

Politics and Law in the Control of Local Surveillance

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POLITICS AND LAW IN THE CONTROL OF LOCAL SURVEILLANCE

Paul G. Chevigny†

TABLE OF CONTENTS

INTRODUCTION	735
I. THE LAW OF POLICE SURVEILLANCE IN THE SEVENTIES...	738
II. ADMINISTRATIVE REMEDY: NEW JERSEY STATE POLICE ..	744
III. FEDERAL LITIGATION: NEW YORK, CHICAGO, AND MEMPHIS	747
IV. STATE COURTS AND CITY LEGISLATURES: LOS ANGELES, MICHIGAN, DETROIT, AND SEATTLE.....	767
A. Los Angeles.....	768
B. The State of Michigan and the City of Detroit.....	775
C. Seattle.....	777
V. THE FLIGHT INTO PRIVATE INVESTIGATION	782
CONCLUSION	783

INTRODUCTION

Local police surveillance of dissenters has a long, if sometimes obscure, history. Former New York City Police Commissioner Patrick Murphy traced the origins of such surveillance in New York to an "Italian Squad," which sought as early as 1904 to curtail the illegal activities of a group of Italian immigrants called the "Black Hand Society."¹ The history of injuries flowing from local police surveillance is similarly lengthy. As early as 1940, a congressional subcommittee published doc-

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¹ Affidavit of Patrick V. Murphy at 2, paras. 5-7, *Handschu v. Special Servs. Div.*, No. 71-2203 (S.D.N.Y. filed May 18, 1971) (in support of defendants' motion to dismiss); *see also* P. CHEVIGNY, *COPS AND REBELS: A STUDY OF PROVOCATION* 252-55 (1972) (discussing political surveillance activities of New York Police Department).

uments detailing "violations of free speech and rights of labor"² by the Intelligence Bureau of the Los Angeles Police Department.³

The police bureaus and squads responsible for political surveillance grew more active in the 1960s.⁴ Part of the reason for the increased activity was reactive; the squads simply had more work to do during that decade of demands for reform and radical change. A deeper reason for the vigor of police political surveillance in the sixties was that the public increasingly recognized the legitimacy of demands for intelligence about the sources of the civil disturbances that were convulsing American cities in those years. In a passage often cited as a justification for increased surveillance,⁵ the National Advisory Commission on Civil Disorders (the Kerner Commission) noted that "[t]he absence of accurate information both before and during a disorder has created special control problems for police."⁶ The Commission recommended that

police departments . . . develop means to obtain adequate intelligence for planning purposes, as well as on-the-scene information for use in police operations during a disorder.

An intelligence unit staffed with full-time personnel should be established to gather, evaluate, analyze, and disseminate information on potential as well as actual civil disorders. It should provide police administrators and commanders with reliable information essential for assessment and decisionmaking. It should use undercover police personnel and informants, but it should also draw on community leaders, agencies, and organizations in the ghetto.⁷

The Law Enforcement Assistance Administration made available federal funding for local surveillance of the discontented⁸ and the local "red squads"⁹ burgeoned.¹⁰

Civil libertarians and radicals began to learn about local political

² *A Resolution to Investigate Violations of the Right of Free Speech and Assembly and Interference with the Right of Labor to Organize and Bargain Collectively, Part 64, Documents Relating to Intelligence Bureau or Red Squad of Los Angeles Police Department: Hearings on S. Res. 266 Before the Senate Comm. on Education and Labor, 74th Cong., 2d Sess. (1936), 76th Cong., 3d Sess. 23507 (1940) [hereinafter cited as *Hearings*].*

³ Police political surveillance units like the Intelligence Bureau of the Los Angeles Police Department have long been referred to as "red squads."

⁴ See Donner, *Theory and Practice of American Political Intelligence*, NEW YORK REVIEW OF BOOKS, Apr. 22, 1971, at 7, 27.

⁵ See, e.g., *Anderson v. Sills*, 56 N.J. 210, 222-23, 265 A.2d 678, 685 (1970); Affidavit of Patrick V. Murphy at 6, para. 22, *Handschu* (former Police Commissioner of the City of New York).

⁶ THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 269 (1968) [hereinafter cited as *KERNER REPORT*].

⁷ *Id.*

⁸ See AMERICAN FRIENDS SERVICE COMMITTEE, *THE POLICE THREAT TO POLITICAL LIBERTY* 14-16 (1979) [hereinafter cited as *POLICE THREAT*].

⁹ See *supra* note 3.

¹⁰ See FINAL REPORT OF THE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS

surveillance and its possible misuse from the political crimes trials of the late sixties and early seventies, which were based to a considerable extent on the testimony of police undercover agents.¹¹ These groups made demands for control as police political surveillance squads expanded. The activists' demands received further fuel following the Watergate scandal and revelation of federal investigative excesses by the Senate Select Committee to Study Intelligence Activities (the Church Committee).¹²

The critics of police red squads' activities recognized the many dangers inherent in political surveillance. Overt appearances at public gatherings by officers either well-known to the crowd as agents or recognizable by their cameras or other equipment, for example, could create an atmosphere of fear and intimidation. The collection of people's names and the compilation of political dossiers on those people through secret attendance at public meetings or undercover work could compound the "chilling" atmosphere of fear and intimidation. Moreover, these practices and other similar activities could produce specific harms. The dissemination of information in political dossiers to public bureaucracies and private employers, for example, could result in false suspicion of criminal activity, damage to reputation, and loss of employment. People's lives and the organizations in which they were involved could be seriously disrupted by spreading false information calculated to cause dissension and disruption. Critics also feared that undercover agents would encourage dissident groups and individuals to commit crimes with a political twist in order to neutralize those organizations and individuals. Finally, critics thought that the police might engage in unlawful searches and electronic surveillance for the purpose of collecting political information.

Critics had good reason to fear potential abuses in local police surveillance activities. The Church Committee investigations established that federal agents were guilty of some, if not all, of the activities mentioned above.¹³ Critics accused local police of similar abuses and in some cases were able to document their contentions.¹⁴ Even though in some situations the police might deny that they had done such things, or even deny that all of these activities constituted abuses, they were thrown on the defensive; the police were obliged to say that they would not indulge

WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 755, 94th Cong., 2d Sess., bks. I-VI (1976) [hereinafter cited as CHURCH COMMITTEE FINAL REPORT]; *Donner, supra* note 4.

¹¹ See generally P. CHEVIGNY, *supra* note 1.

¹² CHURCH COMMITTEE FINAL REPORT, *supra* note 10, bk. III (detailing federal abuses in conducting political surveillance).

¹³ See CHURCH COMMITTEE FINAL REPORT, *supra* note 10, bk. II, 86-93, 104-11, 192-98, 217, 225-49, bk. III, 1-371.

¹⁴ See, e.g., *infra* notes 98-100 and accompanying text (Chicago); *infra* notes 110-11 and accompanying text (Memphis); *infra* notes 207-30 and accompanying text (Los Angeles).

in the vices of the federal investigators. In sum, the local police were put in a position where they were forced to admit that real abuses of political investigation existed and to express their disapproval of such abuses.

The litany of surveillance abuses attributed to local political squads is long and, in most cases, disputed. This article does not attempt to establish the truth or falsity of critics' charges. Rather, the article will consider the instruments that have been fashioned to control political surveillance, including administrative guidelines, judicial decrees, and legislation. In examining closely the course of agitation for reform in selected jurisdictions, the article will focus on how the instruments for control came to be devised and what success they have had. Pleadings, together with such fugitive sources as newspaper stories, political polemics, and personal recollections, have been gathered¹⁵ to trace the pattern of actions taken in six cities and two states: New York City, Chicago, Los Angeles, Seattle, Memphis, Detroit, Michigan, and New Jersey.

In all eight locations, critics of political surveillance undertook institutional reform litigation, that is, "public law litigation" in the sense familiar to us from major civil rights cases and the writings of Professor Chayes.¹⁶ They sought far-reaching changes in police surveillance policies through prospective relief, in cases involving a congeries of abuses and parties. The remedies, when any have been fashioned, are often far afield from the rights alleged.¹⁷ The cases are "political," in the sense that they are intended to create systemic change, and they naturally have led to a legislative solution when that avenue is open.

The substance of the relief in these cases is astonishingly alike, whether the rules are made by judgment, by statute, or, when all else fails, by regulation. One principal reason for the marked likeness is that the legal and policy concerns surrounding police surveillance have acted as a similar constraint in every case. Although the law governing police surveillance activities undoubtedly is familiar to readers of this symposium, a brief review may create a useful framework for examination of the cases analyzed in this article.

I

THE LAW OF POLICE SURVEILLANCE IN THE SEVENTIES

The Supreme Court has held consistently that the introduction of

¹⁵ These materials are described in great detail throughout this article because most of them are relatively inaccessible and are not collected in any other single place. Copies of the sources not publicly available are on file at the *Cornell Law Review*.

¹⁶ See Chayes, *Supreme Court 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982) [hereinafter cited as Chayes, *Public Law Litigation*]; Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) [hereinafter cited as Chayes, *The Role of the Judge*].

¹⁷ See Chayes, *Public Law Litigation*, *supra* note 16, at 4-5; Chayes, *The Role of the Judge*, *supra* note 16, at 1293-94.

an informer into the private life and affairs of a person does not constitute an invasion of privacy in the fourth amendment sense.¹⁸ Thus, the Court has not required police to show probable cause or obtain judicial approval before using informers in an investigation. The Court also has held that an informer's use of a concealed microphone to record electronically what an individual said in the informer's presence constitutes no greater intrusion on the subject's privacy.¹⁹ In the Court's view, such a recording is legally indistinguishable from an informer's oral or written report to his superiors.

For purposes of first amendment analysis, the Court has never clearly distinguished between the introduction of an informer into a political group, and the introduction of an informer into any other sort of situation.²⁰ In *Laird v. Tatum*,²¹ the Court failed to draw such a distinction in a case involving political surveillance conducted by the United States Army. The *Laird* plaintiffs claimed that the mere existence of the Army's system of political surveillance chilled their first amendment rights.²² The Army "collected by a variety of means" files and dossiers, allegedly to facilitate contingency planning for assisting local authorities in civil disorders.²³ The means the Army employed to gather information included undercover attendance at public meetings, reference to local police records and published sources, and alleged use of informers and infiltrators.²⁴ The Court held that the mere existence of the files, without an allegation that the government used the files in a manner that was "regulatory, proscriptive, or compulsory,"²⁵ did not constitute an injury to anyone and that the case therefore was not justiciable. In short, if authorities collected the information by lawful means, the implied intimidation and threat experienced by the plaintiffs as a result of the existence of the files did not give rise to a cause of action.

The Court's position in *Laird* enabled Judge Weinfeld of the South-

¹⁸ See *Hoffa v. United States*, 385 U.S. 293, 300-03 (1966); *Lewis v. United States*, 385 U.S. 206, 211 (1966). There are situations, however, in which use of an informer may violate an individual's sixth amendment right to counsel. See *United States v. Henry*, 447 U.S. 264 (1980) (use of paid informant in prison violated sixth amendment).

¹⁹ See *United States v. White*, 401 U.S. 745 (1971). Such a recording may constitute a violation of the fourth amendment, of course, if the recording is made by a third party concealed from the participants. See *Katz v. United States*, 389 U.S. 347 (1967) (use of electronic surveillance without a warrant violates the fourth amendment).

²⁰ See *Dennis v. United States*, 183 F.2d 210, 224 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951) (§§ 2 and 3 of Smith Act, which make it crime to knowingly or willfully advocate overthrow or destruction of United States government by force or violence, do not violate first or fifth amendment).

²¹ 408 U.S. 1 (1972).

²² See *id.* at 3.

²³ *Id.* at 6.

²⁴ See *id.* at 26-27 (Douglas, J., dissenting).

²⁵ *Id.* at 11.

ern District of New York to write that "[t]he use of informers and infiltrators by itself does not give rise to any claim of violation of constitutional rights."²⁶ Other courts relying on *Laird* went on to hold that no cause of action exists under the first amendment for the collection of names from bank records,²⁷ for the attendance of plainclothesmen at public meetings,²⁸ or for the collection of telephone records,²⁹ even when those acts are directed at individuals or groups engaged in political or other expressive activity. The dissemination of information collected has also been held not actionable, at least when the dissemination is made to other law enforcement agencies.³⁰

Underlying the results of the surveillance cases are police concerns sufficiently powerful to persuade the courts, if not the critics of police surveillance, that the judiciary must largely refrain from interfering with police discretion. One cannot understand the shape of the present law unless one grasps these concerns. One basic consideration is that many crimes, including some with a political motive, could not be prevented or punished without the use of informers.³¹ But this concern alone should not be enough to warrant judicial restraint because the same reasoning applies to many searches that require a warrant; just as the mere existence of a warrant requirement does not prevent searches and seizures covered by the fourth amendment, a warrant requirement would not make the use of informers impermissible in criminal investigations.

Of greater concern is the fact that the information that supplies "probable cause" for an arrest or search ordinarily is derived from surveillance from an informant, from infiltration, or from some other sort of intelligence. As Judge Ditter explained in *Kenyatta v. Kelley*,³² "concomitant with the duty to investigate the criminal must exist the privilege to investigate the suspect, for until information has been acquired,

²⁶ *Handschu v. Special Servs. Div.*, 349 F. Supp. 766, 769 (S.D.N.Y. 1972) (denying defendant's motion to dismiss).

²⁷ See *Fifth Ave. Vietnam Peace Parade Comm. v. Gray*, 480 F.2d 326, 332-33 (2d Cir. 1973).

²⁸ See *Socialist Workers Party v. Attorney Gen.*, 510 F.2d 253 (2d Cir.), *stay denied*, 419 U.S. 1314 (1974) (Marshall, Circuit Justice).

Some courts have found, however, that the presence of uniformed or otherwise identifiable policemen may sometimes constitute a form of unlawful intimidation under the first amendment. See *Bee See Books Inc. v. Leary*, 291 F. Supp. 622, 626-28 (S.D.N.Y. 1968) (policeman stationed in bookstore); *Local 309, United Furniture Workers v. Gates*, 75 F. Supp. 620, 625 (N.D. Ind. 1948) (policemen at union meeting).

²⁹ See *Reporters Comm. for Freedom of the Press v. AT&T*, 593 F.2d 1030 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 949 (1979).

³⁰ See *Philadelphia Yearly Meeting of the Religious Soc'y of Friends v. Tate*, 519 F.2d 1335, 1338 (3d Cir. 1975).

³¹ See *Handschu v. Special Servs. Div.*, 349 F. Supp. 766, 769 (S.D.N.Y. 1972) ("[W]ithout the use of such agents many crimes would go unpunished and wrongdoers escape prosecution.").

³² 375 F. Supp. 1175 (E.D. Pa. 1974).

classified, analyzed and disseminated, neither guilt nor innocence can even be surmised."³³ Thus, one might argue that extension of the requirement of judicial approval to surveillance techniques such as keeping files and using infiltrators would make the law of probable cause almost unworkable. For this reason, the Second Circuit refused to require the involvement of the judiciary "in exercising prior restraints on an investigative agency in the executive or legislative branch."³⁴

The courts also have been reluctant to limit the kinds of information that the police may collect and keep, reasoning that police work may require intelligence that is not directly related to crime. This reluctance was voiced by the Kerner Commission³⁵ and underlies the Supreme Court's decision in *Laird v. Tatum*, in which the majority wrote:

The data-gathering system here involved is said to have been established in connection with the development of more detailed and specific contingency planning designed to permit the Army, when called upon to assist local authorities, to be able to respond effectively with a minimum of force. . . .

The system put into operation as a result of the Army's 1967 experience consisted essentially of the collection of information about public activities that were thought to have at least some potential for civil disorder . . .³⁶

This background information did not directly figure in the Court's conclusion that the plaintiffs failed to state a claim. The Court's explanation of the Army's purpose in collecting the information, however, conveys the Court's underlying belief that the mere existence of information in files is insufficient to state a claim because there may be an excellent reason for keeping the information. Without such a reason, the Court might have been more sympathetic to the plaintiffs' claim.

The period immediately following *Laird* was a low point for critics of police surveillance. The courts seemed unwilling to impose limits on police discretion either in their methods of collecting information or in the kinds of information they collected. Situations existed, however, that were impossible to explain under the policies used by courts to justify their decisions in surveillance cases. When infiltrators spread false information among the members of an organization for the purpose of disrupting it,³⁷ for example, the surveillance activity did not prevent crime, supply information necessary to aid an investigation or to establish probable cause, or further a legitimate, ancillary purpose. In such

³³ *Id.* at 1177.

³⁴ *Socialist Workers Party v. Attorney Gen.*, 510 F.2d 253, 255 (2d Cir. 1974). Thus far, courts have not chosen to pursue the alternative approach of requiring a warrant that would issue upon a showing of less than probable cause.

³⁵ See KERNER REPORT, *supra* note 6, at 269.

³⁶ 408 U.S. at 5-6.

