V. CONCLUSION: THE NEED FOR STATUTORY GUIDELINES

As noted earlier in this report, the May Day litigation ended based on the belief by the U.S. Court of Appeals that new leadership of the Metropolitan Police Department would address the serious issues raised by litigants and sustained in the U.S. District Court ruling. Judge Levanthal noted that the department "has been advancing its low-key approach" and that there were "reasonable expectations" that the department would address the issues raised, particularly concerning mass arrests. And for at least a period of time the Court's decision not to rehear the case was justified. That justification ended with the events and police actions of April 2000 and in actions taken by the MPD during major demonstrations over the last several years.

The Committee recommends legislation containing guidelines for Metropolitan Police Department practice in two areas: conducting surveillance and infiltration of political organizations and handling problematic mass demonstrations (using the ACLU definition of problematic, i.e. where civil disobedience is expected). It is the intent of the Committee to introduce legislation this spring to reflect these recommendations. The legislation will likely take the form of regulations that, once in place, can be amended by the Executive branch with approval of the Council.

Guidelines on Intelligence

As the Gilmore Commission noted in its final report in December 2003, definitions are changing for what constitutes legitimate law enforcement activity, including what purpose may be served by surveillance of political organizations. In the aftermath of the terrorist attacks of September 11, 2001, there is a strong and legitimate public interest in careful scrutiny of any and all intelligence that might prevent terror, whether that terror takes the form of violent attack based on ideology or gang-related violence that occurs in the streets of American cities. The elected legislature has a responsibility to draw the line between what is legitimate law enforcement purpose and what violates the civil rights and civil liberties of District residents.

Legitimate law enforcement purpose includes acting to prevent crime and pursuing information that can assist in preventing crime. It is the latter that gives rise to intelligence directed at individuals and organizations based on what, in other contexts, is protected First Amendment activity. The Committee has reviewed policies recently adopted in Chicago, New York City, and the State of California governing intelligence operations. These documents offer useful models and the Committee has included some aspects of these law enforcement policies in recommendations that follow. For these purposes surveillance is defined as the systematic, on-going undercover monitoring of a group's activities and includes police attendance at public meetings or social activities.

The Metropolitan Police Department should conduct intelligence operations solely for a legitimate law enforcement purpose.

Before police undertake surveillance of any group engaging in constitutionally protected expression or freedom of association, there should be reasonable suspicion to believe that the group is engaging in, planning to engage in, or about to engage in criminal activity.

MPD should be prohibited from using undercover officers to conduct surveillance of individuals or organizations based solely on the content of their political speech or ideology.

Surveillance in this context should be expressly approved by the Assistant Chief for Special Services, be time-limited in duration, and be conducted in a manner that is not more extensive or intrusive than is justified by its purpose.

MPD should be required to have an internal oversight mechanism once an undercover operation is underway that, on a regular basis, reviews the activity of and information gained by undercover officers and determines whether undercover surveillance is still warranted.

Officers engaged in surveillance should report regularly to the Assistant Chief for Special Services. Police should immediately cease such surveillance once facts made known to them no longer support reasonable suspicion.

MPD should be prohibited from using agents provocateur.

Guidelines for Mass Demonstrations

The Committee recommends legislative guidelines for the Metropolitan Police Department in handling mass demonstrations to include the following. "Current MPD policy" refers to written policies contained in MPD's *Standard Operating Procedures for Mass Demonstrations, Response to Civil Disturbances and Prisoner Processing.* As noted earlier in this report, the policies contained in the manual are generally sound but have been violated by the Department in recent years.

Prior to each mass demonstration, the police chief should issue a directive saying that MPD's overall mission during mass demonstrations is to protect demonstrators' First Amendment right to assemble and protest, and that in the event that individuals engage in unlawful behavior, those individuals shall be arrested without abridging the rights of others lawfully assembled.

Consistent with current MPD policy, MPD should not disperse nonviolent demonstrators in the absence of unlawful activity.

Consistent with current MPD policy, MPD should not arrest nonviolent demonstrators for failure to disburse or failure to obey an order without first giving multiple and clearly audible warnings and an opportunity for demonstrators to comply with police orders.

MPD should not arrest nonviolent demonstrators solely for failure to have a parade permit unless 1) there is another permitted demonstration planned for the same location 2) the demonstrators are blocking buildings or traffic 3) the demonstrators are acting disorderly.

MPD should not use police lines to surround and detain nonviolent demonstrators.

Consistent with current MPD policy, when conducting arrests during a mass demonstration, MPD should, through the use of field arrest forms and commander event logs, contemporaneously record facts necessary to establish probable cause for the arrests.

Individuals arrested during mass demonstrations should receive copies of their field arrest forms.

Consistent with current policy, when conducting mass arrests, when practical, MPD should film police actions in their entirety, including giving warnings and dispersing or arresting demonstrators, in accordance with existing regulations governing the use of Closed Circuit Television cameras.

MPD should not conduct a mass arrest based on the unlawful conduct of a few demonstrators. When arrests are necessary, MPD should only arrest those demonstrators responsible for the unlawful conduct.

MPD should follow its current use of force policy that: 1) the use of force, including riot batons, OC spray and chemical agents be used according to strict standards; 2) force should only be used as authorized by the highest ranking official on the scene, or, in the case of chemical agents, only as authorized by the chief of police; 3) the use of force should be documented and such documentation should be made available to the public consistent with the reporting requirements of MPD's Memorandum of Agreement with the Department of Justice.

MPD should follow its current policy of using riot gear only at the authorization of the highest ranking official on the scene and only when there is reason to anticipate violence.

During mass demonstrations, all uniformed officers should be plainly identified by their badge numbers, which should be displayed in large numbers emblazoned on their jackets so as to be clearly visible to the public.

Uniformed officers should never remove their badges or any other identifying emblem, and supervisors should never authorize such removal, or be subject to disciplinary action.

Consistent with current MPD policy, plain-clothes officers should be required to identify themselves before taking any police action.

MPD should notify the Office of Citizen Complaint Review (OCCR) in advance of demonstrations in which mass arrests may be reasonably anticipated. OCCR should monitor each such demonstration, and should then issue a public assessment of police performance, identifying any police misconduct.

COMMITTEE ACTION

The Committee on the Judiciary met on March 4, 2004, to consider and mark up its report on the Investigation of the Metropolitan Police Department's Policy and Practice in Handling Demonstrations in the District of Columbia. Present and voting were Chairperson Patterson and Councilmembers Sharon Ambrose and Jack Evans.

Chairperson Patterson briefly went over the findings and recommendations of the report, including the need to enact statutory guidelines for managing demonstrations and conducting surveillance of political organizations, and moved for Committee consideration of the report. She then called for discussion.

Councilmember Ambrose congratulated Chairperson Patterson and Committee staff on the investigation and report. She made two recommendations concerning the legislation envisioned in the Committee report. She said the legislation should provide policies for the department, and be written in such a manner that when circumstances change, the rules might be changed without requiring a full legislative process. She also said the closing of the convergence center in 2000 and the use of undercover officers to infiltrate political groups raise the need for drawing a "bright line" between what are the proper duties of the Metropolitan Police Department and what are the responsibilities of the Federal Bureau of Investigation, particularly as it concerns persons who come into the District from other parts of the country expressly to cause disruptions. She also said that the events recounted in the committee report, particularly concerning the need to discipline officers behaving in "an egregiously unconstitutional manner" were "chillingly familiar" and comparable to the events of the 1970s.

Councilmember Evans congratulated and thanked the Committee staff on the comprehensiveness of the report and said the investigation represents, "what the Council committees are supposed to do." He said there are many hard-hitting conclusions in the report; some he agrees with and some he does not. He said the report presents an "excellent roadmap" of issues for further consideration with respect to future demonstrations. He said it's clear the Metropolitan Police Department "fell short" in handling the Pershing Park demonstrations, but noted that it is "a difficult line to draw" given the large volume of demonstrations that occur in the District. "This report should be required reading for every officer," he said. Turning to the events of 2000, also recounted in the report, Councilmember Evans said that regardless of what caused the damage in Seattle in November 1999, it was evident that protestors "were coming here next" and it was important for the Metropolitan Police Department to prepare to make certain "that this community not get busted up." He noted that "hindsight is 20/20" and that legislation in these areas "maybe makes sense; maybe not." He concluded that the report serves as a model of how all Committees should operate.

Councilmember Patterson then moved for approval of the report, with leave for staff to make technical corrections. The Committee voted as follows:

YES: Chairperson Patterson, Councilmember Ambrose and Councilmember Evans

NO:

PRESENT:

ABSENT: Councilmember Harold Brazil and Councilmember Kevin Chavous

APPENDIX A: SUMMARY OF PUBLIC HEARINGS

The Committee on the Judiciary held a 2-day public oversight hearing on the Judiciary Committee Investigation on current policies and practices of the Metropolitan Police Department related to demonstrations with the District on December 17– 18, 2003. Copies of the public testimony are included in Attachment xx. A summary of the hearing follows.

