LEGISLATIVE OVERSIGHT OF POLICE: LESSONS LEARNED FROM AN INVESTIGATION OF POLICE HANDLING OF DEMONSTRATIONS IN WASHINGTON, D.C.

*Mary M. Cheh**

I. INTRODUCTION

Various mechanisms exist to oversee police behavior. These include internal discipline, civilian review boards, civil lawsuits, and criminal prosecutions. These are important tools, and commentators and police experts have devoted considerable effort to refining and critiquing them.[1] But another, less examined tool is legislative oversight and, in particular, the legislative investigation. When the legislature steps in, there is both power to act—through subpoenas and, ultimately, legislation—and the gravitas of the people's representatives focusing their attention on police practices.

Legislative investigations are usually associated with Congress, typically in the form of public hearings. But policing is largely a local and decentralized affair, and cities and counties have a vital role in exercising oversight of the police. Most local oversight, to the extent that it is exercised, occurs as part of the budgetary process. A town council, for example, may question the amount, purpose, or results of certain expenditures. On occasion, however, when the issue is politically salient and involves police practices that are neither isolated nor sporadic but department-wide and on-going, local legislative bodies may choose to inform themselves with their own inquiry.

The legislature may therefore choose to review police policies concerning the use of surveillance,[2] informants and undercover operatives,[3] the implementation of

---

* Elycee Zenoff Research Professor of Law, George Washington University. The author served as Special Counsel to the D.C. Committee of the Judiciary. Many thanks to G.W. law student V. David Zvenyach who provided invaluable research assistance and wonderful enthusiasm. All views expressed are the author's own and are not meant to reflect the views of the District of Columbia.

1. *See* POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE (William A. Geller & Hans Toch eds., 1996) (collecting many articles and an extensive bibliography, primarily focused on issues of brutality); *see also* ANDREW GOLDSTEIN & COLLEEN LEWIS, CIVILIAN OVERSIGHT OF POLICING: GOVERNANCE, DEMOCRACY, AND HUMAN RIGHTS (2000); Merrick Bobb, *Civilian Oversight of the Police in the United States*, 22 ST. LOUIS U. PUB. L. REV. 151 (2003); Debra Livingston, *The Unfulfilled Promise of Citizen Review*, 1 OHIO ST. J. CRIM. L. 653 (2004) (analyzing the efficacy of traditional approaches of complaint review as a vehicle for systemic reform).

2. *See, e.g.*, Martha T. Moore, *Cities Opening More Video Surveillance Eyes*, USA TODAY, July 18, 2005, at 3A:

> Civil libertarians complain that although private security video often is seen only after a crime has occurred, many public video cameras are watched all the time. In Washington, public protest led to restrictions: Cameras are turned on only during large demonstrations and emergencies, and that fact is announced at the time.

community policing,[4] the use of force,[5] eradication of gang activity,[6] and, perhaps most prominently in the post 9/11 world, counter-terrorism initiatives.[7] All of these matters involve policy decisions at the department level and not actions taken at the discretion of individual officers in the field. The aim of legislative oversight is not to micro-manage police decisions, but to structure those decisions in line with best practices and to maintain constitutional boundaries. Acting through their elected representatives, communities can have a say, for example, in whether shoot-to-kill policies[8] should be liberalized; whether, and under what circumstances, random searches may be conducted of anyone traveling on a bus or a train;[9] and the extent to which the police may maintain dossiers on individuals or groups.[10]

This essay identifies the benefits and limits of local legislative investigations as a means of police oversight by looking at the 2003 investigation of the Metropolitan Police Department by the Judiciary Committee of the City Council of the District of Columbia.[11] The investigation focused on how the police handled (or mishandled) anti-globalization demonstrations held in Washington, D.C. from 2000–2003, and how that inquiry led, ultimately, to the drafting of model legislation, "The First Amendment

---

Id. *See also* Editorial, *Watching the Watchers*, WASH. POST, July 19, 2005, at A20. Congress, unlike state legislatures, has passed many laws related to surveillance and privacy. *See, e.g.*, Federal Communications Act, ch. 652, 48 Stat. 1064 (1934); Wiretap Act, Pub. L. No. 90-351, tit. III (1968); Electronic Communication Privacy Act, Pub. L. No. 99-508 (1986); Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414 (1994).

3. Arthur Santana, *Ramsey Defends Surveilling Protesters; Chief Says Some Changes Needed as Council Members Object to Undercover Tactics*, WASH. POST, Dec. 19, 2003, at B5.

4. *See, e.g.*, Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 654 (1997) ("Police departments are also at least theoretically accountable to local legislative bodies, since these bodies perform an oversight function that some community policing theorists have suggested might be enhanced . . . .").

5. *See* Jeremy Meyer, *Police Oversight Plan Revised Aurora Board Would Have Four From Community, Four From Cops*, DENVER POST, July 15, 2005, at B5 (discussing the creation of a "use-of-force" review board in Denver).

6. *See* Yvonne Abraham, *More Cities Weigh Crackdown on Gangs*, Boston Globe, Apr. 21, 2003, at A1.

7. *See, e.g.*, John Caher, State Legislature Approves Tough Anti-Terrorism Laws, NEW YORK L.J., Sept. 18, 2001, at 1 (reporting the passage of a New York state counter-terrorism measure in the wake of 9/11).

8. The Capitol Police of Washington, D.C., for example, has a controversial "shoot-to-kill" policy, which permits officers to shoot suspected suicide bombers. *Compare* Sari Horwitz, *Capitol Police Focused On Terror; Recent Moves Part of Broader Strategy*, WASH. POST, Aug. 4, 2004, at B1 ("If the suspect appears to be carrying explosives and refuses to stop and be searched or to cooperate otherwise, officers are instructed to shoot the suspect in the head."), *with* Editorial, *Shoot to Kill*, WASH. POST, Aug. 10, 2005, at A15:

> The key lesson here is that with rigorous training, authorities can learn to identify suicide bombers with greater accuracy, and to disarm them in most instances without killing. Shooting to the head may be a necessary last resort, but if through rash actions and poor judgment innocent people end up as the victims, the main battle has already been lost.

Id.

9. *See, e.g.*, Sewell Chan & Kareem Fahim, *New York Starts to Inspect Bags on the Subways*, N.Y. TIMES, July 22, 2005, at A1. Notably, the use of random searches on subways in New York has not only caused controversy, it has led to litigation. *See* Michelle Garcia, *New York Police Sued Over Subway Searches*, WASH. POST, Aug. 5, 2005, at A3.

10. *See, e.g.*, OR. REV. STAT. § 181.575 (2003) (Oregon law limiting the amount and type of information that law enforcement agencies may collect).

11. D.C. COMMITTEE ON THE JUDICIARY, REPORT ON INVESTIGATION OF THE METROPOLITAN POLICE DEPARTMENT'S POLICY AND PRACTICE IN HANDLING DEMONSTRATIONS IN THE DISTRICT OF COLUMBIA [hereinafter D.C. REPORT] (2004), *available at* http://www.dccouncil.washington.dc.us/patterson/kathypatterson.org/ pages/prinfo/ MPDReportFinal5304.doc (last visited Nov. 8, 2005).

Rights and Police Standards Act of 2004," which became law in 2005.[12] The experience shows that legislatures need not be bystanders to police misbehavior or excess and that, indeed, the people's representatives may be in the best position to judge the wisdom of police policies and practices and, where appropriate, provide reform.[13]

II. BACKGROUND

As the nation's capital, Washington, D.C. has served as the major United States site for hundreds of protests, demonstrations, rallies, and marches.[14] Between the years 2000 and 2003, thousands of demonstrators came to the city specifically to protest the effects of globalization, the inauguration of George W. Bush as President, and the war in Iraq.[15] Similar protests occurred in cities around the nation. The most notorious protest occurred in Seattle, Washington during World Trade Organization meetings held November 29 to December 3, 1999. A more recent violent encounter took place during Western Hemisphere free trade talks held in Miami, Florida on November 20, 2003.[16] The violence arose from clashes with the police when overwhelmingly non-violent protestors faced official overreaction and police brutality.