³⁷ See CHURCH COMMITTEE FINAL REPORT, *supra* note 10, bk. III, at 40-61.

cases, some lower courts gradually fashioned a narrow body of law upon which plaintiffs could rely. The *Laird* Court had conceded that governmental conduct affecting first amendment rights would be actionable if it were "proscriptive."³⁸ Lower courts held that surveillance tactics may be deemed "proscriptive" if they have a concrete effect on the life of a subject of an investigation, apart from mere personal feelings of outrage, and if the police use the tactics for the purpose of violating constitutional rights.³⁹

Thus, some federal courts have shaped a sort of constitutional prima facie tort requiring actual injury and malicious intent. Proof of deliberate disruption of political activity by police satisfies both the intent and the injury requirements. Courts have held that the dissemination of information in political files to persons outside the ambit of police investigation may be actionable as well.⁴⁰ Finally, courts have permitted plaintiffs to prove their case by drawing an inference of unlawful intent from a combination of extensive surveillance over political activities and the lack of any legitimate law enforcement purpose in conducting the surveillance.⁴¹ Thus although the *Laird* decision seemingly foreclosed the possibility of a cause of action to limit police surveillance activities, some lower courts have developed a slim set of substantive rights against political surveillance. The law has developed to the point where an investigation may be held "proscriptive" and therefore actionable if it is done entirely for political, rather than law enforcement purposes.

Even though plaintiffs in suits brought against police for improper surveillance may be able to state a claim in certain circumstances, they still may have difficulty obtaining the relief they desire. Although some lower courts have fashioned limited substantive rights against political surveillance, the Supreme Court created procedural difficulties for plaintiffs by its decision in *Rizzo v. Goode*.⁴² The plaintiffs in *Rizzo* sought relief for an alleged pattern of police brutality by the Philadelphia police department. They proved some twenty incidents of police abuse, a

³⁸ 408 U.S. at 11.

³⁹ See *Jabara v. Kelley*, 476 F. Supp. 561, 567-69 (E.D. Mich. 1979), *vacated on other grounds*, 691 F.2d 272 (6th Cir. 1982); *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 149-51 (D.D.C. 1976); *Handschu v. Special Servs. Div.*, 349 F. Supp. 766, 770 (S.D.N.Y. 1972).

⁴⁰ See *Philadelphia Yearly Meeting of the Religious Soc'y of Friends v. Tate*, 519 F.2d 1335, 1338 (3d Cir. 1975); *Jabara v. Kelley*, 476 F. Supp. 561, 573 (E.D. Mich. 1979) (quoting *Philadelphia Yearly Meeting*), *vacated on other grounds*, 691 F.2d 272 (6th Cir. 1982); *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 150-51 (D.D.C. 1976) (citing *Philadelphia Yearly Meeting*).

⁴¹ See *Jabara v. Kelley*, 476 F. Supp. 561, 568-69, 574-75 (E.D. Mich. 1979) (quoting *Berlin*), *vacated on other grounds*, 691 F.2d 272 (6th Cir. 1982); *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 151 (D.D.C. 1976).

⁴² 423 U.S. 362 (1976).

showing sufficient to satisfy the lower court of the existence of a pattern of abuse.⁴³ The district judge ordered the defendants to establish a formal procedure for citizen complaints.⁴⁴ The Supreme Court reversed, finding that the plaintiffs had failed to prove a purposeful pattern of behavior.⁴⁵ The Court specifically rejected the relief ordered below,⁴⁶ following a developing doctrine that "[r]emedial power is bounded by constitutional right."⁴⁷ The Court further held that in structuring relief a federal court should not intervene as deeply in the internal affairs of a local agency, especially one concerned with law enforcement, as had the district court.⁴⁸

After the Court's decision in *Rizzo*, the federal courts still could entertain cases for institutional reform of police practices if the plaintiff pleaded and proved a well-defined motive and pattern of behavior on the part of superior officials.⁴⁹ But the *Rizzo* Court clearly indicated to federal judges that they ought to be chary of offering any systematic or detailed relief in such cases. Given the Court's message in *Rizzo*, plaintiffs increasingly chose to repair to the state courts, particularly in jurisdictions where the courts were at all hospitable.

In the face of substantive and procedural doctrinal problems, cases for institutional reform of local political surveillance went forward. Because these cases were directed against police practices that were both very secret and very important to the government, the cases were among the most ambitious of all public law litigations. Fortunately for the plaintiffs, the political climate after the Watergate scandal and the Church Committee investigations sometimes favored reform.⁵⁰ Proponents of reform did not limit themselves to a judicial resolution; in addition to bringing suit in state and federal court, they sought a legislative solution. In seeking legislative action, however, they were faced with the recurring problems, in lobbying for reform, of getting on the legislative agenda and then of securing a favorable result. As the following examination of the results of lobbying and litigation activities in six cities and two states illustrates, the relief obtained was remarkably uniform and generally less comprehensive than anticipated.

⁴³ See *id.* at 373.

⁴⁴ See *id.* at 364-65; see also Council of Orgs. on Philadelphia Police Accountability & Responsibility v. *Rizzo*, 357 F. Supp. 1289, 1322 (E.D. Pa. 1973).

⁴⁵ 423 U.S. at 375.

⁴⁶ See *id.* at 380-81.

⁴⁷ Chayes, *Public Law Litigation*, *supra* note 16, at 51; see also *Special Project: The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784, 799, 854-55 (1978) [hereinafter cited as *Special Project*].

⁴⁸ *Rizzo*, 423 U.S. at 377-79.

⁴⁹ See *Allee v. Medrano*, 416 U.S. 802, 815-16 (1974).

⁵⁰ See *supra* text accompanying notes 11-13.

II

ADMINISTRATIVE REMEDY: NEW JERSEY STATE POLICE

Prompted by the major urban riots of the sixties, especially the Newark riot of 1967, and on the advice of the Kerner Commission, the Attorney General of New Jersey sought to strengthen the intelligence capabilities of the state police.⁵¹ The Attorney General issued a memorandum to local officials entitled "Civil Disorders—the Role of Local, County and State Government" in which he wrote: "The State Police Central Security Unit has distributed Security Summary Reports (Form 421) and Security Incident Reports (Form 420) . . . to each police department. . . . We urge you to see that this vital intelligence is communicated to this central bureau for evaluation and dissemination."⁵² Police were to use the Security Incident form to report events such as "civil disturbance[s], riot[s], rall[ies], protest[s], demonstration[s], march[es], confrontation[s], etc."⁵³ They were to use the Security Summary form to collect information on individuals. The incident report solicited the names of the organizations and leaders involved in a disturbance together with a characterization, such as "left-wing, right-wing, Civil Rights";⁵⁴ the summary report sought the names of associates, memberships, and a "record of past activities."⁵⁵

In *Anderson v. Sills*,⁵⁶ activists brought suit in New Jersey state court protesting the policy enunciated in the memorandum and the use of the report forms. *Anderson*, decided on appeal two years before *Laird v. Tatum*, was one of the first of the major cases seeking systematic limits on political surveillance. Not one of the most successful of police surveillance cases, *Anderson* anticipated many of the problems that were to plague the plaintiffs in similar cases in the succeeding fifteen years. The result in *Anderson* also presaged some elements of future solutions.

The *Anderson* plaintiffs, urban activists and a civil rights organization, sought from the New Jersey courts declaratory and injunctive relief on the ground that the memorandum and the forms were overly broad under the first amendment. In response to the Attorney General's motion to dismiss, the plaintiffs moved for summary judgment. The lower court, in those palmy days for civil rights cases, granted the plaintiffs' motion.⁵⁷ In reversing and remanding,⁵⁸ the New Jersey Supreme

⁵¹ See *Anderson v. Sills*, 106 N.J. Super. 545, 547, 256 A.2d 298, 299 (Ch. Div. 1969), *rev'd*, 56 N.J. 210, 265 A.2d 678 (1970), *dismissed as moot*, 143 N.J. Super. 432, 363 A.2d 381 (Ch. Div. 1976).

⁵² *Anderson*, 106 N.J. Super. at 548, 256 A.2d at 300.

⁵³ *Id.* at 559, 256 A.2d at 306.

⁵⁴ *Id.* at 560, 256 A.2d at 307.

⁵⁵ *Id.* at 566, 256 A.2d at 313.

⁵⁶ 106 N.J. Super. 545, 256 A.2d 298 (Ch. Div. 1969), *rev'd*, 56 N.J. 210, 265 A.2d 678 (1970), *dismissed as moot*, 143 N.J. Super. 432, 363 A.2d 381 (Ch. Div. 1976).

⁵⁷ See *Anderson*, 106 N.J. Super. 545, 256 A.2d 298 (Ch. Div. 1969).

⁵⁸ 56 N.J. 210, 265 A.2d 678 (1970).

Court foreshadowed doctrines that later appeared in *Laird v. Tatum*.⁵⁹ The court found that the plaintiffs had failed to establish any personal injury and went on to discuss the necessity of police surveillance activities:

The police function is pervasive. It is not limited to the detection of past criminal events. Of at least equal importance is the responsibility to prevent crime. . . . In the current scene, the preventive role requires an awareness of group tensions and preparations to head off disasters as well as to deal with them if they appear. To that end the police must know what forces exist, what groups or organizations could be enmeshed in public disorders.⁶⁰

The court concluded that “[t]he basic approach must be that the executive branch may gather whatever information it reasonably believes to be necessary to enable it to perform the police roles, detectional and preventive. A court should not interfere in the absence of proof of bad faith or arbitrariness.”⁶¹ Finally, the court held that if on remand the lower court ultimately found any relief appropriate, “the restraint must be limited to the offensive matter.”⁶²

As early as 1970, then, the *Anderson* case opened the issues of standing and justiciability, of the proper scope of surveillance, and even of the limitation of the remedy to the scope of the right. Yet the New Jersey Supreme Court had not dismissed the case out of hand; the plaintiffs still were entitled to a trial. The possibility, however tenuous, that the trial would lead to relief caused the state police to draft a new manual for its Central Security Unit (CSU) in a successful effort to moot the case.⁶³

The state police manual⁶⁴ is an elaborate administrative document purporting to establish policies for the collection of intelligence concerning “social-political organized crime activity.”⁶⁵ It requires the CSU to maintain files on “individuals and/or groups that pose an *actual threat of*

⁵⁹ 408 U.S. 1 (1972). Still later, the case was actually to be swallowed by the *Laird* ruling. See 143 N.J. Super. 432, 363 A.2d 381 (Ch. Div. 1976) (dismissing the action as moot); see also *infra* text accompanying note 63.

⁶⁰ 56 N.J. at 222, 265 A.2d at 684 (citation omitted).

⁶¹ *Id.* at 229, 265 A.2d at 688.

⁶² *Id.* at 230, 265 A.2d at 689.

⁶³ See 143 N.J. Super. 432, 363 A.2d 381 (Ch. Div. 1976).

⁶⁴ DEPARTMENT OF LAW AND PUBLIC SAFETY DIVISION OF NEW JERSEY STATE POLICE, NEW JERSEY STATE POLICE CENTRAL SECURITY UNIT MANUAL DELINEATING THE SCOPE — FUNCTIONS AND OPERATIONS (released Feb. 10, 1976).

⁶⁵ *Id.* at 8. The manual defines “social political organized crime” as “a group of persons structured for the purpose of engaging in a *continuing course of criminal activity* wherein the desired goal is a change in the existing political and/or socio-economic structure for the purpose of destroying, modifying or weakening the structure itself.” *Id.* at 28 (emphasis in original).

inciting violent confrontation."⁶⁶ This standard, viewed in isolation, places virtually no restraint on the collection of intelligence. Thus, of greater interest are the activities the manual prohibits and the bureaucratic procedures it requires for the collection and dissemination of information.

The manual forbids the collection of data about an individual "merely" because of the individual's race or political affiliation or because the individual supports unpopular causes.⁶⁷ It prohibits the use of an "Agent Provocateur," and the use of confidential information "for political and/or economic purposes."⁶⁸ The manual mandates that CSU officers may conduct photographic surveillance or disseminate information to other units only with the approval of the head of the Unit.⁶⁹ The manual further limits dissemination by requiring that the recipients be law enforcement personnel.⁷⁰ Finally, the manual dictates that the head of the Unit must conduct an annual audit and "purge" outdated or "unreliable" information.⁷¹

The restraints set forth in the manual presage the pattern for later cases. By the middle of the seventies, scandal about surveillance abuses and the substantive limits on surveillance suggested by the courts made it untenable for the police to admit that they wished to conduct surveillance for political reasons. They therefore claimed that any such surveillance was incidental to a criminal investigation. The natural solution, which appears repeatedly in one form or another, was for the police to agree to refrain from surveillance for *purely* political reasons, to impose administrative restrictions on the use of intrusive methods, and to limit the dissemination of information. Even with the limited bargaining power they had left after the decision of the New Jersey Supreme Court, the *Anderson* plaintiffs were able to accomplish this much as a purely administrative remedy.

The chief weakness of the New Jersey State Police Manual as a means of remedying surveillance abuses is that the manual represents only an administrative solution. There is no guarantee that the police will follow the manual, nor is there any provision for punishment if the CSU ignores the manual's restraints. If the Unit does follow the manual and finds its limits too restrictive, the police are free to change it.⁷² In sum, the New Jersey State Police Manual represents a very limited victory for critics of police surveillance.

⁶⁶ *Id.* at 9 (emphasis in original).

⁶⁷ *See id.*

⁶⁸ *Id.* at 9-10.

⁶⁹ *See id.* at 12.

⁷⁰ *See id.* at 20-21.

⁷¹ *Id.* at 18-19.

⁷² *See* Elliff, *The Attorney General's Guidelines for FBI Investigations*, 69 CORNELL L. REV. 785 (1984) (concerning changes in United States Justice Department guidelines); *see also infra* text accompanying notes 90, 209-18.

III

FEDERAL LITIGATION: NEW YORK, CHICAGO, AND
MEMPHIS

In the mid-seventies, critics of political surveillance in New York, Chicago, and Memphis sought to control the local police through federal civil rights actions. In addition to facing pervasive substantive law limitations peculiar to police surveillance cases, plaintiffs confronted the problems inherent in classic public law⁷³ litigation: pleading a pattern of abuse and an unlawful purpose, notifying the persons who might be affected, conducting discovery from recalcitrant defendants, and fashioning a suitable remedy. All three cases were pending at the same time and all were interdependent to some extent.

In 1971, activists brought the first of these federal cases, *Handschu v. Special Services Division*,⁷⁴ to curtail the surveillance practices of the New York City Police, which had been revealed in the political trials of the late sixties.⁷⁵ Proponents of reform expected great things from civil rights actions against police abuses.⁷⁶ The plaintiffs' attorneys in *Handschu* hoped, for example, that the courts might finally require police to secure a judicial warrant before conducting political surveillance.

The *Handschu* complaint was initially filed on behalf of a class of people who "object to governmental policies or social conditions."⁷⁷ The complaint alleged that the Special Services Division of the New York City Police Department had maintained political dossiers, used covert civilian informers and undercover police officers to infiltrate political groups, and engaged in overt interrogation and surveillance for the purpose of intimidating persons from participating in political activities.⁷⁸ It further alleged that the police had incited the subject persons and groups to commit crimes, "fingered" activists later subjected to acts of brutality, and unlawfully used electronic surveillance.⁷⁹ Significantly, as it later turned out, the complaint claimed that all these acts were "designed to chill, deter, discourage and inhibit plaintiffs . . . from freely associating and communicating with others to advance . . . their

⁷³ See *supra* text accompanying note 16.

⁷⁴ No. 71-2203 (S.D.N.Y. filed May 18, 1971) (settlement order stipulation signed by attorneys Dec. 30, 1980, but not yet signed by court).

⁷⁵ See, e.g., S. BLACKBURN, *WHITE JUSTICE: BLACK EXPERIENCE TODAY IN AMERICA'S COURTROOMS* (1971); P. CHEVICNY, *supra* note 1; P. ZIMROTH, *PERVERSIONS OF JUSTICE* (1974).

⁷⁶ See, e.g., Note, *Use of § 1983 to Remedy Unconstitutional Police Conduct: Guarding the Guards*, 5 HARV. C.R.-C.L. L. REV. 104 (1970); Note, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct*, 78 YALE L.J. 143 (1968).

⁷⁷ Complaint at 2, para. 6, *Handschu v. Special Servs. Div.*, No. 71-2203 (S.D.N.Y. filed May 18, 1971).

⁷⁸ See *id.* at 5-10, paras. 28-50.

⁷⁹ See *id.* at 6-13, 17, paras. 35, 37, 40, 42-43, 47, 63-66, 87-88.

dissenting beliefs and ideas."⁸⁰

From today's perspective, some of the relief sought is surprising. Not only did the plaintiffs ask that the court enjoin the use of informers, infiltrators, and electronic surveillance "except where authorized by appropriate authority,"⁸¹ but they also sought the destruction of the police department's political files.⁸² Since the passage of the Freedom of Information Act⁸³ and investigations of governmental misconduct, such files are viewed as a precious historical and political resource. The preservation of the files against the wishes of the police who claim that they would prefer to destroy them has become a major issue in many cases, often more important than any other relief.

The defendants responded to the plaintiffs' claims in a number of ways, beginning with a motion to dismiss for failure to state a claim. The Police Commissioner of the City of New York, Patrick V. Murphy, submitted an affidavit in support of the motion in which he blandly asserted that one mission of the Special Services Division was the collection of information about "groups or individuals whose purpose is the disruption of governmental activities or the peace and harmony of the community"⁸⁴ and that during the sixties the Division had increased its "close surveillance activities of groups that because of their conduct or rhetoric may pose a threat to life, property, or governmental administration."⁸⁵ The defendants appear to have had little of the sensitivity to public fear of surveillance that was to develop among senior officials during the next ten years.