In opening the two days of hearings in December, Councilmember Patterson recounted the events of April 2000 and read from a letter to Mayor Williams and the then-chair of the financial control board written by constituents, both attorneys. Ross Eisenbrey and Barbara Somson wrote, they said, "to express our deep dismay over the manner in which the Washington Metropolitan Police Department handled the anti-IMF protest over the weekend of April 15. We request a thorough investigation into the actions of the MPD, which, as reported by the news media, appear to be unconstitutional and illegal."

The letter noted the apparently preemptive closing of the demonstrator's convergence center "allegedly because of fire violations." Noting their experience, as parents, with fire code violations in public schools, the writers said "we cannot recall a single instance when a building was closed because of initial findings of fire code violations. We believe the actions of the MPD were nothing more than a pretext and plainly illegal." They also requested an investigation of hundreds of arrests that, according to press accounts also appeared preemptive "to prevent them from protesting at the opening of the IMF/World Bank meetings on Sunday, April 16."

Finally, they wrote,

> Regardless of whether we agree with the message or the tactics of the protesters, we believe there is evidence that the MPD trampled on protesters' constitutionally protected rights and interfered with academic freedom. In so doing, the MPD has jeopardized the rights of all of us. Reports of these police actions are beamed around the world, and risk making a mockery of the freedoms of speech and assembly that symbolize our nation. We urge you, as Chief Ramsey's superiors, to conduct a thorough investigation of these charges and to report to District residents and to the world the results of your investigation, with recommendations for assuring that our constitutional rights are safeguarded here in the nation's capital.

In her opening statement at the hearing, Councilmember Patterson also recounted testimony given to the Judiciary Committee on October 24, 2002. At that time the ACLU presented three witnesses who recounted their experiences

during anti-war and anti-globalization demonstrations on September 27, 2002. All were arrested and detained for 24 hours or more. A young woman attorney, a computer programmer, and a retired Army lieutenant colonel shared their experiences with this committee (and subsequently became plaintiffs in one of the class action lawsuits against the District.).

Patterson noted that Joseph L. Mayer, the retired Army officer, said: "On Friday, September 27, in Washington D.C., my sense of my own place in society was stunned when I was arrested for the first time at the age of 69. This experience shook my confidence that our Constitution and my adherence to that rule of law, made me safe and secure on the streets of our capitol." The three witnesses were among the 400 or so individuals wrongfully arrested in Pershing Park that Friday morning in September.

We have seen police abuses in the past, here, and across the country. It is the job of elected policymakers, through oversight of the police department, to question, and, as necessary, to legislate parameters to make sure our department is protecting, and not jeopardizing, Constitutional rights.

Arthur Spitzer, Legal Director, American Civil Liberties Union of the National Capital Area ("ACLU-NCA")

Mr. Spitzer, on behalf of the ACLU-NCA, commended the Judiciary Committee for holding public hearings about the policies and practices of MPD relating to demonstrations. "[W]e believe this investigation will show the need for the Council to provide more detailed and effective guidance to the police with regard to their handling of demonstration activities," said Mr. Spitzer. He noted that while MPD is effective in handling routine demonstrations, the department has over-reacted when faced with demonstrations in which some sponsors announced the occurrence of civil disobedience. "We are not suggesting that there is any legal right to engage in civil disobedience...but non-violent civil disobedience does not justify police violence, and it certainly does not justify the arrest of hundreds of people who have not violated any law...". In addition, Mr. Spitzer presented to the Committee a ACLU-NCA report entitled, "The Policing of Demonstrations in the Nation's Capital: A Misconception of Mission and a Failure of Leadership." The report contained 20 recommendations for Council action regarding policies and practices related to demonstrations.

Mara Verheyden-Hilliard, Partnership for Civil Justice and National Lawyers Guild Mass Defense Committee ("PCJ")

Ms. Verheyden-Hilliard, on behalf of PCJ, testified that the litigation by the PCJ has revealed, in their opinion, the systematic police abuse of demonstrators. She also testified that, in the organization's opinion, MPD is engaged in an ongoing illegal domestic spying operation on political activists. Finally, Ms. Verheyden-Hilliard noted that PCJ has four pending First

Amendment cases on behalf of demonstrators in Washington against the District government. A chart detailing the pending lawsuits as of December 15, 2003 is included as Appendix C.

Mark Goldstone, Chairman of the Demonstration Support Committee of the D.C. Chapter of the National Lawyer's Guild- DC Chapter

Mr. Goldstone, on behalf of Demonstration Support Committee of the D.C. Chapter of the National Lawyer's Guild- DC Chapter, testified that Chief Ramsey has implemented a plan – "The Ramsey Plan" – to thwart individuals demonstrating in the District. According Mr. Goldstone, the Ramsey Plan included scaring the media and the residents of the District with the potential for protestor violence and conducting mass arrests of protestors, sometimes preemptively, in order to disrupt the protestors plans. "...the Ramsey Plan has a chilling effect on people's interest and motivation in speaking out against the government, of attending protests and rallies, and of even visiting downtown during demonstrations," said Mr. Goldstone.

Kristinn Taylor, Co-Leader, DC Chapter of FreeRepublic.com

Ms. Taylor testified on behalf of DC Chapter of FreeRepublic.com, an independent, grassroots conservative group that was established in September 1998. She testified that members of the FreeRepublic.com has held over 200 protests and demonstrations in the District and never had the alleged behavior of the MPD against the leftist groups directed at them. Ms. Taylor also testified that she has a hard time disagreeing with the department's decision to arrest the 400 people in Pershing Park on September 27, 2002.

Beth Caherty, DC Chapter of FreeRepublic.com

Ms. Caherty testified that she believes in freedom of speech and expression for everyone, but did not believe that freedom of expression included the right to damage and destroy public or private property, riot, threats and intimidation. She noted that in more than three years of participation in peaceful demonstrations on the streets of DC, she never witnessed or been involved in an incident where any law enforcement agency has used excessive force or violated a person's civil rights.

Adam Eidinger

Mr. Eidinger testified that the Council should take action to ensure that the rights of political demonstrators are not violated by MPD. He noted that MPD, as well as other law enforcement agencies, needs to end the routine infiltration, disruption, mass arrests and intimidation of local political activists. He recommended that the city leaders and MPD agree on new rules for how demonstrations are served.

"For the record I was arrested on September 27, 2002 in Pershing Park while attempting to express my opposition to war on Iraq...The arrests were terrifying and a despicable violation of basics constitutional rights. Police forcibly removed us from the park even though we posed no threat to anyone and were never ordered to leave...I was in jail for about 26 hours, during that time I began to question, and to his day question, if this country is really free," said Mr. Eidinger.

Robin Bell

Mr. Bell, a journalist with Washington DC Independent Media Center, as well as a freelance videographer, testified that MPD targeted and indiscriminately arrested journalists, including himself, on September 27, 2002. He also brought videotape that he believes illustrated this action.

John Brodkin, Americans for Deomcratic Action, Greater Washington Chapter

Mr. Brodkin testified on behalf of Americans for Democratic Action, Greater Washington Chapter, the nation's oldest independent liberal political organization. He said that Americans for Democratic Action commends the Judiciary Committee's decision to investigate MPD practices during political demonstrations. He noted that current policies of preventive arrests, massive police presence, and announcements hyping possible violence at demonstrations infringe on the fundamental rights of District residents and that Pershing Park arrests are a prime example of this type of action.

Dr. Lucy G. Barber, Author, *Marching on Washington: the Forging of an American Tradition*

Dr. Barber, a historian, was invited by the Judiciary Committee to provide a historical context of political protests in Washington, D.C. and how the police department handled the demonstrations. Dr. Barber described how MPD's officers and their advisors responded to three different national protests in Washington between 1874 and 1971. She started with first "march on Washington" in 1894 by a group called Coxey's Army where the police practiced a "line in the sand" strategy. The next march described was Bonus Army in 1932. In this protect, District's officers used a policy called "forceful courtesy" towards the demonstrators. The final demonstration that Dr. Barber described was Mayday Protests of 1971. It was these protests where protestors threatened to "shut down" Washington and where MPD responded by preemptively disrupting protest events and by using mass arrests, resulting in over 12,000 arrests over a three-day period.

Robert Klotz, former Commander, Special Operations Division, Metropolitan Police Department

Mr. Klotz was invited by the Judiciary Committee to testify because he served as SOD commander in the late 1970s and early 1980s. He stated that the police must respect the rights of the demonstrators as well the rights of the people in the city. He also said that if the public could not tell whether police officer were supportive or not of the demonstrators that means the police have managed the event well.

Note: More information on the Klotz and Temple testimony is included in the *Departing From Best Practices* section.