In Seattle, a small number of demonstrators blocked streets, set fire to trash cans, spray painted graffiti, vandalized stores, and caused more than $3 million in damage to downtown businesses.[17] There were 631 arrests, most of them for obstruction of traffic and failure to disperse.[18] The cause of this "disastrous week of tear gas, burning dumpsters, and injured citizens"[19] was a complicated amalgam of poor planning, a police force of 600 overwhelmed by the task of policing a crowd of 50,000, a small

12. The First Amendment Rights and Police Standards Act of 2004, 52 D.C. Reg. 2296 (Mar. 11, 2005) [hereinafter FARPSA].

13. Indeed, while courts are often seen as the vehicle for counter-majoritarian protection of individual rights from the police, the MPD investigation proves that legislatures are uniquely capable of reinforcing individual liberties through democratic means. For a discussion of the relationship between democracy and law enforcement, see David A. Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699 (2005) (discussing theories of democratic pluralism, participatory democracy, and deliberative democracy as they apply to various issues in policing).

14. *See generally* LUCY BARBER, MARCHING ON WASHINGTON (2002) (recounting the history of marches and demonstrations in Washington, D.C.). Capital cities have historically served as major sites for symbolic protests, and the response to those protests can reflect the values of the nation generally. Therefore, the Chinese response to the Tiananmen Square protests in Beijing reflected the perception of the oppressive communist regime. In contrast, the recent Orange Revolution protests in Independence Square in Kiev, Ukraine, were hailed by the West as a symbol of strength and the triumph of democracy.

15. *See, e.g.*, Petula Dvorak & Michael E. Ruane, *Police, Protesters Claim Victory; Scattered Scuffles and Arrests Punctuate a Largely Peaceful Day*, WASH. POST, Apr. 17, 2000, at A1 (IMF protests); Karlyn Barker & Serge F. Kovaleski, *Day is Filled With Drama and Defiance*, WASH. POST, Jan. 21, 2001, at A1 (inauguration protests); Monte Reel & Manny Fernandez, *100,000 Rally, March Against War in Iraq*, WASH. POST, Oct. 27, 2002, at A1 (anti-war protests).

16. *See, e.g.*, David Postman, Jack Broom & Florangela Davila, *Police Haul Hundreds to Jail – National Guard on Patrol; 1,000 Protestors Enter Restricted Zone*, SEATTLE TIMES, Dec. 1, 1999, at A1 (Seattle protests); Steven Greenhouse, *Demonstration Turns Violent at Trade Talks in Miami*, N.Y. TIMES, Nov. 21, 2003, at A25 (Miami protests).

17. SEATTLE POLICE DEP'T, WTO AFTER ACTION REP. 34, 49 (2000), *available at* http://www.ci.seattle.wa.us/Police/Publications/WTO/WTO_AAR.PDF.

18. *Id.* at 48.

19. SEATTLE CITY COUNCIL, WTO ARC PREPARATIONS AND PLANNING PANEL, FINAL REPORT 3 (2000), *available at* http://www.cityofseattle.net/wtocommittee/panel2final.pdf.

number of violent actions by protestors, and broad overreaction by the police and government officials.[20] The Seattle City Council's World Trade Organization Accountability Review Committee found that "[t]he WTO Conference deteriorated into chaos and violence due to: (1) [p]oor planning and preparation[,] (2) [l]imited coordination among Mayor Paul Schell, the Seattle Police Department, and the Seattle Host Organization[,] and (3) [a] pattern of leaders at every level abdicating their responsibilities throughout the planning process."[21]

In Miami, 2,500 police clad in full riot gear met 8,000–10,000 demonstrators who were mostly union members and retirees.[22] In response to provocations as mild as one protestor throwing an orange, police indiscriminately assaulted, pepper-sprayed, and shot rubber bullets at the otherwise peaceful crowd.[23] In some incidents, there was no crowd provocation of any kind. The police hit protestors with batons, zapped them with stun guns, and dispersed them with tear gas.[24] Overall, the police arrested more than 200 people.[25] An independent panel created to review the actions of the police "strenuously condemn[ed] and deplore[d] the unrestrained and disproportionate use of force observed in Miami"[26] and expressed "heartfelt apologies to the visitors who came to [the] city to peaceably voice their concerns, but who were met with closed fists instead of open arms."[27]

Even in cities that did not experience such dramatic behavior, police and government officials have deprived anti-globalization, anti-war, and anti-administration protestors of their rights of free expression by more subtle tactics.[28] In other situations, protestors have been forced to demonstrate in out-of-sight locations or have been penned behind barricades to keep them from the objects of their protest.[29] The Secret Service has, for example, used "security zones" to insulate President Bush from the sights and sounds of opposition marches and demonstrations.[30] Federal and state police have used sophisticated and intimidating tactics, such as surveillance, undercover

---

20. *Id.* at 4; *see also* SEATTLE CITY COUNCIL, REPORT OF THE ACCOUNTABILITY REVIEW COMMITTEE 3 (2000), *available at* http://www.cityofseattle.net/wtocommittee/arcfinal.pdf.

21. Seattle City Council Planning Panel Report, *supra* note 19, at 4.

22. *See, e.g.*, Greenhouse, *supra* note 16; John Pacenti, *Miami Trade Summit Security Hailed, Reviled*, PALM BEACH POST, Nov. 22, 2003, at 1A; Robyn E. Blumner, *Miami Crowd Control Would Do a Tyrant Proud*, ST. PETERSBURG TIMES, Nov. 30, 2003, at 1P.

23. *See* Blumner, *supra* note 22.

24. *See id.*; *see also* Greenhouse, *supra* note 16.

25. *See* Pacenti, *supra* note 22.

26. INDEPENDENT REVIEW PANEL, EXECUTIVE SUMMARY OF INDEPENDENT REVIEW PANEL FINDINGS AND RECOMMENDATIONS FROM THE FTAA DEMONSTRATION COMPLAINTS INQUIRY 1–2 (2004), *available at* http://www.co.miami-dade.fl.us/irp/Library/5-19-04_FTAA_Exec_sum.pdf.

27. *Id.* at 1–2.

28. Most recently, police used the tactic of mass arrests during the 2004 Republican National Convention in New York City, where over a thousand protestors were arrested. In subsequent lawsuits, some of the protestors have alleged that the arrests were unlawful and baseless, and that protestors were held in unsafe conditions (according to some reports, those arrested were held in a former bus garage on a riverfront pier), and that they were detained for excessive periods of time. *See, e.g.*, Robert D. McFadden, *Vast Anti-Bush Rally Greets Republicans in New York*, N.Y. TIMES, Aug. 30, 2004, at A1; Martha T. Moore, *Protesters Challenge NYC Arrests*, USA TODAY, Feb. 7, 2005, at 3A; Diane Cardwell, *Lawyers' Group Sues City Over Arrests of Protesters*, N.Y. TIMES, Oct. 8, 2004, at B3.

29. *See* Mary M. Cheh, *Demonstrations, Security Zones, and First Amendment Protection of Special Places*, 8 D.C. L. REV. 53, 57–58 (2004).

