The First Amendment Rights and Police Standards Act of 2004, Bill 15-968

November 9, 2004

Dear Chairman Patterson:

Note: *The views expressed herein represent only those of the District of Columbia Affairs Section of the District of Columbia Bar and not those of the D.C. Bar or of its Board of Governors.*

These comments are submitted on behalf of the D.C. Affairs Section of the District of Columbia Bar (the "Section"). The comments were drafted principally by Section Co-Chair Bell Clement and were approved on Thursday, October 28, by the members of the Section Steering Committee, with one member, Sally B. Kram, absent. The views expressed herein represent only those of the Section and not those of the D.C. Bar or its Board of Governors.
We appreciate this opportunity to comment on Bill 15-968, the “First Amendment Rights and Police Standards Act of 2004.” We wish particularly to commend the hard work and commitment of the Committee on the Judiciary in exploring the issue of protection of First Amendment rights in the Nation’s Capital. We wish also to recognize and commend the faithful service to the city of officers of the Metropolitan Police Department, frequently rendered under trying circumstances.

The D.C. Bar’s District of Columbia Affairs Section serves all attorneys who live, work, or have interest in the District of Columbia, and Bar members who practice before or work with the Council of the District of Columbia and the Executive Branch or the court system. The Section monitors legislative, judicial, and related legal developments affecting the District of Columbia.

Washington, D.C. is sometimes called the capital of the free world. If, as a city, we strive to merit that title, our first efforts should be directed to earning a reputation as a community which welcomes and facilitates free speech and free speech assemblies. The actions of this Committee and Council to affirm the policies of our community and District government in this regard are particularly important in that they must protect both citizens of the District and the tens of thousands of other Americans who come to Washington each year to petition their government for redress of grievances.

While Bill 15-968 is useful in providing specific guidance to the District government and the Metropolitan Police Department (MPD) concerning the exercise of free speech rights, its primary importance is in its emphatic statement of the policies of the people of the District regarding First Amendment rights. Whether due to the climate created by the present war on terror or to other factors, misunderstandings concerning the rights and duties of citizens and of government authorities concerning First Amendment exercise have become pervasive. Bill 15-968 provides a timely and pointed correction.

The right of free speech and free assembly is granted by the United States Constitution. It is not within the authority of a police department or other government agency to restrict this right except on clear evidence of imminent danger to public safety. The notion that in granting a permit to a free speech assembly, the police department is granting “permission” to use public space in the exercise of free speech rights reflects a fundamental confusion. Public space is the public’s space; it belongs to the people.

Bill 15-968 reiterates the priority of constitutionally-protected First Amendment rights and gives specific guidance on the role of MPD in protecting these rights and facilitating their exercise. We comment below on the following aspects of the bill:

(1) procedures for notice to government authorities concerning planned First Amendment assemblies;
(2) government responsibilities in terms of managing those assemblies;
(3) police conduct in making arrests in connection with the exercise of first amendment rights;
(4) police inquiries and investigations which touch upon exercise of first amendment rights;
(5) creation of a private right of action to ensure adequate enforcement of the law; and
(6) need for Council review of proposed regulations implementing the law.
In several instances we are in accord with positions taken before the Committee by the American Civil Liberties Union – National Capital Area (ACLU-NCA); page references are to the ACLU testimony of October 7, 2004.

1. Procedures for Notice to the District of Planned First Amendment Assemblies

First Amendment assemblies often involve some disruption of day-to-day police department process. While these disruptions can and should be minimized consistent with the exercise of First Amendment rights, the procedures required by Bill 15-968 make clear that priority is to be given not to minimizing MPD inconvenience but rather to facilitating the widest range of free speech exercise possible consistent with public safety.

1.1. Scope of Notice Requirement
The First Amendment shields citizens from any requirement that they provide the government with advance notice of their intent to exercise free speech or free assembly rights. We support §106(f)(1)(C), which emphasizes that MPD is without authority "to issue an order to disperse or arrest assembly participants based solely on the fact that the assembly does not have a permit." In addition, we join with the ACLU-NCA in supporting a new § 105 (j) which underscores District recognition of the constitutional protection accorded the right "to assemble or parade without a permit on a District street, sidewalk, or other public way, or in a District Park." (ACLU-NCA at p. 7)

1.2. Process Nomenclature
As recognized in § 105(a), the purpose of permitting provisions is to provide city authorities the information they need in order to facilitate the free speech assembly. Because calling this a "permitting" process has promoted the misunderstanding that MPD has authority to grant or withhold "permission" to first amendment assemblies, we recommend that Bill 15-968 be amended to rename this a "notice" process. The applicant files "notice" of a planned first amendment assembly with MPD, and MPD responds by issuing a First Amendment Assembly "plan."

