



**American Civil Liberties Union
of the National Capital Area**

**THE POLICING OF DEMONSTRATIONS
IN THE NATION'S CAPITAL:**

**A MISCONCEPTION OF
MISSION AND A FAILURE
OF LEADERSHIP**

**Prepared by Ralph Temple
former Legal Director
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**A Report of the
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December 2003

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**AMERICAN CIVIL LIBERTIES UNION
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1400 20th Street, N.W., Washington, D.C. 20036

202-457-0800

www.aclu-nca.org

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THE POLICING OF DEMONSTRATIONS IN THE NATION'S CAPITAL: A MISCONCEPTION OF MISSION AND A FAILURE OF LEADERSHIP

“Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

United States Constitution, First Amendment

“I do solemnly swear . . . that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same . . . So help me God.”

Oath of Office, D.C. Chief of Police

“Ain’t it a thing of beauty to see our folks up there ready to go.”

D.C. Chief of Police Charles H. Ramsey, admiring columns of his officers on September 27, 2002, as they prepared to arrest four hundred peaceful protesters and bystanders they had herded into Pershing Park (Reported in The Washington Post, Sept. 28, 2002. p. B-4, col. 6).

The Metropolitan Police Department has acknowledged that the September 27, 2002 arrest of more than 400 protesters in Pershing Park was unlawful. This report will show that:

- D.C. Police management has a history of preemptive and brutal actions when dealing with problematic demonstrations.
- D.C. Police management has never understood that protecting free speech and assembly is an essential part of its mission, even when faced with difficult demonstrations.
- The media, by unwarranted praise for past unlawful police actions, shares responsibility for the improper police actions of September 27, 2002.

INTRODUCTION

The Metropolitan Police Department of the District of Columbia has efficiently and professionally handled numerous mass demonstrations in the Nation's Capital. Yet the Department has repeatedly failed in handling demonstrations at which significant numbers of arrests were anticipated.

In the last fifty years, there have been three major periods of mass arrests: the April 1968 riots, the 1969 to 1971 anti-Vietnam War demonstrations, and the April 2000 to present anti-globalization demonstrations. In each of these episodes, the police engaged in indiscriminate arrests, indiscriminate assaults with clubs and gas, and unlawfully prolonged detention. A major feature of the police actions has been the failure to record arrest information that would enable the prosecution of rightfully arrested protesters and the discipline of wrongfully acting police officers. The arrests were made, not for criminal prosecution, but solely to clear and keep people off the streets—an unlawful use of the power of arrest.

Of course, many large demonstrations have occurred in Washington, D.C. without any significant problems. Non-problematic demonstrations, conducted with official sanction and cooperation, such as the Million-Man March, the Million-Mom March, or the anti-war demonstrations of October 26, 2002, and October 25, 2003, pose mainly logistical problems. Peripheral disorders occur in those, too, but police officers, under orders to do so, are able efficiently to isolate and control those incidents. When properly directed, D.C. police officers have shown time and again that they can lawfully and professionally handle whatever problems arise. A good example is one of the few problematic demonstrations where the D.C.

police excelled—the Ku Klux Klan march down Pennsylvania Avenue in October 1991. The police, under court order to permit the march, were pelted along the parade route with rocks, bottles, and curses by enraged crowds from which the officers protected a handful of robed Klan marchers. It was one of the D.C. Police Department's hardest assignments and finest moments.

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.

D.C. Police Management has regularly abused several of its powers in such demonstrations: the parade permit law, the power of the police to clear an area due to emergency or disorder, the power of arrest, and the power to detain before presentation to a magistrate.

Mayor Anthony Williams and Chief of Police Charles H. Ramsey have attempted to rationalize the September 27, 2002, Pershing Park arrests by “defending” the rank and file police officers who carried out the Chief's policies. But it is the Chief and the Mayor, not their officers, who are principally at fault, and they should not try to hide behind the rank and file.

Management also argues that the police should not be second-guessed for tough decisions made in the urgency of street

dynamics. Thus, Mayor Williams argues, “It’s important ... to recognize that when [the police] are on the spot and making very, very difficult decisions, it’s important to back them up.”¹ And Chief Ramsey, in a memorandum to the Mayor recommended that no police official should be disciplined for the mishandling of the September 27th demonstrations because of “good faith” errors during “quickly-evolving events.”²

However, the Pershing Park arrests were not an on-the-spot police response. They were a pre-planned maneuver, as is evident from the precise way in which assembling demonstrators were diverted from Freedom Plaza into Pershing Park, and in which seventy-five bicycling demonstrators from Union Station were channeled by a heavy police escort into the park. The tactic was part of Chief Ramsey’s general policy of preemptive action, as were the prolonged detentions, designed to prevent those arrested from participating in other demonstration activity that weekend.

It is a violation of the law for police to act preemptively because they anticipate that demonstrators will at some time later in the day or the weekend attempt to block traffic. Such action is a “prior restraint,” long recognized by the courts as presumptively unconstitutional. Only when there is a “clear and present danger”—disorder unfolding at that very instant—may the government impose a prior restraint on free speech activity.³ Yet prior restraint was the policy

¹ “Doubt Cast On Arrests Of IMF Protesters,” by David A. Fahrenthold and David Nakamura, *The Washington Post*, February 27, 2003, p. B-1, at carry-over p. B-8, column 1, para. 3.

² “IMF Arrests Improper Police Found,” by Carol D. Leonnig, *The Washington Post*, September 13, 2003, p. B-2, column 4, para. 2.

³ *Near v. Minnesota*, 283 U.S. 697 (1931); *Collins v. Jordan*, 110 F.3d 1363, 1371 (9th Cir.

and purpose of the September 27th arrests—preventive action because demonstration sponsors had announced they would block traffic and “shut down the city.”

Part I of this report shows that the abuses of September 27, 2002, are not an isolated incident, and they are not new. D.C. Police Management used the same unlawful methods in the April 2000 anti-globalization demonstrations. Indeed, these abuses date back to the Vietnam War thirty years ago, when the federal courts condemned them and awarded victimized demonstrators millions of dollars in damages.

Part II of this report suggests that civil disobedience and disruptions during mass demonstrations can be handled within the bounds of the law. D.C. Police Management’s unlawfulness has been a failure of will, not necessity.

Part III of the report points to the media’s unwavering support as a major factor in encouraging D.C. Police Management to continue to rely on unlawful methods. This media response reflects the same misguided intention as that of the Mayor—to support the police in the hard work of maintaining order in the District. But it is not truly supportive; providing cover for the failings of D.C. Police Management is subversive to order and to police professionalism.

Since the Executive Branch has shown itself incapable of self-reform and the efforts of the Judicial Branch have not brought about change, it is urgent that the D.C. Council take corrective legislative action. This report concludes with twenty specific recommendations of how to accomplish that reform.

1996) (citing *Carroll v. Commissioners of Princess Anne*, 393 U.S. 175, 180-81 (1968)); see also *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

I. THE HISTORY OF PREEMPTIVE AND BRUTAL D.C. POLICE ACTIONS IN DEMONSTRATIONS

In the April 1968 riots following the assassination of Dr. Martin Luther King, Jr., 6,000 people were arrested and detained over a period of a few days in the three areas racked by widespread arson, vandalism and looting. During the Vietnam War, from the late 1960s to the mid 1970s, there were mass arrests of antiwar protesters, culminating in the first week of May 1971, during which almost 15,000 people were arrested and preventively detained. The third period of mass arrests began with the anti-globalization demonstrations of April 2000 and extends to the present. In none of these episodes were the illegal methods relied upon by D.C. Police Management necessary.