30. *See id.* at 58–60.

operatives, disinformation, and preemptive arrests, to undermine and frustrate the ability of protestors to conduct their demonstrations and send their message to the larger public.[31]

Since the tumultuous anti-Vietnam protests of the 1970s, the Metropolitan Police Department (MPD) of Washington, D.C. (and the related police agencies of the area such as the National Park Police) have gained a reputation for peacefully, efficiently, and fairly handling mass demonstrations.[32] The MPD proved able to protect the public and honor the free speech rights of protestors, even hundreds of thousands at a time and even in the presence of counter demonstrations. But most of these free speech events were tame, negotiated, stage-managed affairs that, despite their size, were usually controversial only in the debate about how big the crowd was.[33]

The anti-globalization protests were different.[34] They were the kind of troublesome protests that police seek to dominate lest they get out of control.[35] The protestors, many of whom were students, sometimes used radical rhetoric.[36] They were boisterous, confrontational, occasionally disobedient, and hard to negotiate with because they were comprised of many loosely affiliated and decentralized groups.[37] Some of the groups pre-announced their plans to engage in civil disobedience, such as blocking traffic or preventing the members of the World Bank or International Monetary Fund from holding their meetings.[38] And the police, as they had in the past with anti-Vietnam war marchers, took up battle stations. They inflated crowd estimates and exaggerated dangers.[39] The police made plans for infiltrating, disrupting, and preempting the protestors, and resolved that the nation's capital would not become "another Seattle."[40]

Two of these "troublesome" demonstrations took place in 2000 and 2002. In April, 2000 approximately 10,000 demonstrators came to Washington D.C. for a weekend of protests in conjunction with the International Monetary Fund and the World Bank

---

31. *Id.* at 53.

32. *See* BARBER, *supra* note 14, at 224.

33. *Id.* at 226.

34. *Id.* at 224–25.

35. *See* Ralph Temple, *The Policing of Demonstrations in the Nation's Capital: Legislative and Judicial Corrections of a Police Department's Misconception of Mission and Failure of Leadership*, 8 U.D.C. L. REV. 3, 5 (2005):

> But virtually all other problematic demonstrations—those in which the sponsors pre-announce civil disobedience, such as traffic blocking, or in which some factions are bent on vandalism or disorder—have been another matter. It is those demonstrations that challenge D.C. Police Management to honor and protect First Amendment rights of speech and assembly while maintaining order. And that is where the leadership of the Metropolitan Police Department has, with rare exception, failed.

Id.

36. *See id.* at 12 (stating that demonstration sponsors announced they would "shut down the city").

37. *See generally id.*

38. *See* Jack Kelley, *In D.C., Police, Protesters Alike Say They're Prepared: Capital Braces for Weekend Demonstrations*, USA TODAY, Apr. 13, 2000, at 4A (explaining that one website, http://www.a16.org, which served as a virtual headquarters for protest groups, had a number of postings that threatened violence and destruction of property).

39. *See* D.C. REPORT, *supra* note 11, at 52.

40. Kelley, *supra* note 38 (quoting Police Chief Charles H. Ramsey as saying, "They ain't burning our city like they did Seattle"); *see also* John Kifner, *Police Move Against Trade Demonstrators*, N.Y. TIMES, Apr. 16, 2000, at A6.

meetings.[41] This demonstration was the first Washington anti-globalization protest since Seattle. The MPD planned for the event months in advance, secured significant funding from the federal government, arranged for police assistance from other police departments, asked the courts to be prepared for mass arrests, investigated and infiltrated the protesting groups, and mobilized the entire department.[42] Eventually 1,300 people were arrested.[43]

Not content to deal with unlawful behavior if it occurred, the MPD took various actions to disrupt and preempt the demonstrations. For example, on Saturday, April 15, 2000, the day before the largest scheduled demonstration, the MPD and City fire officials entered the anti-globalization groups' headquarters, or "convergence center," on the pretext of a fire inspection.[44] Fire officials issued multiple fire code violation notices and closed down the center, thus seriously disrupting the plans of the demonstrators and displacing many out-of-town protestors who were staying at the building.[45] Officials confiscated property of the demonstrators and sealed the building, only letting individuals return two days later—after the demonstrations had ended.[46] The police chief and his top assistant chief made false public statements that the confiscated materials included ingredients to make pepper spray and Molotov cocktails.[47]

MPD also used "trap and detain" tactics to round up demonstrators and to preemptively arrest them. As the New York Times reported in one account:

> By late evening . . . about 600 people had been arrested. They faced charges of parading without a permit and possibly obstructing traffic, although the march, under continuous police escort, caused little serious disruption on the city's streets as the marchers mainly stayed on sidewalks. The group of demonstrators had been marching through downtown streets—progressively blocked off by the police during the day—when they found themselves blocked, then surrounded by city police officers on a block of 20th Street . . . . Although the marchers and their supporters on nearby sidewalks chanted for the police tolet them go, Police Chief [Charles H.] Ramsey said later that the crowd had refused police orders to disperse. Reporters who had observed the march had not heard any such order.[48]

There were also incidents of police using violence against non-violent demonstrators, including baton strikes and pepper spray.[49] Police arrested and held

---

41. Anne E. Kornblut, *Thousands in Protests Against Finance Groups IMF; World Bank Press on in D.C.*, BOSTON GLOBE, Apr. 17, 2000, at A1.

42. *See* Kelley, *supra* note 38; *see also* David Montgomery, *Protests End with Voluntary Arrests; Police, Demonstrators Say They Met Goals*, WASH. POST, Apr. 18, 2000, at A1.

43. *See* Montgomery, *supra* note 42, at A1.

44. D.C. REPORT, *supra* note 11, at 25–33.

45. *Id.* at 25.

46. *See id.* at 35–36.

47. *Id.* at 32.

48. Kifner, *supra* note 40.

49. *See* John Kifner & David E. Sanger, *Financial Leaders Meet as Protests Clog Washington*, N.Y. TIMES, Apr. 17, 2000, at A1.

persons for prolonged periods without access to food, water, or counsel.[50]

Similar harsh, arbitrary, and preemptive actions marked the fall 2002 anti-globalization demonstrations. That protest drew approximately 2,000 people, a number easily overwhelmed by a far larger police force.[51] The MPD's internal assessment predicted no more than 4,000 demonstrators even though, publicly, Police Chief Charles H. Ramsey told city leaders that 20,000–30,000 would descend on the city.[52] Chief Ramsey urged workers to take public transportation and expect delays.[53] Citing protestor rhetoric, the Chief said the demonstrators planned to "shut down the city."[54]

The most egregious police action occurred on Friday morning, September 27, 2002. In what appeared to be a series of preemptive maneuvers netting a total of 600 arrestees, police funneled hundreds of protestors and many uninvolved bystanders into Pershing Park on Pennsylvania Avenue.[55] Once they were corralled, police closed up the park and arrested nearly 400 people. Police then escorted the arrestees to buses, which had been standing by for that purpose.[56] There had been no violence and virtually no disorder—just some chanting, drum banging, and milling about.[57] As the police later conceded, there was no order to disperse and, more importantly, no basis for an order to disperse.[58]

City lawyers did not prosecute any of the persons arrested in Pershing Park. But the aim may never have been prosecution since protestors were held in harsh circumstances for prolonged periods, exceeding twenty-four hours and, by then, the protest was over. As Chief Ramsey told the Washington Post at the time, "These people that are apprehended are going to miss several protests because they'll be behind bars."[59]

III. WHY A LEGISLATIVE INVESTIGATION WAS NECESSARY

Of the multiple ways to oversee police conduct—internal review, civilian oversight, and law suits—none was realistically available or likely to result in a timely, forward-looking response to the police abuse of the anti-globalization demonstrators. A timely, forward-looking response was insistently needed because similar protests continued to occur in the District and around the country and because police departments were copying the "successful" tactics they saw used elsewhere.

---

50. *See* Kevin Johnson, *Groups Challenge Conduct of Police*, USA TODAY, Apr. 17, 2000, at 3A.

51. Manny Fernandez & David A. Fahrenthold, *Police Arrest Hundreds in Protests; Anti-Capitalism Events Cause Few Disruptions*, WASH. POST, Sept. 28, 2002, at A1.

52. *See* D.C. REPORT, *supra* note 11, at 48.

53. *See id.*

54. *See id.* at 48.

55. *See id.* at 48, 51.

56. *See id.* at 48, 52–54.