1.3. Processing Timetable

Proposed § 105 grants MPD 30 days for review of First Amendment assembly "permit applications," substantially longer than the present five-day requirement. The thirty-day period is not reasonably necessary to allow adequate processing by MPD and it unduly complicates the efforts of assembly planners to coordinate orderly, large-scale events. The two-phased timetable proposed by the ACLU should be substituted. This timetable first provides event organizers, within ten days, an appealable response from MPD of denial, provisional acceptance, or acceptance of the assembly plan. It also ensures
(i) that event planners who have filed notice well in advance are able to confirm their proposed arrangement with MPD well before the event;

(ii) that changes to confirmed plans proposed by MPD may be challenged as overly restrictive by event organizers in court; and
(iii) that MPD is not empowered to prevent a First Amendment Assembly purely on grounds that it received late notice (or no notice at all). (ACLU-NCA at 7 ff.)

1.4. "Time, Place, and Manner" Restrictions

We strongly support the recognition, given in the § 103 statement of District policy on First Amendment assemblies and the further guidance provided in § 107, that the District must facilitate First Amendment assemblies "near the object of their protest." The restriction of free speech activities to so-called "Free Speech Zones," used at both the Republican and the Democratic National Conventions this past summer, is not consistent with First Amendment guarantees. The object of speech is communication. To deny a First Amendment assembly access to the object of its protest is to deny the free speech right. Creation of Orwellian "Free Speech Zones" ignores the constitutional truth, referred to by several of the Committee's witnesses, that Washington, D.C. is itself a "Free Speech Zone."

2. Police Department Facilitation of First Amendment Assemblies

"Orderliness" is not particularly a characteristic of democratic societies nor of the exercise of free speech. First Amendment exercise can and should be consistent with public safety, but toleration of some disorder is also required. The proper role of police in maintaining this balance is neither to prevent nor to restrict unduly First Amendment assemblies but rather to protect participants and to harmonize free speech activities with the requirements of the day-to-day flows of the city.

We strongly support the guidance provided by the legislation that, where there exists grounds for dispersal of an assembly, that adequate announcements and dispersal routes are provided.

2.1. Minimize Conflict

Violence associated with First Amendment assemblies is always unfortunate; it is particularly unfortunate if initiated by police officers charged with upholding the law. Use of full riot gear unnecessarily creates a tense atmosphere. MPD should be directed to propose regulations which articulate the standard used in making a decision to engage officers uniformed in riot gear and which recognize the need to minimize its use, consistent with officer safety.
With or without riot gear, it is critical that officer badges and badge numbers be clearly visible to the public at all times, as is provided by § 108 and § 302. We strongly support the inclusion of these sections in Bill 15-968.

2.2. Ad Hoc Changes by MPD to Approved Assembly Plan

2.2.1. Harmonize the Language of § 104 and its § 104(b) subparagraphs

With regard to standards for the issuance of ad hoc restrictions by police during the course of a First Amendment assembly, we recommend that the wording of subparagraphs § 104 (b)(1) , (b)(2), and (b)(3) duplicate the language of the section title and of subsection § 104(b) itself, both of which permit police to place "reasonable" time, place, and manner restrictions on First Amendment assemblies. Current language in the subsections permits police to enforce "appropriate restrictions." A consistent standard gives clearer guidance, and in this context, "reasonableness" may be better defined than "appropriateness."

2.2.2. Preserve Proper Constitutional Standard of § 104(b)(2)(C)
We strongly support retention of the "imminent likelihood" standard contained in § 104(b)(2)(C). "Imminent likelihood" is the constitutional standard guiding police interaction with First Amendment assemblies. We join the ACLU-NCA in urging that the Committee not accept a lower "substantial probability" standard which both falls short of constitutional requirements and fails to provide adequate guidance to police. (ACLU-NCA at 13 ff.)

2.2.3. Delete § 104(b)(2)(B) as Superfluous
Section 104(b)(2)(B) as currently worded creates a loophole which undercuts the protections which the rest of § 104 is intended to provide, since it gives police a free hand in responding to events "not anticipated at the time" of permit issuance. The subsection appears to be superfluous: we would ask the Committee to consider whether there are any contingencies which are not already addressed under the
§ 104(b)(2)(A) (covering ad hoc restrictions necessary "to implement the substance and intent of the permit conditions" which would, for example, address the hypothetical situation of a broken water main requiring diversion of a parade route) or § 104(b)(2)(C), addressing "imminent likelihood" of violence.

If the subsection must be retained, we would join the ACLU-NCA in urging language which limits police discretion to actions "that were not caused by the permit-holder, counter-demonstrators, or the police" (ACLU-NCA at 12 ff) and propose a further limitation directing that police have discretion to impose restrictions only in cases of "imminent likelihood" of danger to the public safety.