A. Riots and Demonstrations, 1968-1971

During the 1968 riots, from April 4th to April 8th the police indiscriminately swept people off the streets in riot areas, never recording the circumstances and basis for the arrests. With the jails overflowing, and booking procedures overwhelmed, those arrested, including many innocent people, were held for days without being brought to the local court—then called the D.C. Court of General Sessions—and when they were brought to court, the judges, in violation of the right to individual consideration, set across-the-board bail-bonds of \$1,000.00 as a way of keeping people locked up. On April 9, 1968, the American Civil Liberties Union of the National Capital Area challenged the arrests and detentions by filing a lawsuit in federal court against then-Chief Judge Harold Greene and a dozen of the other judges, the United States Attorney, the Corporation

Counsel, the Chief of Police, and the Director of the Department of Corrections. The suit was immediately dismissed, but the day it was filed the government began rapidly freeing people and almost all were out within twenty-four hours.

Subsequently, a Committee on the Administration of Justice Under Emergency Conditions of the Judicial Conference of the District of Columbia Circuit concluded that the system of justice had broken down. It recommended that measures be developed and implemented to maintain order *within* the law, including the development of rapid field arrest-recording procedures.⁴ The Police Department then developed a field arrest form procedure.

However, from 1969 to 1971, during the mass arrests of the Vietnam War, the Police Department abandoned that procedure and resumed its practice of sweeping people up indiscriminately and without recording the basis for arrests.

The major events occurred in the first week of May 1971. On Monday, May 3, 1971, the D.C. police, fearing that 100,000 anti-war protesters would try to block bridges and intersections, arrested almost 8,000 people in a single day, scooping them up all over the city, so indiscriminately that federal employees on their way to work, journalists, attorneys, and other bystanders were also seized. On Tuesday, May 4th, 3,000 orderly demonstrators were encircled and arrested on 10th Street at the Justice Department for

⁴ See *Sullivan v. Murphy*, 478 F.2d 938, 946 (D.C. Cir. 1973).

failing to disperse, despite the fact that no dispersal order was given and people were not allowed to leave. On Wednesday, May 5th, 1,200 were encircled and arrested in the same way on the U.S. Capitol steps while listening to a Congressman's speech.⁵

All 15,000 arrests of "Mayweek 1971" were declared unlawful,⁶ and millions of dollars in damages were paid out by the District of Columbia under court award or settlement.⁷

The first of the police practices that was condemned by the federal courts was the use of the power of arrest just to clear the streets without attempting to record information that would justify the arrest. The United States Court of Appeals for the District of Columbia Circuit stated:

On May 3, 1971, when Washington, D.C. was confronted with a threat to bring the orderly conduct of the Federal government to a standstill, the public authorities responded by ordering mass arrests. There was no declaration of martial law. Yet the procedures for requiring that arrests be accompanied by some indication of the basis therefor ... were terminated. The innocent as well as the guilty were in large numbers swept from the streets and placed in detention facilities.

....
[P]olice officials laid primary emphasis upon mass arrests as a means of clearing the streets. The premise of the legal system, that unlawful arrests can be avoided or remedied by holding individual policemen accountable, evaporated

.... This lack of accountability was heightened by the fact that officers appeared on duty without customary name tags or numbered badges⁸

The Court indicated that mass arrests without recording individual violations may be conducted only "in those extreme circumstances where . . . [otherwise] loss of life or serious bodily harm would result."⁹

In another of its major lawsuits, the ACLU of the National Capital Area brought a class action on behalf of participants, observers, and bystanders at demonstrations occurring from November 1969 through May 1971.¹⁰ The complaint alleged that whenever D.C. police deemed it necessary to take law enforcement action during demonstrations, there followed unwarranted dispersals, indiscriminate arrests, excessive violence, and unduly prolonged and abusive post-arrest detentions. During a three-week trial, plaintiffs presented the testimony of 75 witnesses and over 100 documentary exhibits, including police officials' sworn answers to interrogatories, Police Department General Orders and other directives, training materials, correspondence regarding complaints, deposition and trial transcripts in this

⁸ *Sullivan v. Murphy*, *supra*, 478 F.2d at 959, 967.

⁹ *Sullivan v. Murphy*, *supra*, at 967 note 57, citing the Report of the Committee on the Administration of Justice Under Emergency Conditions of the Judicial Conference of the D.C. Circuit at p. 134 (March 1973).

¹⁰ *Washington Mobilization Committee v. Cullinane*, 400 F. Supp. 186 (D.D.C. 1975), *reversed*, 566 F.2d 107, *rehearing en banc denied*, 566 F.2d 124 (D.C. Cir. 1977). A majority of five of the nine members of the full court issued opinions stating that the reversal was erroneous but that there was a new chief of police, and that the police tactics had already been condemned in *Sullivan v. Murphy* and other cases, and were not expected to recur. 566 F.2d 124, 129.

⁵ See *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977). See also *Mayday 1971: Order Without Law* (ACLU, Washington D.C., July 1972). A copy of this 80-page report detailing police actions that week may be obtained from the ACLU; some excerpts are attached to this report as Appendix A.

⁶ *Sullivan v. Murphy*, *supra*.

⁷ See, e.g., *Dellums v. Powell*, *supra*.

and other demonstration cases, and Police Department movies of police actions.

After the trial, the United States District Court for the District of Columbia found that D.C. Police Management was responsible for consistently unlawful actions in the demonstrations. The Court concluded, among other things, that on February 19, 1970, in an unnecessary application of the parade permit law, the police had caused “chaos” by attacking, “stampeding,” and arresting orderly demonstrators on Virginia Avenue near the Watergate Apartments:

Although the demonstrators had not sought a parade permit for the march to the Watergate, notices on campus posted prior to the 19th announced the intended course of the demonstration. The police department was aware of the proposed activities and in anticipation of difficulties staged a large number of officers from the CDU [Civil Disturbance Unit] around the apartment complex.

. . . .

Most of the persons arrested were not engaged in any unlawful conduct. . . .¹¹

The Court found similarly excessive police actions in the whole series of demonstrations from 1969 to 1971:

[O]fficers of the CDU repeatedly took actions which were unreasonable and unnecessary in the performance of their duties, including: arresting persons who had not engaged in illegal conduct; excessive use of force; unrestricted and hazardous use of chemical agents (primarily gas); unjustified maintenance of police lines and initiation of sweeps; failure to give sufficient warning to demonstrators of the establishment of police lines; and refusing to advise arrestees of the charges being placed

against them or of their constitutional rights¹²

The District Court also found:

[A] pervasive pattern of lack of restraint by police was discernible from the police films and supported by the testimony of witnesses.

. . . .

Wanton use of physical force also accompanied the arrests made on [George Washington University] campus in the late afternoon.¹³

The Court condemned the excessive use of riot batons, chemical mace, and gas.¹⁴ Finally, the Court found unlawful conditions of detention and the denial of the right to be brought promptly before a judicial officer or released on collateral,¹⁵ concluding:

Whether the [police] department purposely failed to make ... [sufficient] plans in order to prolong the booking process, thereby keeping the demonstrators off the streets, cannot be conclusively determined from the record, however, the net effect of keeping persons in detention for such extraordinary long periods of time was unlawful.¹⁶

The Court issued detailed instructions for the correction of these practices and policies, including a ban on dispersing demonstrators “unless a breach of the peace involving a substantial risk of violence has occurred or will occur,” a ban on mass arrests without immediately “recording information necessary to establish probable cause,” and directing that a new police manual for handling demonstrations and prompt release

¹² *Ibid* at 208.

