manpower assistance from other police departments, asking the courts to be prepared for mass arrests, and by mobilizing the entire department.

On Saturday, April 15, 2000, the day before the largest scheduled anti-globalization demonstration, Fire and Emergency Medical Services (FEMS) officials and MPD officers entered the headquarters, or "convergence center," of the anti-globalization organizations at 1328 Florida Avenue, N.W.; issued multiple fire code violation notices; and closed down the center, ordering all of the individuals inside to vacate the premises. This raid of the convergence center disrupted the organizational plans of the demonstrators and displaced many anti-globalization activists from out of town who were staying at the center while visiting the District.

Demonstrators as well as some residents criticized the District's actions at the convergence center, and accused MPD of orchestrating the event for the purpose of frustrating the constitutional rights of the demonstrators. An April 16, 2000 *New York Times* article, "Police Move Against Trade Demonstrators," characterized the raid as "a pre-emptive show of force." Councilmember Patterson, joined by Councilmember Jim Graham, wrote to Council Chair Linda Cropp and Judiciary Chairman Harold Brazil to request an oversight hearing on the police actions. In April, 2001, a lawsuit¹⁰ was filed against the District of Columbia that included allegations that the District's actions at the convergence center were unconstitutional.

The Committee examined the convergence center raid as a case study of MPD's policies and practices in handling demonstrations, particularly its practices with respect to intelligence tactics. The Committee subpoenaed documents related to the raid on the convergence center and deposed four individuals: FEMS Chief Adrian Thompson, FEMS Deputy Chief James N. Short, MPD contract employee Neil Trugman, and Intelligence Unit Sergeant Jeffrey Madison. In April 2000, Chief Thompson was the Fire Marshall, Deputy Chief Short was a Battalion Chief and Assistant Fire Marshall with the Fire Prevention Division,

¹⁰ *Alliance for Global Justice, et al v. District of Columbia, et al*

Neil Trugman was a detective assigned to MPD's Intelligence Unit, and Sgt. Madison was, as he is now, a supervisor assigned to MPD's Intelligence Unit.

The following is a chronology of the events leading up to and during the raid on the convergence center, based on the information collected by the Committee.

During the week prior to the IMF-World Bank meetings, Chief Ramsey and then-Executive Assistant Chief (EAC) Terrance Gainer provided a briefing for Councilmembers and staff on plans for addressing public safety concerns associated with the meetings and demonstrations. The department, in conjunction with the two international organizations and the federal government, essentially closed off certain areas of the city including areas immediately surrounding the IMF offices and the headquarters of the third police district. The police executives showed Councilmembers a videotape of incidents that took place in Seattle the previous December, and voiced their own determination that such events would not take place in the District of Columbia.

Chief Ramsey told the *Washington Post* on April 8, 2000, "They ain't burning our city like they did Seattle." Three days later Assistant Executive Chief Terrance Gainer told the *Post*, "Arrests will be quick, swift and certain. We won't be caught sleeping."

During the days leading up to the IMF-World Bank weekend, MPD monitored the convergence center. An April 3, 2000 memo from Intelligence Unit Lieutenant Lorraine Kittrell to Chief Ramsey described, in minute detail, the layout of the convergence center, a schedule and description of the events that were to take place from April 8 to April 15, and information about the ownership of the building.

According to the testimony of Mr. Trugman, during the course of this monitoring, MPD became concerned about potentially hazardous conditions inside the convergence center, including the presence of propane tanks, demonstrators sleeping on staircases, and over-crowding. He indicated that MPD discussed securing a search warrant of the premises. Mr. Trugman was asked in his deposition if he had reason to believe there was illegal activity at the center, and he said there were "bits and pieces" of information.

Q: I take it that you did not have enough to get a warrant to go into the convergence center. Is that correct?

A: I think we did.

Q: But as far as you know, no one attempted to get a warrant to go into the convergence center, did they?

A: I'm - I think there may have been discussions with the U.S. Attorney's office, and they were not going to go ahead with a search warrant.

Apparently it was decided that the department did not have sufficient cause to secure a search warrant. MPD officials turned to potential administrative actions. The department invited representatives of FEMS, including Deputy Chief Short, to a meeting on or about April 13, 2000. Sergeant Madison and Mr. Trugman participated in this meeting.

During the meeting, MPD officials showed Deputy Chief Short news media videotape footage of the conditions inside the convergence center, including footage of propane tanks and, according to Deputy Chief Short, "a large number of people in a very small area inside the building." Deputy Chief Short was asked if he saw anything improper in the video footage and he stated that what he saw was "not allowed under the Fire Code." After seeing these violations, he stated that he "had to take some action" and it was decided within the fire department that the District's Nuisance Abatement Task Force¹¹ would conduct an inspection of the building.

It was not, however, until at least two days later, on the morning on April 15, 2000, that Deputy Chief Short conducted the inspection with FEMS Captain Richard Fleming, fire inspector Ronnie Elam, a Department of Consumer and Regulatory Affairs (DCRA) inspector, and a Department of Public Works (DPW) inspector. There is a discrepancy in testimony on whether the Task Force entered the building simultaneously with members of the MPD. According to the deposition testimony of Deputy Chief Short, Mr. Trugman and Sgt. Madison, MPD did not enter the building until Deputy Chief Short became concerned that the demonstrators were not clearing out of the property or abating the fire code violations noted by the Task Force. Deputy Chief Short testified that "a great deal of time passed between the initial being allowed to come in and conduct the inspection until the police officers that I saw were on the scene."

In apparent contradiction to that statement, videotape viewed by the Committee clearly shows MPD officers, including Sgt. Madison and Mr. Trugman, entering the building at 8:45 a.m. Chief Thompson's written deposition states that the Task Force entered the building at 8:45 a.m. Deputy Chief Short testified during his deposition that the time was either 8 a.m. or 8:45 a.m. and he could not be sure of the exact time.

MPD intelligence officers, including Sgt. Madison and Mr. Trugman, were aware that the inspection was taking place and were on hand to respond to

¹¹ The Nuisance Abatement Task Force is an inter-agency task force, typically made up of representatives of multiple agencies, including MPD, DCRA, DPW and FEMS, that conducts simultaneous housing, fire and code inspections of buildings.

any request for assistance from the Task Force. The following is an excerpt of Mr. Trugman's testimony on this point:

A: I know that they went in -- they went into the building first, and if they needed our help, they were going to call for our help, and we responded after the call. We didn't go in with the fire department.