Ralph Temple, former Legal Director, ACLU-NCA

Mr. Temple was invited by the Judiciary Committee to testify because he participated in the extensive litigation that followed the May Day 1971 arrests. He praised the leadership of Mr. Klotz when he lead the department's work on demonstrations and said, "except for Bob Klotz's reign, it's never been done right by the Metropolitan Police Department." In commenting on the trade meetings and protests in Seattle, Temple said there were large peaceful demonstrations that did not get any press attention. On the political side, he said, "There were much greater political benefits to the nation and to the world from the Seattle demonstrations than the downsides. It changed the whole world consciousness of trade issues, and it changed the political agenda for the world trade organizations." He presented the policy proposals of the American Civil Liberties Union, including a recommendation that police officials be disciplined for misrepresenting facts on police actions. "I'd go farther than the ACLU," he said. "I'd make it a prosecutable felony for a law enforcement official to publicly lie about a law enforcement action."

James Short, Deputy Fire Chief, Department of Fire and Emergency Medical Services ("FEMS")

Deputy Fire Chief Short provided testimony to clarify the role of FEMS in inspecting 1324 Florida Avenue, NW, known as the convergence center. Deputy Fire Chief Short noted that at the time, he was assigned as the Battalion Fire Chief at the Fire Prevention Bureau, which had responsibility in the enforcement of the Fire Prevention Code. In addition, he was tasked with supervising filed operations of the Mayor's Nuisance Abatement Task Force.

Deputy Fire Chief Short testified that he first became aware of the convergence center when he viewed a local new broadcast that depicted activities that were unusual for that location. He said that he was contacted by MPD after the airing of the broadcast. After some research that revealed no permits for the premises, he conducted on April 15, 2000 a fire inspection of the property that revealed numerous fire code violations, including the use of propane gas and

overcrowding. Deputy Fire Chief Short said that the occupants of the building were given approximately two hours to abate the fire code violations and when they failed to do so, the building was closed as authorized by the Fire Prevention Code.

Alfred J. Broadbent, Sr., Assistant Chief, Special Services Command, Metropolitan Police Department

Assistant Chief Broadbent, who is responsible for the management of the Special Services Command and coordinating and preparing the department for major events and demonstrations that occur in Washington, provided testimony on MPD's philosophy regarding demonstrations within Washington. He said that MPD's underlying philosophical principle related to managing and responding to demonstrations is to ensure that demonstrators have full opportunity to voice their First Amendment right, without fear. He noted that department's purposed dedication to managing safe large scale demonstrations met a new challenge after the events in Seattle, WA in November 1999.

During those demonstrations surrounding the WTO, there was widespread looting, uncontrolled civil disobedience and over $3 million in property damage and destruction to downtown Seattle. Because of the unrest in Seattle, Assistant Chief Broadbent said that MPD was uncertain what to expect at the protests in April 2000 at the IMF/WB Conference. Therefore the department prepared for the worst possible scenario because it had received intelligence that the demonstration organizers wanted a repeat of Seattle in Washington, DC. Assistant Chief Broadbent noted because of the policies and procedures utilized by MPD, April 2000 demonstration proceeded in an orderly fashion and there was no destruction of property like in Seattle. In his final comments, Assistant Chief Broadbent said that he has traveled around the world as a consultant to share "best practices" with the respective law enforcement authorities and assist them in preparing for large-scale events.

Peter Newsham, Assistant Chief, Office of Professional Responsibility, Metropolitan Police Department

Assistant Chief Newsham, who is responsible for the Office of Professional Responsibility that encompasses the Office of Internal Affairs, the Civil Rights and Force Investigation Team, the department's Disciplinary Review Office, the Compliance Monitoring Team, and the department's Diversity Compliance and Equal Employment Opportunity Office, testified about his decision to arrest protesters in Pershing Park on September 27, 2002. He said that he was responsible for the geographical zone that included Pershing Park and the park was significant in terms of management of any large demonstration because of its proximity to the White House and to the 14th Street Bridge. He noted that since the attacks of September 11th, security has been heightened in the immediate

area of the White House, and MPD must be concerned with ensuring that the security of the White House is not threatened or compromised in any way.

Assistant Chief Newsham said that he was aware that no parade permits had been issued for September 27, 2002 and therefore any street demonstrations would be, *per se*, unlawful. He also was aware that that some of the demonstrators in his zone who were unlawfully marking through the streets were knocking over trash containers and newspaper vending machines, and that at least one store window had been smashed by the demonstrators. He said that when he arrived at Pershing Park, he observed demonstrators converging on the park from every direction and disregarding traffic laws. Assistant Chief Newsham said that after observing the demonstrators for 45 minutes, he concluded that they had not intention of concluding their demonstration and dispersing, but would continue their unlawful demonstrations in the streets. He said that it was his determination, in the interest public safety, he should not allow this to occur.

Assistant Chief Newsham said that at some point he conferred with Chief Ramsey and Executive Assistant Chief Fitzgerald at Pershing Park. He said that he informed them that the demonstrators had already violated several laws and that he believed that there was probable cause to arrest the demonstrator. He also told Chief Ramsey and EAC Fitzgerald that the demonstrators should be arrested before they left the park so as to prevent further unlawful acts and potential violence. Assistant Chief Newsham said that he did not give orders for the demonstrators to clear the park for two reasons. First, he believed that probable cause already existed to arrest the demonstrators because of their unlawful actions prior to converging on Pershing Park. Second, he was concerned that if orders were given to clear the park, the demonstrators would leave the park as on organized group, and unlawfully take to the streets as they had previously done.

"Under the circumstances that occurred on September 27, 2002 in Pershing Park, I believed that his actions were lawful, reasonable, appropriate and that course of action that I took was necessary to minimize the likelihood of violence," said Assistant Chief Newsham.

Matthew Klein, Captain, Director of the Civil Rights and Force Investigation Division, Metropolitan Police Department

Chairperson Patterson asked Captain Klein questions about his role in the MPD investigation of the mass arrests at Pershing Park. Please see *Pershing Park Investigation* section.

Joshua Ederheimer, Captain, Deputy Director of the Institute of Police Sciences, Metropolitan Police Department

Chairperson Patterson asked Captain Ederheimer questions about his role in the MPD of the mass arrests at Pershing Park. Please see *Pershing Park Investigation* section.

Margret Nedelkoff Kellems, Deputy Mayor for Public Safety and Justice

"It is not the policy of this [Williams] Administration to stifle the free speech or assembly rights of demonstrators. It is not the policy of this Administration to preemptively arrest protestors because we think they might say something wrong. It is the policy of this Administration to protect (1) the rights of individuals to speak their piece, (2) the rights of individuals to be safe in their persons and in their property, and (3) the rights of organizations to gather and meet to discuss programs and policies that my be abhorrent to others," testified Deputy Mayor Kellems. She noted, contrary to some assertions, that there has not been fundamental change in MPD policies and practices regarding large-scale demonstrations. She said that MPD operations and practices are driven by information, intelligence, and experience.

Charles H. Ramsey, Chief of Police, Metropolitan Police Department

Chief Ramsey testified that he was extremely proud in the way the department has handled demonstrations. "[W]hen it comes to managing demonstrations and supporting the First Amendment rights of large number of people, espousing the whole spectrum of ideas and causes, the Metropolitan Police Department is among the very best – and we continue to get better," he said. He noted that in addition to upholding the rights of demonstrators, MPD has the equally important responsibility of protecting the lives and property of residents, business owners and others who are not associated with the protests. He also noted that demonstrations have changed since Seattle 1999.

Regarding the arrests of Perking Park in September 2002, Chief Ramsey testified that he directed MPD's Office of Professional Responsibility to conduct a thorough review of the incident and the actions of department and produce a report on its findings. The report identified management and operational deficiencies that occurred during the Pershing Park incident. "The report also suggested three important changes related to our mass demonstrations procedures. In accepting these three areas for improvement, I also directed that 10 additional actions be taken in order to more fully address the deficiencies identified during our internal investigation," he said.

Thea Lee, Chief International Economist, AFL-CIO

Ms. Lee testified about the planning involved in the march and rally on "global justices issues" that occurred on November 20, 2003 in Miami Florida. She noted that AFL-CIO worked for months with the Miami officials over arrangements for the permitted march and rally, and that those arrangements were

clearly ignored by the Miami police. She noted the importance of discipline among police officers, and said when police leaders permit a situation to escalate, "that trains activists to hate the police." On the issue of accountability, she said if there is evidence of police brutality, as she indicated there was in Miami, "there have to be consequences." More information on Lee's testimony is included in the *National Context* section.