57. *See* D.C. REPORT, *supra* note 11, at 56–57. Prior to coming to the park, some demonstrators broke a window and overturned newspaper boxes. There was no basis to think that those people were in the group arrested, and police made no effort to identify them apart from the hundreds of persons who were marching peacefully. *Id.*

58. *See id.* at 53–56.

59. Monte Reel & Manny Fernandez, *Police, Protestors in D.C. Prepare for Day of Disruption*, WASH. POST, Sept. 27, 2002, at B1.

The MPD, like almost every other police department in the nation, has a system of internal review.[60] Following the 2000 and 2002 demonstrations, MPD did not initiate any review of its actions; this, despite the fact that several officers filed after-action reports questioning the legality of the Department's behavior and members of the community publicly complained about the treatment they received.[61] Indeed the Department's own general orders required an investigation under such circumstances.[62] The Department only acted after the City Council pressured the Mayor to look into the mass arrests effected at Pershing Park in September 2002.[63] But the reluctantly-conducted internal investigation was plagued by irregularities, including changes at the direction of the Police Chief which softened criticism of the MPD.[64] In the end, the investigation was a whitewash. The Chief reported to the Mayor that no police official should be disciplined for the unlawful arrests at Pershing Park, saying that the officers acted in "good faith" and were responding to "rapidly evolving circumstances."[65] The Mayor overruled this recommendation, and a letter of reprimand was sent to the Assistant Chief who said he gave the order to arrest.[66] Apart from this minor consequence, no MPD officer or official was formally disciplined in any way for any action that occurred at either the 2000 or the 2002 demonstrations.

Commentators have routinely questioned the ability of police departments to reliably or thoroughly investigate themselves.[67] This concern was evident in the case of the MPD's internal investigation of the Pershing Park arrests. The later legislative investigation found that, "[t]he [MPD] investigation and release of the final report were marked by evasions and misstatements by senior officials including Chief Ramsey, giving rise to the appearance of an attempt to cover up Chief Ramsey's role in ordering the Pershing Park arrests."[68]

As for other checks on the police, there were no criminal prosecutions of police for their actions during the 2000 or 2002 demonstrations.[69] There was no investigation by

---

60. *See generally* Metropolitan Police Department, Office of Professional Responsibility, http://mpdc.dc.gov/mpdc/cqp/view,a,1230,Q,540837.asp (last visited Nov. 11, 2005) (discussing the MPD's Office of Professional Responsibility, which oversees the internal review process).

61. D.C. REPORT, *supra* note 11, at 44–47.

62. *Id.* at 76.

63. *Id.*

64. *Id.* at 76–80.

65. Memorandum from Chief Charles H. Ramsey to Mayor Anthony A. Williams regarding Final Decisions on Recommendations Following Review of Actions Taken by Members of the Metropolitan Police Department During the Fall 2002 IMF/World Bank Protests 2 (Mar. 13, 2003) (*available at* http://www.dcd.uscourts. gov/02-2010.pdf as part of the public docket for *Chang v. United States*, No. 02-2010, made available on September 12, 2003, by order of Judge Emmitt G. Sullivan). *See also* Carol D. Leonnig, *IMF Arrests Improper, Police Found; Ramsey Memo Acknowledges Protesters Weren't Warned*, WASH. POST, Sept. 13, 2003, at B2.

66. Leonnig, *supra* note 65 ("Two sources close to the investigation said that the mayor overruled the chief's March recommendation and that [Police Commander] Newsham was given a minor reprimand. Ramsey and Newsham would not comment yesterday.").

67. *See* Barbara Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 537 (2004) ("The universal practice of police organizations of limiting information regarding complaints filed and aspects of the investigation exacerbates this problem. It creates an appearance of favoritism and undermines citizen perceptions of legitimacy.").

68. D.C. REPORT, *supra* note 11, at 73.

69. This is not atypical. In fact, in many cases it seems that failing to file charges is the rule rather than the exception. *See* Craig Whitlock & David S. Fallis, *Police Rarely Charged in Federal Probes*, WASH.

the City's Civilian Complaint Review Board (CCRB).[70] There were, however, a number of civil lawsuits seeking damages and injunctive relief.[71] Three of the lawsuits remain pending.[72] It is highly unlikely, though, that any of these cases will effect fundamental reform in how the MPD behaves. These cases are hard to bring, and damage awards are not often an incentive to adopt reforms.[73] Injunctive relief offers greater potential for change since department-wide policies and practices can be altered and the results supervised by a judge with continuing authority.[74] Yet whether these lawsuits will successfully achieve injunctive relief is unclear, and it might be years before the open cases are finally resolved. The simple fact was that the D.C. Council was the only body willing and able to act in a timely and effective manner.

IV. BENEFITS OF A LEGISLATIVE INVESTIGATION

Perhaps the greatest advantage of oversight via a legislative investigation is the ability to address police practices at a broader, systemic level. Internal reviews or citizen review boards focus on individual complaints which in turn "tends to make rank and file officers scapegoats for police misconduct."[75] Civil lawsuits for damages[76] and criminal prosecutions also take a narrow look backward with the objective of fixing blame. And, while civil injunctive relief can offer forward-looking reform, it, like all litigation, is bound by the issues raised by the parties and the confining forms of proof associated with lawsuits. Legislative bodies can inform themselves broadly, rely on experts at will, follow trails wherever they may lead, and disregard strict courtroom

---

POST, Aug. 21, 2001, at B1 (showing that between 1991 and 1998, only 1.5% of civil rights complaints led to filed charges); Kevin Flynn, *Public Complaints Are Played Down, Police Data Show*, N.Y. TIMES, Sept. 15, 1999, at A1 ("Of the 420 cases his office has examined so far, Mr. Green said, the [New York Police] department failed to file charges in 295 of the cases. In 90 percent of those cases, he said, police officials within the Department Advocate's office rejected the review board's finding without conducting any investigation of their own.").

70. The CCRB (now called the Police Complaints Board) can dismiss, conciliate, mediate or adjudicate complaints of harassment, use of unnecessary or excessive force, use of language or conduct that is insulting, demeaning or humiliating, discriminatory treatment, and retaliation. D.C. CODE § 5-1107(a) (2005). Apparently no complaints were lodged with the CCRB. Perhaps one reason is that some officers removed their badges during the demonstrations and individual officers could not be identified. More fundamentally, however, the actions of the police during the demonstrations were primarily actions of the police as units, actions directed from the top and in accord with policy and planning developed from the top.

71. Alan Beattie, *Legal Battle Looms Over Protests in Washington*, FIN. TIMES, Sept. 5, 2001, at 6; Manny Fernandez & David A. Fahrenthold, *GWU Students Sue Police Over Mass Arrests; Lawsuit Alleges Protest Observers, News Photographers Were Unfairly Detained*, WASH. POST, Oct. 16, 2002, at B3; Carol D. Leonnig, *District Reaches Settlement Over Mass Arrests; Other Lawsuits Pending From Protests*, WASH. POST, Jan. 1, 2004, at B1.

72. Carol D. Leonnig & Del Quentin Wilber, D.C. *Settles With Mass Arrest Victims; 7 Rounded Up in 2002 IMF Protest to Get $425,000 and an Apology*, WASH. POST, Jan. 25, 2005, at A1.

73. *See, e.g.*, Mary M. Cheh, *Are Lawsuits an Answer to Police Brutality?*, *in* POLICE VIOLENCE, *supra* note 1, at 247.

74. *See* Laurie Levinson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U. L. REV.1, 25–30 (2001) (identifying the strengths and weaknesses of pattern and practice law suits and court-supervised consent decrees, but cautioning that, "[i]t is an open question whether these consent decrees have been effective in bringing police reform").

75. Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department "Pattern or Practice" Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3, 24 (2003).