Q: The timing is such that it appears as though the MPD knew when the fire department was going in. Is that correct?

A: Yes, we did know.

Q: So, it wasn't as if you were sort of out there and then suddenly you got this call, can you come over and help us?

A: No. We knew when they were going to go in.

Deputy Chief Short and Chief Thompson testified that upon entering the building, the Task Force found hazardous conditions inside, including overcrowded conditions, improper use of propane tanks for cooking purposes, make-shift electrical wiring, improper storage near exits and in stairways blocking egress, and storage of large quantities of paint and bedding materials in utility areas. When describing the scene and his attempts to clear demonstrators out of the building, Deputy Chief Short testified:

I would say to them, this is a very dangerous situation and if you don't shut down the cooking, the propane, then someone could die in here. It's imminent danger. Propane explosions are some of the most dangerous in the world. And when you have over 100 pounds in close proximity within side of a building, it wouldn't take much to melt the building.

Several fire code violation notices were issued to the owner of the building, Douglas Development Corporation¹², and the demonstrators were cleared out of the building by 12:30 p.m.

The Committee sought clarification on the role of the MPD's Intelligence Unit in closing down the convergence center. Fire officials acknowledged that the presence of intelligence officers at a building inspection was highly unusual. In

¹² An April 17, 2000 letter from Douglas Development Corp. to Chief Thompson stated, "Douglas Development Corp was led to believe that several non-profit groups were organizing a training workshop for puppet making, and allowed at no cost a sublease of the space for a two-week period. We are outraged at this gross misrepresentation and can assure you that, has we been aware of the true motives of this group, we would never have permitted their assembly at any of our properties."

response to the Committee's October 16, 2003 written deposition question, "Do MPD Intelligence Unit officers typically accompany Fire and Emergency Medical Services Department inspectors during inspections? If yes, under what circumstances?" Chief Thompson stated "To my knowledge no MPD intelligence unit officers accompany Fire and Emergency Medical Services Department inspectors during fire inspections." Deputy Chief Short was also asked this question during his deposition:

Q: Would it be unusual to have intelligence officers accompany you or be [present] at a place when you [are] conducting an inspection?

A: Very unusual.

As indicated above, Mr. Trugman testified that MPD initially wanted a search warrant to look for items such as molotov cocktails or sleeping dragons -- none of which was found on the premises -- but did not have probable cause to obtain a search warrant. The next question became what purpose was served by intelligence unit members being on hand for the fire inspection. Had there been a concern about public safety generally, the normal course would have been use of uniformed officers, not intelligence officers. The allegation in litigation has been that the intelligence unit was on the premises for the specific purpose of gathering intelligence information on demonstrators for law enforcement purposes.

As stated above, Deputy Chief Short testified that he only called MPD officers to the scene to get assistance with clearing the building. Sgt. Madison also testified that he responded to the convergence center out of concern for the safety of the inspectors. But this version of events is not consistent with Mr. Trugman's testimony that intelligence officers entered the building with the specific intent of looking for illegal activity.

The following is an excerpt of the transcript of Mr. Trugman's deposition on both the issue of the warrant and MPD's intentions upon entering the building:

Q: And when you were on the scene, what was... the purpose of intelligence officers being on the scene with the fire department to conduct a fire inspection?

A: To make sure there was no illegal activity going on inside that was going to become a police concern.

Q: Did you have reason to believe there would be illegal activity inside?

A: We had information that was -- there was a lot of bits and pieces, and one of them was a thing called sleeping dragons, which

is used to block streets, possible molotov cocktails, things of that nature.

Q: Now, prior to going into the convergence center, though, apparently you had enough information for a specific house to actually get a warrant to go in to get certain pipes and things to make these sleeping dragons, what-have-you. But I take it that you did not have enough to get a warrant to go into the convergence center. Is that correct?

A: I think we did.

Q: But as far as you know, no one attempted to get a warrant to go into the convergence center, did they?

A: I'm -- I think there may have been discussions with the U.S. Attorney's office, and they were not going to go ahead with a search warrant.

Q: So then your entry into the convergence center was sort of derivative on the entry by the fire department. Is that right?

A: Well, it's also because it was a severe safety hazard. I mean, it would have been tragic with all these kids in that place smoking cigarettes...

A: We were also aware of what to look for. We were there to look for molotov cocktails, if there were -- excuse me -- if there were any, sleeping dragons, which was totally new to this area. And a lot of the officers, no matter how you can describe them, may have not known what they were looking for.

Q: Did you find any?

A: Not in that building.

Q: Now, when you say that the intelligence unit was there because they could, you know, have a look at -- for certain of these items, I take it that is something you were hoping to do via a search warrant, right?

A: Correct.

Q: But having failed to get the search warrant, this was the second best way to have a look?

A: Well, this actually turned out to be the best way for safety.

The assertion that MPD intelligence officers arrived at the convergence center for the purpose of collecting information on demonstrators is further bolstered by some of their actions once they arrived. In response to a subpoena issued to MPD, the Committee obtained a videotape containing footage taken by MPD intelligence officers during the inspection of the convergence center. At several points during the video, the camera pans over crowds of demonstrators, inside and outside of the building, at times zooming in on individuals. At another point on the tape, for approximately 20 minutes, the camera zooms in on, and scans, the entirety of a bulletin board containing political posters and fliers as well as hand-written personal notes containing the names, phone numbers and other personal information presumably on demonstrators who used the center's bulletin board as an information exchange.

In his deposition testimony, Mr. Trugman suggested that the purpose of the footage was to cross reference the names of anyone who had been "troublemakers" in other cities, like Seattle, with the names of the people attending the demonstrations in Washington:

Q: So that was part of the intelligence that you would gather in those circumstances?

A: Exactly. Now, was information gathered from that? I don't remember any.

