



# 1<sup>st</sup> Amendment Considerations: Intelligence Gathering and Demonstrations

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# 1<sup>st</sup> A Guidelines: Background

- Democratic National Convention, Boston, July 2004.
- Massachusetts State Police & Boston Police Department
  - **BPD Legal (William V. Hoch, Esq. primary drafter)**
  - 04-SM-003: MSP "Guidelines for Investigations Involving First Amendment Activity"
  - Looked at FBI Guidelines, NY Guidelines, and other states
- Denver Police Department: ACLU v. Denver Police Department (2002) ("Spy files case") challenging the department's practice of monitoring and recording the peaceful protest activities of Denver-area residents and keeping criminal intelligence files of the expressive activities of law-abiding advocacy groups. Sought changes in policies and practices rather than money damages. (settled April 2003)



# 1<sup>st</sup> A Guidelines: Background (cont'd)

## ■ New York City Police Department:

- *Handshu et al., v. Special Services Division, et al.*, 349 F. Supp. 766 (S.D. N.Y. 1972). Court denied NYPD's motion to dismiss. Civil rights class action seeking declaratory judgment and injunctive relief on claims that various surveillance and other activities of the NYPD violated their constitutional rights (1<sup>st</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, and 14<sup>th</sup> Amendments).
- *Handshu et al., v. Special Services Division, et al.*, 605 F. Supp. 1384, aff'd, 787 F.2d 828 (S.D. N.Y. 1985). March 7, 1985. Approving consent decree.
- *Handshu et al., v. Special Services Division, et al.*, 273 F. Supp.2d 327 (S.D. N.Y. 2003). Feb. 11, 2003. N.Y. City Police sought to modify guidelines set out in consent decree because of changed circumstances of 9/11.
- *Handshu et al., v. Special Services Division, et al.*, 288 F. Supp.2d 411 (S.D. N.Y. 2003). Aug. 6, 2003. Plaintiff class seeks to modify existing guidelines. Court held that ignorance of investigatory techniques of Demonstration Debriefing Form (custodial interrogation) warranted modification of consent decree to provide for enhanced level of judicial review.
- *Handshu et al., v. Special Services Division, et al.*, 2006 WL 1716919 (S.D. N.Y. June 6, 2006). Plaintiff class moving to enjoin enforcement of Interim Order 47 allowing use of video/photographs ..if "deemed potentially beneficial or useful."





# 1<sup>st</sup> A Guidelines: Background (cont'd)

## ■ FBI in Chicago:

- *Alliance to End Repression v. City of Chicago, et al.*, F.R.D. 182 (N.D. Ill. 1981). Aug. 11, 1981, the parties enter into a consent decree.
- *Alliance to End Repression v. City of Chicago, et al.*, 742 F.2d 1007 (7<sup>th</sup> Cir. 1984), *on rehearing*,
  - *Alliance to End Repression v. City of Chicago, et al.*, 561 F. Supp. 575 (N.D. Ill. 1983), *affirmed as modified by*,
  - *Alliance to End Repression v. City of Chicago, et al.* 733 F.2d 1187 (7<sup>th</sup> Cir. 1984)

## ■ Chicago Police Department:

- *Alliance to End Repression v. City of Chicago, et al.*, 356 F.3d 767 (7<sup>th</sup> Cir. 2004), rehearing denied (Mar. 1, 2004).
  - *Alliance to End Repression v. City of Chicago, et al.*, 66 F. Supp.2d 899 (N.D. Ill. 1999), *judgment reversed and remanded by*,
  - *Alliance to End Repression v. City of Chicago, et al.* 237 F.3d 799 (7<sup>th</sup> Cir. 2001), *appeal after remand*,



# Guidelines for Investigations Involving 1<sup>st</sup> A Activity

- Investigations never based SOLELY on activities protected by the 1<sup>st</sup> A.
- Investigations will not be directed towards disrupting the lawful conduct of groups in 1<sup>st</sup> A activity or an individual's participation in such lawful activity.
- Investigations will be terminated when logical leads are exhausted and there is no longer a legitimate law enforcement purpose.