76. Pattern and practice lawsuits are different in that they do look at police reform more broadly and importantly bring in monitoring from the outside.

rules of evidence.[77] It is particularly appropriate to evaluate the MPD handling of mass demonstrations from this broader perspective since, in policing demonstrations, individual officers are not acting as agents of discretion on the street. Rather they are quasi-military units responding to a pre-existing plan created at the top and administered from the top. Unlike the problem of police use of excessive force, police action during demonstrations cannot plausibly be excused as the behavior of a few "bad apples."[78]

Another advantage of the legislative investigation is greater police cooperation. Since the focus of a legislative investigation is not to affix blame per se, there is a greater likelihood that officers will use back channels to inform the committee of what they know or to testify about behavior they found questionable. Of course, the operative words here are "more likely." Even in a legislative investigation, individual officers may dissemble or cover for higher-ups. The MPD investigation encountered witnesses who either exhibited stunning failures to recall or made implausible claims of non-involvement.

The format of a legislative investigation also enhances the prospect of cooperation. Testimony can be taken in non-public, executive session.[79] The witness can provide narrative answers, opinions, and hearsay, and is not subject to cross examination. In short, a witness can tell his or her story freely and fully. A more general form of cooperation may also arise as the entire process of an investigation including a final report, recommendations, and proposed legislation generates a salutary dialectic among the legislature, the executive, and the police department. This, of itself, can lead to the department recognizing the need for and voluntarily adopting reforms.[80]

A legislative investigation can also move forward with relative speed. Unlike litigation which can drag on for years, an investigation can be completed in months, and legislation can follow soon after. The Judiciary Committee of the D.C. Council began its legislative investigation partly out of frustration with the agonizingly slow pace of the litigation spawned by MPD's handling of the 2000–2003 demonstrations. For example, cases arising out of the fall 2000 demonstration are still only in a pre-trial stage, and no trial date has yet been set, five years after the event. In contrast, the Committee authorized an investigation by a resolution adopted on April 28, 2003. Over

---

77. *See* Keith A. Findley, *Learning From Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W. L. REV. 333, 341 (2002) (suggesting the benefits of legislative investigation are the legislature's ability to look at a matter comprehensively, to call upon experts, to translate efforts into reforms, and to respond to local realities).

78. *See* Armacost, *supra* note 67, at 457–59 (discussing this persistent police explanation for bad behavior).

79. D.C. COUNCIL R. 306. This procedure, although used only once previously in the District of Columbia, proved useful during the testimony of several witnesses.

80. Indeed, as a result of the D.C. legislative investigation, the police modified their Standard Operating Procedures in 2004 to limit the scope of allowable police intelligence gathering activities directed at protest groups. *See* Letter from Mayor Anthony Williams to Councilwoman Kathleen Patterson (with enclosure, "Responses to Recommendations in the Judiciary Committee Report on Investigation of the Metropolitan Police Department's Policy and Practice in Handling Demonstrations in the District of Columbia") (Apr. 20, 2004) [hereinafter Mayor's Letter](on file with author) (stating in the enclosure that "[o]n February 15, 2004, MPD implemented a standard operating procedure for the conduct of intelligence gathering activities. Included in the directive are restrictions governing when and under what circumstances intelligence activities should be initiated").

the next eight months the Committee collected and studied case law, documents, videos, police manuals, and responses to subpoenas and written interrogatories, and conducted depositions. This effort culminated in public hearings held on December 17 and 18, 2003, and the Committee issued a final report on March 24, 2004. By the end of 2004, the Committee drafted and reported out a comprehensive bill: First Amendment Rights and Police Standards Act of 2004.[81] This model legislation declares protection of First Amendment rights to be the public policy of the District of Columbia, sets "rules of engagement" to be followed by the police in dispersing, arresting, or holding demonstrators, specifies the circumstances permitting investigation of protest groups, and provides for officer training and supervision. FARPSA became law in 2005.[82]

Legislative investigations, if legitimately and seriously pursued, also have some potential to counter the "dual messages" phenomenon that allows police to acknowledge the rules that limit their behavior but to flout them at the same time. Formal policies and official pronouncements of police departments never prescribe or approve of violation of rights of free expression any more than they prescribe or authorize brutality, corruption, or unlawful conduct. But informal messages and signals may communicate a different set of norms. When police are told exaggerated tales of having to defend their community against violent, Molotov-cocktail-throwing hordes, when they are complimented for their behavior following demonstrations involving police abuse or illegal arrests, when personnel actions (citations, promotions, and the like)[83] reward aggressive or preemptive conduct, and when the media applaud the police for their fine work in quelling or neutralizing peaceful demonstrators, the police notice the disconnect and tend to conform their conduct to the informal understandings, or what they view as the "real" rules.[84]

During the April 2000 and fall 2002 Washington, D.C. demonstrations, top police officials, including the Chief of Police, conveyed the message to the rank and file that it was an us-against-them situation.[85] Top officials grossly inflated the number of protestors planning to come to the capital and implicitly or explicitly approved or condoned aggressive police behavior, mass arrests, use of batons, pepper spray, pre-emptive trap and arrest maneuvers, mass arrests, and harsh and prolonged post-arrest detentions.[86] When the Mayor publicly expressed confidence in the Chief's ability to

81. FARPSA, 52 D.C. Reg. 2296 (Mar. 11, 2005).

82. The legislative history of Bill 15-968 is available at http://www.dccouncil.washington.dc.us (FARPSA (Bill No. 15-968) was enacted on January 27, 2005. It was assigned Act No. 15-757. D.C. Law 15-352 became effective on April 13, 2005).

83. On the very same day that the AFL-CIO was calling for the resignation of Miami police chief John Timoney for the violent attack on demonstrators in 2003, *Union Wants Probe into Miami FTAA Protests*, ST. PETERSBURG TIMES, Dec. 4, 2003, at 3A, the Chamber of Commerce was giving him an award for his handling of the demonstration. Jane Bussey, *Miami-Area Chamber Lauds Police Chief's Work During Americas Trade Meeting*, MIAMI HERALD, Dec. 4, 2003. And, not only have the D.C. officers involved in the unlawful arrests in the Pershing Park incident suffered no ill consequences, they have been promoted. Del Quentin Wilber, *Senior Police Posts Shuffled After 4 Leave; 2 Assistant Chiefs Among Retiring Commanders*, WASH. POST, July 29, 2004, at T3.

84. *See, e.g.*, Armacost, *supra* note 67, at 515–21 (discussing the phenomenon of the "double message" primarily in the context of police brutality); HERMAN GOLDSTEIN, PROBLEM-ORIENTED POLICING 163 (1990) ("Police agencies have long been notorious for urging rank-and-file officers to do one thing while rewarding them for doing something else.").

85. *See, e.g.*, Kelley, *supra* note 38; Kifner, *supra* note 40.

86. *See* D.C. REPORT, *supra* note 11; *see also* Kelley, *supra* note 38.

investigate the complaints arising out of the 2000 demonstration, the Chief responded: "Unless there is overwhelming evidence that an officer physically abused someone, I intend to give them all medals, not discipline, because they did a good job."[87] And, when speaking of the unlawful mass arrests during the fall 2002 demonstration, the Chief expressed satisfaction with that action, consistently defended all of the tactics used, and refused to acknowledge his own role in the events until the legislative investigation pinned him down.[88]

The Mayor and media lauded the actions of the police. The leading paper in the city, the Washington Post, praised the Department after the 2000 demonstrations with an editorial entitled, "Hail To The Chief—And His Cops."[89] A Washington Post news article, entitled, "Taken For a Ride, Police Turn Bike Strike Into A Tour De Force," described the MPD's 2002 unlawful funneling, trapping, and arresting of seventy-five demonstrating bike riders as an amusing trick played on the protestors.[90] The article stated in part:

> [Y]ou could tell that the D.C. police bikers thought this whole scene was a hoot. They straddled their two-wheelers across the street, watching, smiling sometimes. They could afford to be patient. The route may have been 'secret,' [referring to the protestors' attempt to keep their destination quiet] but the police had a pretty good idea of how this adventure was going to end anyway. Everyone else was in for a surprise [i.e., arrest].[91]

But, a legislative investigation can express a counter message and show that there are consequences if departmental rules and constitutional rights are violated.