Sgt. Madison testified that the videotape was taken by an Electronic Surveillance Unit (ESU) officer who usually accompanies MPD on drug-related search warrants issued pursuant to a criminal investigation. In those instances the ESU's typical practice is to collect as much information from a scene as possible; for example, information about suspected drug dealers and their acquaintances. Sgt. Madison testified that the convergence center videotape was not used, or possibly not even watched, for any purpose after the inspection of the convergence center. Craig Broyles, a civilian analyst assigned to the Intelligence Unit, also testified that the unit did nothing with the information contained on the videotape. In response to questions about this practice during the public hearing, Chief Ramsey stated that "the taping of that bulletin board was not necessary. It was regrettable." Asked specifically if the tape had been given to other law enforcement authorities such as the Federal Bureau of Investigation, Ramsey assured the Committee that it had not.

Two documents obtained by the Committee underscore the contention that the convergence center raid was an MPD law enforcement operation designed to thwart the activities of the demonstrators, and has continued to be viewed in that manner by District officials. The Committee issued a subpoena to the Fire Department for any documents relative to 1328 Florida Avenue, N.W. and, in response, received a document labeled "DC Fire Department Real Estate Property Profile." The document contains the following statement:

On 4/15/00, the NATF [nuisance abatement task force] closed this building down due to numerous fire code violations. This was IMF Protestors Headquarters. The closing of this building helped assist MPD with the rioters during the IMF Talks. This location was the main headquarters for the IMF protestors. Removal of propane tanks and other illegal weapons¹³, help stop a repeat of Seattle, Washington.

Deputy Chief Short, when asked about the document, responded, "I do not have an answer on that; I actually do not know who that was." Nonetheless, the connection between the fire inspection, the closing of the center, and the intent to assist MPD's law enforcement efforts is clear.

The second item is a document attached to the original complaint filed by plaintiffs in *Alliance for Global Justice, et al v. District of Columbia, et al*. The document is a memorandum from MPD employee Steve Gaffigan, Senior Executive Director for Quality Assurance, to SRB Productions, a television and video production company, outlining a prospective MPD training video relevant to handling demonstrations. The memo states, "We will then go on to look at the footage of MPD's Intelligence Unit shutting down the convergence center during the 2000 IMF protests, finding bottles with rags. We will explain the significance of such a tactic."

This statement regarding "bottles and rags" brings up another and final issue regarding the convergence center inspection. After the inspection, Chief Ramsey and Executive Assistant Chief Gainer claimed to have confiscated materials to make pepper spray and molotov cocktails¹⁴, statements not corroborated in the Fire/EMS records on materials actually recovered at the convergence center. No one interviewed by the Committee up to and including the police and fire chiefs testified that any illegal or criminal items were found at the convergence center. It is regrettable that the opposite was reported externally and internally by MPD officials.

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.

¹³ According to the witnesses interviewed by the Committee, no illegal weapons were found in the convergence center.

¹⁴ During an April 17, 2000 television story by *The News with Brian Williams*, Chief Ramsey stated "They were making homemade pepper spray." An April 15, 2000 Associated Press story reported "officers seized a plastic container with a rag stuffed inside and what looked like a wick, said executive assistant chief Terry Gainer. He said it 'looks like a Molotov cocktail.'"

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.

The agencies effectively closed down the convergence center not primarily for public safety reasons, but for other reasons that presumably include disrupting the planned demonstrations and securing, for law enforcement purposes, information on those participating in the demonstrations. The center posed a danger to inhabitants or it did not; if it did present imminent danger, as Deputy Short testified, it should have been closed immediately when officials first noticed the violations. The time allowed to lapse between the meeting attended by MPD and FEMS and the actual raid belies that there was, in fact, a public safety concern.

In addition, the District should have given the activists 24 hours to abate the fire code violations and return to the center, prior to the largest scheduled anti-globalization demonstrations. Failure to do so supports the contention of litigants that the raid was designed to frustrate the operations of the activist organizations, something clearly prohibited by First Amendment protections.

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

The January 29, 2001, issue of the *LA Weekly*, an alternative newspaper published in Los Angeles, included this description from along the parade route in Washington D.C. on Inauguration Day, 2001:

Two undercover cops, who had been posing as parade-goers, began grabbing randomly at people, one of them spraying protesters in the face with a small canister of either pepper spray or Mace. Both were immediately mobbed by the crowd, and had to be pulled to safety by uniformed officers in riot gear.

A *Washington Post Style* section piece profiling Mara Verheyden-Hilliard and Carl Messineo, lawyers and founders of the Partnership for Civil Justice, includes this variation on the incident:

Two men in street clothes -- one wearing a black ski mask -- were captured on amateur videotape roaming through the inauguration crowd. They shove bystanders and one pepper-sprays people seemingly at random. After two years of pressing by the Partnership, the District acknowledged the men were on-duty police officers. One has admitted pepper-spraying, but both deny anything they did was improper.

On March 15, 2001, two months after the inauguration of George W. Bush as the president of the United States, the International Action Center and Justice Action Movement plus six named plaintiffs filed suit against the United States, the Metropolitan Police Department, and other government entities alleging constitutional violations, assault and battery, and false arrest and imprisonment. Among the charges: that undercover police pepper sprayed the crowd at the Navy Memorial along the Pennsylvania Avenue parade route. The court filing, sections 105 through 113, follow:

Undercover agents, who declined to identify themselves as law enforcement, at times struck into the crowd, beating people with their fists and radios. Protesters repeatedly asked, "Are you cops" of the government agents who were beating their associates with batons and fists. The government agents declined to answer.

After what appeared to be a signal by a uniformed officer, a team of three undercover operatives maneuvered themselves into a crowd of peaceful demonstrators. One wore a black ski mask. Two of the agents began, without explanation or justification or provocation, to beat and spray a chemical agent, presumably pepper spray, onto the faces of the peaceful persons assembled there. The third agent followed behind, providing protection to the other two.

Plaintiff Elizabeth Ayer was standing by peacefully, when one of the agents came up to her and pulled off a muffler she was wearing. He punched her. He then sprayed her face and mouth with pepper spray at close range.

These agents wandered freely, without intervention from law enforcement, spraying pepper spray in wide circular berths in the faces of the peaceful protesters, and striking others. The peaceful protesters ran in terror, yelling warnings that undercover agents were using pepper spray. The agents continued to strike forward into crowds of persons standing by, spraying the chemical agent into protesters' faces. This continued for some period of time, after which a uniformed officer engaged the agents in a mock arrest. The uniformed police subsequently released the agents who were later observed wandering freely among crowds of protesters.