Judge Edward Weinfeld, writing immediately after the Supreme Court decided *Laird v. Tatum*,⁸⁶ distinguished *Laird* and denied the defendants' motion to dismiss. He set the tone for future cases by holding that disruption of organizations, provocation to commit crime, and indiscriminate dissemination of files, when combined with an allegation of unlawful purpose, were sufficient to constitute a specific harm to the plaintiffs.⁸⁷

The defendants then sought to blunt the effect of the case by internal housecleaning, a measure that was to become a familiar pattern in

⁸⁰ *Id.* at 5-6, para. 29.

⁸¹ *Id.* at 20, para. 100(5).

⁸² *See id.* para. 100(3).

⁸³ Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (1982)).

⁸⁴ Affidavit of Patrick V. Murphy at 7, para. 25, *Handschu* (quoting Murphy's order dated June 24, 1971).

⁸⁵ *Id.* at 3-4, para. 12; *see also* Burnham, *City Has Its Own Special Police to Keep Dossiers on Dissidents*, N.Y. Times, Aug. 8, 1969, at 30, col. 5.

⁸⁶ 408 U.S. 1 (1972).

⁸⁷ *See Handschu v. Special Servs. Div.*, 349 F. Supp. 766, 770 (S.D.N.Y. 1972).

other cities.⁸⁸ The Special Services Division undertook a "purge" of their files. They set aside more than a million documents but did not destroy them, as police departments in other cases were to do. The Department also established guidelines in 1973 for the Special Services Division.⁸⁹ Although the guidelines were entirely internal, contained no sanctions, and could be ignored or changed at any time,⁹⁰ they constituted a step forward simply because they recognized limitations on political surveillance.

Finally, the defendants successfully sought to limit the plaintiffs' discovery to issues that were relevant to the establishment of a class.⁹¹ For years they deflected the discovery into collateral issues and motions with the result that as late as 1978 the plaintiffs still were seeking discovery on the issue of the establishment of the class.⁹²

While the case in New York was shunted off onto a siding of discovery, lawyers and investigators in Chicago were collecting information for a similar action. Members of the Chicago Police Department's Subversive Unit infiltrated the Alliance to End Repression, one of the groups planning the Chicago litigation,⁹³ as they apparently had done with a number of other organizations. Finding that the Alliance intended to file suit, the Department in 1974 destroyed files on thousands of individuals and organizations.⁹⁴ The Alliance filed suit almost immediately

⁸⁸ See, e.g., *supra* text accompanying note 103 (Chicago); *supra* text accompanying note 110 (Memphis).

⁸⁹ See Defendants' Answers and Objections to Plaintiffs' Interrogatories, Exhibit 1, *Handschu v. Special Servs. Div.*, No. 71-2203 (S.D.N.Y. filed May 18, 1971) ("public security" guidelines).

⁹⁰ See also Burnham, *Police Share Political Files With Others*, N.Y. Times, Mar. 27, 1973, at 38, col. 1.

In fact, the New York Police political squad apparently paid no attention to the guidelines. In a criminal case, *People v. Collier*, 85 Misc. 2d 529, 376 N.Y.S.2d 954 (N.Y. County Ct. 1975), the case was dismissed because of misconduct in political surveillance. Surveillance had been conducted over a period of two years, during which time the guidelines went into effect. Yet the officials planning and supervising the investigation apparently made no effort to tailor the investigation to comply with the new guidelines. *Id.* at 537-38, 376 N.Y.S.2d at 964-65.

⁹¹ Defendants' Answers and Objections To Plaintiffs' Interrogatories at 1, *Handschu* (quoting Judge Stewart's order of Aug. 8, 1973, granting defendants' motion to defer class action determination pending discovery and limiting discovery to that necessary to define class).

⁹² In 1978, plaintiffs' motion for sanctions for defendants' recalcitrance in answering questions directed only at the establishment of the class was denied. See Transcript of Argument (Aug. 2, 1978) at 4, *Handschu v. Special Servs. Div.*, No. 71-2203 (S.D.N.Y. filed May 18, 1971) (transcript of argument before Magistrate Sol Schreiber).

⁹³ See *Alliance to End Repression v. Rochford*, 75 F.R.D. 435 (N.D. Ill. 1976), *aff'd*, 558 F.2d 1031 (7th Cir. 1977); Gutman, *Combating Defendants' Obstructionism in the Discovery Process*, 55 U. DET. J. URB. L. 983 (1978) (discussing in detail discovery phase of Chicago litigation).

⁹⁴ See *Alliance to End Repression v. Rochford*, 75 F.R.D. 438 (N.D. Ill. 1976); Gutman, *supra* note 93, at 985, 988.

thereafter.⁹⁵ The American Civil Liberties Union (ACLU) brought a similar action the following year,⁹⁶ and the two cases were consolidated for discovery.⁹⁷

For the first few months, the Chicago cases closely followed the course of the New York litigation. The *Alliance* complaint, like the complaint in *Handschu v. Special Services Division*, claimed that the Chicago Police Department's political squad (then named the Security Section) operated under a general mandate to gather intelligence "on those organizations or individuals which present a threat to the security of the country, state, or city."⁹⁸ The plaintiffs alleged that the police had engaged in surveillance, wiretapping, dissemination of information, infiltration of private meetings and organizations, summary punishment, provocation, and unlawful entries and seizures,⁹⁹ all for the purpose of "chilling, harassing, intimidating, and disrupting the plaintiffs' exercise of their First Amendment rights."¹⁰⁰ The complaint sought damages for individuals and injunctive relief on behalf of the class, including destruction of the files.¹⁰¹ The defendants made motions to dismiss in both cases, which the court denied with heavy reliance on the reasoning and the precedent of Judge Weinfeld's decision in *Handschu*.¹⁰²

After the court's denial of the motion to dismiss, the resemblance between the New York and Chicago cases faded. The Chicago plaintiffs forged ahead with their discovery. The police had made an enormous tactical error in infiltrating the Alliance to End Repression and in destroying their own political surveillance files. The district court, believing that the police had acted in bad faith, issued a series of orders enforcing discovery and imposing sanctions on the defendants, which included making presumptive findings of fact against them.¹⁰³ In 1976,

⁹⁵ See Complaint, *Alliance to End Repression v. Rochford*, No. 74-3268 (N.D. Ill. filed Nov. 13, 1974).

⁹⁶ See Complaint, *ACLU v. City of Chicago*, No. 75-3295 (N.D. Ill. filed Oct. 3, 1975).

⁹⁷ See *Alliance to End Repression v. City of Chicago*, 561 F. Supp. 537 (N.D. Ill. 1982) (approving settlement with defendants City of Chicago and Department of Defense); *Alliance to End Repression v. City of Chicago*, 91 F.R.D. 182 (N.D. Ill. 1981) (approving settlement with defendants FBI, Justice Department, CIA, and certain individuals).

⁹⁸ Complaint at 11-12, paras. 60, 62, *Alliance to End Repression v. Rochford*, No. 74-3268 (N.D. Ill. filed Nov. 13, 1974).

⁹⁹ *Id.* at 11-34, paras. 62-142.

¹⁰⁰ *Id.* at 12, para. 63. The complaint filed by the ACLU was substantially the same as that filed by the Alliance. The ACLU complaint added claims against federal surveillance, which are not discussed here. See Complaint at 12-38, *ACLU v. City of Chicago*, No. 75-3295 (N.D. Ill. filed Oct. 3, 1975).

¹⁰¹ Complaint at 34-35, para. 4, *Alliance to End Repression v. Rochford*, No. 74-3268 (N.D. Ill. filed Nov. 13, 1974).

¹⁰² See *ACLU v. City of Chicago*, 431 F. Supp. 25 (N.D. Ill. 1976); *Alliance to End Repression v. Rochford*, 407 F. Supp. 115 (N.D. Ill. 1975).

¹⁰³ See *Alliance to End Repression v. Rochford*, 75 F.R.D. 428 (N.D. Ill. 1976) (denying defendants' motion to stop oral deposition); *Alliance to End Repression v. Rochford*, 75 F.R.D. 435 (N.D. Ill. 1976) (enjoining defendants from joining plaintiffs' legal team and from

Judge Kirkland also imposed on defendants the burden of proving that they did not "[i]nstruct informers and undercover agents to provoke, encourage, and solicit members of the target organization to participate in unlawful activities."¹⁰⁴

The plaintiffs' discovery revealed that the Chicago Subversive Unit had in fact used surveillance for political purposes. Officers admitted that in 1967 they had broken into the offices of the Chicago Peace Council, Women for Peace, the Fellowship of Reconciliation, and the Latin American Defense Organization and had stolen files, membership lists, correspondence and office supplies, for the purpose of "disrupting" the organizations and "destroy[ing] the left."¹⁰⁵ The infiltration of the Alliance to End Repression,¹⁰⁶ an organization established to reform the Chicago Police Department's surveillance tactics, was itself an act the department could not justify as necessary to a "criminal" investigation.

By 1977, the plaintiffs had obtained discovery of the Chicago political surveillance files under a protective order.¹⁰⁷ The defendants were not in a position to withstand more bad publicity and became more interested in settling the suit.

Before discussing the final Chicago settlement, it will be helpful to examine the decree previously entered in the Memphis litigation. Activists in Memphis brought a federal civil rights suit against the Memphis Police Department's political surveillance activities¹⁰⁸ while the Chicago case was moving into discovery in 1976, but settled the case in 1978, three years before the final settlement of the *Alliance* case. The Memphis settlement, the first of its kind, undoubtedly influenced the final resolution of the *Alliance* case.

The Memphis case, *Kendrick v. Chandler*,¹⁰⁹ was prompted by a newspaper report that the Memphis police were on the verge of destroy-

using any evidence so obtained), *aff'd*, 558 F.2d 1031 (7th Cir. 1977); *Alliance to End Repression v. Rochford*, 75 F.R.D. 438 (N.D. Ill. 1976) (imposing sanction on defendants for failure to answer interrogatories); Gutman, *supra* note 93, at 992.

¹⁰⁴ *Alliance to End Repression v. Rochford*, 75 F.R.D. 438, 441 (N.D. Ill. 1976).

¹⁰⁵ *A Red Squadder Deposed*, RIGHTS, Oct.-Nov. 1981, at 6, 7-8 (excerpt of deposition of John Valkenburg, patrolman with the Intelligence Division of the Chicago police department); see ACLU Plaintiffs' Response and Statement to Class Members Regarding Objections of Certain *Alliance* Plaintiffs to the Injunction Settlement with the City of Chicago, *Alliance to End Repression v. City of Chicago*, No. 74-3268 (N.D. Ill. filed Nov. 13, 1974); see also *Improper Police Intelligence Activities: A Report by the Extended March 1975 Cook County Grand Jury*, FIRST PRINCIPLES, Jan. 1976, at 3 (detailing improper gathering and dissemination of intelligence data by members of the Security Section of the Chicago Police Department's Intelligence Division).

¹⁰⁶ See *supra* note 93 and accompanying text.

¹⁰⁷ See *Alliance to End Repression v. City of Chicago*, 561 F. Supp. 537, 542-43 (N.D. Ill. 1982) (paras. 26-28 of Findings of Fact in settlement with City of Chicago and Department of Defense).

¹⁰⁸ See Complaint, *Kendrick v. Chandler*, No. 76-449 (W.D. Tenn. filed Sept. 10, 1976).

¹⁰⁹ No. 76-449 (W.D. Tenn. Sept. 14, 1978).

ing their political files.¹¹⁰ The plaintiffs obtained a temporary restraining order enjoining the defendants from destroying the files, but the mayor and the chief of police claimed to have destroyed them before the order could be served. Although the officials' action subjected the defendants to future sanctions of the court, the mere threat of sanctions probably would not have been enough to induce the defendants to settle. When copies of highly embarrassing bits of the "destroyed" files turned up in police department offices outside the political section, however, the defendants yielded to the double pressure of bad publicity and the possibility of an adverse court ruling.¹¹¹ The injunction entered pursuant to the consent judgment in Memphis was the first of its kind and thus influential in subsequent cases.

Prospective relief of the sort sought in police surveillance cases is particularly difficult to construct because the relief inevitably limits what courts view as the broad discretion traditionally exercised by the police in conducting investigations. Part of the solution is to forbid all surveillance undertaken purely for political purposes. This approach was used in the Memphis decree and is consistent with the results of the case law. The Memphis decree provides that the defendants shall not operate any bureau, use any electronic surveillance, employ any informant or infiltrator, disseminate any damaging information, or engage in any other action, such as recording names or taking photographs at a demonstration, "for the purpose of political intelligence."¹¹²

By the mid-seventies, police departments could accept this sort of provision because they claimed that they no longer undertook surveillance for political purposes. The more difficult problem from the police departments' point of view arose in bona fide criminal investigations of criminal acts that happened to contain political elements. The police believed that judgments about such "mixed" investigations would have to be made on a case-by-case basis. Critics of police surveillance believed that if the judgments were made ad hoc by officers in the field, the mixed investigations would become indistinguishable from political intelligence investigations.

The Memphis decree contains the framework of a solution to the "mixed" investigation problem. It provides that every "lawful investi-

¹¹⁰ See *Kendrick v. Chandler*, No. 76-449 (W.D. Tenn. Sept. 10, 1976) (order granting temporary restraining order), *dissolved as moot*, *Kendrick v. Chandler*, No. 76-449 (W.D. Tenn. Sept. 20, 1976) (order dissolving temporary restraining order and denying temporary injunction).

¹¹¹ See *Domestic Intelligence Reform: A Court Order Against a Red Squad*, FIRST PRINCIPLES, Oct. 1978, at 1; Conversation with Jack Novik, Staff Attorney, ACLU (Aug. 1983).

¹¹² *Kendrick v. Chandler*, No. 76-449, at 3-4, paras. C-F (W.D. Tenn. Sept. 14, 1978) (Order, Judgment, and Decree). The decree defines "political intelligence" as "the gathering, indexing, filing, maintenance, storage or dissemination of information, or any other investigative activity, relating to any person's beliefs, opinions, associations or other exercise of First Amendment rights." *Id.* at 2, para. B(4).

gation of criminal conduct which investigation may result in the collection of information about the exercise of First Amendment rights," requires the approval of the Director of Police.¹¹³ The Director's authorization expires after ninety days, although it is renewable, and is to state in writing that:

- a. The investigation does not violate the provisions of this Decree; and
- b. the expected collection of information about, or interference with, First Amendment rights is unavoidably necessary for the proper conduct of the investigation; and
- c. Every reasonable precaution has been employed to minimize the collection of information about, or interference with, First Amendment rights; and
- d. the investigation employs the least intrusive technique necessary to obtain the information.¹¹⁴

These provisions of the decree at least would require the department to think carefully before initiating surveillance and to create a "paper trail" by which their thinking could be retraced. The Memphis decree also prohibits the police department from disseminating personal information, even if obtained in accordance with the decree, except to "another governmental law enforcement agency then engaged in a lawful investigation of criminal conduct."¹¹⁵

Finally, the most important feature of the Memphis decree, and others like it, is simply that the decree is an injunction. As such, the decree subjects the police to the continuing jurisdiction and sanctions of a federal court and cannot be changed at the whim of a new police administration.¹¹⁶ Even the most innocuous provisions of a decree, such as a prohibition of surveillance for purely political purposes, may become powerful tools for the public if police policies do not comply with the terms of the decree.

The Memphis decree was consistent with then existing case law concerning politically motivated surveillance and dissemination but outdistanced the case law in bureaucratic control of discretion.¹¹⁷ Although the Police Director was comfortable with the decree,¹¹⁸ critics of

¹¹³ *Id.* at 4, para. G(1).

¹¹⁴ *Id.* at 4-5, para. G(2).

¹¹⁵ *Id.* at 5, para. H(2).

¹¹⁶ In the Chicago litigation against the Federal Bureau of Investigation (FBI), for example, Judge Getzendanner enjoined certain changes in the United States Justice Department "Guidelines on Domestic Security/Terrorism Investigations" on the ground that they violated provisions of the settlement in that case. *See Alliance to End Repression v. City of Chicago*, 561 F. Supp. 575 (N.D. Ill. 1982).

¹¹⁷ *See supra* notes 18-49 and accompanying text.

¹¹⁸ E.W. Chapman, Director of the Memphis Police Department, stated: "Since I've been here [since 1976] I have insisted that any surveillance be done in connection with an ongoing investigation. [The ACLU] wrote the decree around the way I operate the depart-

political surveillance could have been dissatisfied with it for a number of reasons. The decree failed to set forth any standard to govern decisions to initiate mixed criminal-political investigations, to wrest control of such decisions from the police department, or to provide any appeal or audit of the decision of the Police Director. In fairness, these are recurrent and intractable problems encountered in all the cases and ordinances discussed in this article.

The plaintiffs in the Chicago federal case incorporated the basic protections of the Memphis decree into their settlement, but attempted to avoid its shortcomings. The negotiated agreement¹¹⁹ in the Chicago litigation was wisely written as a "political" document, intended to obtain public support as well as to establish rules governing the initiation and conduct of police political surveillance. The agreement's statement of principles recognizes the importance of the first and fourth amendments and of effective law enforcement, and announces a city policy that "[n]o investigation shall be conducted for political, religious or personal reasons. First Amendment information may be gathered only for valid governmental purposes in accordance with this Judgment."¹²⁰ The Chicago agreement limits the applicability of its provisions to investigative activities "directed toward First Amendment conduct",¹²¹ ordinary criminal investigations or investigations "that merely [include] incidental references to [first amendment] conduct"¹²² are not subject to the decree's

ment and I don't think it will change our present mode of operations." POLICE THREAT, *supra* note 8, at 77.

