

OPC MONITORING OF THE INAUGURATION JANUARY 20, 2017



REPORT AND RECOMMENDATIONS OF THE POLICE COMPLAINTS BOARD

TO

**MAYOR MURIEL BOWSER,
THE COUNCIL OF THE DISTRICT OF COLUMBIA, AND
INTERIM CHIEF OF POLICE PETER NEWSHAM**

February 27, 2017

POLICE COMPLAINTS BOARD

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I. INTRODUCTION AND OVERVIEW

On Friday, January 20, 2017, hundreds of thousands of people from across the nation attended the Presidential Inauguration and its related events and protests.¹ The inauguration was held on the steps of the Capitol building with attendees spanning west onto the National Mall. The parade took place predominately along Pennsylvania Avenue from the Capitol to the White House. Other events and protests took place across the city, with incidents of particular note happening in the area of Franklin Square Park.

OPC, pursuant to the agency's authority under the First Amendment Rights and Police Standards Act,² deployed eleven members of its staff to monitor MPD's interactions with protesters throughout the day on Friday. Because the event took place on both federal and District of Columbia property, a number of federal law enforcement officers, specifically officers from the Secret Service, U.S. Park Police, Capitol Police, and the National Guard, were present in addition to MPD officers. Approximately 3,000 officers from federal agencies and other local jurisdictions also provided law enforcement services as part of this National Security Special Event (NSSE). Because the Act applies only to the District of Columbia's police officers, OPC staff primarily concentrated on observing the actions of MPD officers. OPC also photographed and video recorded observations of incidents.³ This report summarizes OPC's observations and makes recommendations based on those observations.⁴ The Police Complaints Board (PCB) concludes that while in many instances MPD conducted activities in a constitutional manner, there are several instances where the observations made by OPC cause concern and raise questions.

¹ No official crowd estimate has been released; this is based on observations and anecdotal evidence.

² See D.C. Code §§ 5-331.01 to -337.01 (2015). The Act articulates the District of Columbia's official policy on First Amendment assemblies and, among other things, establishes specific standards of police conduct when handling protests or demonstrations. These standards prohibit MPD from employing crowd control tactics during protests that have the potential to deprive demonstrators of the right to assemble peaceably and express their views.

³ See Appendix.

⁴ The Police Complaints Board (PCB), the governing body of the Office of Police Complaints (OPC), submits this report and recommendations pursuant to its statutory authority to make recommendations to the Mayor, the Council of the District of Columbia, and the Chief of the Metropolitan Police Department (MPD) that, if implemented, may lower the occurrence of police misconduct, and its authority to monitor and evaluate MPD's handling of First Amendment assemblies. See D.C. Code § 5-1104(d) (2015). PCB would like to acknowledge the assistance of OPC's staff in conducting the protest monitoring on January 21, 2017, and with preparing this report and recommendations. The agency's monitoring work was coordinated and supervised by OPC Executive Director Michael G. Tobin; Deputy Director Rochelle Howard; and Senior Investigators, Anthony Lawrence, Denise Hatchell, and Jessica Rau. In addition, the following OPC staff members served as monitors: Investigations Manager Robert Rowe; Administrative Officer Stephanie Banks; Investigators Hansel Aguilar, Victoria Keys, Lindsey Murphy, and Ethan Trinh; Program Analyst Christopher Weber; Investigative Clerk Chauntini Clark; and PCB Member Bobbi Strang.

II. THE ACT AND OPC'S MONITORING EFFORTS

The First Amendment Rights and Police Standards Act of 2004 ("Act") took effect in the District on April 13, 2005. The Act established and declared the District's official policy on First Amendment protests. In the District, persons and groups have a right to engage in peaceful First Amendment demonstrations in or on public space controlled by the District – particularly places near the object of the demonstrators' protest so they can be seen and heard – subject solely to reasonable restrictions designed to protect public safety and to accommodate competing rights of non-demonstrators.⁵ The Act requires MPD to recognize and implement this official policy by adhering to specific standards of conduct in interacting with persons and organizations engaged in exercising First Amendment rights.⁶