The officer who used pepper spray along the inaugural parade route was MPD Investigator Patrick Cumba working in plain clothes that day for the Intelligence Unit. The lawsuit describing the pepper spray incident was amended on October 11, 2002, with Investigator Cumba and his Inauguration Day partner, Detective Jed Worrell, and their immediate superiors, named as additional defendants.

The amended filing added this information:

10. Defendants Cumba and Worrell deliberately concealed their identities from plaintiffs. Both dressed in plain clothes for the assaults, notwithstanding being on official MPD duty. Neither displayed any badge, name tag or other insignia publicly identifying them to be government agents or MPD officers. Officer Patrick A. Cumba concealed his identity (and increased the psychological fear of his assault) by wearing a hood and a balaclava – a black ski mask concealing all but his eyes and bridge of his nose. Officer Jed Worrell also wore a hood and additionally concealed his characteristics with a full head hat pulled down low to his eyes. To date, neither has come forward notwithstanding this lawsuit.

In response to being named a defendant in the lawsuit, Investigator Cumba provided the following answer to the amended complaint, which was filed with the federal court on January 17, 2003:

8. Defendant Cumba admits that on January 20, 2001, he did use a chemical agent known as pepper spray while in the area of the Navy Memorial but denies that he used pepper spray as described in this paragraph of the second amended complaint.

All of the other allegations against the officers were denied in the January 2001 filing.

Nearly two years after the Inauguration and 22 months after the lawsuit was filed alleging the pepper spray incident, the MPD Office of Professional Responsibility initiated an investigation of the officer's actions that day. The OPR Force Investigation Team interviewed Investigator Cumba on December 12, 2002.

The MPD lead investigator, Detective Elisa Brown, interviewed Investigator Cumba and Detective Jed Worrell. Investigators spoke to the plaintiffs' attorney, Verhayden-Hilliard, but did not interview the plaintiffs because, the report states, the plaintiffs' attorney would not permit the interviews. Nor did the investigators interview anyone else on hand at the Navy Memorial on inauguration day, which included representatives of the U.S. Park Police, several persons interviewed by the news media including *The Washington Post*, and individuals who subsequently wrote to *The Washington Post* about what they saw and heard at the Navy Memorial. The investigators indicated that they were unable to talk with Cumba's superior, retired Sgt. James Staples because he did not respond to a letter sent to his Forestville, Md., home address.

The MPD report on the investigation indicates that Detective Brown viewed the protester's videotape. That tape, also shown during the Committee's December 17 hearing, shows Investigator Cumba wearing dark warm-up pants and a black and orange coat striding through the crowd along the parade route. Uniformed police officers are plentiful in and alongside the crowd. Cumba's face is hidden by a black ski mask and a white hood. Though the picture is slanted and jerky, it clearly shows Cumba holding a can in his right hand. He is seen walking through the crowd, and he shoves someone out of his way to his left. In two series of shots he appears to hold the can and spray its contents at other persons in the crowd. Onlookers run away from him and he follows them, apparently continuing to spray. At one point he changes direction, and walks toward another part of the crowd, spraying again. He is seen being taken into custody by Park police. At no time is there any indication that the officer announced he was a police officer, as is required by department policy (MPD general order 308.13) that states an officer working out of uniform should identify himself as an officer if he is required to take police action.

The department's policy on use of pepper spray, contained in the May 2003 *Standard Operating Procedures for Mass Demonstrations, Response to Civil Disturbances and Prisoner Processing*, states that canisters of Oleoresin Capsicum (OC or pepper spray) "shall be employed against crowds only as necessary in a defensive capacity, unless no other crowd management weapons are readily available." Any offensive use "shall be only upon approval of the Field Commander and/or her designee"¹⁵.

¹⁵ p. 23, *Standard Operating Procedures for Mass Demonstrations, Response to Civil Disturbances and Prisoner Processing*, May 2003

Cumba's account of the incident given as part of the MPD investigation, contrasting sharply with the version included in the litigation and what is plainly visible on the videotape, and given 23 months after it occurred, follows:

I was assigned to NSID¹⁶, but detailed to the Intelligence Branch. We were to gather intelligence by calling in problems by the protesters such as rocks, bricks, bottles, being thrown. I heard a 1033 over the police radio from Park Police at the Navy Memorial. I went over in that direction, and as I started to get over there, there were four to six Park Officers pinned down at the base of the memorial. People were throwing sticks and anything they could get their hands on at the officers. They were also kicking the officers.

I worked my way through the crowd to give them any assistance that I could give them. I started clearing the crowd by pushing the crowd back. At that point I tried to work my way back to my original location, about a half block away. The protesters had then locked their arms together so that you couldn't get through. I then lifted my jacket displaying my badge and told the protesters that I was a police officer and to let me through. Then then cursed me and refused to allow me to pass.

I again tried to get through by pushing the protesters out of the way. They again refused my passage. I then used my pepper spray in an effort to clear the protesters, after which a guy swung at me with a pole. I remember deflecting it and pepper sprayed him with my right hand. I then tossed the pole to the side. I again tried to find an escape route but was unsuccessful.

The crowd started yelling undercover, undercover, jump them. I could also see a couple of protesters coming at me with what appeared to be pepper spray canisters in their hands. I kept hearing the crowd yell undercover and to get Jed and me. I again used my pepper spray at the protesters coming at me with canisters in their hands.

We were then able to back up towards the uniform units when they grabbed me. I remember somebody yelling that I was a police officer and then they pulled me behind their lines. They asked me if I was okay and if I needed to go to the hospital. One of the officers, Park police officer, said I saw you get hit with the pole, do you want an ambulance. Again he asked me if I were okay I told him yes and he let me walk off.

Cumba indicated that he reported use of pepper spray to his sergeant but did not know if Sgt. Staples filed a use of force report. The investigators apparently found no record of a report within the department. The investigator consulted with Assistant U.S. Attorney Sherri Berthrong in July 2002, wrote that the AUSA viewed the videotape, and four days later the department received a

¹⁶ Narcotics and Special Investigations Division

letter from the U.S. attorney declining criminal prosecution for the use of pepper spray.