¹³ *Ibid* at 195.

¹⁴ *Ibid* at 198, 204, 213.

¹⁵ *Ibid* at 205-08, 214-15.

¹⁶ *Ibid* at 215.

¹¹ *Washington Mobilization, supra*, 400 F. Supp. at 194, 195.

of arrestees be prepared and submitted to the court for approval.¹⁷

Those reforms were never carried out. A three-judge panel of the U.S. Court of Appeals reversed the District Court's ruling.¹⁸ The ACLU challenged the action of the panel, asking the full nine-member U.S. Court of Appeals to rehear the case and to reinstate the District Court's ruling. A majority of five of the nine judges of the full United States Court of Appeals then issued opinions stating that the three-judge panel's reversal was *wrong*, but that, rather than prolong the litigation, they would deny a rehearing and rely upon the Police Department, which by then had a new chief of police, voluntarily to change its mass demonstration policies and practices.¹⁹

Four months later, in January 1978, D.C. Police Management issued two new mass arrest manuals which failed to correct, and which indeed perpetuated, the three principal police practices which had been condemned: (i) Arrests without recording the facts essential to establish probable cause; (ii) The establishment of "police lines" and the authority to order demonstrators to disperse whenever there was a "potential" for "large scale unlawful activity" (instead of the constitutional standard of a clear and present danger); and (iii) Needless and protracted booking procedures which assured unduly prolonged detention of those arrested. On September 10, 1979, John Vanderstar of the law firm of Covington & Burling, on behalf of the ACLU, wrote to the Corporation Counsel urging that the District require D.C. Police Management to revise its manuals to

correct these three practices. The Police Department refused to do so.

The U.S. Court of Appeals' reliance on D.C. Police Management was a mistake. The District Court's directions for corrective action in the *Washington Mobilization* case, and the proposals in the Covington & Burling letter of September 10, 1979, should now serve as guidelines for corrective action, and their points have been included in the twenty recommendations at the conclusion of this report.²⁰

B. The April 2000 World Trade Demonstrations

In the current period of mass arrests, beginning with the 1,300 arrested in the April 2000 anti-globalization demonstrations and culminating most recently in the September 27, 2002, arrests of 649 protesters,²¹ more than 400 of them in Pershing Park, the D.C. Police Department has once more employed the same illegal methods: unlawful dispersals, arrests, brutality, and prolonged and abusive detentions. There was one unprecedented and particularly egregious innovation: the raid on the demonstrators' headquarters under the guise of enforcing the fire code.

1. Unlawful Preemption and Shutting Down the Demonstrators' Center

At the April 2000 demonstrations, D.C. Police Management employed unconstitutional prior restraints in the form of "preemptive" actions:

²⁰ The Covington & Burling letter to Corporation Counsel Judith Rodgers, September 10, 1979, and the District Court's order in the *Washington Mobilization* case, are attached to this report as Appendices B and C, respectively.

²¹ "Police Arrest Hundreds In Protests," by Manny Fernandez and David A. Farenthold, *The Washington Post*, September 28, 2002, p. A-1, at carry-over p. A-14, column 1, para. 1.

¹⁷ *Ibid* at 218-19.

¹⁸ *Washington Mobilization*, *supra*, 566 F.2d 107.

¹⁹ *Washington Mobilization*, *supra*, 566 F.2d at 124, 129.

News report: “In a pre-emptive show of force, the police this morning shut down the headquarters of protesters”²²

News report: “All weekend long the police acted sternly and preemptively ... making mass arrests of even peaceful marchers.”²³

News report: “He [Mayor Anthony Williams] said ... that the mass arrests of peaceful protesters last night were justified as a matter of prudence.”²⁴

The April 15th Saturday morning raid on the demonstrators’ coordinating center was an unusually blatant and dangerous violation of civil liberties. Arriving with two fire marshals, D.C. police inspected the building, found violations of the fire code, and proceeded to force two hundred protesters and coordinators out of the building, confiscate their communications equipment and political paraphernalia, and seal the building.²⁵ Demonstration coordinators were not allowed back in the building until Monday night April 17th, after the demonstrations were over.²⁶ Although police officials insisted to the media that the action was taken solely for the safety of the occupants and not to interfere with the planned demonstrations, it is obvious that the action was, as the New York Times accurately characterized it, “preemptive.” There were also indications that D.C.

²² “Police Move Against Trade Demonstrators,” by John Kifner, NY Times, Apr. 16, 2000, p. 6.

²³ “Financial Leaders Meet As Protesters Clog Washington,” by John Kifner with David E. Sanger, NY Times, April 17, 2000, p. A-1, para 6.

²⁴ *Ibid* at carry-over p. A-8, para 5.

²⁵ “Police Move Against Trade Demonstrators,” *supra*, NY Times, April 16, 2000, p. 6.

²⁶ “Protesters Looking To Los Angeles After Detour To D.C. Court,” The Washington Post, April 19, 2000, p. A-14, at carry-over p. A-15, para. 13.

undercover police had infiltrated the demonstrators’ gatherings to gain access to the building and seek out the fire code violations that would be the pretext of the raid.²⁷ This unsavory spying is a regression to D.C. police participation in the FBI’s unlawful COINTELPRO program of the 1960s and 1970s for which damages were awarded against the District.²⁸

What is particularly troubling about this violation of the demonstration coordinators’ Fourth and Fifth Amendment rights to freedom from unreasonable search and confiscation of property and First Amendment rights of speech and assembly, is that it establishes a precedent for taking the same action against any organization the government chooses to target. The chances are extremely high that technical fire code violations can be found in any building in the city. Today it is the anti-globalization movement, but tomorrow it could be The Washington Post. The Council should examine this episode in depth; it is one of the most outlandish violations of demonstrators’ rights ever to occur in the city.

2. Preemptive Encirclement and Arrest

As illustrated in the following New York Times news report, the police tactics in April 2000 were precisely those for which they have now admitted error in the September 27, 2002, Pershing Park arrests:

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 streets as the marchers mainly stayed on

²⁷ *Ibid* at para. 14.

²⁸ *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984).

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, between K Street and Pennsylvania Avenue.

••••

Although the marchers and their supporters on nearby sidewalks chanted for the police to let them go, Police Chief Ramsey said later that the crowd had refused police orders to disperse. Reporters who had observed the march had not heard any such order.²⁹

In addition, in April 2000, as on September 27, 2002, D.C. Police Management’s excuse for arresting orderly demonstrators was the failure to obtain a parade permit and the failure to obey an order to disperse. But, as recognized by the District Court in the *Washington Mobilization* case,³⁰ since the purposes of the parade permit law are to avoid two groups competing for the same spot, and to provide sufficient notice of a march so there can be police on hand to divert traffic and maintain order, it is a misuse of that law for the police to escort orderly marchers and divert traffic, then to invoke the parade permit law as a pretext for preventive arrests.