Timothy Lynch, Director, Project on Criminal Justice, The Cato Institute

Mr. Lynch expressed his concerns about the recent blurring of distinctions between military and police missions, a phenomenon he said began with the "drug war." This has included a greater level of training by law enforcement agencies as military units. He said the number of "SWAT" teams within police departments has skyrocketed, even in small town departments. The danger in blurring the military and the police mission is that the military represents the use of force, while the police mission is to assure public safety with the least amount of force possible. He said the Committee's hearings were appropriate, and stressed the importance of police agencies avoiding "the military mindset." He described "good police work" as "making distinctions," including distinguishing between law-breaking vandals and demonstrators who may be unpleasant but not violating the law.

Frederick D. Cooke, Jr., Esq., former Corporation Counsel of the District of Columbia

Asked whether the Council should enact legislative guidelines for the Metropolitan Police Department, Mr. Cooke said yes, and said there has been too little interaction recently between the Office of the Corporation Counsel and MPD. In earlier years, including his tenure as Corporation Counsel, there was greater interaction between both the OCC and the U.S. Attorney and the police department. In discussing the issue of training and attitude with other panelists, Mr. Cooke said it is critical that police "not give in to fear" noting that a judgment that there is danger present "doesn't mean everyone is dangerous."

Robert Weiner, Esq., former President, District of Columbia Bar Association and Senior Counsel to the White House Counsel

Mr. Weiner noted that some protesters may expressly seek a reaction from police in order to call attention to themselves and their casues, something police need to be careful to avoid. He emphasized the need for good training, including a grounding in constitutional law, and the need for adequate resources, including support from the federal government as needed. He said there is a legitimate purpose for undercover police work, including when there is reason to expect criminal behavior, and emphasized using the "least intrusive means" for a limited amount of time in undercover work to gather information.

Robert Spagnoletti, Corporation Counsel, Office of Corporation Counsel ("OCC")

Mr. Spagnoletti explained the role OCC has played in the District's response to planned mass demonstrations. He said that when the District anticipates large-scale demonstrations, OCC works closely with District and federal agencies during the preparation phase, the operational phase, and the post-demonstration phase. He noted that there are where OCC could be more proactive in providing advice and guidance to embers of law enforcement and work to better control the District's potential liabilities.

James Jacobs, Director, Office of Risk Management

"Given that decision making is at the center of the risk exposures associated with demonstrations, the most effective risk control strategies center on established and acceptable police and related training, supplemented by adequate supervision and continuous operational improvement," Mr. Jacobs said. He noted that MPD has a mass arrest manual as well as an event-specific manual to guide MPD activities.

COUNCIL OF THE DISTRICT OF COLUMBIA
Committee on the Judiciary
Councilmember Kathleen Patterson
John Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Memorandum

To: Kathy Patterson
From: Alina Morris
Date: November 25, 2003
Subject: MPD Investigation: Prior Restraint and First Amendment Issues

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I. PRIOR RESTRAINT

The doctrine of prior restraint holds that an attempt to prevent publication or broadcast of any statement is an unconstitutional restraint on free speech and free press. The ban on prior restraint allows publication of libel, slander, obvious untruths, anti-government diatribes, racial and religious epithets, and almost any material, except if public security or public safety is endangered and some forms of pornography. (*See* law.com dictionary, *available at* http://dictionary.law.com). Free speech in public forums can be limited by time, place, and manner regulations, which take into account such matters as control of traffic in the streets, the scheduling of two meetings or demonstrations at the same time and place, the preventing of blockages of building entrances, and the like. (FindLaw for Legal Professionals, *available at* http://www.findlaw.com; *see also Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 647 -50 (1981); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984)). Preventive limitations must be content-neutral, serve a significant governmental interest, and leave open ample alternative channels for communication of information. (*See generally Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *Clark v. Community for Creative NonViolence*, 468 U.S. 288(1984)). For example, a requirement of one day advanced notice and registration of a demonstration and advance disclosure of the "sponsoring" group or individual was held to be prior restraint. *Rosen v. Port of Portland*, 641 F.2d 1243, 1247-50 (9th Cir. 1981).

Statutes requiring permits for demonstrations are not prior restraint, to the extent that there exists a neutral procedure for approving or denying the permit with response within a reasonable time. This is to prevent a deciding body from using dilatory tactics to prevent or selectively deny political speech. However, an ordinance requiring all speakers, demonstrators, and entertainers to obtain a permit before making use of the public parks was held unconstitutional. *Grossman v. City of Portland*, 33 F.3d 1200 (9th Cir. 1994). The District of Columbia Parks and Recreation *Permit Procedures Manual* specifies that a notice of availability will be mailed to the applicant within 10 business days after receipt

of application, and requires registration and insurance for events at city parks with more than 250 people in attendance. DC Parks and Recreation *Permit Procedures Manual* (January 2003) at 2, 5-6.

The Metropolitan Police Department via the DC Emergency Management Agency issues "special events" permits, which include protests and demonstrations. The MPD website says,

> The DC Emergency Management Agency (DCEMA) has the final word on special event planning in the Nation's Capital. According to the 1990 District of Columbia Special Event handbook of the DCEMA: "Special events are activities for which licenses and permits are required within the District of Columbia and where large numbers of persons may gather or participate. Such events may include parades, cultural programs, festivals, musical rock concerts, religious gatherings, block parties, community activities, and *First Amendment Rights activities*."

See Metropolitan Police Department—Services—Special Events In DC, *at* http://mpdc.dc.gov/serv/events/specialevents.shtm (last visited July 10, 2003) (emphasis added). The requirements include meeting with the Special Events Task Group at least 60 days prior to the proposed event, submitting 12 copies of a plan of action, and making a presentation about the event. *Id.* The MPD Web site suggests, "due to the large number of events held in Washington, DC, and the District's extensive regulations that govern event planning, you should contact the Task Force at least 120 days in advance of an event." *Id.* Such a process may be violative of the First Amendment if it serves to systematically prevent certain groups from assembling and speaking, such as those without the resources or organization necessary to conform to these regulations. Additionally, the site does not specify response time to the application of approval or denial of the permit.

Section 22-1307 of the D.C. Code deals with unlawful assembly, profane and indecent language, and states that

> It shall not be lawful for any person or persons within the District of Columbia to congregate and assemble in any street, avenue, alley, road, or highway, or in or around any public building or inclosure [sic], or any park or any park or reservation, or at the entrance of any private building or inclosure [sic], and engage in loud and boisterous talking or other disorderly conduct, or to insult or make rude or obscene gestures or comments or observations on persons passing by, or in their hearing, or to crowd, obstruct, or incommode, the free use of any such street, avenue, alley, road, highway, or any of the foot pavements thereof, or the free entrance into any public or private building or inclosure [sic]; it shall not be lawful for any person or person to curse, swear, or make use of any profane language or indecent or obscene words, or engage in nay disorderly conduct in any street, avenue, alley, road, highway, public park or inclosure [sic], public building, church, or assembly

> room, or in any other public place, or in any place wherefrom the same may be heard in any street, avenue, alley, road, highway, public park or inclosure [sic], or other building, or in any premises other than those where the offense was committed, under a penalty of not more than $250 or imprisonment for not more than 90 days, or both for each and every such offense.

D.C. Code §22-1307 (2003). Arrests made under this statute must be pursuant to probable cause. If this statute withstands constitutional scrutiny, in the context of a large protest situation there would seem to be a low bar for individual probable cause, but less so for a mass arrest, as it would be difficult to determine whether every person there was engaging in the prohibited activity, or may be trying to leave or just observing.

II. OFFICERS' ACTIONS AND QUALIFIED IMMUNITY

The standard governing police conduct is composed of two elements, the first being subjective and the second objective. *Tatum v. Morton*, 402 F.Supp. 719, 723 (D.C. 1974). Thus, the officer must prove not only that he believed in good faith that his conduct was lawful and also that his conduct was reasonable. *Id.*

The District of Columbia and a police officer acting in his individual capacity were liable for First Amendment damages in *Tatum v. Morton* after the officer arrested demonstrators for failing to obey an order for dispersal of a peaceful, permitted vigil outside the White House. 562 F.2d 1279 (D.C. Cir. 1977). In *Tatum*, a peaceful Quaker group scheduled a prayer vigil regarding Richard Nixon and Vietnam to be held outside the White House from noon to midnight. *Id.* at 1280. When persons thought to be "outsiders" joined the vigil, police lines were established and the vigil participants were ordered to disperse. *Id.* Police testified that they thought these outsiders were from a disorderly group observed the night before on the grounds of the Washington Monument. *Tatum*, 402 F.Supp. 719, 721. When the plaintiffs refused, they were arrested. *Tatum*, 562 F.2d 1279, 1280. Approximately three to four hours of confinement went by before any plaintiffs were offered the opportunity to post collateral. *Id.* at 1281. The district court found the officer's establishment of police lines and ordering of dispersal objectively unreasonable. *Id.*

In *Gregory v. Chicago*, the Court found that demonstrators were arrested not for disorderly conduct, as the police cited, but for demonstrating, which is a violation of due process. 394 U.S. 111 (1969). Justice Warren described it as a "simple case." *Id.*

> Petitioners, accompanied by Chicago police and an assistant city attorney, marched in a peaceful and orderly procession from city hall to the mayor's residence to press their claims for desegregation of the public schools. Having promised to cease singing at 8:30 p.m., the marchers did so. Although petitioners and the other demonstrators continued to march in a completely lawful fashion, the onlookers became unruly as the number of bystanders

> increased. Chicago police, to prevent what they regarded as an impending civil disorder, demanded that the demonstrators, upon pain of arrest, disperse. When this command was not obeyed, petitioners were arrested for disorderly conduct.