The result of the internal MPD investigation: "On January 14, 2003, the Use of Force Review Board reviewed the use of service weapon incident by Major Narcotics Branch Investigator Patrick Cumba. After careful consideration the board concluded that the officer's use of force was justified." The board also determined this was a "tactical improvement opportunity," that is, Investigator Cumba was recommended for "personalized tactical improvement opportunity training" at the police academy.

At the Committee's hearing December 17 Assistant Chief Broadbent, whose purview includes the Intelligence Unit, was asked what the officers were doing the day of the inauguration. He said he did not know.

To reach the conclusion in the investigative report, MPD investigators appear to have relied solely on statements by Cumba and Worrell. They do not explain the stark difference between their accounts and what is clearly visible on the amateur videotape, or the discrepancies between the accounts of Cumba and Worrell. Beyond what appears on the videotape to be illegal use of pepper spray by a plain clothes officer, the pepper spray incident and resulting investigation raise serious concerns about the willingness and capacity of the Metropolitan Police Department to investigate misconduct within its own ranks.

Chief Ramsey was questioned about this incident and the department's investigation in a November 14, 2003 deposition in one of the lawsuits, *International Action Center, et al, v. the United States of America, et al.* He testified that he first became aware of the pepper spray incident "a couple of weeks ago" when he also viewed the amateur videotape. Asked if he was aware of the internal investigation, he said, "I just became aware of that recently...through my attorney, in preparation for this" deposition. Excerpts of the testimony that followed:

Plaintiffs attorney Mara Verheyden-Hilliard: Having viewed that video, did it appear that their actions were in conformity with their constitutional obligation as the MPD?

Ramsey: [following an objection by his attorney] I am unable to determine based on the footage that I saw.

Verheyden-Hilliard: Can you describe what the footage was that you saw?

Ramsey: An individual had a liquid substance. There was a crowd of people, a liquid substance spraying into the air. I don't know

what prompted it, unable to see anything going on around or hearing anything so I don't know what prompted it.

Verheyden-Hilliard: What did the individual look like that you saw?

Ramsey: I don't recall. I only saw the tape once.

Verheyden-Hilliard: Do you recall seeing an individual who was wearing a balaclava or a black mask?

Ramsey: There were a lot of people in that tape that had on black masks...

Verheyden-Hilliard: Since you have been made aware of the issue of the use of OC spray at the Navy Memorial have you undertaken any investigational review of that incident?

Ramsey: Our Force Investigation Team looks into any discharges of OC spray now. I don't get involved in investigations until they come to me for final determination.

The attorney and Chief Ramsey go through a series of questions on the level of oversight of MPD Office of Internal Affairs and Force Investigation Team investigations. Verheyden-Hilliard asks, "what safeguards are in place to ensure that the police officer is not essentially let off the hook?" and "If there is no adverse action taken against that officer, is there any safeguard to ensure that that was the correct determination?" Ramsey describes the command channel review. It is made very clear on the record that when an investigation concludes that the officer acted within MPD policy, as was the case with the pepper spray incident, there is no second-level review up the chain of command.

Verheyden-Hilliard: Do you intend to take any action to investigate or ensure that there is investigation of the use of OC spray at the Navy Memorial on Inauguration day?

Ramsey: Since there is pending civil litigation in this matter, we certainly will look into it to make sure that it falls within department guidelines that existed at the time the incident took place.

In December during the Committee's hearings, Assistant Chief Broadbent was asked about the videotape showing the pepper spray incident. He said he had not seen the Force Investigation Team report, but took for granted that the investigation was "complete and comprehensive."

The prevalence and quality of internal MPD investigations was not initially an issue within the scope of the Judiciary Committee investigation. The committee, nonetheless, has no choice but to comment and make recommendations concerning this critical aspect of police work: it is imperative that the D.C. Council, and the public generally, be able to have confidence that law enforcement leaders hold themselves and their subordinates accountable.

There is no evidence that the pepper spray incident was even considered as an issue by MPD until the litigation forced the Department to acknowledge its occurrence. There is no evidence Investigator Cumba filed a report on use of pepper spray; there is no evidence Sgt. Staples was aware or did anything about the use of force; the Office of Professional Responsibility investigator failed to pursue even the basic step of contacting Sgt. Staples in person to pursue this aspect of the investigation, let alone other basic police work such as interviewing persons known on the public record to have been on hand where the incident occurred. Not only was a report on the use of force required, and not filed, but, according to the SOP on mass demonstrations, "members who observe other members engaging in misconduct against citizens shall report such misconduct to an official as soon as possible." That, too, did not occur.

The Committee's concern with the ability of the MPD to police itself was underscored a second time in the course of this investigation by receipt on December 16, 2003 of another Office of Professional Responsibility report on three allegations brought to the department's attention in April by Committee Chair Patterson. The allegations were summarized as follows in a memorandum to the Assistant Chief of Police, Office of Professional Responsibility, signed on Sept. 9, 2003, and received by Councilmember Patterson on December 16, 2003:

Mr. Adam Eidinger complained that six police officers followed him on Friday, March 28, 2003, as he rode his bicycle from Dupont Circle to Visions Theater, located at Connecticut Avenue and Florida Avenue, Northwest. Mr. Eidinger stated that one of the police officers told him that Lieutenant Jeff Herold directed them to follow him.

Ms. Margaret Luck complained that members of the MPD used poor tactics on Saturday, April 12, 2003, when they rode their motorcycles through a crowd of protesters at 9th and F Street, Northwest. She stated that her complaint was not about the conduct of a particular officer, but about the commanding officer that directed the officers to ride their motorcycles through the crowd of protesters.

Mr. David Curtis complained that while participating in a protest on Monday, March 31, 2003, he was forced from his bicycle and arrested for Assaulting a Police Officer.

While the Committee notes and appreciates the due diligence shown by the Office of Professional Responsibility in treating these allegations sufficiently seriously to have conducted an investigation, the end result is inadequate. That is, the memorandum report does not disagree with, but also does not explain why Eidinger was followed by six MPD officers. And it does not indicate any action taken whatsoever in the wake of MPD having wrongfully arrested David Curtis for assaulting a police officer.