¹¹⁹ Alliance to End Repression v. City of Chicago, 561 F. Supp. 537 (N.D. Ill. 1982) (Agreed Order, Judgment and Decree). The decree does not settle individual damage claims.

¹²⁰ *Id.* at 560 (Preliminary Statement of Principles § D(1)). A subsequent section forbids harassment of any person because of the person's first amendment conduct. *See id.* at 562 (Agreed Order, Judgment and Decree § 2.2).

¹²¹ *Id.* at 561 (Agreed Order, Judgment and Decree § 1.1) (emphasis in original) Section 1.5 of the decree defines this as "conduct protected by . . . the First Amendment," *id.* at 562, including, for example, the right to hold and to communicate beliefs, *id.* (Agreed Order, Judgment and Decree § 1.5.1-.5.2), to associate and assemble, *id.* (Agreed Order, Judgment and Decree § 1.5.3), to "advocate alternative systems of government," *id.* (Agreed Order, Judgment and Decree § 1.5.5), and to advocate "the use of force or of law violation, except where such advocacy is directed to inciting or producing imminent lawless conduct and is likely to incite or produce such action," *id.* (Agreed Order, Judgment and Decree § 1.5.4) (quoting *Brandenburg v. Ohio*, 395 U.S. 444 (1969)). The decree authorizes a preliminary inquiry to determine the facts under this standard, *id.* (Agreed Order, Judgment and Decree § 1.5.4), but does not authorize full investigations except on a showing of reasonable suspicion of crime, *id.* at 564 (Agreed Order, Judgment and Decree § 3.2.2.), and in accordance with standards under § 3.2 of the decree. *See infra* note 136.

¹²² *Id.* at 561 (Agreed Order, Judgment and Decree § 1.1.1) (emphasis in original); *see also id.* at 561-62 (Agreed Order, Judgment and Decree § 1 *passim*). Section 1.4 of the decree defines "incidental reference" to be one where the conduct itself is not a significant issue or the focus of the investigation, and the information and the reference is relevant to the law enforcement purpose. *Id.* at 562 (Agreed Order, Judgment and Decree § 1.4.1-4.2). An example of an incidental reference is "information that a community organization was a burglary victim." *Id.* (Agreed Order, Judgment and Decree § 1.4).

restraints. The police may disseminate information garnered through surveillance only to Chicago and federal law enforcement authorities in connection with criminal investigations or "to another governmental law enforcement agency upon its signed written request certifying that the information is needed in a criminal investigation based upon *reasonable suspicion* of crime."¹²³

In all investigations directed toward first amendment conduct, the Chicago decree prohibits the collection of information about first amendment activities unless it is "necessary to and inseparable from the purpose of the investigation."¹²⁴ The decree requires that police use minimization procedures to reduce an investigation's impact on first amendment conduct.¹²⁵ The Superintendent of Police or a member of his executive staff must authorize all such investigations in writing¹²⁶ and explain the factual basis of the investigation.¹²⁷ The authorization lasts only thirty days, although it may be renewed.¹²⁸ The decree also provides that police investigators may direct intrusive methods of investigation, such as the use of informers, infiltrators, or any form of electronic surveillance and mail covers, against first amendment conduct only with similar written authorization and minimization procedures.¹²⁹ One of the most creative sections of the decree forbids use of the intrusive method of "nonconsensual *seizure*,"¹³⁰ defined as the "acquisition of a *person's* private papers . . . without a judicial warrant or the *person's* prior express consent."¹³¹ This provision clarifies by decree an area of law that is still in conflict;¹³² it implies that obtaining personal documents by stealth or misrepresentation is a "seizure" in the fourth amendment sense,¹³³ and requires police to secure a judicial warrant before engaging in such activities.¹³⁴

The negotiating parties in the Chicago litigation tried to foresee and provide for all the contingencies that might arise in connection with the general order-keeping functions of the police. As a result, the Chicago decree contains more than the single distinction between "criminal" and "political" investigations. The decree provides that the police

¹²³ *Id.* at 564 (Agreed Order, Judgment and Decree § 3.1.6.4) (emphasis in original).

¹²⁴ *Id.* at 563 (Agreed Order, Judgment and Decree § 3.1.1).

¹²⁵ *See id.* (Agreed Order, Judgment and Decree § 3.1.2).

¹²⁶ *See id.* (Agreed Order, Judgment and Decree § 3.1.4).

¹²⁷ *See id.* (Agreed Order, Judgment and Decree § 3.1.4.1)

¹²⁸ *See id.* (Agreed Order, Judgment and Decree § 3.1.4.2).

¹²⁹ *Id.* at 567-68 (Agreed Order, Judgment and Decree § 3.6).

¹³⁰ *Id.* at 567 (Agreed Order, Judgment and Decree § 3.6.2.4) (emphasis in original).

¹³¹ *Id.* (Agreed Order, Judgment and Decree § 3.6.1.5) (emphasis in original).

¹³² *See Lewis v. United States*, 385 U.S. 206 (1966) (distinguishing *Gouled v. United States*, 255 U.S. 298 (1921)); Y. KAMISAR, W. LAFAYE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 489-90 (5th ed. 1980).

¹³³ *See Alliance to End Repression v. City of Chicago*, 561 F. Supp. 537, 567 (N.D. Ill. 1982) (Agreed Order, Judgment and Decree § 3.6).

¹³⁴ *Id.* (Agreed Order, Judgment and Decree § 3.6.2.4).

department may conduct investigations directed toward first amendment activity only in four classes of cases: criminal, dignitary protection, public gathering, or regulatory investigation.¹³⁵ The decree sets forth a thicket of standards that trigger the requirement of written executive permission for each category of investigation. Authorities may begin a criminal investigation only upon "reasonable *suspicion* based on specific and articulable facts that the subject has committed, is committing, or is about to commit a crime."¹³⁶ Police may initiate a dignitary protection investigation only upon a "reasonable *suspicion* that the subject(s) of the investigation poses a threat to the physical safety of the dignitary."¹³⁷ A public-gathering investigation, necessary to ensure traffic flow and public safety, may be begun without approval for the purpose of collecting announcements and making overt contact with the planners of the gathering or demonstration;¹³⁸ a more detailed investigation may be begun only on "reasonable *suspicion* that the *public gathering* is likely to produce an imminent and substantial breach of the peace or riot or that the information on a permit application is false"¹³⁹ A regulatory investigation directed at first amendment conduct, such as a license application, "shall be conducted solely for the purpose of fulfilling regulatory responsibilities"¹⁴⁰ Provisions such as these, honeycombed with details and exceptions, are obviously the fruit of compromise and the potential subject of future administrative errors.

The provisions prescribe use of the stop-and-frisk standard of reasonable suspicion rather than the more stringent probable cause standard in authorization decisions. Reasonable suspicion was chosen because probable cause is a standard for arrest and is thus a standard to be met at the close of an investigation; if police had to meet a probable cause standard at the beginning of an investigation, investigations arguably would be almost impossible to initiate.¹⁴¹

Finally, the Chicago decree provides for audits of its implementation by the Superintendent annually, by the Police Board (a civilian oversight body) as appropriate, and by an independent auditing firm at

¹³⁵ *Id.* at 563-68 (Agreed Order, Judgment and Decree § 3).

¹³⁶ *Id.* at 564 (Agreed Order, Judgment and Decree § 3.2.2) (footnote omitted) (emphasis in original). The standard is that for a stop-and-frisk. *See* Terry v. Ohio, 392 U.S. 1 (1968). The decree also provides for a short "emergency" period in which the police may conduct criminal investigations without executive written approval. *See* Alliance to End Repression v. City of Chicago, 561 F. Supp. 537, 564-65 (N.D. Ill. 1982) (Agreed Order, Judgment and Decree § 3.2.4).

¹³⁷ Alliance to End Repression v. City of Chicago, 561 F. Supp. 537, 565 (N.D. Ill. 1982) (Agreed Order, Judgment and Decree § 3.3.2) (emphasis in original).

¹³⁸ *See id.* at 566 (Agreed Order, Judgment and Decree § 3.4.4).

¹³⁹ *Id.* (Agreed Order, Judgment and Decree § 3.4.5) (emphasis in original).

¹⁴⁰ *Id.* at 567 (Agreed Order, Judgment and Decree § 3.5.1).

¹⁴¹ *See supra* notes 32-34 and accompanying text.

least every five years.¹⁴² The decree states that the auditors shall have access to all information except the identification of informants and matters related to current criminal investigations.¹⁴³

The Chicago decree thus contains the kernel of the Memphis settlement: isolation and prohibition of purely political investigations, limitations on dissemination, and establishment of bureaucratic review of mixed cases by superiors in the department. The Chicago decree, however, goes beyond the Memphis settlement by providing for separate controls on intrusive methods, an explicit standard to guide the Superintendent or his delegate in giving written approval, and an independent audit.

The class of plaintiffs established for the Chicago case consisted of all persons in the city "who engage or have engaged in lawful political, religious, educational or social activities and who, as a result of these activities, have been within the last five years, are now, or hereafter may be, subjected to"¹⁴⁴ the practices alleged against the defendants. The class definition swept in an enormous number of people, all of whom were entitled to comment on the decree and some of whom lodged objections to it.

The most substantial objection to the Chicago decree centered on the argument that the decree would legitimize some police spying; because the distinction between the forbidden and the permissible depended on the relatively fluid standard of reasonable suspicion, the police always could justify their spying by finding some excuse to term their investigation a criminal investigation. As the Socialist Workers Party protested, "this means when the cops want to get something on the people they think they ought to get something on they can do it."¹⁴⁵

This is a perennial objection,¹⁴⁶ to which there is no easy reply. A standard is always subject to linguistic manipulation, especially when the standard is administered internally, as is the Chicago decree. The malleability of an internally administered reasonable suspicion standard undoubtedly was one of the reasons behind the defendants' refusal to agree to a true warrant system administered by a neutral party for the approval of "mixed" investigations. But even the interposition of a neutral party would not entirely eliminate the problem of potential manipulation of the standard. Magistrates are notoriously compliant in

¹⁴² See *Alliance*, 561 F. Supp. at 568-69 (Agreed Order, Judgment and Decree § 5).

¹⁴³ See *id.* at 569 (Agreed Order, Judgment and Decree § 5.3).

¹⁴⁴ *Alliance to End Repression v. Rochford*, 565 F.2d 975, 976 (7th Cir. 1977).

¹⁴⁵ Socialist Workers Party (Chicago), *The Cause of Civil Liberties Is Not Served By the Chicago Red Squad Settlement: Why We Oppose "Lesser-Evilism" in the Fight for Democratic Rights 2* (1981) (pamphlet) [hereinafter cited as SWP Pamphlet]; see also *The Alliance/ACLU Settlements: A Dissenting Viewpoint from the Movement* (Oct. 2, 1981) (pamphlet).

¹⁴⁶ See, e.g., *infra* text accompanying note 198.

granting warrants, and even when they are not, nothing prevents an applicant from making representations that will satisfy an exacting official.¹⁴⁷

This principal complaint registered by critics of the Chicago settlement is, in the last analysis, a general objection to the use of legal language in decrees as a means of resolving social problems. The tenor of other objections¹⁴⁸ entered by the dissenting members of the class in the *Alliance* case evidenced the dissenters' unwillingness to settle the case on any terms. They wanted a trial, in which the misconduct of the defendants would be detailed in testimony and reported in the newspapers, thereby affecting public attitudes. By implication, the dissenters cared little if the trial resulted in a decree that was less favorable to the plaintiffs than the negotiated decree because the dissenters had no faith in the efficacy of any decree. The dissenters considered the case "political" not in the sense that it sought institutional and quasi-legislative change,¹⁴⁹ but in the sense that the discovery and trial were part of a process of political agitation and organization for change. In their view, the court and its resolution of the case was ancillary, in essence no more important than any other source of information. Thus, the dissenters judged any compromise counterproductive, because it tended to legitimize the police and the courts¹⁵⁰ and to preclude the publicity and potential for agitation available at trial.

The plaintiffs' attorneys could give no effective answer to objections rooted in such differences of principle, although they did point out that the objections misconceived the nature of the settlement process, and that the court had already found some facts about police wrongdoing.¹⁵¹ The question remains, given the amount of evidence of police wrongdoing they apparently possessed, why the lawyers did not simply take the case to trial and thus satisfy the objectors. Judge Getzendanner's Findings of Fact and Conclusions of Law Concerning the Settlement make clear why that would not have been a wise choice:

¹⁴⁷ See Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 570-71 (1983).

¹⁴⁸ See SWP Pamphlet, *supra* note 145, at 2; Letter from G. Flint Taylor, Dennis Cunningham & Jeffrey Haas, Chicago People's Law Office, to Richard Gutman (May 6, 1981) (containing statement of objection to *Alliance* settlement); Letter from Donna-Marie Gilligan, Attorney for the Socialist Workers Party and the Young Socialist Alliance, to Richard Gutman (Apr. 30, 1981) (containing statement of clients' objection to *Alliance* settlement). These objections concerned the settlement's failure to contain proof or admissions of illegal activities by the police.

¹⁴⁹ See *supra* note 16 and accompanying text.

¹⁵⁰ "It is . . . important that we guard against efforts to amend the police apparatus so as to separate people from each other, obscure the real target of police repression, and leave the basic apparatus intact." Open Letter from G. Flint Taylor & Brian Glick for the Chicago People's Law Office (May 1, 1981) (quoting Kenneth E. Tilsen's Keynote Address at the National Conference on Government Spying (Jan. 1977)).

¹⁵¹ See *supra* text accompanying notes 104-06.

The legal protections conferred upon the plaintiff classes by the proposed City of Chicago Settlement not only correspond well with the relief sought in the complaints, they also go far beyond the legal relief plaintiffs would likely have obtained if the cases had gone to trial. Counsel for the plaintiffs and counsel for the City of Chicago defendants all recognized that the Court would not likely have entered such a detailed and restrictive injunction following trial, assuming plaintiffs prevailed. . . .

. . . .

Absent the proposed settlement, plaintiffs' proof of their case at trial would have encountered a number of difficulties, some of which, in other litigation involving similar issues, have seriously hampered or proved fatal to proof of the plaintiffs' case. These include the risk that the claim for declaratory and injunctive relief would have been denied as moot.

Also, there was the risk that even if the plaintiffs prevailed on the merits, and their claims for injunctive relief were held not moot, the Court might nonetheless decline to issue an injunction, or might issue an injunction less protective of their rights than the provisions of the proposed settlement.¹⁵²

The representatives of the city agreed to settle, not because they feared that a post-trial decree would be more sweeping than the one they actually signed, but rather because the city wished to reject the misdeeds of a former administration and to avoid the publicity of a trial. In short, the stipulation contained more relief than a trial would have yielded, a peculiar consequence of the fact that a court usually does not alter a negotiated settlement.¹⁵³ The decree's restructuring of the administration of surveillance, for example, was considerably more detailed than that which the Supreme Court had rejected as an excessive intrusion into local affairs in *Rizzo v. Goode*.¹⁵⁴ If the plaintiffs had requested different relief after a trial, such as a judicial warrant requirement for the use of intrusive methods, the Chicago court probably would have been forced to deny it, under the *Rizzo* doctrine that

¹⁵² *Alliance to End Repression v. City of Chicago*, 561 F. Supp. 537, 551 (N.D. Ill. 1982) (paras. 18-21 of Conclusions of Law in Settlement with City of Chicago and the Department of Defense). The danger that the plaintiffs' claim for declaratory and injunctive relief would have been denied as moot stemmed from the possibility that if the plaintiffs were no longer subject to surveillance, they might now lack standing. See *Rizzo v. Goode*, 423 U.S. 362, 372-73 (1976) (plaintiffs lacked requisite personal stake in outcome when claims rested on what one of small unnamed minority of policemen might do to them); *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974) (case-or-controversy requirement demands more than general assertions that plaintiffs will be subjected to discriminatory practices if they violate unchallenged laws).

¹⁵³ See *Alliance to End Repression v. City of Chicago*, 561 F. Supp. 537, 548 (N.D. Ill. 1982) (para. 5 of Conclusions of Law in Settlement with City of Chicago and Department of Defense); see also *Special Project*, *supra* note 47, at 809-12.

¹⁵⁴ 423 U.S. 362 (1976); see *supra* text accompanying notes 42-48.

"[r]emedial power is bounded by constitutional right,"¹⁵⁵ because the Constitution simply does not require surveillance warrants.¹⁵⁶ The defendants undoubtedly refused to agree to such a warrant requirement, except in the one context in which it suited them to do so,¹⁵⁷ because they knew that the court would never impose the requirement upon them.