Id. at 111-12. He continued that "[h]owever reasonable the police request may have been and however laudable the police motives, petitioners were charged and convicted for holding a demonstration, not for a refusal to obey a police officer." *Id.* at 112.

A. Reasonable Conduct and Restraint on Speech

Restraint on speech must be narrowly tailored, but government and police officers have a duty to protect the citizenry from violence. Thus, strict requirements govern when a state actor can restrict speech without harming the First Amendment. The Supreme Court articulated three requirements in *Brandenburg v. Ohio*, all of which must be met before a peace officer can lawfully abridge speech. 395 U.S. 444 (1969). First, the speaker must promote "imminent" lawless action. This would include, for example, a contemporaneous exhortation for a lynching, assault, mayhem, etc. Second, the imminent lawless action must be highly "likely" to occur. Speaking to a highly angered or charged crowd that is susceptible to such suggestion would make the action likely to occur. Third, the speaker must *intend* to produce imminent lawless action; the speech must be "directed to inciting or producing imminent lawless action." In *Cox v. Louisiana*, a civil rights leader's exhortation to the assembled crowd to stage "sit ins" at uptown lunch counters resulted in police dispersal and arrest. 379 U.S. 536 (1965). The Court held this action was an unconstitutional abridgement of the demonstrators' First Amendment rights, "this part of Cox's speech obviously did not deprive the demonstration of its protected character under the Constitution as free speech and assembly." *Id.* at 459. Moreover, there was "no indication that the mood of the students was ever hostile, aggressive, or unfriendly." *Id.* at 479. Applied to some of the facts in recent globalization demonstrations in the District of Columbia, *Brandenburg* may show that the police were not justified in restraining speech. Exhortations on a website to "shut down the city," a scavenger hunt with points for certain types of destruction and assault, or windows broken blocks away from a central gathering, may not satisfy the requirement of imminence.

The best argument the police would have for the validity of their actions is that they reasonably did think violence was imminent. Although exhortations were made on a Website and property damage may have happened a distance away, today's society is more mobile and technically savvy than at the time of *Brandenburg*. Thus, groups may mobilize quickly via electronic technology. Further, in *Planned Parenthood of the Colombia/Willamette, Inc. v. American Coalition of Life Activists*, the 9th Circuit held that "wanted" posters targeting abortion providers were illegal threats of violence. 290 F.3d 1058 (9th Cir. 2002) *cert. denied* 123 S. Ct. 715 (2002). Thus, it would be a question of fact whether online statements, particular specific details of a violent "scavenger hunt" may count as exhortations of violence.

B. Previous Violence is not Grounds for Banning Demonstrations

In *United States v. Baugh*, the court pointed out that, "[o]rganizers of protests ordinarily cannot warrant in good faith that all the participants in a demonstration will comply with the law. Demonstrations are often robust. No one can guarantee how demonstrators will behave throughout the course of the entire protest." 187 F.3d 1037, 1043 (9th Cir. 1999). A complete ban on First Amendment activity cannot be justified simply because past similar activity led to violence. *Id.* at 1043-44. The case of *Collins v. Jordan* dealt with demonstrations and police action in the wake of the Rodney King verdict. 110 F.3d 1363 (9th Cir. 1997). The day after the Rodney King verdict, a demonstration in downtown San Francisco led to a number of violent injuries. The next day, the mayor issued an order for officers, among other things, to implement a policy of custodial arrests (instead of citations) to disperse all gatherings whenever the officer has reason to believe the gathering endangers or is likely to endanger persons or property. *Id.* at 1367. That day, a group assembled in downtown San Francisco. The police ordered dispersal. As people moved away from the central area, people were encircled and arrested. *Id.* at 1368. The arrestees were held up to 55 hours. *Id.* at 1369. The court held that the earlier violence fell far short of "the type of occurrence that could have led any reasonable official to believe that it would be constitutional to impose a city-wide ban on all demonstrations and that the law to that effect was clearly established. *Id.* at 1373. Moreover, the police officer who ordered the dispersal of the gathering was not entitled to qualified immunity against claims that he violated the First Amendment rights of demonstrators. *Id.* at 1379.

Collins stands for the principles that unlawful conduct must be dealt with after it occurs, acting before demonstrators have broken the law is presumptively a First Amendment violation, and that keeping demonstrators in custody to keep them from demonstrating violates their individual First Amendment rights. 110 F.3d 1363. These ideas may be extended to the actions taken in the District of Columbia. In particular, vague fears of violent demonstrations in the wake of Seattle and Genoa on the part of police are legitimate reasons to curb demonstrators' speech and assembly. Moreover, MPD has been dealing with the same group of protestors since April 2000 (and probably earlier; one of the complaints says they've been protesting since 1996); these groups have been demonstrating twice a year for the past three years without serious unrest or any cause for preemptive action. As a matter of fact, no major problems with protests in the city had occurred between the May Day riots in the early 1970s, and the present disturbances beginning in 2000. Further, officers at the scene and officers involved in creation of orders and policy to disperse demonstrators may not be entitled to qualified immunity from suit.

C. Probable Cause and Arrest

The case of *Sullivan v. Murphy* was a class action arising out of mass arrests made during May Day anti-war demonstrations. 478 F.2d 938 (D.C. Cir. 1973), *cert. denied* 414 U.S. 880 (1973). The arrestees challenged the procedures used in effecting the arrests, the disposition of criminal charges, and the maintenance of arrest records. The court held that disorderly conduct arrests were

presumptively invalid if they were not accompanied by a contemporaneous photograph and field arrest form. This presumption could be rebutted upon an affirmative showing that any particular arrest was based on probable cause. *Id.* Moreover, the court held that it was unconstitutional to arrest demonstrators for disorderly conduct at the scene of anti-war demonstrations, without probable cause determinations made at the time of arrest, in hope that evidence uncovered during the process of detention would serve as the basis for some prosecutions. *Id.* This may be analogized to alleged MPD practices of intelligence-gathering on protesters. Videos showed police, upon raiding the convergence center in April 2002, taping not just the fire hazards cited for shut-down, but also names and identifying information posted on a communal message board.

D. Application

Looking at the alleged record of events in the demonstration and arrest in Pershing Park in September of 2002, prior restraint may well have occurred. Many of the alleged infractions happened far away in time and space from the arrest. For example, a group of bicycle protesters were riding from Union Station to downtown, and were guided and herded into Pershing Park by police officers. The two most popular reasons for arrest for people were "failure to obey a police order" and "parading without a permit." While if the protesters indeed had blocked traffic and were walking in the streets (instead of on the sidewalks), they can be arrested, the police must notify them right away and arrest them as soon as possible, instead of allowing them to keep walking, but guiding them into the park for a mass arrest.

III. VIEWPOINT DISCRIMINATION

In *Sammartano v. First Judicial District*, an unwritten policy at the Carson City Public Safety Complex directed security personnel not to permit individuals if they were wearing "clothing having symbols, markings or words indicating an affiliation with street gangs, biker, or similar organizations which could be disruptive and/or intimidating. 303 F.3d 959, 963 (9th Cir. 2002). Plaintiffs, wearing biker apparel, were denied admission. *Id.* The court agreed that the rule banning this type of clothing was unreasonable, and the risk asserted by defendants was unreal. Any Metropolitan Police policy, written or otherwise, targeting anarchists and those "dressed in black" may likewise be unconstitutional viewpoint discrimination.

We have observed in some of the training videotapes and protest footage that the police may indeed have targeted people dressed in all black, who may have identified themselves as anarchists. However, police may also have observed discrete identifiable groups instigating violence. In particular, the April 2000 video footage shows a crowd milling around the Navy Memorial, when anarchists dressed in black started attacking other protesters in the crowd. It is proper for the police to take action upon a particular group, identified as anarchist, in this type of situation. However, an incident like this would not empower the police to crack down on a different anarchist group several blocks away.