With regard to the claim about motorcycles riding into a crowd, the investigators were unable to sustain the charge, but also did not take several steps that might have been indicated, including asking local television stations to view their video footage from that day of demonstrations. One videotape reviewed by the Committee shot by an independent journalist showed large numbers of MPD officers on motorcycles in the downtown area along Pennsylvania Avenue and side streets leading up to Pennsylvania, using the vehicles to butt their way through a crowd of anti-war protesters. The journalist interviewed a local attorney who described motorcycles driving into demonstrators. "He hit me on the back of my leg with his motorcycle," the lawyer said, but indicated he was not seriously injured. He said in the 900 block of E Street eight motorcycle officers used their vehicles to move demonstrators into the streets. While not precisely the scene described by Ms. Luck, the description was similar, and based not on a law enforcement investigation but, rather, on the Committee simply reviewing tapes of police conduct during the April 2003 anti-war demonstrations.

On the Eidinger complaint, the report notes, "Lieutenant Herold reported that the bicycle riders were followed so that he would know if and when the bicyclists were going to rejoin one another and begin an illegal Critical Mass Bike ride." Why were six officers tailing a single bicycle rider? What kind of deployment of resources did that represent, and was that defensible or worth challenging as a matter of policy and poor decision-making?

With regard to the Curtis arrest, the memorandum recounts reviewing the arrest/prosecution report which "appears to lack the basic elements for an Assault on a Police Officer." The arrest was no-papered, that is, prosecution for the alleged crime did not go forward. And the narrative in the memorandum indicates that Curtis along with other bicycle protesters was stopped and asked to show his bike registration; when he sought to ride off an officer grabbed the back bike tire and the officer's hand was injured. The arresting officer, Robert Hay, "stated that he became verbally abusive," when asked for the registration. He was "removed from his bicycle and placed under arrest for assault on a police officer."

A review of the prosecution report "revealed that at no time did Mr. Curtis actually assault the officers" and, rather, "it appears that Mr. Curtis failed to obey the officers' commands and attempted to escape." As to the individual being arrested for a crime he did not commit, the memorandum simply says: "Officer Hay has since resigned from the Metropolitan Police Department and it is

therefore recommended that no further action be taken regarding his part in the arrest." Investigators did not question or review the apparent policy of seeking bicycle registrations of individual engaged in protected First Amendment political activity. As has been the case with other incidents reviewed by the Committee, the department's leadership does not use complaints lodged by residents to evaluate the performance of members of the department or of tactics generally used during demonstrations.

The third and final aspect of the Committee's investigation that points to failures at self-policing is discussed in greater length in the section on the Pershing Park investigation. As shown there, a series of after-action reports by MPD officials made very clear that there were serious issues with the arrests effected that day. "The mass arrests at Pershing Park were total confusion," wrote Capt. Andrew Solberg. "I was not confident of the legality of our arrests.... That a great number of the failure to obey cases were no-papered indicates the USAO also felt uncomfortable with the charges and/or the arrests."

Another after-action report by Commander Abraham Parks noted, "officers showed up to paper cases and informed the papering attorneys they did not know why the demonstrators were arrested." That memorandum is dated October 2, 2002. A handwritten note on the memo states: "Send copy to EAC Fitzgerald, Terry Ryan, Esq." and is signed by Assistant Chief Alfred Broadbent. Chief Fitzgerald is second in command in the department; Terry Ryan is General Counsel. When asked in his deposition about after-action reports that highlighted issues with the arrests, Broadbent insisted he was not aware of those critical reports, his own signature on one of them notwithstanding. In his deposition, Executive Assistant Chief Fitzgerald stated that he was not aware of any problems with the Pershing Park arrests until sometime after the Council received testimony on the issue on October 24, 2002.

During the hearing December 17 and 18 Chief Broadbent and Chief Ramsey were asked about the failure of the department to follow up immediately on the mistaken arrests when after-action reports indicated serious problems. Neither gave a satisfactory answer.

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 the amateur videotape that clearly shows Investigator Cumba acting as the aggressor with the crowd in his use of pepper spray. The 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 Eiding, 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.

Recommendation:

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 on use of force, or the DOJ Inspector General.

**CASE STUDY:
THE PERSHING PARK ARRESTS, SEPTEMBER 2002**

On September 27, 2002, the Metropolitan Police Department arrested well over 600 persons in connection with anti-war and anti-globalization demonstrations throughout downtown Washington D.C. The Committee's investigation has focused on the arrest of nearly 400 persons in Pershing Park that day as a case study of MPD practices in order to assess whether the department adheres to its own policy, to legal requirements, and to best practices in assuring civil rights while protecting public safety.

Planning

MPD began preparing for the fall 2002 meetings of the International Monetary Fund and World Bank several months in advance including development of a comprehensive operations plan for the weekend of events. Political activists announced plans for both anti-war and anti-globalization events on Friday, Saturday, and Sunday, September 27-29.

In a July 21, 2002 e-mail to members of the command staff, Assistant Chief Broadbent warned "preliminary intelligence is that this will be the worst we ever faced" in terms of demonstrations. In preparation for the meetings, the department was fully mobilized, and MPD asked for manpower assistance from several local and federal police departments.

On September 23, 2002, Chief Ramsey briefed Councilmembers and Council staff on the upcoming weekend's events. He said that MPD was expecting 20,000-30,000 demonstrators. He said MPD was most concerned about non-permitted events planned for Friday, September 27th. Chief Ramsey urged people to take public transportation to work that day, and to expect delays if driving. He said that a group called the Anti-Capitalist Convergence was planning protests for that Friday, perhaps gathering around Freedom Plaza at around 10 a.m. Chief Ramsey shared information from the websites of some of the groups involved that he said had indicated they planned to "shut down the city."

By contrast to the Council briefing and similar updates provided to the media, the Department's own operations plan indicates that the department did not expect more than 4,000 demonstrators at any event over that weekend. A September 27, 2002 Intelligence Unit undercover activity report indicates that MPD had a clear picture of the schedule of the demonstrators that day. That report notes that a "snake march" would begin at 7 a.m. in Franklin Park at 14th and K Streets, N.W., that a "Critical Mass bike ride" would begin at Union Station at 7:30 a.m., and that a "People's Strike" would begin at 9 a.m. at Freedom Plaza.

The MPD operations plan for Friday, September 27, 2003, describes the People's Strike as a "call for protestors to blockade various major intersections throughout Washington, D.C. in an effort to shutdown the downtown area" and describes the "Bike Strike" as a ride to "protest global capitalism and environmental destruction" through the streets of downtown, during rush hour, "in an effort to shut down the city."