3. Arrests and Conditions of Detention
The guidance provided by Sections 108 through 112 of the legislation is of special importance in light of alleged MPD misconduct, most recently in the handling of First Amendment assemblies in April 2000 and September 2002. The charges, which include police entrapment of citizens, false arrest, false imprisonment, unreasonable use of physical restraints, unreasonable length of detention and failure to give accurate or timely information concerning release options, are troubling. These charges demonstrate the urgent need for the clear statement of District policy and procedures concerning arrests and detention in connection with the exercise of Free Speech rights which Bill 15-968 provides.

Persons exercising their free speech rights in the Nation's Capital should, at a minimum, be able to assume that they will not be arrested without cause, will not be confronted by police officers who hide their badges or refuse to state their badge numbers, will not be detained for unconscionable periods of time, nor given false or inaccurate information with regard to release, nor be subjected to physical restraints the only purpose of which is to inflict humiliation or physical pain.

3.1. Police May Arrest Only Law-Breakers; Arrests Must be Documented
Allegations concerning MPD conduct during the 2000 and 2002 demonstrations suggest that it is necessary to reiterate that police officers may arrest only those persons reasonably suspected of breaking the law and may not arrest persons simply because they are participating in a First Amendment assembly. The procedures and requirements specified in
§ 106(b) (permitting arrest of "specific noncompliant persons" and § 106(c) (permitting arrest of

"persons engaged in [unlawful] conduct) and in § 109 (requiring documentation of arrests) provide adequate protection from overreaching of police authority.

We join the ACLU-NCA in recommending that § 111 be amended to ensure prompt release of persons whose arrest is not documented as provided in § 109, believing this will serve as an appropriate incentive to limit improper arrests and to provide adequate documentation of arrests of persons reasonably believed to have broken the law. (ACLU-NCA at 15.)

3.2. Use of Restraints

It is alleged that MPD used wrist-to-ankle restraints to shackle First Amendment demonstrators for periods exceeding 24 hours during the Pershing Park incidents of September 2002. The restraints were not used in response to any disruptiveness on the part of arrestees or any attempts to resist arrest. It is difficult to avoid the inference that any such use of restraints by MPD would have had the sole purpose of inflicting humiliation and physical pain. Litigation concerning MPD behavior in this incident has exposed the District government to liability for significant damages awards.

We support § 110(a)'s prohibition on the use of physical restraints on persons arrested in connection with a First Amendment assembly and strongly oppose any amendment to the section which would allow MPD discretion in this area. The allegations concerning police conduct in September 2002 demonstrate the need for clear guidance in this regard in order to protect First Amendment demonstrators, to guide individual police officers in performance of their duty, and to avert District government liability. We join the ACLU-NCA in supporting additional language which, in the context of First Amendment activity, specifically prohibits the use of wrist-to-ankle restraints and any other restraint which "forces the person to remain in a physically painful position." (ACLU-NCA at 16.)

3.4. Length of Detention

Extended detention is unlawful. Police may not use extended detention to "punish" First Amendment demonstrators. Extended detention may not be used to prevent arrestees' exercise of Free Speech rights in demonstrations occurring contemporaneously, or to chill their exercise of First Amendment rights in the future. We strongly support the direction to police concerning the provision of accurate and timely information on release options given in §§ 111, 112, and 301. We support the ACLU-NCA's proposed amendment of § 301 limiting the District's future use of an arrestee's decision to make use of post and forfeiture. (ACLU-NCA at 18.)

4. Police Inquiries and Investigations Involving the First Amendment

Title II of Bill 15-968 attempts the difficult task of providing proper guidance to police action with regard to First Amendment activities which may be intertwined with criminal behavior. Title II appears to rest on the assumption that persons exercising First Amendment rights will regularly be involved simultaneously in preparing or engaging in criminal conduct. Because we believe this assumption should be vigorously questioned, we urge the Committee to limit carefully the authority and discretion provided by Title II to MPD.

4.1. Define the "Criminal Activity" Intended to be Reached under Title II

Title II applies solely to conduct connected with exercise of First Amendment rights. It does not affect other police investigations. Given this context, we support the ACLU-NCA recommendation that the legislation more closely define, whether in § 201 itself or in the

Committee report, the types of “criminal activity” which MPD may use to justify inquiries or investigations connected with First Amendment activities. (ACLU-NCA at 19.)

4.2. Require Court Authorization of Inquiries and Investigations; of Inquiry and Investigation Extensions; and of the Use of § 204(d)(3) and § 204(d)(4) Techniques

Introduction of Bill 15-968 has been prompted in part by recognition that MPD may misuse its authority in handling First Amendment-related activities. We recommend that, for the protection of persons engaged in exercise of First Amendment rights in the Nation’s Capital, but also to provide a level of guidance and protection to decision-makers within MPD itself, District courts be engaged in decisions to initiate MPD surveillance of First Amendment-related activities and in decisions concerning the means by which such surveillance is to be accomplished.