COUNCIL OF THE DISTRICT OF COLUMBIA
Committee on the Judiciary
Councilmember Kathleen Patterson
John Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Memorandum
To: Amy Mauro
From: Josh Harris
Date: 8.7.03
RE: Excessive Force: Overview

The **Use of Force Model** was designed as an instructional method developed by Professor Greg Connor of the Police Training Institute at the University of Illinois, a nationally renowned expert in the field of police training in the use of force. The Model's stated purpose is to provide a template for the standardization of police force utilization in confrontational situations. In the *Integrated Force Management Training Manual*, Professor Connor systematically outlined the theory behind the Use of Force Model. Additionally, it should be noted that Professor Connor's theory is the basis of the Metropolitan Police Department's new General Orders relating to Use of Force.

The Use of Force Model establishes three factors in order to objectively support the reasonable use of force: (1) the nature of the risk, ranging from strategic to lethal; (2) the officer's perception of the subject's action, ranging from compliant to actively resistant; and (3) the force used by the officer in order to gain control and compliance, ranging from verbal communication to lethal force.

Additionally, the Model recognizes the fluidity of a real-life situation. As such, an officer's use of force based on the above-mentioned factors can escalate, de-escalate or stabilize in response to changing conditions. This process is known as **Tactical Transition.**

Nature of the Risk

The Nature of the Risk is classified according to a **Threat Perception Color Code** that assigns a color to the various levels of threat perception: blue, green, yellow orange and red. These categories include strategic, tactical, volatile, harmful and lethal. A *Strategic* threat level is identified by the color blue and is the lowest level of threat assessment. The *Tactical* threat level is indicated by the color green and represents an increase in threat potential. The *Volatile* category, represented by the color yellow, requires the officer to increasingly focus on the actions of the subject and the safety of those nearby. The *Harmful* category, orange, represents an increase in the threat level due to the subject's 'assaultive actions.' The *Lethal* category, represented by the color red, is the most hazardous level. This level is activated after a potentially lethal assault has been initiated.

Perceived Subject Action

There are five categories of Perceived Subject Action. *Compliant* is the most common category and requires only verbal communication throughout the encounter. *Resistant (Passive)* involves a subject who is noncompliant but may be brought into compliance without physical or mechanical defiance by the officer. *Resistant (Active)* also addresses a noncompliant subject, but here, the level of noncompliance requires "enhanced physical or mechanical defiance." *Assaultive(Bodily Harm)* refers to an actual assault on the officer. This level does not support the use of lethal force. However, in the *Assaultive (Serious Bodily Harm/Death)* category, the officer may conclude that lethal force is necessary based on the subject's actions.

Response Categories

The Response Categories includes Cooperative Controls, Contact Controls, Compliance Techniques, Defense Tactics and Deadly Force. *Cooperative Controls* are most commonly employed when the Perceived Subject Action is *Compliant*. Accordingly, the officer is to, "capitalize upon the acceptance of authority" by the use of a variety of communication and body language skills. *Contact Controls* are to be employed in the first instance of non-compliance when the Perceived Subject Action is *Resistant (Passive)*. Here, the officer employs non-pain contact measures to establish control. *Compliance Techniques* refers to the response to be used when the Perceived Subject Action has reached a level of *Resistant (Active)*. At this stage, 'balanced force' is to be used to overcome non-compliance, including pain compliance, joint restraints and chemical irritants. *Defensive Tactics* are those directed to toward a subject that has reached the *Assaultive (Bodily Harm)* level of Perceived Subject Action. At this point, the officer is justified in taking action to halt the assault, including weapons strikes, and canine apprehension measures. *Deadly Force* is the final and most severe responsive measure, to be used when the Perceived Subject Action level has risen to the *Assaultive (Seriously Bodily Harm/Death)* level. This response is to be used only when "absolute and immediate tactics must be deployed to stop the lethal risk" and may include those acts that may lead to permanent disability or death.

Force Indexing

Finally, the Integrated Force Management Program utilizes a 'Force Indexing Form' to allow the agency to track and survey the force response employed in each situation. Accordingly, an officer must identify the appropriate categories of Threat Perception, Perceived Subject Action and Response Used in a standardized form provided by the Department.

COUNCIL OF THE DISTRICT OF COLUMBIA
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MEMORANDUM
To: Investigation Staff
From: Josh Harris
RE: Administrative Searches and Pretext
Date: 10.01.03

I. Facts

On April 15, 2000, 1328 Florida Ave, N.W. was inspected by the District of Columbia Fire and Emergency Medical Services Department, Fire Prevention Bureau, in pursuant to District of Columbia Municipal Regulations Title 12D, Chapter 1, §108.1, which reads, in part

> The code official shall inspect all structures and premises, except single-family dwellings and dwelling units in two-family and multiple family dwellings, for the purposes of ascertaining and causing to be corrected any conditions liable to cause fire, contribute to the spread of fire, interfere with fire fighting operations, endanger life or any violations of the provisions or intent of this code or any other ordinance affecting fire safety.

The building, designated as a commercial warehouse rather than a residence, was being used as a 'convergence center' for the Mobilization for Global Justice, an umbrella organization that consisted of several groups including the American Friends Service Committee, City at Peace and the Washington Artist's Group. The building was leased from the Douglas Development Corporation for a period of two weeks. Inspector Ronald P. Elam was listed as the authorized representative of the District of Columbia. The authority for such inspections is found in §108.3 of the Municipal Regulations, which provides the right of entry, "whenever necessary for the purpose of enforcing the provisions of this code, or whenever the code official has reasonable cause to believe that there exists in any structure or upon any premises, any condition which makes such structure or premises unsafe." Pursuant to this authority, Inspector Elam cited the following 29 violations he observed while inspecting 1328 Florida Ave:

F 107.2: No Permits for Propane
F107.1: No Permits for Place of Assembly
F3606.1: Improper Storage of Propane
F309.1: No Hood System for Kitchen

F310.6: Electrical Box Open w/o "Face"
F402.2: Unsafe Use of Lighting Equipment, Inside and Out
F601.5: No Egress Plans
F406.2: Cooking w/ Propane Grill inside Building
F519.6: Fire Extinguishing not mounted
F3601.2: Permit Required
F110.1: People Sleeping Inside Electrical Room
(No Citation Provided) No Smoke Detectors
F110.1: Flammables stored throughout building (paint, paint thinner, etc.)
F111.1: Evacuation
F110.3: Unsafe Conditions
F607.1: Fire Door Removed from corridor
F306.1: Combustible Material hanging throughout
F504.1: Fire Alarm System not installed as to Code
F310.5: Improper Use of Extension Cords
F610.2: Exit lights defected throughout, "all defected"
F609.2: Maintenance
F110.1: Excessive storage of combustibles around open electrical box
F110.1: Faulty wiring from electrical box to truck
F601.3: Means of Egress; Owner Responsible
F601.8: Overcrowding
F605.1: Exit Doors Stairway and Passageways obstructed
F609.1: Bars on windows
F608.1 Doors knobs missing on "exit door"

In an April 17, 2000 letter to Deputy Fire Chief Adrian Thompson, Paul Millstein of the Douglas Development Corporation advised that he "had no idea of the actual activities of persons occupying the above address." Millstein stated that he was led to believe that the tenants were organizing a training workshop for puppet making. "We are outraged at this misrepresentation," Millstein said, adding, "had we been aware of the true motives of this group, we would never have permitted their assembly at any or our properties."

II. Case Law

In 1967, the Supreme Court expressly recognized the constitutionality of 'warrantless administrative searches.' In Camara v. Municipal Court of San Francisco, 387 U.S. 523 (1967), the defendant was charged with violating the San Francisco Housing Code when he refused to allow a warrantless inspection of his home. Id. The Court held that the probable cause requirement of the Fourth Amendment could be established if, "a valid public interest justifie[d] the intrusion contemplated." Id. at 539. The Court identified such factors as, "the passage of time, the nature of the building (e. g., a multi-family apartment house), or the condition of the entire area," as examples of sufficiently valid public interests. Id. Such a finding makes clear that the Fourth Amendment probable cause requirement should not be uniformly applied to all types of searches. The 'probable cause' necessary to support a warrantless administrative is to be measured by the state interest in effectuating a particular regulatory scheme rather than actual suspicion of a legal violation.

In Donovan v. Dewey, 452 U.S. 594 (1981), the Supreme Court further explained the justification for this more relaxed 'probable cause' requirement, specifically as applied in the commercial setting. The appellant, a federal mine inspector was denied access to conduct an administrative mine inspection as per Section 103(a) of Federal Mine Safety and Health Act of 1977. Id. at 596. Accordingly the Secretary of Labor filed a civil action to enjoin the mining company from refusing such administrative searches. Id. at 597. The Court held that legislative schemes authorizing warrantless administrative searches of commercial property do not necessarily violate the Fourth Amendment, reasoning that the "greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home, and that this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections." Id. at 598.