Sequence of Events

The Committee has reconstructed the events of September 27, 2002 by reviewing live media footage of that day as well as published press reports, listening to MPD radio runs, reviewing MPD after-action reports and the Department's "running resume" that logs events reported throughout the day, and interviewing MPD officials. The record shows that mass arrests were ordered throughout the downtown area either in the presence of or with the approval of Chief Ramsey throughout the morning.

Throughout the morning of September 27th, there were groups of demonstrators ranging in size from 30 to more than 150 people converging at different locations across the city, from downtown to Dupont Circle. There were also unsubstantiated reports of small disturbances at different points across the city. For example, local television stations reported that burning tires were reported to be seen on the 14th Street bridge at around 7 a.m. According to MPD radio tapes, at 8:48 a.m., 35 demonstrators were throwing debris on Dupont Circle. And at 8:55 a.m., a report came over the radio of demonstrators destroying property at 16th and P Streets, N.W. The Committee did not confirm the factual basis of these reports.

There were also several mass arrests made that morning. The arrests started at 6:55 a.m. when approximately 21 demonstrators were arrested for blocking traffic at the intersection of 14th Street and Independence Avenue, SW, at the exit/entrance to the 14th Street bridge. Five of these demonstrators linked themselves to each other through "sleeping dragon" devices¹⁷ and were extracted by the Fire and Emergency Medical Services Emergency Services Team.

At 7 a.m. roughly 400 demonstrators congregated at Franklin Park at 14th and K Streets, N.W. and then started marching out into K Street. Assistant Chief Brian Jordan was one of four command staff officials given a geographical area of responsibility, including 14th and K¹⁸.

¹⁷ A "sleeping dragon" is a device by which two or more people can lock their arms together, usually with a securing device inside steel or polyvinyl chloride (PVC) piping to inhibit the effectiveness of removal by saws.

¹⁸ In his deposition testimony that is contradicted by the operational plan outline of anticipated events, including the snake march to start at Franklin Park, Jordan said: "Friday was a real unclear day that there was specific requests for the Thursday, the Saturday, and the Sunday, but Friday there wasn't any clear information and the responsibility was just for the area commanders to be ready for their areas."

He testified that demonstrators began marching in the street without regard for traffic, creating "a dangerous situation." He said, "I decided that we had to make arrests because if they continue there could be possible serious danger in terms of pedestrians being struck." His civil disturbance units (CDU) surrounded and attempted to cut off the demonstrators without success.

According to MPD's running resumé for the day, Chief Ramsey arrived on the scene at 7:27 a.m.

Once the march got to Vermont Avenue, the CDUs blocked in the demonstrators. According to Assistant Chief Jordan's commander's log, at 7:35 a.m., "civil disobedience that could have possible lead to serious injuries to pedestrians, drivers, protesters and police. Decision to effect mass arrests made for marching without a permit." At 7:40 a.m., additional CDUs were deployed to 14th and K Streets and at 7:46 a.m., smoke bombs were thrown at the police. Skirmishes then broke out between demonstrators and police officers. Images of police officers striking demonstrators aired on local television stations.

Assistant Chief Jordan testified that his CDUs formed a cordon around the demonstrators to prevent them from getting back to K Street. Within the area surrounded by police, the window of a business was broken at 7:49 am. At 7:52 a.m., the arrest order was given and approximately 178 arrests were made, all on charges of failure to obey a lawful order of a police officer. Assistant Chief Jordan testified that he gave the order to arrest. This testimony was confirmed by Commander Tom McGuire, who was one of the assistant commanders in charge of that area.

Assistant Chief Jordan testified that he did not give warnings. "With regard to the march, warnings were impractical and to the point of giving someone directions, impossible." He described the situation as "fluid" until the police lines stopped the marchers. He was asked, "even though at that point there was a line in front of them and a line in back of them even though in your own mind you had made a decision to arrest, where was the danger?" Jordan responded, "The action stopped the danger. If they were allowed to continue the danger would continue." Notwithstanding that view, the department's primary policy guidance on the issue of crowd control requires warning and dispersal orders prior to mass arrests "when time and circumstances permit."

There were multiple mass arrests made elsewhere in the city that morning. For example, according to radio tapes and media coverage, at 8:22 a.m., a group of protesters were contained on the 900th block of 12th Street, NW. At 8:32 a.m., Chief Ramsey arrived at this scene. At 8:37 a.m., approximately 70 protesters were arrested at this location. At 8:48 a.m. there were reports of fireworks being lit up and of demonstrators writing on the sidewalk with chalk on the 1200th block

of Connecticut Avenue. By 8:58 a.m., according to the radio tapes, everything was orderly at this location. Yet at 9:10 a.m., a group of demonstrators was stopped and contained by CDU units at 1025 Connecticut Avenue, N.W., and at 9:12 a.m., 42 arrests were made with individuals charged with Failure to Obey.

The largest mass arrest that morning took place at Pershing Park on Pennsylvania Avenue between 14th and 15th Streets, N.W. Beginning at approximately 8:40 a.m., demonstrators and police officers began converging at Freedom Plaza between 13th and 14th Streets and at Pershing Park. According to radio tapes, at 8:47 a.m., 150 demonstrators were headed south on 13th Street crossing over G Street, NW.

At 9 a.m., a call came over the radio for all transport buses to report to the 1400th block of Constitution Avenue, N.W., a block south of Pershing Park. Transport buses are the means used by the police to transport prisoners after effectuating mass arrests.

By 9:06 a.m., the southern and eastern sides of Pershing Park were closed off by MPD civil disturbance units. As demonstrators began to converge on this location, a large group began to walk north on 14th Street. Fearing they were losing control of the group, according to Captain McLean, MPD officers cut those demonstrators off at 14th and F Streets and directed them back down 14th Street and into Pershing Park.