# Applicability

- Guidelines only apply to investigations of speech or conduct, i.e. monitoring groups involved in or planning demonstrations.
- Includes authorized proactive intelligence gathering that can be carried out in the absence of facts and information justifying the checking of leads.
- Not applicable to other types of investigations that do not involve the 1<sup>st</sup> A, i.e. narcotics investigations, B&Es, OC investigations, etc.
- Not applicable to Joint Terrorism Task Force (JTTF) investigations.





# Scenario 1: Checking of Leads

- Lead: Information received warrants some follow-up as to the possibility of unlawful activity.
- Ex: What if the Department receives an anonymous allegation that a group on campus has advocated the commission of violence on campus?



# Scenario I: First Steps

## ■ Attending group's public meetings

- For detection or preventing unlawful activities or for police planning related to unlawful activity, police can attend any event open to the public the same way any member of the public would.
- Demonstrations
- Public meetings

The police may record a public event for a legitimate law enforcement purpose such as identifying suspicious activity, intelligence gathering, identifying unlawful activity or training purposes. *Pledge of Resistance v. We the People 200, Inc.*, 665 F. Supp. 414, 418 (E.D. PA 1987) ; see also *Philadelphia Yearly Meeting of the Religious Society of Friends v. Tate*, 519 F.2d 1335, 1337 (3<sup>rd</sup> Cir. 1975) (police photographs of public events do not give rise to 1<sup>st</sup> A claim).

- Obtaining publicly distributed literature, i.e. newspapers, magazines
- On-line research, i.e. review internet postings
- Making contact with informants/reliable people who may have information concerning the group.





# Scenario I: Records

- Purpose: To determine whether the group does in fact advocate unlawful acts.
- Recordkeeping
- Closing out: only keep chronological log of activity that:
  - Identities the investigating officer
  - Steps taken
  - Reasons for inquiry
  - Outcome of lead checking
  - No specific names of individuals or groups under investigation



# Scenario II: Preliminary Inquiry

- You have information indicating the possibility of unlawful activity and the responsible handling would require further scrutiny beyond the prompt and limited checking out of initial leads.
- Does not require lead checking to get to PI stage.
- Completed 180 days after authorization (90 day extensions)
- Ex: The Department determines that a group does advocate for the commission of crimes, thus giving supporting facts of the possibility of unlawful activity. A PI may be undertaken to determine whether the group has the apparent ability or intent to carry out or attempt to carry out the advocated unlawful act.



# Scenario II: First Steps

- Dealing with anonymous sources or information received from a source of unknown reliability.
- At PI stage, undercover operations may be used *only* to observe and record public meetings (need to assess practicality of this investigative technique in a campus setting). Undercover infiltration should not be employed in a PI because a PI is based on less than "reasonable suspicion" and infiltration is only constitutionally permissible if that standard is met. *Pledge of Resistance*, 665 F. Supp. at 418.
- Police can interview informers but should not direct the informer to become friends with people in the group. Police cannot have informers "maintain a duplicitous relationship with an individual" during a PI because there is not yet a reasonable suspicion of criminal conduct. *See Alliance to End Repression v. City of Chicago*, 627 F. Supp. 1044, 1053 n. 4 (N.D. Ill. 1985)
- PI should be completed relatively quickly (MSP requires 180 days with extension options)





# Scenario III: Full Investigation

- May be initiated when facts/info establish a “reasonable suspicion” that an unlawful act is or will be committed.
- Std is met where there is not yet a current substantive or preparatory unlawful act, but facts/circumstances reasonably indicate that such unlawful conduct will occur in the future.
- Ex: Several students uncomfortable with the group’s plan to destroy property at a demonstration go to the police. They don’t know specifics of the plan.