In the Chicago Findings and Conclusion, Judge Getzendanner reminded the parties that "[m]ore important than any internal enforcement mechanism, of course, is the character of the settlement as an injunction enforceable by the Court."¹⁵⁸ Within a few months of signing the decree in 1981, Judge Getzendanner illustrated the importance of the decree's injunctive nature. Shortly after the decree was signed, the Chicago Police made films and still photographs of a demonstration protesting the nuclear arms race. The police apparently had made no effort to obtain written approval from the Superintendent or his delegate for these activities. The plaintiffs moved for contempt and, on July 8, 1982, the court found that the defendants had violated the "public gathering" provisions of the decree.¹⁵⁹ The court further found that the officers who made the film had not even been informed of the content of the decree.¹⁶⁰

The court's willingness to enforce the settlement suggests an answer to those who objected to the decree on the grounds that it was ambiguous and foreclosed further use of the case as an instrument of political agitation. If the police department ignores the decree and engages in abuses that are indisputably violations, the decree provides some protection in spite of its potential ambiguity in other contexts. More importantly, the case can continue to serve as a rallying point for political activity because of the continuing jurisdiction of the court under an equitable decree.¹⁶¹ The decree creates rights against political surveillance that are broader than those afforded by the Constitution; the new rights can contribute to political consciousness in the same way the more limited constitutional rights do, if citizens recognize them and complain about their violation.

The New York case is moving toward a conclusion similar to that of the Chicago suit, although by a much more devious route. Shortly after

¹⁵⁵ Chayes, *Public Law Litigation*, *supra* note 16, at 51; *see also supra* note 47 and accompanying text.

¹⁵⁶ *See supra* notes 18-19 and accompanying text.

¹⁵⁷ *See supra* notes 130-33 and accompanying text.

¹⁵⁸ *Alliance to End Repression v. City of Chicago*, 561 F. Supp. 537, 550-51 (N.D. Ill. 1982) (para. 16 of Conclusions of Law in Settlement with City of Chicago and Department of Defense).

¹⁵⁹ *Alliance to End Repression v. City of Chicago*, No. 74-3268 (N.D. Ill. July 8, 1982) (order finding defendants guilty of violating the Agreed Order, Judgment, and Decree).

¹⁶⁰ *Id.*

¹⁶¹ *See supra* text accompanying note 158.

the class had been established in the Chicago case,¹⁶² the New York plaintiffs sought class action status. The New York plaintiffs relied on the Chicago case as a precedent, as the Chicago plaintiffs had once used the New York case to resist a motion to dismiss, and redefined the class in the same terms used in Chicago. After the New York class was established in 1979,¹⁶³ the defendants began serious settlement discussions, because at that point nothing remained for them but more discovery. The plaintiffs, having fought an uphill battle for eight years were also amenable to settlement. In fact, as Judge Getzendanner pointed out in the Chicago litigation, the dynamics of the procedural and substantive law make settlement very tempting because the plaintiffs' power to carry out discovery is potentially great, while the power of the court to grant relief after trial is limited.¹⁶⁴ Thus, the endemic problems of political surveillance litigation and the constraints of the case law made settlement attractive to the parties and shaped a result that, although arrived at independently, was similar to other settlements.

The New York stipulation, like other settlements, prohibits any investigation of "political activity,"¹⁶⁵ defined as "[t]he exercise of a right of expression or association for the purpose of maintaining or changing governmental policies or social conditions,"¹⁶⁶ except in connection with a criminal investigation or the planning of a public event.¹⁶⁷ The stipulation specifies, however, that such mixed criminal investigations can be carried out only by the Public Security Section (PSS) of the Intelligence Division under the supervision of an Authority made up of the First Deputy Commissioner, the Deputy Commissioner for Legal Matters (both police department functionaries), and a civilian appointed by the Mayor.¹⁶⁸ The New York stipulation provides that the PSS may begin an investigation if it submits an investigation statement to the Authority containing "specific information . . . that a person or group engaged in political activity is engaged in, about to engage in or has threatened to engage in conduct which constitutes a crime."¹⁶⁹ Within thirty days, the PSS must present a request for approval to the Authority, who may

¹⁶² See *Alliance to End Repression v. Rochford*, 565 F.2d 975 (7th Cir. 1977).

¹⁶³ *Handschu v. Special Servs. Div.*, No. 71-2203 (S.D.N.Y. May 24, 1979) (memorandum opinion and order certifying action as class action).

¹⁶⁴ See *supra* text accompanying note 152.

¹⁶⁵ Stipulation of Settlement and Order at 3, § IV(A), *Handschu v. Special Servs. Div.*, No. 71-2203 (S.D.N.Y. filed May 18, 1971) (settlement order signed by attorneys Dec. 30, 1980, but not yet signed by court).

¹⁶⁶ *Id.* at 3, § II(A).

¹⁶⁷ *Id.* at 3, § IV(A), (B), (C).

¹⁶⁸ *Id.* at 3, §§ III, IV.

¹⁶⁹ *Id.* at 3, § IV(C). In response to a Socialist Workers Party interrogatory, the defendants stated that because "[m]ere rhetoric [sic] or theoretical advocacy" of revolution is not a crime, it is not a predicate for investigation." Defendants' Amended Responses and Objections to Interrogatories of Socialist Workers Party, at 3, *Handschu v. Special Servs. Div.*, No. 71-2203 (S.D.N.Y. filed May 18, 1971).

either terminate the investigation or permit it to continue beyond the first thirty days.¹⁷⁰ The stipulation provides that the PSS may use undercover infiltrators in such cases only with the express approval of the Authority,¹⁷¹ but it allows plainclothes officers to be present at "public activities of political organizations" without separate approval if they are part of an investigation for which proper statements and applications have been filed with the Authority.¹⁷²

The stipulation also limits the types of information the PSS may gather and the grounds upon which it can start a file on a particular subject. Without the written approval of the Authority, the PSS may not maintain records indicating that a person has signed a petition, has his name on a mailing list, supports a group by contributions, or has "authored" a political or religious writing.¹⁷³ The political, religious, or sexual preference of an individual or organization may not be the sole basis of a PSS file.¹⁷⁴

In connection with a public event, the PSS may seek information such as the date, time, and place of the event and any expectations of a counterdemonstration through open contact with the organizations planning the event "in order to preserve the peace, deploy manpower for control of crowds and to protect the right of individuals to freedom of speech and assembly."¹⁷⁵ The stipulation prohibits the PSS from conducting more intrusive public event investigations unless they are criminal investigations approved by the Authority.¹⁷⁶ Finally, the stipulation requires that the PSS keep information concerning the planning of events isolated from their other records.¹⁷⁷

The stipulation limits the PSS's dissemination of materials gathered through its surveillance activities. The PSS may disseminate its records with the approval of the commander of the PSS, but only to law enforcement agencies or government agencies conducting security clearances.¹⁷⁸ The stipulation requires that the PSS maintain a written record of such requests and disseminations.¹⁷⁹

The New York stipulation provides three monitoring mechanisms

¹⁷⁰ See Stipulation of Settlement and Order at 3, § IV(C)(3), *Handschu*.

¹⁷¹ See *id.* at 3-4, § IV(C)(6).

¹⁷² See *id.* at 4, § IV(C)(7). This provision resulted from the Second Circuit decision holding that there is no constitutional objection to the mere presence of officers at public meetings. See *Socialist Workers Party v. Attorney Gen.*, 510 F.2d 253 (2d Cir.), *stay denied*, 419 U.S. 1314 (1974) (Marshall, Circuit Judge); *supra* note 28 and accompanying text.

¹⁷³ See Stipulation of Settlement and Order at 4, § VI(B), *Handschu*.

¹⁷⁴ See *id.* § VI(C).

¹⁷⁵ *Id.* at 3, § IV(B). The section enumerates the categories of information the Public Security Division may obtain in connection with the "Event Planning Inquiry." *Id.*

¹⁷⁶ See *id.*

¹⁷⁷ See *id.*

¹⁷⁸ *Id.* at 4, § VII(A).

¹⁷⁹ See *id.* at 5, § VII(E).

in addition to the provisions for prior approvals by the Authority. First, the commander of the Intelligence Division reports annually to the Authority concerning compliance with the stipulation.¹⁸⁰ Second, the Authority must report to the Mayor and the Police Commissioner with a statistical analysis of the PSS's work.¹⁸¹ Finally, groups or individuals that suspect that they have been included in the PSS files may make an inquiry of the Authority.¹⁸² If their name appears in the file, the PSS must disclose the facts to the Authority, and "[i]f such file does not exist (appear) or if the Authority's inquiry reveals that an investigation was conducted in conformity with these Guidelines, the Authority shall notify the requesting party that if such an investigation was made it was conducted in conformity with these Guidelines."¹⁸³ If the Authority finds, however, that the investigation was not conducted in a lawful manner, the Authority must notify the Commissioner, who must take disciplinary measures.¹⁸⁴ The settlement also requires the Authority to inform the subject of the investigation, who may examine the material unless the Authority determines that disclosure would jeopardize an ongoing criminal investigation or an individual's safety.¹⁸⁵

One issue that proved to be impossible to resolve through negotiation was the disposition of the New York red squad's early records, particularly the records isolated in the "purge" conducted at the beginning of the case.¹⁸⁶ The defendants were determined to destroy the files; the plaintiffs were determined to keep them. A complete stand-off exists today, with the records in almost the same situation they would have been in had no litigation arisen: the defendants are to dispose of them "in accordance with law."¹⁸⁷ For limited periods, individuals and representatives of organizations may inspect old political files gathered on them except where the file has been maintained properly under the standards of the stipulation or is related to a current investigation.¹⁸⁸ Any denial of inspection is appealable to the Authority.¹⁸⁹

Finally, the stipulation acts as a final adjudication, disposing of equitable claims for the class and settling "[a]ny claim [of the class] for damages based solely upon the collection and/or retention of informa-

¹⁸⁰ *Id.* § VIII.

¹⁸¹ *Id.* § IX.

¹⁸² *Id.* at 4, § V.

¹⁸³ *Id.* § V(A).

¹⁸⁴ *Id.* § V(B)(3).

¹⁸⁵ *See id.* § V(B)(4).

¹⁸⁶ *See supra* text accompanying notes 88-89.

¹⁸⁷ Stipulation of Settlement and Order at 1, para. 2(a), *Handschu*. The import of this term was a chief bone of contention for those who objected to the settlement. *See infra* text accompanying note 193.

¹⁸⁸ Stipulation of Settlement and Order at 2, para. 4, *Handschu*.

¹⁸⁹ *Id.*

tion . . . by the New York City Police Department."¹⁹⁰

The New York stipulation provoked criticism, just as the Chicago settlement did at approximately the same time. Over the many years of litigation, the plaintiffs' lawyers had not kept the members of the class fully apprised of the case's progress; the proposal took most of them by surprise. Many members felt as though they first had been brought under the net of a class action, and then had had their rights settled without their full participation.¹⁹¹ Thus, the result of establishing a sprawling class definition in hopes of ensuring that rights created under any decree would affect the greatest number was that many of those affected were mistrustful of the settlement.¹⁹²

The objectors to the New York stipulation were dismayed by the provision allowing older files to be "disposed of in accordance with law," at first believing that the phrase was an invitation to destroy the records. The plaintiffs, however, pointed out, and the City admitted in answers to the objectors' interrogatories, that the phrase implied that the documents would pass to the jurisdiction of New York City's Department of Records.¹⁹³ Moreover, some access to the records was available under the New York Freedom of Information Law. Many objectors, however, for whom the principal value of the case lay in the revelations made through discovery, felt that this limited access was grossly insufficient. In their view, only an order preserving and revealing the records would constitute significant relief.

A second controversy arose over the clause settling damage claims "based solely on the collection and/or retention of information."¹⁹⁴ Some objectors feared that this waiver covered claims for surveillance

¹⁹⁰ *Id.* at 2, para. 7.

¹⁹¹ Plaintiffs' attorneys gave notice of the settlement by newspaper publication, a method found adequate by the court in light of the size of the class. *See Handschu v. Special Servs. Div.*, No. 71-2203 (S.D.N.Y. Feb. 9, 1981) (memorandum opinion and order finding notice of settlement adequate and directing additional newspaper publication of notice).

¹⁹² *See* Hentoff, *Chicago Shows Us Yokels How to Leash a Red Squad*, Village Voice, June 24, 1981, at 8, col. 1; Hentoff, *How We All Got Screwed in the N.Y. Red Squad Case*, Village Voice, June 17, 1981, at 8, col. 1; Hentoff, *Afeni Shakur v. New York Civil Liberties Union*, Village Voice, June 10, 1981, at 8, col. 1; Hentoff, *NYPD's Red Squad Goes Legit*, Village Voice, June 3, 1981, at 1, col. 1. *But see* Neier, *A Time to Settle*, Village Voice, July 1, 1981, at 14, col. 1. *See generally The Red Squad Controversy*, NATION, July 11, 1981, at 43; Tell, *Liberals See Red Over "Red Squad" Pact*, Nat'l L.J., July 6, 1981, at 5, col. 1.

¹⁹³ *See* NEW YORK, N.Y.C. CHARTER §§ 3004, 3005 (Supp. 1983-1984); N.Y. PUB. OFF. LAW §§ 84-90 (McKinney Supp. 1983-1984) (Freedom of Information Law); *see also* Plaintiffs' Memorandum of Law in Support of Proposed Settlement at 6, *Handschu v. Special Servs. Div.*, No. 71-2203 (S.D.N.Y. filed May 18, 1971); Defendants' Amended Responses and Objections to Interrogatories at 5, para. 66, *Handschu v. Special Servs. Div.*, No. 71-2203 (S.D.N.Y. filed May 18, 1971); Defendant's Responses and Objections to Further Interrogatories of Objectors National Emergency Civil Liberties Committee et. al. at 5, *Handschu v. Special Servs. Div.*, No. 71-2203 (S.D.N.Y. filed May 18, 1971).

¹⁹⁴ Stipulation of Settlement and Order at 2, para. 7, *Handschu*.

with an unlawful purpose or by unconstitutional means;¹⁹⁵ for them, the clause represented the plaintiffs' lawyers' attempt to waive some very important claims on behalf of the class. The City admitted, however, that the waiver covered only those claims found nonjusticiable in *Laird v. Tatum*,¹⁹⁶ and did not reach claims based on unconstitutional methods of collecting information.¹⁹⁷

Objectors pointed out, as had the Chicago dissenters, that the settlement allowed for surveillance without a judicial warrant and used an ill-defined distinction between "criminal" and "political" cases to mark the limits of permissible surveillance.¹⁹⁸ Neither the New York nor the Chicago settlement required that police obtain a judicial warrant before engaging in surveillance because the Supreme Court has held that the Constitution does not require a surveillance warrant.¹⁹⁹ Thus, the federal courts probably have no power to provide such relief.

The New York settlement also suffered in comparisons drawn between it and the Chicago decree, chiefly because, in critics' eyes, the Chicago decree allowed greater civilian control over police surveillance activities through the decree's provision for civilian auditors.²⁰⁰ The critics failed to note, however, that the Chicago decree, like the Memphis decree, allows the police chief to approve surveillance without civilian input, while the New York settlement provides for civilian participation in the approval process.

Behind this technical difference lies a genuine difference of principle. Both the New York and Chicago plaintiffs' lawyers agreed that, in the absence of a judicial warrant requirement, effective reform required an institutionalized procedure for approval of surveillance that would eliminate ad hoc decisions in the field and guarantee that police reflect before beginning an investigation, leaving a "paper trail" for review purposes. Beyond that, the New York lawyers thought it important to have the input of some civilian who might act as a brake and sometimes a "whistleblower." They regarded civilian input in the authorization

¹⁹⁵ See, e.g., Hentoff, *How We All Got Screwed in the N.Y. Red Squad Case*, Village Voice, June 17, 1981, at 8, col. 1.

¹⁹⁶ 408 U.S. 1 (1972); see *supra* notes 18-49 and accompanying text.

¹⁹⁷ See Plaintiff's Memorandum of Law in Support of Proposed Settlement at 1-6, *Handschu v. Special Servs. Div.*, No. 71-2203 (S.D.N.Y. filed May 18, 1971). Defendant's Response and Objections to Further Interrogatories of Objectors National Emergency Civil Liberties Committee et. al. at 5, *Handschu v. Special Servs. Div.*, No. 71-2203 (S.D.N.Y. filed May 18, 1971).

¹⁹⁸ See, e.g., Hentoff, *NYPD's Red Squad Goes Legit*, Village Voice, June 3, 1981, at 1, col. 1; see also *supra* text accompanying note 145 (discussing similar objection to Chicago settlement).

¹⁹⁹ See *supra* text accompanying notes 18-19.

²⁰⁰ See, e.g., Hentoff, *Chicago Shows Us Yokels How to Leash a Red Squad*, Village Voice, June 24, 1981, at 8, col. 1 (arguing that Chicago's "reasonable suspicion" standard for beginning investigation is more precise than New York's "specific information" standard). But see Neier, *A Time to Settle*, Village Voice, July 1, 1981, at 14, col. 1 ("I have been looking closely at legal language for many years and I am unable to discern the difference.").

process as important enough to justify bargaining for such a provision. In contrast, the Chicago lawyers felt that civilian oversight in the authorization stage was not as crucial as other elements for which they fought in negotiating the Chicago decree. As Matthew Piers, one of the Chicago plaintiffs' lawyers, explained:

My Chicago co-counsel and I never had much faith in the efficacy of *any* oversight authority. It's just too easy for the secret police to secrete. We therefore focused our efforts on establishing strict investigative standards which could be used *by the victims* the next time we catch the inevitable Son of Red Squad²⁰¹

Arguments can be made in support of either view. If a compliant authorizing board makes hash of a strict standard, one must hope that such activity will be caught in the net of a future review. If the reviewing body employs lax standards or if the original decision is unlikely to be reviewed, then one must hope that the initial authority makes thoughtful decisions. The choice between fighting for meaningful review and fighting for careful initial authorizations, if the choice must be made, ultimately depends on whether one pins one's hopes on the initial decision concerning the investigation or on the review. If forced to choose, I would argue that the initial decision is more important than a review because even the most critical reviewing body will tend to approve the original decision and because it is obviously preferable to prevent, rather than to remedy, abuses. The sad fact is that none of the compromises is entirely satisfactory; a strict investigative standard, an independent warranting body, and an independent reviewing body are needed.