3. *Police Assaults*

Despite the fact that the vast majority of demonstrators were non-violent, the police were quick to resort to violence, “responding forcefully to any ... who defied them,” using “pepper spray and what appeared to be a form of anti-riot gas or smoke grenades and chargin[ing] into the protesters beating them

with long sticks.”³¹ Police roughed up a plainly identified Washington Post reporter, then arrested her when she complained, struck an Associated Press radio reporter from behind, and assaulted non-resisting demonstrators.³² In one incident, the police, instead of just removing protesters from the path of a bus, doused them with pepper spray before dragging them away.³³ Even the inadequate police directives of thirty years ago prohibited such use of chemical agents against “passive crowds or at the scene of a sit-down or arm-lock type of demonstration where the objective is simply to move a group or effect arrests.”³⁴

4. *Unlawfully Prolonged and Abusive Detention*

Despite the minor nature of the charges and despite the fact that there was no documentation to establish probable cause, arrestees were held for many hours on buses, without access to food, water, or counsel, and for many more hours before release. One report presented this perspective:

For [Thies] Broderson, who grew up in Germany, the police tactics—11 hours in handcuffs for a misdemeanor charge, no food, no water, no access to a lawyer—were uncomfortable reminders of his nation’s past. ‘It was real police-state measures. Not the sort of thing one

³¹ “Financial Leaders Meet As Protests Clog Washington,” *supra*, NY Times, April 17, 2000, p. A-1, para 4, and carry-over p. A-8, column 1, para 2.

³² Reports in The Washington Post, April 16, 2000, p. A-28, and April 17, 2000, page A-1 article, at carry-over p. A-7.

³³ “World Trade Officials Pledging To Step Up Effort Against AIDS,” by Joseph Kahn and John Kifner, NY Times, April 18, 2000, p. A-1, at carry-over p. A-11, column 3, para 4.

³⁴ Metropolitan Police Department General Order, Series 805, No. 1 (December 1, 1971), at p. 6, quoted in *Washington Mobilization Committee v. Cullinane*, *supra*, 400 F. Supp. at 204.

²⁹ “Police Move Against Trade Demonstrators,” by John Kifner, NY Times, April 16, 2000, p. 6.

³⁰ See this report at p. 6, above.

would expect in the capital of a democracy.’³⁵

The Police Department has shown itself incapable of self-correction. The District of Columbia Council has the authority and ample justification to take corrective action, and this report concludes with twenty recommendations for specific legislative measures.

C. The September 27, 2002 Demonstrations

The terrorist attacks of September 11, 2001, imposed on Washington, D.C. a new tension and a heightened sense of security that have affected all law enforcement agencies. The invasion and occupation of Iraq, and other government actions following the terrorist attacks, have initiated a new wave of protest demonstrations in Washington. As in the Vietnam War protests, law enforcement agencies have tended to overreact at the expense of First Amendment rights, for example, by attempting to clamp down on demonstrations in general, and at such key locations as the White House and the United States Capitol. Such efforts to restrict the right to assemble were rebuffed by the courts thirty years ago,³⁶ and once more are being challenged.³⁷ There is no good reasons for such restrictions because there is no connection between terrorist attacks and demonstrations. There has never been a life-

³⁵ Reported in *The Washington Post*, April 17, 2000, p. A-1, at carry-over p. A-6, column 2.

³⁶ See, e.g., *A Quaker Action Group v. Morton*, 516 F.2d 717 (D.C. Cir. 1975) (injunction against limits on White House area demonstrations); *Jeannette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575 (D.D.C. 1972) (three-judge court), *summarily affirmed*, 409 U.S. 972 (1972) (declaring unconstitutional a statute banning demonstrations on Capitol grounds).

³⁷ See, e.g., *Lederman v. United States*, 291 F.3d 36 (D.C. Cir. 2002) (invalidating ban on demonstrations in front of Capitol steps).

threatening attack emanating from a protest demonstration in Washington.

Nor can protection against terrorism excuse preemptive, arbitrary, or harsh actions in handling demonstrations. As detailed in this report, D.C. Police Management consistently resorted to these methods long before there was any threat of terrorist attacks.

Nothing could more dramatize the need for correction of police policy and practice than the mishandling of the September 27, 2002, demonstrations. The Police Department has acknowledged that on September 27, 2002, its officers herded over four hundred protesters into Pershing Park at 15th Street and Pennsylvania Avenue, N.W., then corralled and arrested them, as well as journalists, legal observers, and passersby caught in the police trap, including a Justice Department lawyer on his way to work. Those arrested were treated punitively by being kept handcuffed on buses for many hours, then held at various police facilities for another twenty hours or more, while handcuffed ankle to opposite wrist.

The simplicity of the September 27th demonstrations highlights the Police Department’s failure to master the art of maintaining order while themselves obeying the law: a relatively small demonstration of no more than 2,000,³⁸ unusually light traffic, no violence, virtually no disorder (two smashed windows and several overturned newspaper boxes), and a police presence at the scene that “overwhelmed” the demonstrators, enabling police “easily ... to out-number protesters whenever they felt the need.”³⁹

³⁸ “Police Arrest Hundreds In Protests,” *supra*, *The Washington Post*, September 28, 2002, p. A-1, column 4, para. 1.

³⁹ “Police Arrest Hundreds In Protest,” *supra*, p. A-1, para. 1; “A Day Of Tightly Controlled Chaos,”

Chief Ramsey and his commanders have never had to deal with major disorders like the city-wide riots of 1968 or the massive civil disobedience of Mayweek 1971, in which the Judicial Conference and the courts admonished the police to do better. Even with the far smaller and less challenging demonstrations of April 2000, and the simple demonstrations of September 2002, Police Management resorted to preemptive and unrecorded arrests, unnecessary club and gas attacks, and unlawfully harsh and prolonged detention.

1. *No Justification to Arrest or to Disperse*

Police Management's mishandling of the September 27th demonstrations was far more serious than the mere failure to give a dispersal order and to allow those in Pershing Park to comply. The protesters were not disorderly or impeding traffic, and there were more than enough police on hand to maintain order. There was no good reason for the police to order them to disperse, let alone arrest them. They were peaceably assembled in a public park in the Nation's Capital to petition for a redress of grievances, an exercise of First Amendment rights, in the words of the Supreme Court, "in their most pristine and classic form."⁴⁰

In two other incidents that same day, the police also overreacted. One or two people threw rocks through the windows of a Citibank branch office at K Street and Vermont Avenue, N.W. But instead of apprehending only the perpetrators, the police arrested the entire group of 150 demonstrators. A second group of 42 demonstrators was arrested on Connecticut Avenue between

by Monte Reel, *The Washington Post*, September 28, 2002, p. B-1, at carry-over p. B-4, column 3.

⁴⁰ *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963).

K and L Streets, N.W., apparently because a few of them had been walking in the street rather than on the sidewalk. These mass arrests were unlawful inasmuch as hardly any of the arrestees had violated the law. Group guilt and punishment are not the norm or the law in this country.⁴¹

The problem *can* become complicated where a handful of people in the midst of a crowd of hundreds begin throwing objects at the police. In that circumstance, it may not be feasible for the police to attempt to penetrate a large crowd to make arrests. Even there, the group should not be dispersed because of the actions of a few. The police can try to end the disorderly conduct by working with the demonstrators' representatives on the scene, if any, or by bull-horn admonitions. Failing that, it is usually sounder for the police to wait out limited object-throwing, under the protection of their riot gear and shields, rather than to disperse a large group over the violence of a few. Only if a significant proportion of a group becomes disorderly are dispersal and arrests appropriate.

These mass arrests of an additional nearly 200 people, however, were another instance of the D.C. police overreacting in relatively simple circumstances where they were well in control and could have managed the incident without arresting innocent demonstrators.