In New York v Burger, 482 US 691 (1987), the Supreme Court again addressed the issue of administrative searches. In Burger, police officers performed an administrative search on respondent's auto junkyard pursuant to a New York State law. Id. at 693. In the course if this search, the police uncovered several stolen vehicles. Id. at 694. The Court of Appeals held that the statute was unconstitutional as it authorized warrantless searches in order to uncover criminal activity. Id. at 697. The Supreme Court reversed, holding that auto junkyards were a "closely regulated industry." Id. at 701. Accordingly, such industries have a reduced expectation of privacy.

The Court held that a state must satisfy three separate requirements in order to justify this form of privacy reduction. First, a state must have a "substantial interest that informs the regulatory scheme pursuant to which the inspection is made." *Id.* at 702. Second, the search must be "necessary to further that regulatory scheme." Id. Finally, "the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally

adequate substitute for a warrant." *Id.* at 703. In this case, the Court held that preventing motor vehicle theft satisfied the requisite state interest. *Id.* at 708.

However, precedent also makes clear that administrative searches cannot be used to circumvent the probable cause standard required in a criminal search. The Supreme Court has held that 'pretextual searches,' in which the justification given for the search is valid but is used for invalid purposes, are unconstitutional abuses of the Fourth Amendment. In *Scott v. United States*, 436 U.S. 128 (1978), the Supreme Court announced that alleged Fourth Amendment violations can only be resolved using the objective reasonableness of the conduct in question instead of attempting to determine the subjective motivations of the officer. *Id.* at 138. "The fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Id.*

Several years later, the Supreme Court elaborated on the "objective reasonableness requirement" announced in *Scott.* In *United States v. Villamonte-Marquez,* 462 U.S. 579 (1983), the Supreme Court held that a stop and boarding of a vessels was constitutional when made in furtherance of vessel documentation laws. The defendants' attempted to establish pretext using both the stated subjective and objective manifestations of intent. The defendants' argued that customs agents were merely investigating in response to a tip that the vessel in question contained narcotics. *Id.* at 584. Moreover, the defendants' argued that the accompanying police officers were not a necessary incident to such a routine administrative document check. *Id.*

The Court quickly disposed of these pretext arguments, holding, "this line of reasoning was rejected in a similar situation [Scott]... and we again reject it. *Id.* While *Villamonte-Marquez* does not offer an express formulation of what type of evidence would objectively establish pretext, it makes clear that the mere presence of law enforcement or the receipt of a 'tip' cannot suffice absent more concrete evidence.

Finally, in *United States v Whren*, 517 U.S. 806 (1996), the Supreme Court held rejected the defendants argument that a police stop, pursuant to an actual traffic violation should be viewed as a pretextual attempt at finding illegal narcotics. According to the Court, outside the limited context of administrative and inventory searches, an officer's motivation to act cannot invalidate what was an otherwise justifiable search predicated on probable cause under the Fourth Amendment. *Id.* at 812. As such, *Whren* reaffirms that pretext is still a legitimate invalidating principle in administrative searches.

Analysis

The Florida Avenue search was clearly administrative in nature, established both by the statutory authority cited by the presiding officials at the scene and by the nature of the search itself. Accordingly, the case law reviewed above has repeatedly affirmed the use of pretext as a way to invalidate such searches.

However, this same case law has also limited the ways in which such pretext can be established. As *Villamonte-Marquez* makes clear, subjective manifestations of intent will not suffice. This leaves 'objective' manifestations as the sole means of establishing intent.

While the Court has routinely struck down any attempts to establish motive through subjective intent, circumstantial objective evidence may be permissible. Examples of such evidence may include the video footage recorded incident to the Florida Avenue search, in effect a record of police interest in the building. Similarly, any correspondences between the Fire and Police Departments may also prove useful in establishing the law enforcement interest in the building. Given the degree of coordination between the two Departments in conducting and documenting the search, there would most likely be a paper trail between the two, either by way of formal notification from one department to the other or a request for police assistance in conducting the search.

The pretext argument may also be buttressed by the number of times an administrative search has been conducted at 1328 Florida Avenue in the past as well as the number of administrative searches conducted annually. Similarly, it may be useful to find out if any notice was given to the tenants of the Florida Avenue address, and, if not, if this is in keeping with usual practice. Additionally, if notice was given to any representative of the Douglas Development Corporation, if there was ever any request on behalf of the Police or Fire Departments not to inform their tenants. As such, in our next document production request, we should consider obtaining copies, if they exist, of any of the foregoing communications in an effort to establish an objective manifestation of an pretextual and thus illegal administrative search.

COUNCIL OF THE DISTRICT OF COLUMBIA
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Memorandum
To: Investigation Staff
From: Josh Harris
RE: Domestic Spying Case Law
Date: 7.15.03

Summary

In arguing against the legality of police surveillance, a plaintiff must first demonstrate that they have actually been injured by the surveillance. Most commonly, suits alleging unconstitutional government surveillance of lawful political activity allege that the "chilling effect" of police surveillance on speech establishes the requisite injury-in-fact. As the following cases make clear, the "chill" must be more than speculative. Litigants must demonstrate that the government action actually created an injury-in-fact. If plaintiffs fail to meet this burden, the case will not reach the merits.

However, once standing has been established, the government may still justify the intelligence gathering methods in question by demonstrating a compelling government interest. Justifications such as public safety and crime prevention have been judged to meet this standard. However, if the government fails to meet this burden, courts will order declaratory or injunctive relief. Such relief usually takes the form of a consent decree, tailored to remedy the constitutional violation.

In one of the earliest applications of this rationale, *Anderson v. Sills*, 56 N.J. 210 (1970), the New Jersey Supreme Court rejected the "chilling effect" rationale as a basis for standing, holding that

[t]he question in the case is not merely whether there are some individuals who might be "chilled" in their speech or associations by reason of the police activity here involved. Rather the critical question is whether that activity is legal, and although the amount of "chill" might in a given case be relevant to the issue of legality, the fact of "chill" is not itself pivotal. Indeed, the very existence of this Court may "chill" some who would speak or act more freely if there were no accounting before us for trespassers against others. (*Anderson v Sills* 56 N.J. 210, 226 (1970)).

Supreme Court Decisions

In *Laird v. Tatum,* 408 U.S. 1 (1972), the United States Supreme Court held that plaintiffs must demonstrate that they sustained or were immediately in danger

of sustaining a direct injury as a result of the challenged state action. *Id.* The Court ruled that the plaintiffs, activists challenging the constitutionality of the United States Army's surveillance of political events, failed to meet this requirement. According to the Court, "in order to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action." *Id.* at 14. Thus, *Laird* makes clear that allegations of a speculative chill on speech are not enough to establish a justiciable injury.

Two years later, the Supreme Court elaborated the *Laird* rationale in *Socialist Workers Party v. Attorney General*, 419 U.S. 1314 (1974). In distinguishing this case from Laird, Justice Marshall explained that

> In this case, the allegations are much more specific: the applicants have complained that the challenged investigative activity will have the concrete effects of dissuading some...from participating actively in the convention and leading to possible loss of employment for those who are identified as being in attendance. Whether the claimed "chill" is substantial or not is still subject to question, but that is a matter to be reached on the merits, not as a threshold jurisdictional question. The specificity of the injury claimed by the applicants is sufficient, under *Laird*, to satisfy the requirements of Art. III. *Id.* at 1320.

Regardless, Marshall denied the plaintiffs' request for injunctive relief, citing the limited nature of the FBI's investigation, the limited dissemination involved, and the potential injury to their investigative efforts. *Id.* Thus, Marshall's opinion makes clear that once the justiciability threshold is met, the conduct in question should be measured against the nature of the government's interest.

In *Meese v. Keene*, 481 U.S. 465 (1987), the Court again took the occasion to elaborate when standing to challenge police conduct is established. In *Meese*, a film exhibitor filed a lawsuit to enjoin the designation of several Canadian films as "political propaganda" under the Foreign Agents Registration Act of 1938, 22 U.S.C.S §§611-621. Appellee argued that this designation would injure his, "personal, political, and professional reputation." *Meese* at 472. The Court re-iterated the *Laird* standard requiring, "a claim of specific present objective harm or a threat of specific future harm." *Laird* at 14.

However, in this case, the Court agreed that appellee's allegations established a justiciable injury, beyond a mere "subjective chill." *Meese* at 472. In contrast to *Laird*, the Court held that harm to a plaintiff's reputation in the community constitutes a cognizable injury that suffices to establish standing.

This line of Supreme Court precedent establishes a two-prong analysis in determining whether a police surveillance activity violates Constitutional rights. First, a cognizable injury must be demonstrated. Injury sufficient to satisfy this prong includes specific allegations of a concrete harm, or concrete injury to one's reputation in the community. Second, it must be established that the injury was the result of action outside the scope of legitimate state interests. Any surveillance activity that chills speech or injures reputation can only be sustained if the defendant can demonstrate a 'compelling' state interest that cannot be achieved by any less intrusive means. The subsequent lower court treatment

establishes precedent for resolving the conflict between First Amendment liberties and the compelling state interests associated with political intelligence gathering.