The most sweeping objection to the New York settlement grows out of the case's class action status and the prospective nature of the relief it provides. As the National Emergency Civil Liberties Committee said in its statement of objection to the New York settlement:

By this proceeding it is proposed to make all of those persons, including, we would suppose, persons not now living in the City or, indeed, not yet born, [subject] to a series of rules affecting their rights and the correlative rights of the Police Department.

It appears that the function the court is being asked to perform in this lawsuit is a typical legislative function and not a judicial one. The making of rules to govern the relationship between residents of and visitors to this city with the Police Department, regardless of whether such persons have any existing controversy with the Department or its members, is a typical legislative function and could not properly be decreed by a court even after full litigation of the issues

²⁰¹ Letter from Matthew Piers, Attorney for Plaintiffs in Chicago Litigation, to Editor, Village Voice at 3 (July 13, 1981) (unpublished) (emphasis in original).

and certainly not as a result of a settlement with the plaintiffs.²⁰²

Such an objection is essentially an attack on public law litigation in general, or at least on political rights suits like the New York case. The critics' position implies that a case attacking political surveillance upon grounds of principle is not like other cases; it is a confrontation with the State that the plaintiffs' lawyers cannot compromise in the same way as other cases.

The plaintiffs' lawyers reached a contrary conclusion: they had a duty to compromise given the constraints of the controlling case law. They believe that when the court signs the stipulation, it will represent a better decree than any they could have won by litigating the case to a conclusion because of the Supreme Court's strictures on the remedial powers of the federal courts. Thus, the plaintiffs' attorneys reasoned that the class could obtain satisfactory relief only by compromising some issues of principle in a negotiated decree. Ironically, it was this negotiation and compromise that opened the plaintiffs' attorneys and the stipulation to criticism. The necessity of compromise is a sad indication of how far the existing state of the law lies from the original aims of the case.

The strong point of a negotiated decree for the lawyers is that it presents a *fait accompli* to the court, subject to the court's approval or disapproval; for the court, this is the most troublesome aspect of a settlement. The judge has very little power to shape the document that the parties present to him. He must decide whether it represents an advance over existing law, whether it actually sanctions practices that are at present illegal, and then, whether he should sign it or reject it.²⁰³ As of the date of this writing, the court has not signed the New York stipulation.

IV

STATE COURTS AND CITY LEGISLATURES: LOS ANGELES, MICHIGAN, DETROIT, AND SEATTLE

One way to avoid some of the difficulties the plaintiffs encountered in the New York, Chicago, and Memphis cases may be to stay out of the federal courts in cases challenging local police surveillance activities. Since the New Jersey state court challenge, critics of political surveillance have initiated state litigation in California, Michigan, and Washington. Rather than relying exclusively on the courts, however, critics have also lobbied city legislatures in their efforts to change police surveillance policies and practices.

²⁰² Statement of Objection to The Proposed Settlement in the Above Proceeding at 3, *Handschu v. Special Servs. Div.*, No. 71-2203 (S.D.N.Y. filed May 18, 1971) (National Emergency Civil Liberties Committee).

²⁰³ See *supra* note 153 and accompanying text.

A. Los Angeles

The California Supreme Court has been solicitous of civil liberties, extending criminal defendants protections under the state constitution that the federal Supreme Court declined to find in the United States Constitution.²⁰⁴ In one major surveillance case, the California court held that undercover infiltration of university classrooms for the purpose of compiling political dossiers is a violation of rights guaranteed by the state and federal Constitutions.²⁰⁵ Plaintiffs in political surveillance cases, then, might reasonably expect a more favorable treatment in a California state court. Moreover, the political squad of the Los Angeles Police Department (LAPD), the subject of various waves of scandal for the past sixty years, is a natural candidate for reform.²⁰⁶ The current drive for reform began, as it did in many other cities, when the Los Angeles Police "purged" their files.

In 1975, the Los Angeles Board of Police Commissioners²⁰⁷ disclosed that the Public Disorder Intelligence Division (PDID) had destroyed some two million "outdated" intelligence files on "potentially disruptive" groups during the previous year.²⁰⁸ The police destroyed

²⁰⁴ See, e.g., *People v. Disbrow*, 16 Cal. 3d 101, 545 P.2d 272 (1976). In *Disbrow*, the California Supreme Court declined to follow the rule stated in *Harris v. New York*, 401 U.S. 222 (1971), that statements made voluntarily by a criminal defendant during pretrial interrogation that are inadmissible as affirmative evidence at trial because of failure to comply with *Miranda* may be introduced to impeach the defendant's trial testimony. Asserting "the independent nature of the California Constitution," the court held that the use of inadmissible statements as impeachment evidence was prejudicial per se and required automatic reversal. *Id.* at 114-16, 545 P.2d at 280-81; see also *People v. Brisendine*, 13 Cal. 3d 528, 531 P.2d 1099 (1975) (holding that Article 1, section 13 of California Constitution imposes "higher standard of reasonableness" for searches and seizures than fourth amendment of United States Constitution as interpreted in *United States v. Robinson*, 414 U.S. 218 (1973)).

²⁰⁵ See *White v. Davis*, 13 Cal. 3d 757, 533 P.2d 222 (1975). In addition, California has a liberal standard for taxpayers' standing in cases dealing with allegedly illegal expenditure of public funds to finance police investigatory activities. As a result, individuals and organizations other than those actually or potentially affected by surveillance activities also have standing in California to bring suit. Cf. *supra* note 144 and accompanying text (class definition in Chicago litigation). Unlike federal cases, suits in California may be brought by concerned taxpayers. See, e.g., *White*, 13 Cal. 3d at 762-63, 533 P.2d at 225-26.

²⁰⁶ The defendant in *White*, for example, was the Chief of Police of the Los Angeles Police Department. See also *Hearings, supra* note 3; Transcript of Hearing at 1-3, *In re Consideration of a Statement Relative to the Public Disorder Intelligence Division (PDID)*, Item No. 4A (Bd. of Police Comm'rs of Los Angeles Jan. 18, 1983) [hereinafter cited as Transcript of Hearing].

²⁰⁷ The Los Angeles City Charter establishes a Board of five commissioners for the "control and management" of the police department. LOS ANGELES, CAL., CITY CHARTER § 70(b) (1967). The Mayor appoints the members of the Board of Police Commissioners to five year terms subject to the approval of the City Council. *Id.* §§ 72-73. Detroit and Chicago have instituted similar Boards of Commissioners for the police. See, e.g., *infra* note 258 (Detroit).

²⁰⁸ POLICE THREAT, *supra* note 8, at 36; see also *The Los Angeles Police Spy Dispute*, in Sappell, *Commission to Abolish Police Intelligence Units*, L.A. Times, Jan. 19, 1983, at 22, col. 3 [hereinafter cited as *Spy Dispute*].

the files in connection with the promulgation of new guidelines designed to define the functions of the PDID,²⁰⁹ as had their New York counterparts after the filing of the *Handschu* case. The guidelines, the Standards and Procedures for the LAPD, PDID Files, suffered from the perennial shortcomings of such reform efforts: they contained no sanctions for noncompliance and were subject to unilateral change. In addition, they provided very little guidance to the officer in the field. The Standards' statement of principles and purposes only generally defined the proper subjects of police surveillance: "[T]he political and personal beliefs or preferences of any individual, group, or organization are not of relevance or of concern to the Department. Individuals and organizations are of concern to the Department only when there is a substantial threat that their activities will result in public disorder."²¹⁰ The Standards went on to provide that the PDID could maintain files only on individuals or organizations that "threaten, attempt, plan or perform acts disruptive of the public order," or which "assist" such organizations.²¹¹ The files were to contain only information "relevant to past or possible future disruptions of the public order."²¹² The Standards also limited the PDID's dissemination of files to law enforcement agencies²¹³ and required the PDID to keep a written record of such disseminations.²¹⁴ Finally, the Standards provided for an audit of the PDID by the Board of Police Commissioners to monitor compliance with the guidelines.²¹⁵

Citizens concerned that the guidelines did not provide outside review organized groups to oversee the workings of the PDID.²¹⁶ In the

²⁰⁹ Board of Police Commissioners, Standards and Procedures for the Los Angeles Police Department Public Disorder Intelligence Division Files 1 (adopted Dec. 16, 1976) [hereinafter cited as LAPD Standards].

²¹⁰ *Id.*

²¹¹ *Id.* at 3, §§ II(A), (C), III.

²¹² *Id.* at 5, § V(A). The provision directs the PDID to destroy all information not meeting this standard before filing any source material or making any card entry.

²¹³ *Id.* at 6, § VII(A). The PDID could provide the information to certain defined law enforcement agencies, *id.* at 7, § VII(E), exclusively on a "need to know" basis, i.e., only when "the requested information is both useful and necessary in assisting [the] law enforcement agency in preventing acts disruptive of the public order," *id.* at 6, § VII(A), (B).

²¹⁴ *Id.* at 7-8, § VII(F).

²¹⁵ *Id.* at 8-10, §§ VIII, IX. The monthly review by supervisory personnel was to include a review of each PDID file, the removal and destruction of all outdated and irrelevant information, the removal and destruction of unnecessary files, and the submission of a report to the Board of Commissioners. The semiannual audit by two members of the Board of Commissioners was to consist of a review of current PDID regulations and a report on the extent of compliance by the PDID. *Id.*

²¹⁶ In August 1977, the American Friends Service Committee, with the support of the American Civil Liberties Union, began a program on police surveillance which succeeded in organizing a coalition of civil liberties, civil rights, and political groups, including, besides the organizations named above, some 35 community groups. Called the Citizens' Commission on Police Repression (CCOPR), this organization serves as "a clearinghouse for information and research" and provides "coordination for community action, public education, litigation, and legislative reform." POLICE THREAT, *supra* note 8, at 38.

next few years, several of the groups active in the efforts to curb political surveillance discovered that PDID officers had infiltrated their groups,²¹⁷ thus clearly demonstrating the ineffectiveness of the 1976 Standards in preventing abuses.²¹⁸ Various individuals and groups affected by the PDID's abuses brought some six lawsuits, now consolidated into one, *Coalition Against Police Abuse v. Board of Police Commissioners*,²¹⁹ in the state court. The consolidated complaint sought injunctive relief and damages, under the United States and California Constitutions, for invasion of privacy and interference with free expression and association. It alleged that PDID officers infiltrated some twenty-three organizations, disrupting their internal affairs by creating dissension and distrust among the members.²²⁰ A principal claim was that "this illegal surveillance and monitoring has been conducted by the defendants for the purpose of monitoring plaintiffs' political activities because these activities have included public criticism of the LAPD, and its officials, and because these activities have included criticism of the political status quo."²²¹

In response to the plaintiffs' allegations, the Chief of Police, Daryl Gates, continued to take the official position, commonly adopted in the middle seventies, that the Department did not condone investigations for political reasons. At a meeting of the Board of Commissioners in 1980, he scoffed at the idea that the PDID had infiltrated the Citizens Commission on Police Repression (CCOPR), saying, "why do they (CCOPR members) believe we are interested in them? . . . We can't clutter our files with that nonsense."²²² Information obtained during discovery in the consolidated litigation nevertheless showed that undercover agents had indeed infiltrated CCOPR and other similar oversight groups.²²³ Officers in the field apparently did not understand or did not feel bound by the guidelines endorsed by senior policymaking officials.

In the months that followed, further revelations from the discovery materials made the "Police Spy Dispute" into a major news item, with frequent front-page stories in the local newspapers. Investigators established, for example, that the PDID kept files on major and minor politi-

²¹⁷ PDID undercover officers were discovered to have infiltrated, among other organizations, the staff of an underground newspaper, *see id.* at 38-39, the Coalition against Police Abuse, *see id.* at 41, the Campaign for Democratic Freedoms, *see id.* at 42, and the Committee on Nuclear Information, *see id.* at 41-42.

²¹⁸ *See L.A. Police Chief Probed for Misleading Statement on Surveillance*, ORGANIZING NOTES, Sept.-Oct. 1982, at 3 [hereinafter cited as *L.A. Police Chief Probed*].

²¹⁹ No. 243-458 (L.A. County Ct. filed Dec. 16, 1982).

²²⁰ *See* First Consolidated Complaint for Injunctive and Declaratory Relief and Damages at 4, 25-26, paras. 2, 100; *Coalition Against Police Abuse v. Board of Police Comm'rs*, No. 243-458 (L.A. County Ct. filed Dec. 16, 1982).

²²¹ *Id.* at 25, para. 99.

²²² *L.A. Police Chief Probed*, *supra* note 218, at 3.

²²³ *See* Cooper, *Spies over Los Angeles*, INQUIRY, Jan. 1983, at 10.

cians, a judge, and the President of the Board of Police Commissioners, its own oversight body.²²⁴

The Board of Commissioners adopted yet another set of guidelines for PDID procedures in 1982,²²⁵ in which the Department finally recognized the principle that a distinction exists between criminal and political investigations.²²⁶ The Board of Commissioners claimed that these were "the toughest in the country,"²²⁷ yet they were still only "guidelines." The overall effect of the Board of Commissioners' activities was to enable the police department to placate the public, while freeing all other political forces from the necessity of intervening in police matters. Neither the City Council nor any executive entity was obliged to intervene as long as the Commissioners were ostensibly taking active reform measures.

At the close of 1982, discovery in the consolidated litigation began

²²⁴ See *id.*; *Spy Dispute*, *supra* note 208; Sappell, *File on Judge Found in Police Spy Documents*, L.A. Times, Jan. 17, 1983, at 1, col. 5; Sappell & Wallace, *Officer Admits to Storing Police Spy Files at Home*, L.A. Times, Jan. 7, 1983, at 1, col. 1.

²²⁵ See Los Angeles Police Commission, Standards and Procedures for the Collection of Intelligence Information by the Los Angeles Police Department Public Disorder Intelligence Division (proposed Feb. 24, 1982) [hereinafter cited as 1982 Standards].

²²⁶ The 1982 PDID guidelines' statement of principle forbids information-gathering "on any organization unless its ideology advocates criminal conduct and its members have planned, threatened, attempted or performed such criminal conduct," *id.* at 2, para. 2 (emphasis in original), or on any person unless that person is the leader of such a group or has himself engaged in such acts, *id.* at 3, para. 2.

The 1982 guidelines attempted to define proper investigatory procedures more precisely and to establish more effective bureaucratic monitoring of those procedures. They provide that the PDID may undertake a preliminary investigation "upon a reasonable indication that the individual or organization is planning, performing, threatening or attempting unlawful acts that could result either in significant disruption of the public order or in harassment on the basis of race, religion or national origin." *Id.* at 8, § III(A)(1)(a) (emphasis in original). A preliminary investigation required the prior approval of the commander of the PDID, *id.* § III(A)(1)(c), and could not be conducted through the use of infiltration or electronic surveillance, *id.* at 10, § III(A)(1)(e). The PDID could open a "file" and conduct a "full investigation" only when the preliminary investigation had yielded corroborated evidence of unlawful acts as defined in the Statement of Principle. *Id.* at 11-12, § III(A)(2)(a). The Commanding Officer of the PDID had to authorize the opening of each new file in writing, setting forth the basis for the conclusion that there was corroborated evidence of a reasonable indication of planned or attempted unlawful acts. See *id.* at 12, § III(A)(2)(b).

Under the 1982 guidelines, investigators could use infiltration and electronic surveillance only with the written authorization of the Director of the Office of Special Services, and only when less intrusive means were not "available." The director's authorization had to include a showing of probable cause for the belief that the surveillance was appropriate and necessary. *Id.* at 12-14, § III(A)(3). It is unclear whether "probable cause" was essential or merely a factor to be taken into account in the authorization decision.

Finally, the PDID was given the mission of collecting information on "terrorist trends," as well as protecting dignitaries and monitoring public gatherings. See *id.* at 16-20, § III(B)-(E). The "public gathering" passage, see *id.* at 17-20, § III(E), apparently was modelled on the Chicago decree, forbidding as it does the use of intrusive techniques as well as plainclothes surveillance, unless the uses are otherwise authorized. See *supra* notes 129-34 and accompanying text.