2. *Unlawful Use of Arrest and Detention Just to Clear the Streets*

The arrests of September 27, 2002, were also unlawful and lacking in good faith because no effort was made to record the

⁴¹ The ACLU of the National Capital Area has filed a class action lawsuit on behalf of these two groups of arrestees. *Burgin v. District of Columbia*, No. 03-cv-2005 (DDC) (filed September 26, 2003). See also "A Day Of Tightly Controlled Chaos," *supra*, *The Washington Post*, September 28, 2002, p. B-1, column 3.

name of each arresting officer who could testify to a particular individual's violation of the law. The only lawful basis for arrests is to charge and prosecute those arrested. Yet D.C. Police Management had no intention to establish probable cause for these arrests.

The failure to create such records has an additional serious consequence: if there were some demonstrators who *did* break the law, they also could not be prosecuted because there was no way to establish their guilt. The District's taxpayers will ultimately have to pay them compensation for false arrest, even if their arrests were proper, because of Police Management's decision to dispense with lawful arrest procedures.

3. *Police Assaults*

D.C. police were also accused of unjustifiably beating and pepper spraying protesters and onlookers,⁴² and an investigation of police violence was demanded by a law professor.⁴³ We know of no instance in which D.C. Police Management has formally held an officer accountable for an unwaranted assault in a demonstration.

4. *Unlawfully Prolonged and Abusive Detention*

For such minor charges as parading without a permit and failure to obey an

officer—even if the charges had been documented, which they weren't—those arrested should have been promptly released on citation. Instead they were held for periods exceeding twenty-four hours. But these arrests, unlawful at their inception, were never intended to comply with law. The prolonged detentions were solely for the purpose of removing people from the streets and keeping them from participating in demonstrations. Chief Ramsey told *The Washington Post*, "These people that are apprehended are going to miss several protests because they'll be behind bars."⁴⁴ Watching the arrests of the demonstrators in Pershing Park, the Chief attempted to justify his preventive action by saying that if people were allowed to leave the police encirclement, "they leave here and go someplace else and do something else."⁴⁵

The conditions in which people were held were abusive and unlawful. The punitive intention of Police Management is exposed by the decision to cuff those detained, ankle to opposite wrist, for many long hours. This particular violation stands out for its cruelty. The Council should determine which police official was responsible for that perverse decision. Such an official is unfit to serve on the Metropolitan Police Force.

⁴² "Police Arrest Hundreds In Protests," *supra*, *The Washington Post*, September 28, 2002, p. A-1, at carry-over p. A-14, column 1, para. 3.

⁴³ "Un-American Arrests," by Professor Jonathan Turley, *The Washington Post*, October 6, 2002, p. B-8.

⁴⁴ "Police, Protesters In D.C. Prepare For Day Of Disruption," by Monte Reel and Manny Fernandez, *The Washington Post*, September 27, 2002, p. B-1, para. 3.

⁴⁵ "A Day Of Tightly Controlled Chaos," *supra*, *The Washington Post*, September 28, 2002, p. B-1, at carry-over p. B-4, column 1, para. 4.

II. A FAILURE OF LEADERSHIP

A. Misconception of Mission

The police wrongdoings of September 27, 2002, like those of April 2000, are failures of leadership. D.C. Police Management misconceives its mission as being to keep the traffic moving at all costs. That is not the mission. The police have their powers for the purpose of upholding the law, and the highest law they are sworn to uphold is the United States Constitution. When D.C. Police Management directs and permits its officers to act outside the law it imposes upon them the attributes of a uniformed and armed street-gang, diminishing them and undermining the rule of law.

It is clear that D.C. Police Management was deeply affected by the disorders that attended some—but not all—of the anti-globalization demonstrations in Seattle from November 30 to December 2, 1999. As a result, they became determined not to permit another “Seattle” in Washington, D.C.. That in itself is a legitimate goal. However, resorting to lawless police measures to prevent another Seattle is a drastic mistake. Seattle was not a catastrophe that warrants the suspension of the Constitution in the Nation’s Capital. Moreover, the First Amendment aspects of even the Seattle episode had major beneficial repercussions, raising American and international consciousness about world trade issues and changing the political and economic agendas of the world trade organizations. Demonstrators should be stopped from blocking traffic and buildings if possible. Compliance with Constitutional rights and the law may require the police to take more time and care in their actions, so that there may be some temporary blockages. Such disruptions, if any, are not as socially destructive as the damage done to

the Constitution and to the rule of law by unlawful police actions.

The challenge posed by large groups assembling in Washington, D.C., especially when civil disobedience is likely to occur, is great. But, as the United States District Court stated in 1975 in the *Washington Mobilization* case:

The police may not simply claim exasperation at the enormity of the task and defer constitutional precepts to convenience.⁴⁶

B. Misdirection, Misrepresentation and Cover-Up

1. Misdirection

The cop on the street in a demonstration has a severely difficult job. He or she must be ready to take action to suppress disorder and to subdue violence. Most D.C. police officers are up to these tasks. They have the quickness of mind and reaction, the physical stamina and strength, and the resolution and courage to deal with the challenges. They also have the toughness of mind, if called upon, to handle the hardest part of the job, the part on which they most need training, encouragement, and support: the ability not to overreact, not to have hair-trigger nerves, and to remain cool, disciplined and restrained in the face of stress and provocation. But in this, D.C. police officers are not called upon, are not supported, and indeed are undermined, by D.C. Police Management.

Police Management sets the tone and the atmosphere, and when the Chief of Police displays a willingness to disregard the law, to confront and arrest peaceful protesters, to

⁴⁶ *Washington Mobilization*, *supra*, 400 F. Supp. at 217.

misrepresent and cover up mistakes and violations of proper procedures, it has a powerfully corrupting effect on the entire police force. The Mayor's support of such actions by the Chief is a further undermining of the professionalism of the force.

Chief Ramsey, in preparation for problematic demonstrations, bought into the rhetoric of some of the demonstration sponsors by emphasizing that some were threatening to "shut down the city" or to "take over the city." The Chief at first defended the September 27th Pershing Park arrests on the grounds that:

They can't come here and say they're going to shut down the city, and then turn around and get angry when they're not allowed to.⁴⁷

It is neither disciplined nor strategic to take such rhetoric at face value and to treat the demonstrations, as did the Chief, as a confrontation and a contest of wills. Rather, mass demonstrations must be dealt with for what they actually are—a complex dynamic involving many different groups engaged in a wide variety of actions which require specific, measured, and discerning responses to specific behavior. But the Chief's message to the force was: it's us against them. This in turn leads to an aggressive and militaristic presentation to the demonstrators regardless of their demeanor, as in this description of D.C. police at the April 2000 demonstrations:

Lines of police officers in riot helmets stamped their feet rhythmically and pumped their nightsticks in front of their chests as they moved in on the protesters.⁴⁸

⁴⁷ "Did D.C. Police Go Too Far?" The Washington Post, October 1, 2002, p. B-1, at carry-over p. B-4, column 1, para. 6.

⁴⁸ "Police Move Against Trade Demonstrators," by John Kifner, NY Times, April 16, 2000, p. 6, para. 2.

This perspective also explains the Chief's satisfaction soon after the unlawful Pershing Park arrests when he said, "a lot of the wind was taken out of their sails Friday."⁴⁹ This undisciplined and unwise mind-set is the cause of the needless arrests and assaults on non-violating demonstrators, and the harsh and prolonged post-arrest detention, that have characterized Police Management's actions.