These were not the only demonstrators ushered into the Park by MPD. One of the demonstrators arrested at Pershing Park, retired Army Lieutenant Colonel Joseph Mayer, was interviewed by MPD as part of its internal investigation into the Pershing Park arrests. During that interview, he described arriving at Freedom Plaza to participate in the protest:

The police then were surrounding the plaza, told us we could not enter Freedom Plaza, and directed us across 14th Street, to Pershing Park, where they indicated the demonstration was going to take place. So, we crossed 14th Street to Pershing Park, which was also surrounded by police, and the police were at that point along the curbline surrounding the park, and we went up on the sidewalk, the edge of the sidewalk closest to the park. And we had a cloth banner which we stretched out parallel to 14th Street, so the traffic could see it, opposing the war in Iraq, and we stood on the sidewalk with our banner for ten or fifteen minutes, not long. And at that point, the police who were along the curb line, danced across the sidewalk and pushed us in the park, we said to the police wait a minute, we want to stand on the sidewalk where our banner could be seen by the traffic. He said get in the park, so we moved into the park about ten or fifteen feet.

At 9:06 a.m., a group of approximately 75 to 100 demonstrators on bicycles arrived in the vicinity of Freedom Plaza. These "bike demonstrators" had set off from Union Station at 7:30 a.m. and rode around the city for approximately 90 minutes. Captain Andrew Solberg was in command of the CDU bike units that followed the bike demonstrators that morning. Capt. Solberg testified that he accompanied the bike demonstrators to the vicinity of Pershing Park and then the demonstrators ended up in the park.

According to Sergeant Darrick Ross, who was riding with one of the CDU bike units, the bike demonstrators had ridden past the park when the CDU officers were ordered to push the bike demonstrators back into the park. Given the fact that MPD had just pushed a large group of demonstrators into Pershing Park from 14th Street, it is likely that the bike demonstrators had no access to 14th Street and, indeed, were directed into the park. A September 28, 2002 *The Washington Post* article¹⁹ described it this way:

After steering from Pennsylvania Avenue onto 15th Street, NW about 9:10 a.m., they encountered a wall of police that wasn't going to budge. Quickly, the wall collapsed on the riders and moved them into Pershing Park. The ring of officers around the park constricted, forcing the bicyclists to commingle with a couple of hundred other demonstrators who had been corralled there.

One of the riders, Michael Eichler, testified before the Judiciary Committee on October 24, 2002 about his experience:

I decided to linger in the park for a few minutes to listen to the drums being played, to soak in the excitement and energy coming from the peaceful activists and listen to their message. But before I knew it, the entire park was surrounded by police: MPD, US Park Police, riot police from Fairfax County, the MPD bicycle squad... I cautiously approached the police line and asked if I could leave. I was denied. I feverishly rode my bike around the inner perimeter of the park looking for a way out. I could not find one.

Similar testimony was provided by Julie Abbate:

The bike strikers began to arrive. They appeared to be outnumbered by the bike police. The police flanked the bike protesters on both sides and funneled them into the park. At that time I noticed that the police presence was increasing, and I decided to leave... I was told that I could not leave.

By approximately 9:15 a.m., a full half hour before the decision to make a mass arrest was made, Chief Ramsey and Executive Assistant Chief Michael

¹⁹ "A Day of Tightly Controlled Chaos," Monte Reel *Washington Post*, September 28, 2002

Fitzgerald had arrived at Pershing Park. MPD's tactical strategy of intentionally directing demonstrators into the park was confirmed by Chief Ramsey. In an interview with washingtonpost.com that morning, Chief Ramsey said:

There were folks that were in the street earlier, we told 'em to get out, they didn't, so we moved 'em back into the park, and now we're in the process of making arrests for failure to obey. We held 'em until we had enough buses and vans and people to move in.

At 9:42 a.m., all four sides of Pershing Park were closed off and demonstrators were not allowed to leave. During the approximately thirty minutes prior to MPD's closing off the remaining two sides of the park, demonstrators and others within the park were not given any orders to disperse or warnings that they would be arrested. This has been substantiated by both the Committee's and MPD's own investigation, and by the testimony of Captains Andy Solberg and Ralph McLean, Lieutenant Herold, and numerous public witnesses. Assistant Chief Newsham testified that he believed that warnings had been given to demonstrators earlier that morning, and that that, in addition to the fact that two of the sides of the Park were open for a period of time, was sufficient warning to those inside the park that arrests would be made.

The decision to conduct a mass arrest had not yet been made when Chief Ramsey and EAC Fitzgerald arrived. According to the deposition testimony of EAC Fitzgerald, Assistant Chief Newsham, who was in charge of the area, approached Chief Ramsey and EAC Fitzgerald when they arrived on the scene and described the situation. Several witnesses interviewed by the Committee observed this conversation, which took place at the southeast corner of the park, at the intersection of 14th Street and Pennsylvania Avenue. The following are relevant excerpts from Assistant Chief Newsham's deposition about this conversation:

Q: We have had sworn testimony that the chief directed you, instructed you to arrest the protesters, is that correct?

A: I wouldn't say that's correct, no.

Q: Well, when you advised him about what was going on did he have questions about what was going on?

A: Yes.

Q: And did you inform him about what you thought was the appropriate course of action?

A: Yes.

Q: And I take it that you took his involvement as some sort of approval?

A: Yes...I know I briefed the Chief and I told him. I said I think they're arrestable. Like I said, Chief Fitzgerald was right there and I felt when I left that group that I had the authority to make the arrests....

Q: When you described to Ramsey what you saw in a situation such that you said subsequently in your testimony you felt you had his approval, in your conversation with him did you directly seek that approval?

A: I would say yes.

According to Captain McLean's deposition testimony, after this conversation with Chief Ramsey, Captain McLean and Assistant Chief Newsham discussed what the demonstrators should be charged with.

In his public hearing testimony before the Committee, Chief Ramsey confirmed that he gave approval for the order to make the arrests at Pershing Park.

At approximately 10:25 a.m., the demonstrators inside Pershing Park began to be arrested and loaded onto buses.

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.

In statements to the media throughout the morning of September 27, 2002, Chief Ramsey indicated that he anticipated civil disobedience and that any law-breakers would be quickly arrested. The arrests made throughout the downtown area that morning showed that there would be no tolerance for any non-permitted, spontaneous demonstrating. Arrests were swift and, at times, preemptive, indiscriminate and in violation of MPD policy.

In the case of Pershing Park, it is clear from the testimony of Assistant Chief Newsham that arrests were made in anticipation of what may occur if protesters were allowed to continue demonstrating. The decision to make arrests was consistent with a preemptive tone set by Chief Ramsey in preparation for the demonstrations. Commander Tom McGuire testified during his deposition that