²²⁷ *Spy Dispute*, *supra* note 208, at 22, col. 3-4.

to turn up evidence that confirmed activists' worst nightmares about use of the supposedly "purged" police files. PDID officers had not in fact destroyed all of the files in 1976; allegedly, they had offered some files to the school system and had given others to military intelligence.²²⁸ Further investigation showed that certain PDID officers were extremely upset at the prospect of destroying information they had worked so hard to obtain. After some discussion, they had taken various measures to protect the information.²²⁹ Jay Paul, a detective with the PDID, had kept dozens of boxes of "purged files," apparently with the approval of his superiors.²³⁰

The pressure for legislative action prompted by this evidence would seem irresistible, but the movement for a legislative solution once again was blunted by the Board of Commissioners. The Board voted on January 18, 1983, to abolish the PDID and retain the records for "final disposition."²³¹ The abolition was largely a public relations gesture; the question remained whether the police department's political surveillance practices would be truly changed or merely reallocated and transferred. On May 9, 1983, the Board made clear that it would pursue the latter course. Although various nonpolitical divisions assumed the responsibilities for dignitary protection and public gatherings, the Board reestablished the "Anti-Terrorist Division" (ATD), governed by standards little different from those set forth in the earlier guidelines.²³² The division commander was to report directly to the chief of police, who

²²⁸ See Sappell, *LAPD Offered Files to Schools, Official Says*, L.A. Times, Nov. 8, 1982, at 1, col. 5. An associate Los Angeles school superintendent claimed that police department personnel had offered him and a subordinate files on school employees, but he had refused them. He also claimed that he had "reasonable cause" to believe the military had accepted a similar offer. *Id.* at 1, cols. 5-6, at 3, col. 3.

²²⁹ See Sappell, *LAPD's No. 2 Man Under Scrutiny in Inquiry Over Files*, L.A. Times, Mar. 15, 1983, at 1, col. 5 (metro ed.). Besides attempting to place documents with other agencies, see *supra* note 228, members of the PDID, apparently with the consent of the assistant chief of police, shielded various documents by labelling them "investigators' 'private notes,'" *id.*

²³⁰ See Sappell, *Sanctioned Removal of Spy Data, Probers Told*, L.A. Times, Feb. 9, 1983, at 1, col. 5 (morning final ed.); Sappell & Wallace, *supra* note 224, at 1, col. 1.

²³¹ Transcript of Hearing, *supra* note 206, at 5. In support of his motion to deactivate the PDID, Commissioner Tooley gave a history of intelligence gathering by the Los Angeles Police Department and summarized his views of the PDID: "Recent events have led me to conclude that PDID has not been operating in the manner contemplated by Commission guidelines. Also, it seems evident to me that . . . it threatens to tarnish the reputation of the Department as a whole." *Id.* at 4. The Board passed the motion unanimously. *Id.* at 14.

²³² See Sappell, *Police Intelligence Given to New Unit*, L.A. Times, May 10, 1983, at 1, col. 5; Intradepartmental Memorandum from Police Comm'n Subcomm. on Intelligence Reorg. to Bd. of Police Comm'rs (May 9, 1983) (concerning "reorganization of anti-terrorist intelligence function") [hereinafter cited as Reorganization Memorandum]. After outlining certain policies for ATD personnel and record transfers from the PDID, the Reorganization Memorandum specifically recommends that the Board of Commissioners "confirm by Motion in public session that [the 1976 and 1982] guidelines will continue in full force and effect over the new anti-terrorist division." *Id.* at 5.

was to have the exclusive power to authorize undercover operations.²³³ Apart from these organizational changes, business was to continue as usual.

Considering the dimensions of the scandal over the PDID's activities, the Board's attempted resolution of the problem was disappointing. The Los Angeles City Council, at last, was moved to action. In July of 1983, the Council passed an ordinance giving the subjects of the old PDID files limited rights of access to them.²³⁴ The City Council apparently was not ready to approve controls on future surveillance, however, until it was forced to do so by the pressure of litigation. In February 1984, on the eve of trial in the consolidated case, the Council and the Board of Commissioners agreed to a settlement that provided a damage award to the plaintiffs of \$900,000 and a new framework for police investigations.²³⁵

The Los Angeles consent decree provides that "investigations on individuals and organizations shall not occur unless there is a reasonable and articulated suspicion that said individual or organization is planning, threatening[,] attempting or performing a significant disruption of the public order."²³⁶ The decree goes on to impose special limitations on "undercover investigations," which are those investigations conducted by officers who assume fictitious identities to obtain information.²³⁷ Undercover investigations are forbidden "unless there is probable cause to believe . . . said individual or organization is committing or seeking to commit significant disruptions of the public order and only after such a determination on probable cause has been made by at

²³³ Reorganization Memorandum, *supra* note 232, at 6.

²³⁴ Los Angeles, Cal., Freedom of Information Ordinance of 1983 (July 6, 1983) (amending LOS ANGELES, CAL., ADMIN. CODE div. 12, ch. 1, ch. 2, art. 2) (access to public records) [hereinafter cited as L.A. Freedom of Information Ordinance]. The ordinance lists a number of categories of records that are not subject to disclosure, including those whose disclosure would "[i]nterfere with an ongoing investigation or enforcement proceeding," "[d]eprive a person of the right to a fair trial," or "[e]ndanger the life or physical safety of any person." *Id.* at § 3.

The police also may withhold a record "where . . . the public interest served by not making record public clearly outweighs the public interest served by disclosure of the record." *Id.* at § 4. The police department's chief lobbyist was particularly active in regard to passage of this provision as part of the ordinance. See Boyarsky, *Council Passes Watered-Down Police File Law*, L.A. Times, July 7, 1983, at 1, col. 4.

²³⁵ See *Coalition Against Police Abuse v. Board of Police Comm'rs*, No. 243-458 (L.A. County Ct. Feb. 22, 1984) (Stipulated Consent Decree and Judgment and attached appendix A, containing Standards and Procedures for the Anti-Terrorist Division, LAPD, Jan. 31, 1984) (ATD standards).

²³⁶ *Id.* at 3, para. 2(vii). The term "significant disruption of the public order" is defined in the ATD standards to mean "unlawful acts which can reasonably be expected to result in death, serious bodily injury or significant property damage and which are intended to have such results to further societal objectives, to influence societal action or to harass on the basis of race, religion or national origin." *Id.* app. A, § III(N), at 5.

²³⁷ *Id.* app. A, § III(S), at 6.

least two members of the Police Commission."²³⁸ On its face, this provision seems to require that police secure an administrative warrant, issued upon probable cause, before using undercover infiltrators; such a warrant requirement would make the Los Angeles provision singularly protective in comparison to analogous provisions in the decrees entered in all other police surveillance cases. The term "probable cause to believe," however, is defined in a way that seems to blunt its force in the 1984 Standards and Procedures for the Anti-Terrorist Division, which are incorporated in the consent decree.²³⁹ The term is defined to mean that "there is a good faith reasonable belief that the use of an undercover investigation will, when taken in conjunction with the facts gathered in the Full Investigation (including the facts gathered by the undercover operator), lead to the probable cause to arrest the targets of said investigation."²⁴⁰ Once again, then, because of the logic of the investigative function²⁴¹ and the dynamics of compromise, the constitutional probable cause standard has eluded the plaintiffs in a police surveillance case. Nevertheless, the Los Angeles consent decree does institute an important reform: civil approval, in the form of Police Commission authorization, is required for an undercover investigation.²⁴²

The settlement leaves open some issues that may provoke further litigation. The consent decree does not distinguish clearly between "political" and "criminal" investigations, although the ATD standards to which the decree refers state that the ATD's "primary function" is the prevention of "significant disruption of the public order."²⁴³ The consent decree also permits investigations in "situations where advocacy of a criminal act is in and of itself a crime" or "to the extent necessary to confirm that statements made are in fact merely advocacy."²⁴⁴ These provisions seem to raise questions as to what sorts of investigations the settlement affects. The provision regarding enforcement of the consent decree also illustrates the decree's ambulatory nature: "At the present time this Court does not enter any injunctive order, however [sic], the Court hereby reserves and retains jurisdiction to amplify, modify, supplement, amend or terminate the orders set forth above, including providing for injunctive relief if necessary and appropriate."²⁴⁵ Although the decree at present carries no sanction of contempt, any attempt by

²³⁸ *Id.* at 3, para. 2(viii).

²³⁹ *Id.* at 4, para. 3.

²⁴⁰ *Id.* app. A, § III(M), at 5.

²⁴¹ *See supra* text accompanying notes 32-34.

²⁴² *See Coalition Against Police Abuse v. Board of Police Comm'rs*, No. 243-458, at 3, para. 2(viii) (L.A. County Ct. Feb. 22, 1984) (Stipulated Consent Decree and Judgment and attached appendix A, containing ATD standards).

²⁴³ *Id.* app. A, § II, at 3.

²⁴⁴ *Id.* at 3, para. 2(vi).

²⁴⁵ *Id.* at 5, para. 6.

the defendants to flout the new ATD standards,²⁴⁶ or to unilaterally change them will result in a motion for injunctive relief cognizable under the court's continued jurisdiction.

B. The State of Michigan and the City of Detroit

The suit against the Michigan State Police Department's political surveillance activities was brought at a particularly propitious time, just after the Watergate scandal, and in a favorable venue, the state courts of Michigan.²⁴⁷ *Benkert v. Michigan State Police*,²⁴⁸ was initiated by a Michigan consumer advocate who accidentally discovered that the state police had been investigating his organization.²⁴⁹ He and his coplaintiffs in the case were at first extraordinarily successful in the state court. In granting the plaintiffs' partial summary judgment, the court abolished the state police red squad by holding unconstitutional under the Michigan and United States Constitutions all the provisions of Michigan law that authorized the squad, together with some substantive provisions, such as a communist control act and an old criminal anarchy law.²⁵⁰ It is perhaps a measure of the strength of popular support for this result that the state never appealed the *Benkert* decision and the legislature has not sought to circumvent its effect.²⁵¹ The state police apparently have

²⁴⁶ The ATD standards loosely track the framework of the Stipulated Consent Decree and Judgment. They provide for a "preliminary investigation" upon "reasonable suspicion." *Id.* app A, § IV(A)(1), at 7. Such an investigation may include the use of plainclothes surveillance, but not of undercover infiltrators. *Id.* app. A, § IV(A)(5), (6), at 8. The latter may only be used in a "full investigation," after approval by the Chief of Police and a Committee of the Police Commission, *id.* app. A, § IV(B)-(D), at 9-17, and on a showing of "probable cause to believe," *see id.* app. A, § III(M), at 5; *supra* text accompanying note 240 (defining standard). The police may disseminate information only to law enforcement agencies except that they may supply limited information to private organizations to protect the safety of employees and property, or where disruption may affect the organization. *Id.* app. A, § VI, at 21-23.

²⁴⁷ *See generally* Jacobs & Soble, *A Blow Against the Red Squads*, NATION, Feb. 14, 1981, at 168.

²⁴⁸ No. 74-023-934-AZ (Wayne County Ct. June 9, 1976) (order granting partial summary judgment).

²⁴⁹ *See* Stickgold, *Yesterday's Paranoia is Today's Reality: Documentation of Police Surveillance of First Amendment Activity*, 55 U. DET. J. URB. L. 877 (1978) (summarizing facts of *Benkert* case).

²⁵⁰ *See* *Benkert v. Michigan State Police*, No. 74-023-934-AZ (Wayne County Ct. June 9, 1976) (order granting partial summary judgment). The laws affected were MICH. COMP. LAWS ANN. §§ 28.51-56, 30.101-105, 750.46-48, 752.311-315, 752.321-332 (1968). The court does not specify in the order on what grounds the laws were found unconstitutional.

²⁵¹ In fact the legislature repealed all the laws affected by the decision: MICH. COMP. LAWS ANN. §§ 28.51-56 (1968), *repealed by* 1978 Mich. Pub. Acts 571, § 1; MICH. COMP. LAWS ANN. §§ 30.101-105 (1968), *repealed by* 1978, Mich. Pub. Acts 268, § 25101; MICH. COMP. LAWS ANN. §§ 750.46-48 (1968), *repealed by* 1978 Mich. Pub. Acts 571, § 1; MICH. COMP. LAWS ANN. §§ 752.311-315 (1968), *repealed by* 1978 Mich. Pub. Acts 571, § 1; MICH. COMP. LAWS ANN. §§ 752.321-752.332 (1968), *repealed by* 1978 Mich. Pub. Acts 571, § 1. *See also* Stuart, *Michigan to Release Its Files About Political Surveillance*, N.Y. Times, Dec. 27, 1980, at 10, col. 1.

not reinstated a political squad since that time.²⁵²

By the time the *Benkert* court entered its judgment against the state police in 1976, the plaintiffs had added as defendants the Detroit City Police, who had collected political intelligence files through a special squad. After the judgment, the plaintiffs and defendants negotiated for several years about the disposition of the state and city red squads' old files, before they agreed on a partial settlement.²⁵³ The defendants agreed to notify all persons and organizations named in the files by mail, as well as to publish notices in some fifteen newspapers.²⁵⁴ Those who responded to the notice by requesting access to a file were to receive the complete record, with the exception of the names of informers and officers and "highly personal information" about third parties.²⁵⁵

The partial settlement appears to provide subject persons and groups virtually complete access to their files, without any shield or loophole by which the police could refuse disclosure. It does not, however, eliminate the problem of political spying by the Detroit Police, still unresolved. Although Mayor Coleman Young abolished the political unit of the Detroit Police Department by fiat,²⁵⁶ he did not dispose of the legal issue of the powers of the police to engage in such surveillance.

Attempts to obtain through legislation systematic and ongoing standards to govern the Detroit Police Department's political surveillance ran into difficulties akin to those encountered in Los Angeles. In 1981, the Detroit City Council passed an ordinance similar in effect to the judicial decrees entered in other cities and the ordinance enacted in Seattle.²⁵⁷ The ordinance prohibited all political surveillance except when "unavoidably necessary" for a criminal investigation, upon a standard of reasonable suspicion, and upon the written permission of the Chief of Police.²⁵⁸ The Detroit Police, however, like their Los Angeles

²⁵² The Michigan state legislature went so far as to prevent the state police from participating in interstate law enforcement intelligence gathering unless certain narrowly defined conditions are met. For example, a law enforcement agency in Michigan may only supply information to an interstate law enforcement intelligence organization that is established by an act of Congress or by act of another state legislature or the Michigan legislature. In addition, these organizations must conform to strict procedural guidelines. *See* MICH. COMP. LAWS ANN. § 752.1-6 (1980); *see also infra* note 307 and accompanying text.

²⁵³ *See Benkert v. Michigan State Police*, No. 74-023-934-AZ (Wayne County Ct. Dec. 22, 1980) (order and method of notification and content of files).

²⁵⁴ *See id.* at 2-4.

²⁵⁵ *See id.* at 5-6.

²⁵⁶ *See* Veto Statement from Coleman A. Young, Mayor of Detroit, to the Detroit City Council (Dec. 11, 1981) (explaining veto of anti-surveillance ordinance) [hereinafter cited as Veto Statement].

²⁵⁷ *See infra* notes 267-300 and accompanying text.

²⁵⁸ *See* Detroit, Mich., Anti-Surveillance Ordinance (Dec. 3, 1981) (vetoed Dec. 11, 1981); *Council OK's limit on police spying*, Detroit Free Press, Dec. 4, 1981, at A3, col. 1. The ordinance also provided for a civil remedy by injunction or damages similar to the provision successfully passed in Seattle. *See infra* text accompanying note 290.

counterparts, are part of the municipal executive branch and are supervised by a Board of Commissioners appointed by the Mayor.²⁵⁹ Mayor Young vetoed the measure on the ground that it would interfere with the prerogatives of the executive and his appointed commissioners. In justifying his veto, the Mayor also argued that the terms of the restrictions on political surveillance were "vague" and that the bill would prevent the Detroit Police from cooperating in intelligence work with other agencies that did not operate under such restrictions.²⁶⁰

Mayor Young branded the law "unnecessary" because he could prevent the abuse of police intelligence without legislative intervention. To demonstrate this assertion, the Mayor closed his veto statement with an instruction to the Board to adopt a general order reaffirming the limits on surveillance activities.²⁶¹ At the beginning of 1982, the police department produced a brief order prohibiting investigations into "beliefs, opinions, attitudes, statements, associations and activities" of persons or organizations except when they are "reasonably suspected of violation of the law."²⁶² Understandably, critics of political surveillance were dissatisfied with the order. At this writing, the ordinance is being redrafted in an attempt to meet the mayor's objections,²⁶³ and the portion of the *Benkert* case involving the Detroit Police is being prosecuted in hopes of securing a judicial solution.

C. Seattle

The campaign to control political surveillance in Seattle began, as it did in Los Angeles and Memphis, with the police department's destruction of documents in the aftermath of Watergate. In 1974, the Acting Chief of Police disclosed to the Seattle City Council that he had destroyed hundreds of intelligence files²⁶⁴—a revelation that triggered an outcry from citizens who had not even realized that political files existed. In response to public pressure, the Council began to review the structure of the Seattle Police Intelligence Unit. Meanwhile, the Coalition on Government Spying, a citizen reform group, began to extract the records from the police, first through a demand under a state disclo-

²⁵⁹ See Veto Statement, *supra* note 256, at 3.

²⁶⁰ See *id.* at 2-3.

²⁶¹ See *id.* at 3-4.

²⁶² Chief of Police, Detroit Police Dep't, Special Order No. 82-1, at 1 (Jan. 7, 1982) (regarding surveillance). The order also calls for a review of departmental practices and procedures every three months by the Chief of Police to ensure compliance with the order. The Chief is to submit a written report to the Commissioners after each review. See *id.*

²⁶³ Conversation with Howard Simon, Executive Director, ACLU of Michigan (Sept. 26, 1983).