Ironically, these unlawful methods did not even yield the benefit of keeping the city fully functioning. Police barricaded and closed off central downtown areas, got the Transit Authority to close several central subway stops, and advised federal employees and motorists to stay off the streets. As a result, in April 2000 and September 2002 most federal employees did not come into work on demonstration days, traffic was remarkably light even in rush hours, many downtown businesses closed, and "[p]arts of the downtown corridor appeared largely abandoned by the usual crowds, given over to police and chanting protesters."⁵⁰ In a sense, the Police Department itself became the instrument of those demonstration sponsors who called for "shutting down" the city.

The message which the leadership communicated to the men and women of the police force should have been something like: *Some demonstration sponsors are calling for the blocking of traffic and buildings—our job is to stop them from doing that and we will, but at the same time many demonstrators will be orderly and it is critical that we fully protect their right to assemble and protest. We must not let the*

⁴⁹ "Against War, A Peaceful March," by Manny Fernandez and Monte Reel, The Washington Post, September 30, 2002, p. B-1, at carry-over p. B-5, column 2, para. 2.

⁵⁰ "Police Arrest Hundreds In Protests," *supra*, The Washington Post, September 28, 2002, p. B-1, para. 3.

need to deal with violators cause us to act against innocents in the vicinity. That is the real challenge to us this weekend.

However, for problematic demonstrations, D.C. Police Management has habitually provided the force with poor training, poor supervision, and poor attitude. In addition, police officials personally engaging in public misconduct have provided bad role models for the rank and file. For example, in April 2000, Assistant Chief Terrance W. Gainer on one occasion, directed his officers to point their gas launchers directly at demonstrators.⁵¹ On other occasions, when police officers confronting protesters removed their badges in violation of department policy—a form of cover-up to escape accountability for wrongdoings about to ensue⁵²—Assistant Chief Gainer and Chief Ramsey condoned it.⁵³

2. Misrepresentation and Cover-Up

Another form of cover-up was the misrepresentations of police officials when they raided and closed down the demonstrators' communications center on April 15, 2000, seizing their computers, political props, and handouts. Chief Ramsey and Assistant Chief Gainer told the press it was solely because of fire hazards and a concern for the safety of

those in the center.⁵⁴ This was no less a lie just because it was an obvious lie.

Nor is Chief Ramsey embarrassed by resorting to fanciful excuses for disregarding criminal behavior by his officers. When asked about police clubbing non-violent demonstrators, the Chief responded that it may have been done by demonstrators dressed up as officers.⁵⁵

More recently, Chief Ramsey repeatedly insisted that an order to disperse was given to the demonstrators arrested in Pershing Park on September 27, 2002, even though he had secretly acknowledged in a March 13, 2003, memorandum to the Mayor that no such order had been given.⁵⁶ The Mayor's aides told reporters that the Police Department's Internal Affairs Report about the Pershing Park arrests could not be released because it contained confidential information concerning the discipline of certain police officials. The report in fact contained nothing regarding discipline; so this, too, was a lie.⁵⁷

It is rare for the Department to admit error, and left to its own devices it is unlikely that this internal investigation and report would ever have come into being, particularly because the preemptive arrests of the Pershing Park protesters were carried out pursuant to a policy and practice that Chief Ramsey had implemented in the April 2000 arrests. It was only because of the persistent

⁵¹ "Police, Protesters Claim Victory," The Washington Post, April 17, 2000, p. A-1, at carry-over p. A-6, para. 15.

⁵² See *Sullivan v. Murphy*, *supra*, 478 F.2d at 967.

⁵³ "Police, Protesters Claim Victory," *supra*, at p. A-6, column 2, para. 2; "Businesses Lock Up, Batten Down For Protests," The Washington Post, April 15, 2000, at p. A-12, columns 1-2; "Protests End With Voluntary Arrests," The Washington Post, April 18, 2000, p. A-1, at carry-over p. A-17, column 2, para. 3.

⁵⁴ "Police Move Against Trade Demonstrators," *supra*, NY Times, April 16, 2000, p. A-6, at columns 2-3, 4-5.

⁵⁵ The Washington Post, April 17, 2000, p. A-1, at carry-over p. A-7, paras. 1-2.

⁵⁶ "IMF Arrests Improper Police Found; Ramsey Memo Acknowledges Protesters Weren't Warned," by Carol D. Leonnig, The Washington Post, September 13, 2003, p. B-2, column 1, paras. 3-4, and column 2, para. 3.

⁵⁷ *Ibid*, p. B-2, at columns 4-5.

demands of D.C. Council Judiciary Committee Chair Kathy Patterson upon the Mayor that the Department ultimately was forced to conduct a real investigation and prepare a report. And even then, the Police Department's admission that the Pershing Park arrests were unlawful would never have been made public, and Chief Ramsey's misrepresentation would not have been exposed, if a federal judge had not ordered the report released.⁵⁸

3. *Lack of Accountability*

D.C. Police Management has historically been unwilling to hold police officers accountable for wrongful conduct in demonstrations, no matter how plain the wrongdoing or how severe the consequences. For example, the only discipline that ensued from the Pershing Park arrests was a slap on the wrist in the form of a "minor reprimand" to Assistant Chief Peter Newsham who ordered the arrests.⁵⁹ An official, without justification and in violation of the laws against wrongful arrest, the First Amendment, and Police Department procedures, causes over 400 people to be arrested, handcuffed, separated from their property, and confined under harsh conditions for periods exceeding twenty-four hours, and his only discipline is a reprimand. The discipline should be more commensurate with the magnitude of the wrong committed and the suffering caused. Even the minor reprimand would not have occurred if the Mayor had not overruled Chief Ramsey, who recommended that there be no discipline at all.⁶⁰ On the other hand, it might have been unfair to really discipline Assistant Chief Newsham since it appears that he was following Chief Ramsey's orders and is taking the blame to cover for the Chief.

⁵⁸ *Ibid.*, p. B-2, column 1, para. 2.

⁵⁹ *Ibid.*

Apart from Mr. Newsham, we know of no police officer being formally disciplined for any of the incidents in the demonstrations of April 2000 and September 2002. This is not surprising in light of Chief Ramsey's public clash with the Mayor on the subject. Following the April 2000 demonstrations, the Mayor announced:

The chief has stated ... that all complaints are going to be investigated immediately and taken seriously I think this police department has shown the ability to investigate itself and police itself well.⁶¹

Later that day, when told what the Mayor had said, Chief Ramsey 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.⁶²

It is extraordinary that a police chief would (i) prejudge complaints before they are considered, (ii) exclude consideration of all complaints other than those of physical abuse, and (iii) impose an unlawfully difficult standard for complainants to meet, namely "overwhelming evidence." This unwillingness to hold officers accountable is long standing. In the *Washington Mobilization* case in which the United States District Court found numerous instances of intentionally unlawful arrests and assaults on demonstrators in a series of demonstrations over a two-year period, the Court found:

[N]ot a single formal disciplinary action was taken against any officer involved in

⁶⁰ *Ibid.*

⁶¹ "Patterson, Graham Seek MPD Inquiry," by Kathryn Sinzinger, *The Common Denominator* (Washington D.C. alternative newspaper), April 24, 2000, p. 1, at carry-over p. 8, column 3, para. 2.