Requiring officers within MPD to both request and to make decisions whether to authorize First Amendment-related inquiries and investigations unreasonably asks MPD to act as both prosecutor and judge in these matters. These questions should be addressed to District courts, which have expertise on the issue of constitutional protections. Requests for authorization to initiate § 204(c) preliminary inquiries or § 204(b) investigations should be addressed to the court. Likewise, requests for authorization to extend preliminary inquiries under § 204(c)(3) or to extend investigations under § 204(b)(3) or to authorize use of the more intrusive surveillance techniques covered by §§ 204(d)(3) and (d)(4) should be made to the court, which can provide the necessary constitutional scrutiny.

4.3. Period and Extensions of Inquiries or Investigations

In order to prevent the inquiry and investigation procedures set forth in Title II from being used as a basis for “permanent” inquiries and investigations of persons or groups engaged in First Amendment activities, we recommend reduction of the period authorized in § 204(c)(3) for inquiries from 60 to 30 days, and of the period authorized in §204(b)(3) for investigations from 120 to 60 days.

If the Committee chooses not to require court authorization of MPD surveillance of activities connected with exercise of First Amendment rights, we further recommend that the number of extensions of inquiries or investigations be limited to one, with any further extensions requiring court approval.

4.4. Authorization of “Emergency” Investigations

Bill 15-968 currently provides MPD the authority to initiate investigations, on an emergency basis, without prior authorization. We recommend that the language of § 204(b)(4) be altered to require written approval and authorization of such “emergency” investigations within 24 hours of their initiation. As currently written, the subsection allows MPD personnel five days to obtain the necessary approval. We believe this timetable is unnecessarily generous. In effect, it would permit MPD to engage in unauthorized investigations of up to five days’ duration.

4.5. Prohibited Surveillance Techniques

Section 204(d)(6) explicitly prohibits MPD personnel who are engaged in authorized inquiries or investigations from engaging in certain forms of surveillance. We recommend that §

204(d)(6)(G), regarding surveillance of persons not the targets of an authorized inquiry or investigation, be amended to require that any such surveillance be explicitly described and authorization specifically requested in MPD's request for authorization of the underlying inquiry or investigation, and that it be expressly approved. Without this amendment, the section would operate to permit unauthorized surveillance of persons engaged in First Amendment activity as to whom there is no "reasonable suspicion" of criminal activity. The final clause of § 204(d)(6)(G), permitting such surveillance if the information collected "would itself justify an investigation or preliminary inquiry" should be deleted: if it is reasonable to believe that the information to be collected would justify an inquiry or investigation then, clearly, MPD must follow the procedures for obtaining authorization for such inquiry or investigation set forth in § 204.

We recommend that a subparagraph (H) be added to § 204(d)(6) to require MPD officials attending meetings or events in their official capacity to identify themselves as such, whether by the wearing of police uniform or otherwise. Although § 206 specifically requires that police "undercover" activities must be expressly authorized as provided in § 204, we believe that this added emphasis, making clear that MPD is prohibited from engaging in "domestic spying" is necessary to prevent chilling of the exercise of First Amendment rights.

4.6. Frequency of Inquiry and Investigation Reviews

We ask that the Committee reconsider whether the requirement that MPD review inquiry and investigation authorizations every 90 days is of adequate frequency, given the absence of other devices for monitoring these surveillance activities. Surveillance of activities connected with exercise of First Amendment rights should be rare; it is reasonable to direct MPD to review and report on its activities in this area once every 30 days.

5. Private Right of Action

We join with the ACLU-NCA and others in strongly urging the Committee to add a new § 305 to Bill 15-968 creating a private right of action for enforcement of the rights and protections provided by this legislation. (ACLU-NCA at 22 ff.)

6. Council Review of Regulations under this Act

We join with the ACLU-NCA and others in strongly urging the Committee to amend Bill 15-968 so as to require that regulations drafted by MPD to implement the requirements of this Act be submitted to Council for approval or modification. (ACLU-NCA at 25 ff.)

The D.C. Affairs Section of the D.C. Bar again thanks the Committee for its important service in forwarding Bill 15-968. Our Section frequently comments on District legislation and we often have good reason to express our appreciation for the insights and the hard work of both Councilmembers and staff which go into these bills. Even so, Bill 15-968 represents a special case, and requires our special recognition of the efforts of this Committee. Rights are more often lost by stealth than cataclysm; the work of this Committee has created an important bulwark against further leaching away of First Amendment rights in the District of Columbia.

The D.C. Affairs Section stands ready to assist in any way you may direct in further work on Bill 15-968, the "First Amendment Rights and Police Standards Act of 2004."

Respectfully submitted,

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