# Scenario III: Considerations

- Initial authorization is up to 1 year (1 year extensions)
- Undercover operations, including confidential informants, can be used but need to comply with other guidelines.
  - Undercover cannot direct the operations of a group.
  - Undercover must adhere scrupulously to the scope of a group's invitation. *United States v. Aguilar*, 883 F.2d 662, 705 (9<sup>th</sup> Cir. 1989); *Pleasant v. Lovell*, 876 F.2d 787, 803-805 (10<sup>th</sup> Cir. 1989).
  - Undercover not required to identify themselves or leave a gathering if it is requested that police leave or identify themselves.
  - However, where reasonably possible, and without exposing one's cover or compromising the investigation, undercovers should not attend meetings where legal counsel are discussing or preparing legal strategy for pending litigation. *Greater Newburyport Clamshell Alliance v. Public Service Company of New Hampshire*, 838 F.2d 13, 20 (1<sup>st</sup> Cir. 1988)



# Key Points

- Want to use the least intrusive technique that will get the information needed. *See Presbyterian Church v. United States of America*, 725 F. Supp. ` 505, 1515 (D. Ariz. 1990).
- Exigent circumstances will allow for more intrusive techniques.
- Information should only be maintained as long as there is a legitimate law enforcement purpose for that information. Dissemination guidelines.
- Information no longer having a legitimate law enforcement purpose needs to be purged.





# Some Last Considerations

- Serious anarchist groups do their own intelligence collection. For small police departments, such groups may be able to identity their undercover officers.
- COURT OF PUBLIC OPINION: Need to manage perception.
- Videotaping/photographing at demonstrations could be perceived as an attempt to chill speech.

# First Amendment Review

- Protects freedom of speech
- Protects right to “peaceably assemble” in public forums
- Public forums include: streets, sidewalks, parks, and plazas in front of government buildings







# First Amendment Review (cont.)

- Prior Restraint: "administrative or judicial order forbidding certain communications in advance of such time the communication is to occur." Alexander v. U.S., 509 U.S. 544 (1993).
- Heavy burden on government to establish constitutionality of "prior restraints" on free speech. Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992).
- First Amendment does not guarantee unlimited access to government property for expressive purposes. Int'l Society for Krishna Consciousness v. Lee, 505 U.S. 672 (1992).





# Parades, Marches, and Large Demonstrations



## Permits:

- Can require that protesters first obtain a permit for marches, parades and rallies.
- Permit generally not needed for sidewalks or protests that do not require blocking traffic or closing streets.
  - NOTE: protesters cannot block sidewalks or obstruct pedestrians.
- Advisable to adopt a written permitting policy.



# Parades, Marches, and Large Demonstrations (cont.)

- Can regulate time, place, and manner of speech.
  - Can restrict route of parade or location of rally.
  - Regulation must:
    - Be content-neutral
    - Be narrowly tailored to serve a significant government interest; and
    - Provide ample alternatives for communication.
- New England Regional Council of Carpenters v. Kinton, 284 F. 3d 20 (1st Cir. 2002)



# Parades, Marches, and Large Demonstrations (cont.)

- Counter-demonstrators also have the right to protest.
  - Police may physically separate groups.
  - Location of counter-demonstrators should be planned in advance through negotiation.





# Common First Amendment Issues: Educating Officers Before Demonstrations



- ***Train*** or retrain officers on basic First Amendment principles and intersections between First Amendment rights and lawful government restraint and action.
- ***Speech*** and ***expressive conduct*** is protected no matter how offensive.
- ***Words*** against police officers are not a crime.



# Common First Amendment Issues: Educating Officers Before Demonstrations



- ***Flag burning*** is not a crime.
- ***Leafleting*** is permissible even if it constitutes littering.
  - No permit needed.
  - Cannot block entrances or exits or detain people seeking public access to buildings or streets.
- ***Signs*** are permissible, but may not be used as weapons and may be regulated to protect public safety.



# Right to Peaceful Assembly

- First amendment protects right to peaceful assembly.
- Right does not extend to violent assembly.
- Laws vary among states.
- Massachusetts law provides right of arrest where:
  - 5 or more persons are armed and assembled; or
  - 10 or more persons, armed or not, are unlawfully, riotously or tumultuously assembled. G.L. c. 269 § 1.