Finally a legislative investigation offers advantages even over its close cousin, the "blue ribbon" or special commission.[92] A blue ribbon commission is ordinarily created by the executive branch, and is composed of a panel of experts, who investigate perceived problems and report recommendations.[93] Over the past thirty to forty years, there has been a proliferation of commissions created to study and document police misconduct. The commissions have produced comprehensive reports chronicling beatings, violations of civil rights, patterns of bribe taking, and other wrongful conduct in the nation's police forces, and they have offered wide-ranging and thoughtful

---

87. Kathryn Sinzinger, *Patterson, Graham Seek MPD Inquiry*, COMMON DENOMINATOR, Apr. 24, 2000, at 1.

88. D.C. REPORT, *supra* note 11, at 73.

89. Editorial, *Hail to the Chief—And His Cops*, WASH. POST, Aug. 19, 2000, at A26 ("[The protest organizers] gave themselves an 'A-plus' for PR when in fact they created a weak impression and mainly managed to step on their own fuzzy message by their dubious choice of tactics. If any groups deserve high marks, they are the disciplined men and women of the Metropolitan Police Department and other law enforcement agencies who served under D.C. Chief Charles Ramsey.").

90. David Montgomery, *Taken for A Ride; Police Turn the Bike Strike Into a Tour de Force*, WASH. POST, Sept. 28, 2002, at C1.

91. *Id.*

92. The use of a commission can be an especially important alternative to an investigative process in certain cases, because commissions are non-political bodies. Whereas legislatures are subject to constant political scrutiny, commissions are removed from such pressures. Thus, in circumstances where political pressures could derail an investigation, commissions can still provide valuable oversight.

93. Walker, *supra* note 75, at 20.

recommendations for reform. Some of the more prominent commissions include the 1967 President's Crime Commission, which was designed to combat organized crime,[94] the 1992 Christopher Commission, which investigated the use of excessive force by the Los Angeles Police Department in the wake of the Rodney King beating,[95] and the 1994 Mollen Commission, which studied police corruption in New York.[96]

Like legislative investigations, commission inquiries have the ability to assess police behavior at a broader level. They have the capacity, even without subpoena power, to act in a timely fashion. They can identify systemic issues, provide a comprehensive diagnosis of the problem, and offer blueprints for reform.[97] But commissions lack the teeth to effectuate reforms.[98] While commission recommendations have sometimes been implemented, and while commission reports "have been helpful in understanding the causes of police abuses, they have been disappointing in leading to changes in actual department practices."[99] With a legislative investigation, the lawmakers themselves are calling for reform, they are directly invested in the effort, and they possess the levers to implement change. Even in such circumstances, of course, there is no assurance that true reform will result or take hold, but the odds are better.[100]

V. THE KEYS TO A SUCCESSFUL LEGISLATIVE INVESTIGATION

There must be political will to launch an investigation into police practices, and there must be a problem of sufficient gravity to warrant the expenditure of time and resources. But if an investigation is to begin, a great deal of planning and preparation must precede it. The immediate challenge in the MPD investigation was to confine the scope of the inquiry to a manageable size. The relevant period covered three years of activity and multiple incidents. The solution was to focus on several particular events and use them as case studies. Unless trimmed in this way, the investigation could have easily become a meandering slog through mounds of information, thus losing momentum and the hope of a timely report.

Next began the arduous task of deciding what documentary information to seek, in

---

94. PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967).

95. INDEP. COMM'N ON THE LOS ANGELES POLICE DEP'T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT (1991).

96. THE CITY OF NEW YORK COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT, ANATOMY OF FAILURE: A PATH FOR SUCCESS (1994).

97. Findley, *supra* note 77, at 333.

98. Samuel Walker, *Setting the Standards: The Efforts and Impact of Blue-Ribbon Commissions on the Police*, *in* POLICE LEADERSHIP IN AMERICA: CRISIS AND OPPORTUNITY 363 (William A. Geller ed., 1985).

99. Levinson, *supra* note 74, at 24.

100. Of course legislative investigations are not a panacea. Commentators, speaking principally about Congressional investigations, have cited various limitations. Partisanship and policy differences can destroy the effectiveness of the investigating body, investigating committees may be corrupted by the same influences that control the agency under investigation, committees may not be fully motivated unless they can uncover a politically favorable scandal, or committees may be overzealous and improperly hold witnesses up to ridicule or condemnation (e.g., the McCarthy hearings). *See, e.g.*, Morris S. Ogul, *Congressional Oversight: Structures and Incentives*, *in* CONGRESS RECONSIDERED 317 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 2d ed. 1981); BERNARD ROSEN, HOLDING GOVERNMENT BUREAUCRACIES ACCOUNTABLE 21 (1989).

what order, and from whom. This required an understanding of how the MPD operated, what sorts of documents would be generated in connection with policing a demonstration, and who the actors were. The Committee could not have prepared as effectively as it did without having persons inside and outside of the MPD who were thoroughly familiar with its operations and willing to educate the Committee. This is a critical component of a successful investigation that seeks to uncover not just what happened at certain events but the actual practices and behavior within the police department.

There were many sessions devoted to preparing subpoenas and others devoted to enforcing them. At many points along the way, the chair of the Judiciary Committee, Councilwoman Kathy Patterson, had to negotiate, insist, threaten court action, and cajole executive branch officials to respond fully and promptly. A successful investigation needs a political leader willing to fight for information and to be persistent. If not, the effort will flounder on delay and noncompliance. As the Committee found, even if you have full commitment, you still may not get everything you need or request. Subpoena power is a mighty force. A credible threat to use court enforcement or public disclosure can move even recalcitrant police departments to cooperate.

Once documentary subpoenas and written depositions were served and substantially complied with, the Committee turned its attention to the handling of witnesses. It settled on a rarely used procedure, namely questioning witnesses in executive session.[101] These were under-oath, non-public sessions that gave the Committee and the witness a private setting, free of distraction and free of any distorting influence of media attention. The non-public questioning also served to protect the identity of undercover officers, provide some shield for officers who were concerned about departmental retribution for their testimony, and limit the ability of officers to collaborate on or conform their testimony.

The rules governing these executive sessions were the same as those applicable in a public hearing and gave the Committee considerable latitude to develop the facts and secure a witness's cooperation. After being sworn in, witnesses were advised of their rights to claim the Fifth Amendment (none did), to invoke any common law privileges, such as spousal privilege (none did), to be assisted by counsel (almost all were), and to make an opening statement (almost none did). Witnesses were also told that they would be protected against retaliation for their testimony by the District of Columbia's Whistleblower's Protection Act.[102]

Operating almost like a grand jury or an investigating magistrate, the executive session questioning was done by Committee counsel. The witness was told that the proceeding was not like a trial, that it was not an adversary proceeding, that hearsay was acceptable, and that full and complete answers could include the witness's opinion. The witness and the witness's lawyer were advised that only objections based on privilege were permissible, all rulings would be made by the Committee counsel, and the witness's lawyer had no right to pose questions or cross examine.

---

101. *See* D.C. Council R. 306.

102. D.C. CODE §§ 1-615.51–1-615.59 (2001).

The proceeding often had the feel of a deposition as witnesses were led through a series of questions, but it was also like a conversation. The questioning took place in a small conference room, with few persons present, usually three persons from the Committee, the witness, and the witness's lawyer. It was audio taped. On occasion a witness's lawyer would complain that a question was unclear or interject in some other way to interrupt or stop the witness from answering. However, like any other legislative hearing, the lawyer's role was confined to advising the witness if assistance was sought or to protecting any privileges the witness may have had. For the most part, the Committee was successful in preventing lawyer interference, and that, combined with the non-adversary and non-threatening environment, often produced valuable information.