⁶² *Ibid.* at paras. 3-4.

the demonstrations considered in this case.⁶³



More than thirty years ago, during the Mayweek 1971 demonstrations, The Washington Post published a front page photograph of Deputy Chief Theodore Zanders, then Commander of the Police Department's Civil Disturbance Unit, in direct violation of Police Department directives, spraying chemical Mace at a distance of less than three feet on a group of demonstrators blocking an intersection. The District Judge in the *Washington Mobilization* case stated:

The Court feels compelled to comment that if the Commander of the CDU ...

conducts himself in a manner contrary to ... [Police Department] policies, then it is not unlikely that this ... will also be manifested among his subordinates.⁶⁴

That is precisely what we are seeing today. D.C. Police Management should not be allowed to escape their delinquencies by attempting to shift the focus to their police officers. It is not the officers who are to blame. It is the Chief for the misdirection and lack of accountability by which he encourages excessive actions. The twenty recommendations of this report include Council action to require all demonstration-related complaints to be referred to the District's Citizen Complaint Review Board.

III. THE UNDERMINING ROLE OF AN UNCRITICAL PRESS

"How did it come to this?" asked The Washington Post in its March 4, 2003, editorial condemning the police for the September 27, 2002, Pershing Park arrests.⁶⁵ The answer to that question goes back thirty years, which is when D.C. Police Management began using and the Post began praising the methods it now condemns. Even when the Post finally recognized that there had been widespread police lawlessness in Mayweek 1971, as described in Section I.A of this report, the Post rationalized, as the Mayor does now, that it was "not prepared to

second-guess Chief Wilson on the mass arrest tactics he adopted."⁶⁶

Still today, as the Post condemns the Pershing Park arrests as being "so over the line that the city ultimately declined to prosecute any of those arrested, because it lacked probable cause,"⁶⁷ it perpetuates a myth of its own creation:

For many years D.C. police officers have enjoyed a well-deserved reputation for their deft handling of large public demonstrations. Thousands of people have managed to mass in the city, petition

⁶³ *Washington Mobilization*, *supra*, 400 F. Supp. at 205.

⁶⁴ *Ibid* at 204.

⁶⁵ "Mishandled Mass Arrests," Editorial, The Washington Post, March 4, 2003, para. 3.

⁶⁶ Editorial, The Washington Post, May 23, 1971. The Washington Post's news coverage and editorials concerning the Mayweek 1971 mass arrests are discussed in detail in the ACLU report, *Mayday 1971: Order Without Law*, *supra*, at pp. 54-57, in a section entitled, "The Role of the Press," a copy of which is attached to this report as Appendix A.

⁶⁷ "It Takes A Judge," Editorial, The Washington Post, September 13, 2003, p. A-20, top of column 2.

their government or protest public policy, and then depart town without leaving lawsuits behind.⁶⁸

The fact is D.C. Police Management has rarely handled a major problematic demonstration well. That was so in 1971 and it is still the case today. The Post's reference to "deft handling" of demonstrations is to the mostly non-problematic demonstrations that occupied the three decades between the end of the Vietnam War in the mid-1970s and the beginning of the anti-globalization demonstrations in the late-1990s. Most demonstrations in those years presented no great challenge to the police. When D.C. police were again challenged by problematic demonstrations in April 2000, as described in Section I.B of this report, they again engaged in the same unlawful methods of the 1960s and 1970s, and again left a trail of lawsuits behind.

The Post at first turned a blind eye even to D.C. Police Management's disregard of the law in the Pershing Park arrests that the Post now condemns. Sometimes this took the form of describing the "over the line" police tactics in jovial and approving tones, as in a story about the seventy-five bicycling demonstrators who the police channeled from Union Station into Pershing Park to be unlawfully trapped, arrested, and detained. The story, entitled "Taken For A Ride," and subtitled "Police Turn The Bike Strike Into A Tour De Force," says of the gathering demonstrators, "They never saw it coming." It describes the police waiting to escort the unsuspecting demonstrators into the Pershing Park trap as follows:

[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

⁶⁸ "Mishandled Mass Arrests," Editorial, *supra*, March 4, 2003, para. 3.

sometimes. They could afford to be patient. The route may have been 'secret,' but the police had a pretty good idea of how this adventure was going to end anyway. Everyone else was in for a surprise.⁶⁹

These tactics—encircling, trapping, and arresting orderly demonstrators then preventively holding them for days under harsh conditions—dated back to the 1970s, when they were declared unlawful. But at the time of the Pershing Park arrests in September 2002—the arrests which by March 2003 it found to be "over the line"—the Post was amused at the clever trick the police were playing on the demonstrators.

The question is why the Post waited over five months to condemn these tactics, and did so only after an internal police report acknowledged they were unlawful. And why, when the same unlawful measures were used against the April 2000 anti-globalization demonstrators, did the Post praise them in an editorial entitled, "Hail To The Chief And His Cops."⁷⁰

The reporting and editorializing of the rest of the press and of the TV networks were just as far off the mark. The New York Times, for example, praised the D.C. police in April 2000 for the "preemptive" and "wholesale arrests simply to clear the streets," apparently oblivious to the fact that "preemptive" is synonymous with "prior restraints," which violate the First Amendment.⁷¹ But it is

⁶⁹ "Taken For A Ride," by David Montgomery, The Washington Post, September 28, 2002, p. C-1, column 3, continuing to carry-over p. C-4. Reference to the demonstrators is at p. C-4, column 2, para. 2.

⁷⁰ Editorial, The Washington Post, April 19, 2000. Compare to the Pershing Park arrests the news report of the April 2000 arrests at pp. 8-10 of this report, above.

⁷¹ "The Protesters And The Bank," Editorial, NY Times, April 18, 2000, p. A-30.

appropriate to concentrate on The Washington Post because, along with the New York Times, it has a tremendous effect, both locally and nationally, in setting the tone of the news.⁷² Moreover, there is no city in America where a newspaper has so fulfilled its role as the Fourth Estate, the ex-officio branch of our political mechanisms which monitors, exposes and forces reform when the government fails. The Washington Post has probably been involved in every major reform that has taken place in this city in the last fifty years. But not unlawful police methods during mass demonstrations. As with D.C. Police Management, this is a major failure of The Washington Post in serving the people of the District of Columbia.

The harm done by media praise for unlawful police actions is profound. In any political system there are natural tensions. It is difficult for a police chief to inculcate in his or her police force the discipline necessary to operate professionally in a mass demonstra-

tion when some demonstrators are engaging in disruptive or confrontational actions. It is even harder for a Mayor to put pressure on a police chief who is unwilling to do so. When the newspaper that is the leading force in shaping public and political opinion praises the police for keeping the traffic flowing even if it means operating outside of the law, it places a nearly insurmountable burden on any more disciplined approach.

The media should do better. They should apply the same critical journalistic and editorial vigor and scrupulousness to police actions in demonstrations that they apply to money and sex scandals. As the late James Heller, then-Chairman of the local ACLU, wrote in a 1971 letter to the Washington Post:

When all three branches of government either cooperate in or bless wholesale official illegality, the Fourth Estate should be fulfilling its role as vigorous critic and corrective⁷³

RECOMMENDATIONS

As The Washington Post recognized in an editorial many years ago,⁷⁴ the goal of maintaining order can be accomplished without reliance upon preemptive dispersals and arrests, the brutalization of non-violent protesters, and illegal preventive detention. The first step is to impress on D.C. Police Management that its unlawful policies will no longer be tolerated. There are a number of specific measures that can be taken to correct

specific powers that D.C. Police Management is abusing. Some of the measures here recommended are already official Police Department policy, but they should now be elevated into statutory law by the Council. Some of the corrective measures recommended here may require more research and analysis. For any such measures, a task force could be appointed to assemble data and report back to the Council.