# Right to Peaceful Assembly (cont.)

- Departments should have a policy on responding to civil disturbances.
- Massachusetts State Police and Boston Police Department policies available.
- Policy should include:
  - Relevant state law
  - Initial inquiries
  - Crowd control objectives and procedures
  - Officer responsibilities; and
  - Procedures for mass arrests.



# Close Yelling

- Critical inquiry: whether person is acting in a threatening manner; note body language and arm movements.
- Vulgar, profane, offensive or abusive speech is not, without more, subject to criminal sanction.
- Intentional spitting or bumping not permissible.
- Officers have the right to defend themselves.
- Prevent escalation of activity.



# Videotaping, Photographing, and Audio Recordings of Demonstrations

- Videotaping by police at demonstrations is permissible if overt.
- Secret recording may constitute unreasonable search and seizure in violation of 4th amendment. Key analysis is expectation of privacy.
- Audio recording generally not permissible under state wiretap laws.
- Demonstrators permitted to videotape and photograph police officers.





# Demonstration Zones: Post 9/11 Considerations

- Large-scale protests and events in post 9/11 world present significant challenges to police departments.
- Democratic and Republican Conventions in 2004 were designated "National Special Security Events" with substantial public safety resources dedicated to events due to security concerns.
- Security plans for both DNC in Boston and RNC in New York included designation of "demonstration zones" where protesters could exercise free speech rights in restricted areas. Modeled in part after zone used in Los Angeles for the 2000 DNC.



# Demonstration Zones: Post 9/11 Considerations (cont.)

- Intended to enable police officers to protect public safety by limiting number of protesters and physically closing off the area.
- Balance between first amendment rights of protesters and public demand for increased police presence and heightened security interests in aftermath of World Trade Organization Conference in Seattle in 1999 and 9/11.
- Demonstration zones and protest pens not new but use has increased in major cities in light of WTO and 9/11.
- Demonstration zones challenged in Los Angeles, New York and Boston with differing results.



# 2000 Democratic National Convention: Los Angeles

- Service Employee Intern. Union v. City of Los Angeles, 114 F. Supp.2d 966 (2000). Union filed injunction to bar city from enforcing large security zone around Staples Center and small demonstration zone 260 yards away from entrance.
- City argued that zone arrangement was necessary for security reasons, in light of terrorism fears.
- Zone struck down because:
  - 1) "Secured zone" not narrowly tailored because it would block *ALL* expressive activities 24 hours a day.
  - 2) The "Official Demonstration" zone did not provide adequate alternative means of communication because speakers' messages would not reach intended audience.





# 2004 Democratic National Convention: Boston



- Black Tea Society v. City of Boston, 370 F. 3d 8 (2004).
- Extensive pre-convention negotiation between ACLU and Boston Police Department.
- Parties agreed to zone location but zone itself not constructed until one week before convention.
- Zone consisted of concrete barriers, chain link fences, and mesh netting. Challenged by Black Tea Society.
- District Court viewed the zone and likened it to an internment camp.
- Zone was upheld because:
  - It was a reasonable time, place, and manner restriction.
  - Court relied upon government's representation of security needs, and the opportunity for leafleting and protests in other locations in the city.



# 2004 Republican National Convention: New York



- Stauber et al. v. City of New York et al., 2004 WL 1593870 (S.D.N.Y. 2004).
- City constructed barricades around large pen areas which were then guarded by police officers. Entrance and exits were restricted.
- Plaintiff's argument: restrictions were unreasonable and not narrowly tailored.
- Defendant's argument: heightened security concerns post 9/11.
- Zone struck down as excessively limiting entry and exit areas.



# Summary Tips

- City should adopt a written permitting policy
- Department should adopt a civil disturbance policy
- Train and retrain officers with likely scenarios
- Negotiate in advance with all known protesters
- Be prepared to demonstrate that restriction is reasonable and that security interests warrant the restriction