Second Circuit Court of Appeals

In *Fifth Avenue Peace Parade Committee v. Gray*, 480 F.2d 326: (1973), the Second Circuit upheld the FBI's collection and dissemination of information from a political organization's bank records. The court ruled that it was, "[b]eyond any reasonable doubt the FBI had a legitimate interest in and responsibility for the maintenance of public safety and order during the gigantic demonstration planned for Washington, D.C. In fact, had it been ignored the agency would be properly chargeable with neglect of duty." *Id.* at 332.

The court distinguished this case from *Laird*, stating that, "[t]he ongoing and pervasive military surveillance of civilian activity alleged in [*Laird*] would seemingly create a more understandable apprehension of inhibition of First Amendment rights, than the *ad hoc* response of a civilian agency here to a major and massive demonstration in Washington, D.C." *Id.* at 331. As such, the Court ruled that the plaintiffs failed to state a cognizable injury and that the state actions were in pursuance of a legitimate interest in public safety. *Id.* at 333.

Second Circuit: District Court for the Southern District of New York

In *Handschu v. Special Services Division*, 349 F. Supp. 766 (1972), the District Court for the Southern District of New York held that the New York City Police Department's intelligence gathering operations involving political activists *did* establish a justiciable injury by creating a chilling effect on the group's First Amendment activities. The court held that the allegations regarding the use of police infiltrators and provocateurs constituted charges of direct injury, "beyond the pale of *Laird*."

While the court acknowledged that informers and infiltrators constitute a valid investigative technique, the court placed clear limits on their use. "[T]hose so engaged may not overstep constitutional bounds; the Bill of Rights protects individuals against excesses and abuses in such activities. . . . [T]he initiation and inducement of criminal activity by government agents is proscribed." *Id.* at 770. Specifically, the court took note of an allegation involving a police informer who urged demonstrators to participate in unlawful conduct. *Id.* As a result of the named informer's conduct, the demonstrators disbanded. As such, the Court ruled that the allegations established an injury as a result of activity, beyond passive observance, outside of legitimate state interests[32].

Third Circuit Court of Appeals

In *Philadelphia Yearly Meeting of the Religious Society of Friends v. Tate*, 519 F.2d 1335 (1975), the Third Circuit ruled that plaintiff's challenge to the intelligence activities of the Philadelphia Police Department created a chilling effect on First Amendment Rights. Like the Second Circuit in *Gray*, the Court found that sharing information with other governmental agencies "having a

[32] In subsequent litigation, the parties agreed to a consent decree, known as the *Handschu Guidelines*. These guidelines have since been modified pursuant to a March 2003 decision – more info forthcoming.

legitimate law enforcement function" was not unconstitutional in itself. *Id.* at 1338. Rather, the lack of dissemination standards created a justiciable injury.

In this case, the Police Department, "specifically identified the plaintiff organizations and four of the individual plaintiffs as being the subjects of police dossiers," on a national television broadcast. *Id.* The Court determined that this conduct created a chilling effect on speech and was beyond the scope of legitimate police interests. "It is not apparent how making information concerning the lawful activities of plaintiffs available to non-police groups or individuals could be considered within the proper ambit of law enforcement activity, particularly since it is alleged that plaintiffs are subject to surveillance *only* because their political views deviate from those of the establishment." *Id.* As such, this case establishes guidelines as to the limits of the constitutionality of intelligence dissemination.

Fourth Circuit Court of Appeals

In *Donohoe v. Duling*, 465 F.2d 196 (1972), the Fourth Circuit held that police surveillance of political and religious gatherings did not create a deterrence effect on the exercise of first amendment rights. Reiterating the Supreme Court's rationale in *Laird*, the Court held that "[t]here must be a claim of specific present objective harm or a threat of specific future harm in order to support a justiciable claim for relief in a case of this type. Allegations of a subjective chill will not suffice. Nor may a plaintiff base his right to sue on injury to another." *Id.* at 202.

According to the Court, "the 'chilling' effect of executive actions, falling short of a direct restraint of First Amendment rights, would not give rise to a justiciable cause." *Id.* The mere fear that, "some *other* and additional action detrimental to that individual" might be taken will not establish a justiciable injury. *Id.*

Sixth Circuit Court of Appeals

In *Ghandi v. Police Department of Detroit*, 747 F.2d 338 (1984), appellants argued that illegal acts of a police informant violated their constitutional rights; including advocating a kidnapping scheme so as to allow for a police search of their headquarters. The Court reversed the lower court's summary judgment in favor of appellee because the alleged conduct constituted a direct injury, beyond mere surveillance activity.

However, on the merits, the Court dismissed the charges for lack of evidence. In so doing, the Court reiterated the rationale of the *Handschu* court, stating, "The use of secret informers or undercover agents is a legitimate and proper practice of law enforcement and justified in the public interest -- indeed, without the use of such agents, many crimes would go unpunished and wrongdoers escape prosecution. It is a technique that has frequently been used to prevent serious crimes of a cataclysmic nature." *Id.* at 347. In this case, the Court found no facts to support an allegation of any conduct beyond "mere surveillance." *Id.*

Seventh Circuit Court of Appeals

In *Alliance to End Repression v City of Chicago*, 237 F.3d 799 (2001), the Seventh Circuit reversed a consent decree governing police surveillance operations. Citing changed circumstances, the Court agreed to modify, "the

draconian regulations" (established in *Alliance to End Repression v. Chicago*, 561 F. Supp. 537 (1982)). This agreement was the product of litigation arising from *Alliance to End Repression v. Rochford*, 407 F. Supp. 115 (1975). In that case, the District Court held that the Chicago Police Department's political intelligence gathering practices created a justiciable injury.

> Plaintiffs allege that said activities are carried out under the auspices of a vague and overly broad mandate contained within a general order of the Chicago Police Department directing its Intelligence Division to gather intelligence on organizations and individuals who pose "a threat to the security of the country, state or city." It is alleged that as a result of the above mandate, the defendants have engaged in a continuing pattern and practice involving the following activities: (1) surveillance and intelligence-gathering on individuals and organizations engaged in lawful activities; (2) unlawful wire-tapping and other forms of electronic surveillance; (3) unlawful entry and seizure; (4) dissemination of derogatory information concerning plaintiffs; (5) summary punishment and harassment, and (6) infiltration of private meetings and political organizations by informers and provocateurs. *Id.* at 116.

The *Rochford* court ruled that the allegations, if proven, "would establish a course of conduct which would substantially more intrusive than the conduct engaged in by the defendants in [*Laird v Tatum*, 408 U.S. 1 (1972)]." *Id.* at 119.

Tenth Circuit Court of Appeals

In *Riggs v Albuquerque*, 916 F.2d 582 (1990), the Tenth Circuit Court of Appeals ruled that plaintiffs, political activists and organizations, established a justiciable injury when they alleged the Intelligence Unit of the Albuquerque Police Department kept improper investigative files on them.

The Court noted that a plaintiff seeking prospective relief must establish continuing harm as a result of the conduct. *Id.* at 586. As such, the Court ruled that an allegation of past harm or speculative future harm alone does not confer jurisdiction to seek prospective relief. *Id* The Court determined that because, "plaintiffs in this case allege that defendants continue to conduct illegal surveillance of plaintiffs' activities…they have alleged a cognizable, continuing injury which presents a case or controversy for the court to consider." *Id.*

In distinguishing this case from *Laird,* the Court held that plaintiffs were alleging more than a generalized "chill." Instead, plaintiffs were alleging, "harm to their personal, political, and professional reputations." *Id.*

DC Court of Appeals

In, *Hobson v Wilson,* 737 F.2d 1 (1984), The Court of Appeals for the DC Circuit reversed a district court judgment against the MPD and D.C, while affirming liability against the FBI. Plaintiffs, several Washington-area protestors, alleged members of the MPD Intelligence Division served undercover in their organizations, 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." *Id.* at 13. A demonstrator who was identified later as an MPD officer, urged a crowd to disobey parade instructions and instead to march to an area where police awaited.

Further, MPD encouraged informants to take private mailing lists and membership lists, and in one instance to break into an office at night to take a metal strong box.

The Plaintiffs alleged that the FBI, MPD and DC conspired with each other, "to impede plaintiffs' efforts to associate with others for the purpose of publicly expressing opposition to the Vietnam War, national and local Government race relations policies, and other Government actions." *Id.* at 2. These alleged activities fell under the auspices of COINTELPRO, an FBI program that ran from 1967 until the early 1970s. Ultimately, the court reversed a district court judgment against the MPD and D.C. based on sufficiency of evidence grounds. *Id.* at 97. However, the court affirmed liability against the FBI, affirmed the award of punitive damages, and remanded the expungement of records and damage issues. *Id.*