Specifically, the American Civil Liberties Union of the National Capital Area recommends that legislation be developed to modify the power of the police in demonstration situations, as follows:

⁷² See Eric Alterman, *What Liberal Media?* (New York: Basic Books, 2003) at p. 106.

⁷³ Reprinted in *Mayday 1971: Order Without Law*, cited at note 5, *supra*, at p. 57 (attached to this report as Appendix A).

⁷⁴ Editorial, The Washington Post, May 23, 1971.

A. Freedom of Assembly and Crowd Control

1. The parade permit law should be amended to provide that the police shall not have the power to disperse or arrest people solely for failure to have a parade permit unless another group with a permit has a claim on the same place at the same time. Otherwise, when there are enough police on hand to control matters, those without a permit may be dispersed or arrested only for blocking traffic or buildings, or for disorderly conduct. Permits would still be required, and groups that do not obtain permits risk being blocked by police from the parade route they want and being dispersed or arrested if they block traffic, but should not be dispersed or arrested merely for lack of a permit.

2. The power of the police to establish a police line in order to clear an area, or to order an assemblage to clear an area, should be restricted to circumstances where there is a clear and present danger of serious disruption and disorder. Preemptive dispersals and arrests should be prohibited.

3. The power of the police to arrest for failure to disperse should be restricted to apply only when people have been given a clear, audible order to disperse accompanied by a warning that failure to do so will lead to arrest, and an adequate opportunity for those who wish to comply to do so. Ordinarily, loud electronic amplifiers should be used to issue these warnings.

4. A police officer should have the power to make an arrest only if he or she contemporaneously records facts essential to establish in court probable cause to believe that the person arrested committed a crime.

5. An assembly should not be arrested because a few people are throwing objects or otherwise violating the law. An assembly

ordinarily should not be ordered to disperse because a few are violating the law; if feasible, only the violators should be arrested or dispersed. However, an assembly may be ordered to disperse if that becomes the only way to stop ongoing dangerous unlawful conduct.

6. Strict standards should be enacted restricting the use of clubs, pepper spray, and other gas and chemical agents. Absent an immediate need for self-defense, the use of pepper spray and gas should have to be authorized by a police official on the scene, who should be required thereafter to file a justification report, which should be made public.

7. Riot gear should not be employed to intimidate non-violent demonstrators. It should be used only when there is reason to anticipate significant violence.

B. Release and Other Post-Arrest Procedures

8. The police should be required to release people charged with offenses for which citation and immediate release are appropriate within no more than two hours of arrest.

9. The police should be required to release people charged with offenses for which release on the posting of collateral is appropriate within no more than two hours of arrest. Persons eligible to post collateral should be provided with written notice about their options (post and return for trial, or post and forfeit) and the consequences of each, and should be given a written acknowledgment of the choice they have made.⁷⁵

⁷⁵ Our recommendation for written notice and acknowledgment is consistent with the recommendation made by the D.C. Civilian Complaint Review Board in its November 2003 report, "Disorderly Conduct Arrests Made by Metropolitan Police Department Officers," at 20.

10. The police should be required to deliver, for presentment before a judicial officer, people arrested in a demonstration and not earlier released, within no more than three hours of arrest, unless the court is not open, in which case the police should be required to deliver them for presentment within one hour after the court next opens.

11. An arresting officer should be required to inform the person arrested of the charge and to give the arrestee a card containing the officer's name and badge number, the charge, and an explanation of arrestees' rights regarding counsel, presentment and release. An officer who fails to do so should be subject to formal disciplinary proceedings, and action should be required to be initiated on such a charge if evidence establishing a *prima facie* case is submitted on behalf of any arrestee to whom such information was not provided.

12. The police should be prohibited from holding people in restraints that are painful or unnecessarily uncomfortable, and from holding people for more than one hour in any vehicle or without access to water, telephone, and toilet.

C. Police Accountability

13. All officers policing demonstrations should be plainly identified by large numbers of no more than four digits emblazoned on their helmets and the front and rear of their outerwear so as to be clearly visible to the public. A police officer who removes or conceals his or her number, badge, or other identifying emblem, and any supervisor who permits or condones such action, should be subject to formal disciplinary proceedings.

14. Any law enforcement agent who intentionally and publicly misrepresents the facts of a law enforcement action should be subject to formal disciplinary proceedings,

and action should be required to be initiated on such a charge if evidence establishing a *prima facie* case is submitted on behalf of any person who was a subject of such law enforcement action.

15. The Police Department should be required to film police actions in dispersing or arresting demonstrators, and these films should be made public.

16. The Police Department should be required to notify the Citizen Complaint Review Board as far in advance as possible of demonstrations in which mass arrests may reasonably be anticipated, and the Board should monitor each such demonstration, and should issue a public report assessing police performance, and identifying police misconduct, if any.

17. The Police Department should be required to transmit to the Citizen Complaint Review Board, within five days of receipt, copies of all complaints against the police arising during demonstrations.

18. The Chief of Police should be designated as agent to receive service of process on behalf of any officer of the Police Department who is subject to such service for any legal proceeding related to the officer's duties or actions under color of law.

D. Training and Guidance

19. The Police Department should be required to issue a mission directive to the effect that if some demonstration sponsors are calling for the blocking of traffic and buildings the police mission is to stop them from doing that, but, at the same time, orderly demonstrators must be fully protected in their right to assemble and protest, and the need to deal with violators must not lead to police actions against innocents in the vicinity.

20. The Council should appoint a task force to evaluate and report, with any necessary recommendations, on the adequacy of the present training program and manuals

for the handling of mass demonstrations, including a study of alternative or improved programs and manuals, if appropriate.

CONCLUSION

America has a rich tradition of protest demonstrations which have served as a major instrument of non-violent political and social reform.⁷⁶ No 20th century nation has been as successful as the United States in harmonizing so ethnically, racially and politically diverse a population with so little violence. The transformational power of mass protests has played a major role in that history. The American labor movement of the 1920s and 30s, the anti-Vietnam War movement of the 1960s and 70s, and the 1960s civil rights movement, are the most outstanding examples of social revolutions without bloodshed. That is why Justice Thurgood Marshall argued passionately for preserving sites in Washington, D.C. as the traditional place of “some of the most rousing political demonstrations in the Nation’s history.”⁷⁷ Police flaunting of the First Amendment not only undermines the rule of law, it subverts a vital mechanism of our democracy.

Unlike the Chinese police in Tiananmen Square or the police in Moscow or Istanbul, the top priority of the Metropolitan Police Department of the District of Columbia, greater even than preventing temporary blockages of buildings and traffic, is to uphold the Rule of Law and the Constitution to which they have sworn allegiance. As the United States Supreme Court declared in 1937:

The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly Therein lies the security of the republic, the very foundation of constitutional government.⁷⁸

⁷⁶ See, e.g., Barber, *Marching On Washington: The Forging Of An American Tradition* (Berkeley: Univ. of California Press, 2002).

⁷⁷ *Clark v. Committee For Community Non-Violence*, 468 U.S. 288 at 303 (1984) (dissenting opinion).

⁷⁸ *DeJonge v. Oregon*, 299 U.S. 353, 365 (1937).

[Appendices omitted.]

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202-457-0800

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