The Committee followed a fairly conventional approach to the calling of witnesses, namely working from the bottom up. Out of respect, the Committee did not call the Chief of Police to testify in executive session. His testimony came in the form of responses to interrogatories, and he also gave live testimony at a two-day public hearing. By then the Committee pretty much had all of the relevant facts in hand.

The public hearings also served a separate, valuable function. They highlighted the issues and drew media attention. They allowed members of the public, interested groups, and aggrieved citizens to participate directly. They were also a further means of countering the "dual message" phenomenon as everyone could see police officials facing criticism, not approval, for violating their formal rules and standards.

VI. RESULTS

The Committee issued its investigative report on March 24, 2004. Overall, the Committee found that in policing the anti-globalization demonstrations, the MPD had failed "to acknowledge and protect the rights of individuals to privacy, and to free speech and assembly,"[103] and repeatedly violated the Department's own guidelines for handling demonstrations, "including guidelines on use of force in defensive situations, de-escalation in crowd control, and predicates required for mass arrests."[104] The 156-page submission provided background, specific findings, and recommendations. The Report detailed not only MPD conduct during the demonstrations, but also revealed MPD's "use of undercover officers to infiltrate political organizations in the absence of criminal activity and in the absence of policy guidance meant to protect the constitutional rights of those individuals being monitored."[105] The Report also exposed disturbing practices within the Department that are not necessarily ferreted out in lawsuits, such as evasion on the part of leaders of the MPD as to their actions and the failure of the MPD to police its own members for misconduct associated with demonstrations.[106]

Importantly, the Report placed the MPD's behavior within the history of protest in the District of Columbia, and set it within the larger context of how police departments

103. D.C. REPORT, *supra* note 11, at i.

104. *Id.* at ii.

105. *See generally id.* at 75, 80–87.

106. *Id.* at 88–99.

around the country are currently reacting to protests and demonstrations.[107] The Report observed, for example, that:

> Through legislation and litigation U.S. police entities, including the Federal Bureau of Investigation, are blurring the distinction between intelligence and law enforcement as an outgrowth of the war on terrorism. This important and wide-ranging development includes questioning the continuing validity of the requirement, heretofore, that criminal activity or the reasonable suspicion of criminal activity must precede police use of certain types of investigation. Earlier prohibitions on creation of dossiers on individuals based on their political activities have been weakened in the name of an expanding definition of "law enforcement." Some police departments apparently are following the lead of the FBI in using "disruption" techniques, borrowed from intelligence practices overseas and applied locally to prevent or minimize protest activity. Some local jurisdictions, as well as the Secret Service, have used buffer or "no protest" zones at public events as a security tool, a practice that has been challenged for having a chilling effect on civil liberties.[108]

The Committee reported on protests in San Francisco, Seattle, and Miami, and protests at the 2000 Democratic and Republican conventions,[109] and the phenomenon was repeated again in 2004.[110] By linking these events, the Report provided the opportunity to consider how the practices of one police department are often mimicked by others and to consider the cumulative impact of such actions.

The media reported on the Committee's work at the various stages of investigation, public hearings, and findings and recommendations. As a result, there appeared to be a different perception of the MPD's actions, as was illustrated by an editorial in the Washington Post on December 17, 2003, which stated:

> The committee's probe, which concentrates on the department's handling of demonstrations in the nation's capital, should be followed closely by residents and visitors alike . . . . During the two-day hearing, District residents are likely to gain a sense of how far their department has fallen from the period in the 1970s and 80s when the District's police were nationally renowned for their ability to handle large demonstrations while remaining on the proper side of the Constitution.[111]

Gone was "Hail to the Chief and his Cops."[112]

The Committee furnished a copy of its Report to the Mayor, who had agreed to have the Deputy Mayor, the Police Chief, and the city's lawyers prepare a response to each recommendation it contained. That Response agreed in whole or part with many

---

107. *Id.* at 7–16.

108. *Id.* at 7.

109. D.C. REPORT, *supra* note 11, at 9–12.

110. *See, e.g.*, McFadden, *supra* note 28 (discussing anti-Bush rally in New York); Moore, *supra* note 28; Cardwell, *supra* note 28.

111. Editorial, *Spotlight on the Cops*, WASH. POST, Dec. 17, 2003, at A42.

112. *See* Editorial, *Hail to the Chief—And His Cops*, *supra* note 86.

of the recommendations but disagreed with many others.[113] For example, in answer to the Committee's concerns that no guidelines existed to regulate undercover investigations of protest groups, the Response identified a new standard operating procedure (SOP) the MPD had just adopted to remedy the problem.[114] On the other hand, the Response disagreed with the recommendation that "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."[115] Overall, the Response showed that fundamental differences remained, but it was clear that the Committee's work had already provoked reform, and to that extent, had already served its dialectical function.

The ultimate result of the investigation was a model statute which declares that protestors are entitled to the protections of the First Amendment and, specifically, that demonstrators have the right to be near the object of their protest so that they may be seen and heard. The new law establishes rules governing how the police train for,[116] investigate,[117] and manage protests and demonstrations,[118] as well as how they handle unpermitted demonstrations,[119] crowd dispersal,[120] and protestor arrests and detentions.[121] For example, because the police practice of dispersing and arresting protestors for lack of a permit or the rowdy behavior of a few individuals repeatedly created the predicate for arbitrary action or preemptive arrests, the new law prohibits arresting protestors solely because they lack a permit to demonstrate.[122] Moreover, if there are reasons to arrest persons within a demonstration, the law provides that *those* persons and not the entire gathering are subject to arrest. And, should grounds exist for dispersing an entire crowd—grounds limited to a significant number of participants violating time, place, and manner restrictions where reasonable measures to insure compliance have been tried and are unavailing; a significant number of participants engaging in unlawful disorderly conduct or violence; or a public safety emergency—proper and adequate notice must be given. The essence of these provisions is to limit police to proportionate, graduated, and precise actions.

The First Amendment and Police Standards Act also establishes the practices to be followed in making arrests and holding persons arrested in connection with a protest or

113. *See* Mayor's Letter, *supra* note 80.

114. *Id.* at Enclosure 3 ("On February 15, 2004, MPD implemented a standard operating procedure for the conduct of intelligence gathering activities. Included in the directive are restrictions governing when and under what circumstances intelligence activities should be initiated.").

115. *Id.* (arguing "[t]here may be circumstances in which the particular group undergoing investigation may espouse violence as an explicit part of its ideology. It would be inappropriate to prohibit surveillance activity solely because it is an element of the group's ideology").

116. FARPSA § 115 ("The Chief of Police shall ensure that all relevant MPD personnel, including command staff, supervisory personnel, and line officers, are provided regular and periodic training on the handling of, and response to, First Amendment assemblies.").

117. *Id.* § 207.

118. *Id.* § 107.

119. *Id.* § 107(f)(1) ("Where . . . a [First Amendment] assembly plan has not been approved, the MPD shall, consistent with the interests of public safety, seek to respond to and handle the assembly in substantially the same manner as it responds to and handles assemblies with approved plans.").

120. FARPSA § 107(e).

121. *Id.* §§ 111–112.

122. *Id.* § 105(a).

demonstration.[123] The investigation found that it was an MPD practice and a practice of other departments around the country to hold arrestees for long periods under uncomfortable or painful circumstances.[124] It appeared that such tactics were designed to keep protestors from rejoining the protests and to punish them for their activities. Neither purpose is permissible, but it is fairly easy to disguise these objectives by citing administrative problems, such as, "The computers crashed," or "We just didn't have enough personnel at the intake site." The legislation sets out specific protocols to counter these tendencies.