²⁶⁴ See Spitzer & Kipp, The Mayor's 18-Month Review of the Seattle Police Investigations Ordinance, Ordinance No. 108333 (Seattle Municipal Code, ch. 14.12), at 1-3 (July 1, 1981) (unpublished manuscript) [hereinafter cited as Mayor's Review]; Coalition on Government Spying, Seattle's Surveillance Ordinance 1-2 (Mar. 1980).

sure law²⁶⁵ and then through a lawsuit.²⁶⁶ The Coalition's constant pressure apparently spurred the Seattle City Council to take further action. In 1979, fifty-six months after the police chief first disclosed the existence of political files, the Council actually passed, and the Mayor signed, an ordinance to control police surveillance.²⁶⁷

The director of the ACLU for the State of Washington explains the radical difference between the results obtained in Detroit and Los Angeles and those achieved in Seattle by pointing out that Seattle is a relatively small and cohesive city with a strong sense of "clean government."²⁶⁸ The relative success of the Seattle activists may also have resulted in part from the fact that Seattle has no administrative body like the Los Angeles Board of Police Commissioners to generate an appearance of remedial action while actually insulating the police bureaucracy from effective control.

The Seattle ordinance,²⁶⁹ like other reform documents drafted in the seventies, prohibits purely political surveillance. It provides that "[n]o person shall become the subject of the collection of information on the account of a lawful exercise of a constitutional right or civil liberty"²⁷⁰ and that "no information shall be collected or used for political purposes."²⁷¹ The ordinance mandates that the police may collect "restricted information," defined as the political or religious beliefs or activities of an organization or individual,²⁷² only in connection with criminal investigations and the protection of dignitaries,²⁷³ except for incidental references to such beliefs and activities in connection with routine reports.²⁷⁴

²⁶⁵ WASH. REV. CODE § 42.17 (1974).

²⁶⁶ *It's About Time v. Seattle Police Dep't*, No. 830452 (King County Ct. filed June 27, 1979).

²⁶⁷ SEATTLE, WASH., MUN. CODE ch. 14.12 (1980) (Seattle, Wash., Police Intelligence Ordinance 108333 (1979)) (amended by Seattle, Wash., Ordinance 109237 (1980)).

²⁶⁸ Telephone interview with Kathleen Taylor, Director of the ACLU for the State of Washington (July 15, 1983). It is worth noting that this is not the sort of compliment that local ACLU directors lightly pay to city governments.

²⁶⁹ SEATTLE, WASH., MUN. CODE ch. 14.12 (1980). Similar ordinances have been proposed in municipalities other than Seattle, including Detroit, New York, and the District of Columbia. For a record of such efforts, together with a model ordinance, see Berman, *Draft Model Anti-Surveillance Legislation* (Feb. 1, 1977) (unpublished manuscript prepared for the Center for National Security Studies).

²⁷⁰ SEATTLE, WASH. MUN. CODE § 14.12.020(A) (1980).

²⁷¹ *Id.* § 14.12.020(B).

²⁷² *Id.* § 24.12.030(K). "Restricted information" also includes lists of an organizations members and contributors, and the fact of individuals' membership in an organization. Additionally, the ordinance restricts the collection of information about a person's sexual practices or orientation, except in cases of sex-related crimes or where the information may identify a fugitive. *See id.* § 14.12.130; *see also id.* § 14.12.140 (limiting receipt and transmission of private sexual information).

²⁷³ *See id.* § 14.12.150.

²⁷⁴ *See id.* § 14.12.080.

In a criminal investigation, the ordinance requires a police officer of the rank of lieutenant or higher to authorize in writing the collection of restricted information upon a showing of a "reasonable suspicion that the subject of the *restricted information* has engaged in, is engaging in, or is about to engage in unlawful activity."²⁷⁵ The authorization must state the legal violation under investigation, the nature of the reasonable suspicion, and the relevance of the restricted information.²⁷⁶ The authorization expires in ninety days²⁷⁷ and may be renewed only by the chief of police.²⁷⁸

The Seattle ordinance provides that the collection of restricted information in connection with the protection of a dignitary may be authorized only by the police chief upon a showing of "reasonable suspicion that the subject of the *restricted information* could pose a threat to the life or safety of a visiting official or dignitary."²⁷⁹ The authorization must be in writing and conform to requirements similar to those applicable in criminal investigations.²⁸⁰

Under the ordinance, police may use infiltrators and informants in connection with either a criminal or dignitary protection investigation, provided that the written authorization explains the need for such action.²⁸¹ To introduce an infiltrator into a political, religious, community, or civil liberties organization, however, the police chief must specifically authorize the use of the infiltrator and explain why the infiltration is necessary and how it will avoid "unreasonable infringement upon . . . rights, liberties, and freedoms."²⁸²

The Seattle ordinance permits the police to transmit restricted information to another government agency pursuant to a prosecutor's request or a court order.²⁸³ The police may also disseminate information to a government agency upon a showing sufficient to trigger an authorization for criminal investigation or dignitary protection.²⁸⁴

The ordinance provides for appointment by the Mayor and the City Council of a civilian auditor²⁸⁵ who audits the files at unscheduled

²⁷⁵ *Id.* § 14.12.150(C)(1) (emphasis in original).

²⁷⁶ *Id.* § 14.12.160.

²⁷⁷ *Id.* § 14.12.150.

²⁷⁸ *Id.* § 14.12.170.

²⁷⁹ *Id.* § 14.12.230(A) (emphasis in original).

²⁸⁰ *Id.* Restricted information may be collected for dignitary protection without authorization from other criminal justice agencies or from persons planning a demonstration or other public sources. *Id.* § 14.12.220.

²⁸¹ *See id.* §§ 14.12.210(A) (criminal), 14.12.150-190 (dignitary).

²⁸² *Id.* § 14.12.250(B)(3).

²⁸³ *See id.* § 14.12.200.

²⁸⁴ *Id.* The section does not say that restricted information may *not* be transferred to other persons, but it is fair to imply such a restriction from the language of the section.

²⁸⁵ *See id.* § 14.12.310.

intervals not exceeding 180 days.²⁸⁶ The auditor's duties include examining all authorizations and making a random check of police surveillance files.²⁸⁷ The auditor must report to the Mayor and notify any victim of an investigation conducted in violation of the ordinance.²⁸⁸ The Chief of the Department also must make an annual statistical report to the Mayor.²⁸⁹

The Seattle ordinance is extremely similar in structure, and even in some of its wording, to the Chicago decree negotiated months later. On a substantive level, the Chicago decree contains some requirements for authorization and minimization that the Seattle statute does not. The ordinance, however, contains one notable provision that no court decree shares; it provides that the city may be held civilly liable for damages accruing from willful violations of the principal provisions of the ordinance but it specifically bars recovery against individual officers.²⁹⁰ A court decree probably could not provide for prospective civil remedies in a like manner.

Eighteen months after the ordinance became effective, the Mayor of Seattle issued his first status report,²⁹¹ noting that everyone concerned had been following the ordinance. The Mayor had appointed a civilian auditor, who had twice audited all the authorizations and other department files without finding substantial violations of the ordinance.²⁹² The police chief had made his statistical report, stating that although no authorizations had been issued for dignitary protection investigations, eleven authorizations for criminal investigations had been granted.²⁹³

One of the problems noted in the Mayor's report was the "chilling effect" the Ordinance had on Department Personnel.²⁹⁴ This effect was a natural reaction to a complex new statute that was designed to instill

²⁸⁶ See *id.* § 14.12.330(A).

²⁸⁷ *Id.* § 14.12.330(B)(1).

²⁸⁸ *Id.* § 14.12.340.

²⁸⁹ *Id.* § 14.12.380.

²⁹⁰ See *id.* § 14.12.350-360. Organizations or individuals have a right of action against the City of Seattle for injuries caused by department personnel acting willfully and improperly within the scope and course of their duties, which includes collecting restricted or private sexual information, using an infiltrator, inciting crime, or communicating derogatory information in violation of the other provisions of the ordinance. See *id.* § 14.12.350(A). The ordinance also mandates administrative disciplinary proceedings for officers who violate the ordinance. See *id.* § 14.12.390-400.

²⁹¹ See Mayor's Review, *supra* note 264. The Mayor's review is mandated by the ordinance. See SEATTLE, WASH., MUN. CODE § 14.12.410.

²⁹² See Mayor's Review, *supra* note 264, at 7-12.

²⁹³ *Id.* at 9. The number of authorizations refused, if any, is not noted. The estimated cost of the law's administration was approximately \$300,000, consisting chiefly of expenses for "time lost" at a two-day seminar conducted to familiarize all police personnel with the new ordinance. *Id.* at 12-13.

²⁹⁴ *Id.* at 14.

some hesitation in police officers conducting surveillance activities. Accordingly, the report recommended no major changes.

A more significant problem was the reported refusal of certain "law enforcement agencies," most notably, the Law Enforcement Information Unit (LEIU), to share information with the Seattle police because of the civilian audit.²⁹⁵ Until 1978, the Seattle Police Department was a member in good standing of the LEIU, a nominally autonomous body through which police departments share criminal intelligence.²⁹⁶ Then, just prior to passage of the ordinance, V. L. Bartley, an officer in the Seattle Police Intelligence Unit wrote to the LEIU, noting the pending lawsuit and review of intelligence practices by the City Council and adding: "I am forwarding our LEIU files to you since I can no longer assure their security. Please retain the cards until the situation here improves or until we are forced to resign from LEIU membership."²⁹⁷ The officer's curiously abject tone was repeated in a letter sent by the Seattle Police Department to the LEIU in August of 1980:

We realize that L.E.I.U. is faced with a difficult decision regarding Seattle's continued participation in the organization, however, we can only say that we trust you will make the right decision, we will understand the reason for that decision and, of course, we will have to live with it.²⁹⁸

In October of 1980, the LEIU suspended the Seattle Police Department's membership. The department promptly began to agitate for an exemption of LEIU material from the civilian audit so the department could be readmitted to the organization. The circumstances strongly suggest that the department engineered the suspension to give it leverage in its lobby for an amendment to the ordinance.²⁹⁹ Neither the Mayor, in his first status report, nor the City Council staff recommended the exemption, believing that reinstatement in the LEIU could be achieved by less drastic means. Nevertheless, the department's supporters were able to push through an exemption from civilian audit for LEIU materials.³⁰⁰

The Seattle experience, although unique in the annals of attempts to control political surveillance, illustrates the potential strengths and

²⁹⁵ See *id.* at 14, 28-33.

²⁹⁶ See *infra* text accompanying notes 301-05.

²⁹⁷ POLICE THREAT, *supra* note 8, at 86.

²⁹⁸ Letter from Patrick Munter, Lieutenant, Seattle Police Department, to Thomas Ruxlow, Special Agent, In-Charge Field Operations, Iowa Bureau of Criminal Investigation (Aug. 28, 1980).

²⁹⁹ The suspension is difficult to explain otherwise in view of the fact that the LEIU did not suspend the Chicago department's members although damaging LEIU documents were revealed to the Chicago plaintiffs' lawyers in discovery.

³⁰⁰ See Seattle, Wash., Ordinance 109237 § (1980) (amending Seattle, Wash., Police Intelligence Ordinance 108333, ch. VII, § 30 (1979)). The Police Chief is made auditor for LEIU materials. *Id.*

weaknesses of the legislative process as an avenue to reform. The ordinance is well-drafted, contains civil damage provisions impossible to include in a judicial decree, and arguably induces more willing compliance because it is a result of the political process. On the other hand, opponents of the ordinance have been able to manipulate the political process to secure its amendment. The amendment exempting LEIU documents from the civilian audit did not have a significant impact on the effectiveness of the Seattle ordinance, but it may portend future problems.

V

THE FLIGHT INTO PRIVATE INVESTIGATION

The Seattle Police Department's success in obtaining an exemption for LEIU material may inspire other local police departments to obtain surveillance information through private agencies. Employment of private intelligence-gathering agencies might allow local police to effectively continue political surveillance while avoiding inquiries by courts and municipal investigators.

Shielded from public scrutiny, a private agency may be able to collect political data with impunity. Although the LEIU is nominally private, all of its cooperating members are official law enforcement agencies and almost all its funding comes from government sources.³⁰¹ A lawyer in Chicago's *Alliance* suit estimated that at one time, approximately ten percent of the information on the Chicago LEIU records was political in nature.³⁰² In 1979, the LEIU did attempt to tighten its "guidelines"³⁰³ to exclude political information, but it is impossible to determine whether member agencies are complying with the guidelines.³⁰⁴ Thus, the LEIU is an example of the possibility of using a private agency for political surveillance.³⁰⁵

Another private intelligence gathering body is Western Goals, a foundation based in Alexandria, Virginia. Western Goals styles itself "the first and only public foundation to enter this area and fill the critical gap caused by the crippling of the FBI, the disabling of the House Committee on Un-American Activities and the destruction of

³⁰¹ See *POLICE THREAT*, *supra* note 8, at 85.

³⁰² See *id.* at 87.

³⁰³ LEIU, LEIU Guidelines on Collection, Dissemination and Purging of LEIU/IOCI Index System (1979).

³⁰⁴ See *ACLU v. Deukmejian*, 32 Cal. 3d 440, 651 P.2d 822, 186 Cal. Rptr. 235 (1982) (denying ACLU's request for LEIU material because material fell within "intelligence information" exception to California disclosure law).

³⁰⁵ See Peterzell, *Nuclear Power and Political Surveillance 77-89* (Jan. 1981) (Center for National Securities Studies Report No. 105) (canvassing private agencies like LEIU).

crucial government files.'"³⁰⁶ It is a fascinating coda to the discussion of the Los Angeles political squad to note that detective Jay Paul, who secreted the LAPD's "purged" intelligence files, is a correspondent linked to the computerized files of Western Goals. It is not clear whether Paul fed any of the purged information to Western Goals, but Paul did obtain political information from Western Goals while there were surveillance restrictions on the Los Angeles Police Department.

In the final analysis, however, the flight into private investigation is unlikely to be an effective means of circumventing instruments of control such as court orders, ordinances, or regulations, unless specific exemptions are written into those instruments. The Chicago, Memphis, and New York settlements were drafted to eliminate possible loopholes for "cooperative" efforts.³⁰⁷ Even in the absence of such a precaution, spying conducted by a private agency with government money is a government act and is therefore potentially subject to review and control. In the long run, such spying is not as much a legal as a practical problem. As in cases involving police spying, the difficulty lies in uncovering incidents of spying and the persons responsible for them. That problem will become still more difficult if the use of private agencies becomes a general phenomenon.

CONCLUSION

The substantive results of all the actions taken in an effort to control local police surveillance, whether embodied in regulations, legislation, or judicial decrees, are generally homogeneous. Purely political, noncriminal investigations have usually been interdicted, and the dissemination of information has been generally restricted to governmental or law enforcement personnel. In some instances, elaborate standards and bureaucratic controls for "mixed" investigations have been established.

Although the reforms obtained in court decrees and the Seattle ordinance are consistent with the case law, they have gone beyond it in establishing standards and written accountability for the use of intrusive investigative methods in political cases. These particular reforms are

³⁰⁶ Sappell, *Detective in Spying Case Linked to Birch Leader*, L.A. Times, May 24, 1983, at 13, col. 3 (quoting Western Goals's fund-raising literature).

³⁰⁷ See *Alliance to End Repression v. City of Chicago*, 561 F. Supp. 537, 562 (N.D. Ill. 1982) (Decree § 2); *Kendrick v. Chandler*, No. 76-449, at 5, para. I (W.D. Tenn. Sept. 14, 1978); Stipulation of Settlement and Order at 3, § IV, *Handschu*; Defendants' Amended Responses and Objections to Interrogatories of Socialist Workers Party at 4-5, *Handschu*. Michigan has passed a law restricting the state police from making use of such private sources. See MICH. COMP. LAWS ANN. § 752.1(d) (Supp. 1983). The Los Angeles settlement is unclear on the point permitting "multi-agency task force investigations" outside the ATD standards. See *Coalition Against Police Abuse v. Board of Police Comm'rs*, No. 243-458, at app. A, § VI (L.A. County Ct. Feb. 22, 1984).

especially significant because they establish that it is possible to conceive and administer controls upon surveillance, and that the police will accept such controls.

Of the three principal avenues for reform, administrative regulation, litigation, and legislation, no one was clearly more effective than the others. Of the three, administrative remedies constitute the least satisfactory instrument for reform. Internally administered police "guidelines" have proved woefully inadequate in cases where the guidelines have actually been put to the test because such administrative rules are easily ignored or changed. Judicial decrees, because of their injunctive nature, are not subject to the inherent limitations of administrative guidelines. As public law litigations, however, the cases brought to curtail local police surveillance activities have not been as successful as the plaintiffs had hoped. None of the cases has resulted in a major change in the underlying stratum of constitutional law or legislative policy; the rights recognized in the successful cases have been consistent with the existing law most favorable to the plaintiffs, without passing radically beyond it. Local legislation, which in theory seems a solution preferable to resort to the courts, has not in practice proved much more successful than litigation. For the most part, critics of political surveillance have not had the power to obtain favorable results, and in the one city where an ordinance has been passed, Seattle, the results are much like those obtained by judicial settlement.

Courts and legislatures have long refused to create controls over police investigations, reasoning that police or executive discretion in such matters must be absolute. Any abuses of police discretion were viewed as the price that had to be paid for effective investigative work. The workability of the reforms in the cities and states discussed in this article establish, at the least, that this view does not reflect reality. If Congress, state legislatures, or the courts are ever to establish more effective controls for surveillance, such as judicial warrants, they will do so only if they believe those controls are workable. The results in these cases suggest that controls are workable and point toward more widespread reforms.