Of course, legislative solutions have limits. First, one might question why legislation is necessary at all given that rights of free expression are already protected by the Constitution. It is true that the Constitution protects freedom of expression and other rights such as the right to be free from unreasonable searches and seizures. But it is also true that the Constitution does not fully protect us against all substantial invasions of fundamental liberties. As academics are fond of noting, the Constitution is a floor, not a ceiling of protection. Justice Clarence Thomas captured this reality when he joined with a majority of the Supreme Court in holding that it was perfectly constitutional to forfeit a wife's interest in the family car, even though she was completely innocent of her husband's illegal use of the car.[125] He said that the outcome was "ultimately a reminder that the Federal Constitution does not prohibit everything that is intensely undesirable."[126] Legislation can be the antidote by creating rights, or extending and elaborating on existing constitutional protections. That is why we have civil rights statutes, privacy acts, and laws limiting otherwise lawful police actions such as surveillance.

Even where the Constitution does protect individual rights, legislation can give more detailed content and structure to those rights. This is the case, for instance, with the Speedy Trial Act,[127] which specifies and fleshes out the meaning of the Sixth Amendment's requirement that, "In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial,"[128] or the federal wiretapping statute,[129] which amplifies Fourth Amendment rights as they relate to telephone taps.[130] Even statutory provisions that simply mirror constitutional guarantees have an important role in protecting liberty and individual dignity. They affirm legislative commitment to fundamental principles and renew public awareness. They have, in other words, an expressive function.[131] This can be particularly effective in countering the "dual messages" phenomenon that

123. *Id.* §§ 110–112.

124. *See* Temple, *supra* note 35, at 12.

125. *See* Bennis v. Michigan, 516 U.S. 442, 454 (1996) (Thomas, J., concurring).

126. *Id.* at 454.

127. 18 U.S.C. §§ 3161–3174 (2000).

128. U.S. CONST. amend. VI.

129. Omnibus Crime Control and Safe Streets Act of 1968, tit. III, 18 U.S.C. §§ 2510–2522 (2000 & Supp. 2005).

130. *Id.*

131. There is a significant amount of literature dedicated to the discussion of expressive functions of law. *See, e.g.*, Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. LEGAL STUD. 765, 767–74 (1998); Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998); Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2027–28 (1996).

allows police to acknowledge the rules that limit their behavior but to ignore them all the same.[132]

Another shortcoming of legislative solutions is that some aspects of policing do not lend themselves to rules. Sometimes the best that can be done is to set standards.[133] The Committee recognized the difficult task of legislating in a way that preserved needed police discretion but also reined in excess. The new legislation begins with a broad statement of policy acknowledging the fundamental rights of free expression.[134] Then, when dealing with matters which require discretion, such as when to use certain investigative techniques like infiltration, the legislation uses procedural devices such as requiring approval from a higher ranking officer,[135] limiting the duration of approvals,[136] and documenting the uses of the technique.[137] These sorts of procedural devices are a common means of structuring an officer's thinking, making sure proper justifications can be expressed, and getting the sober benefits of oversight.

Finally, even where legislative rules make sense, simply adopting more rules will mean little if the rules are ignored. The Committee found that many of the police actions during the 2000 and 2002 demonstrations were already prohibited by internal orders and policies. Embodying rules in legislation may give them more heft, but the police themselves must commit to following the rules. One glaring disappointment of the D.C. legislative investigation was the unwillingness of top police department officials to acknowledge mistakes. That stance could be partly explained by concern over pending lawsuits. But the instinct never to admit fault appears to be deeply ingrained.[138] Indeed, when looking at all of the Police Chief's public comments and

---

132. *See supra* text accompanying notes 83–91.

133. *See generally* Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (assessing the value of standards and rules in different contexts); *see also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953 (1995).

134. FARPSA § 103.

> It is the declared public policy of the District of Columbia that persons and groups have a right to organize and participate in peaceful First Amendment assemblies on the streets, sidewalks, and other public ways, and in the parks of the District of Columbia, and to engage in First Amendment assembly near the object of their protest so they may be seen and heard, subject to reasonable restrictions designed to protect public safety, persons, and property, and to accommodate the interest of persons not participating in the assemblies to use the streets, sidewalks, and other public ways to travel to their intended destinations, and use the parks for recreational purposes.

Id.

135. *Id.* §§ 205(b), 206(b), 207(d).

136. *Id.* §§ 205(d), 206(d).

137. *Id.* §§ 211, 212.

138. This instinct might in fact come with the territory of being a law enforcement officer. As one commentator has pointed out,

> Socialization into law enforcement occurs over many months of training. During this period, recruits don a transitional uniform and persona. They learn rules, procedures, law, communication skills, first aid, weaponry, fitness, self-defense, pursuit driving, ethics, and pride. They experience belonging. They are purposefully convinced they are elite. And somewhere along the way, they adopt a "warrior-of-the-street" mentality. When the police uniform is finally put on, it is truly a suit of armor, a persona serving both individual and collective needs. "Image armor" allows the officer to "always look in control, to always be the authority, to repress emotions, to never admit mistakes, to 'take charge,' and, consequently, to repress true emotions."

Sally Gross-Farina, *Fit for duty? Cops Choirpractice, and Another Chance for Healing*, 47 U. MIAMI L. REV. 1079, 1106–07 (1993).

testimony, it is evident that he was and remains pleased with his handling of the demonstrators.[139] But legislation or no legislation, it is probably the case that the public exposure of the legislative investigation was sufficiently negative that even troublesome demonstrations will be handled differently in the future. For good measure, the new law includes a requirement that police officers receive training in how to handle demonstrations[140] and, specifically, that they actually read and receive instruction on the provisions of the law and all regulations adopted under it.[141]

VII. CONCLUSION

Local legislatures are not known for active oversight of police or security agencies. The general posture appears to be one of deference to executive or police officials and a reliance on courts and police boards to correct mistakes. There are probably many reasons for this hands-off posture. Legislators may feel that they lack the needed expertise, or they fear their involvement may be viewed as interference with police discretion and the ability to fight crime, or they may balk at confronting a specialized bureaucracy that tends to be insular, close-mouthed, and hierarchal. It is especially remarkable that the District of Columbia City Council pursued its investigation of how the MPD handled anti-globalization demonstrations, because it is not often that champions of free speech arise from the legislative ranks. Legislatures tend to cater to majority wishes. While majorities are committed to free speech and assembly in the abstract, experience teaches us that when it comes to protests and demonstrations, the majority seems to want no fuss, and, especially, no traffic tie-ups. If the police have to use some strong arm measures and indiscriminate arrests to insure convenience, there is not always a public hue and cry.

But Washington, D.C. is a liberal city with strong civil rights and civil liberties sensibilities. The police misbehavior was dramatic and embarrassing, and it appeared that the harsh and unlawful treatment of protestors was planned and unnecessary. It also appeared that there would be little accountability or correction if the legislature did not step in. The investigation by the District, and the report and legislation that resulted from it, illustrated how beneficial such oversight can be. It exposed bad practices and shortcomings and restored a proper balance between law enforcement and liberty. The public was informed, persons harmed by the police action had a form of public recompense, and the police benefited in that they were given clearer rules and a reasonable structure to guide future decision-making. Overall, the effort was a remarkable affirmation that good police practices and freedom of expression are not antithetical.

Given the persistence and seeming intractability of police misconduct, we are entitled to be skeptical of all models to control it. The simple truth is that no one approach is sufficient, and all have advantages and disadvantages. Yet, as the District

---

139. *See, e.g.*, Kifner, *supra* note 40; D.C. REPORT, *supra* note 11, at 88–90.

140. FARPSA § 115.

141. *Id.* Another way to enforce the statute is to provide citizens with a private cause of action. A provision to this effect was originally included as part of the proposed legislation, and witnesses before the committee (for example, ACLU representatives) supported this strategy. However, the provision was not ultimately adopted, primarily due to opposition by the Police Department.

of Columbia example shows, legislative investigations and oversight can have dramatic and salutary effects. A legislative approach is well suited to oversee general police policy or any pre-existing strategy or planning directed by the chief and his top officials. The public, through its representatives, can and should be actively involved in setting and overseeing policies concerning such things as anti-terrorism plans, public surveillance and monitoring, and infiltration of political groups. The District of Columbia has shown the way.