OPC focused its monitoring on Title I of the Act. Title I, known as First Amendment Assemblies, requires MPD to: 1) permit persons to engage in First Amendment demonstrations even if they have not given notice or obtained approval; 2) seek voluntary compliance with reasonable time, place, and manner restrictions; 3) limit arrest and citation to specific non-compliant demonstrators for whom there is probable cause; 4) refrain from dispersing demonstrators unless there is widespread unlawful conduct; 5) provide multiple audible warnings, a clear dispersal route, and sufficient time to disperse, when dispersal is deemed necessary; 6) refrain from using police lines to surround demonstrators unless there is widespread unlawful conduct; 7) enhance the visibility of officers' names and badge numbers; 8) refrain from using riot gear unless there is a danger of violence; 9) refrain from using chemical irritants to disperse demonstrators unless demonstrators are endangering public safety; and 10) grant the media full access to areas where demonstrations take place.

Throughout most of the day's events at various locations OPC's overall impression is that MPD performed in a professional manner and effectively and lawfully balanced the interests of public safety with the right to free expression. MPD's general interaction with the public appeared cordial, helpful, and respectful. MPD officers appeared alert and attentive, yet unimposing and non-confrontational. MPD officers were observed providing help and directions to individuals who requested assistance at various locations around the inauguration events.

Some specific examples of positive police interactions that were observed by OPC were:

- At Union Station, a large group of protesters were leaving toward 1st and D Streets N.W., toward the Blue Gate entry point, MPD officers were visible monitoring the area. They were courteous and assisted visitors as needed.

⁵ D.C. Code § 5-331.03.

⁶ D.C. Code §§ 5-331.05 to -331.17.

- Along I-395 near 7th Street S.W., OPC observed a large group of protesters who prevented cars from moving on I-395. The bulk of the protesters were traveling south and west, but a small number of unorganized people walked among the cars heading west. This activity stopped vehicle traffic going northbound and southbound. The group was steered into the 12th Street exit by MPD officers. MPD did not interfere or stop the protest, but provided traffic control for safe passage. An MPD cruiser provided traffic control from behind the walkers for their safety. Once the group was fully in the 12th Street exit ramp, I-395 was reopened to vehicular traffic. The group continued to march northbound, eventually ending up at 17th Street and Constitution Avenue N.W. The group was easily directed by police roadblocks at the intersections. No unconstitutional tactics were observed and no arrests were required by the police.
- A group of protesters were walking on Massachusetts Avenue N.W. near 12th Street, towards the police perimeter. MPD reinforced their northern barricade and had MPD officers in neon jackets, as well as National Guard standing at attention with baton in hand. The protesters passed by peacefully and joined the rest of the crowd. When the protesters got too close to the police line, the police began to walk forward while the protesters backed up. All interactions were calm, no physical force was used, and no arrests were made.
- At 14th and I Streets N.W., an MPD Lieutenant was observed explaining police procedure to a civilian.

Nearly all MPD officers whom OPC staff observed displayed their nameplates and badge numbers. However, at Union Station, around 11:55 a.m., one MPD officer was observed with no visible name tag or badge number. And around 1:30 p.m. near 12th and L Streets N.W., two MPD officers in riot gear were not displaying name tags, but their badge numbers were visible, as the newly issued MPD protective helmets have officers' badge numbers imprinted on the front above the visor. Based on all the observations, these appear to be anomalies, and the majority of MPD officers were following protocol with nameplates and badge numbers displayed.

However, there were other observations made throughout that day that raise concerns on how protests were handled. Some examples are:

- At a parade security checkpoint entrance at 14th Street N.W., between F Street and Pennsylvania Avenue, there were protesters blocking access to the check point. About 10 protesters were seated in the walkway blocking access. A supervisory officer approached the officers surrounding the seated protestors. There was a woman carrying a long lensed camera standing between the fence and the seated protestors. The supervisory officer told the other officers to "push her down or out," expressing the desire to use force on a woman who appeared to be news media, and had not yet been asked to move in any way.

- At 10th and F Streets N.W., a large group of protesters had formed a human wall that was two to three rows deep in certain locations, in order to block the check point entry to the parade route. The protesters were all linked in arms. This prevented inauguration attendees from entering and created a long line of individuals who were not allowed access to the event. This also created a conflict in balancing the First Amendment Rights and Police Standards Act's provisions to accommodate the competing rights of non-demonstrators. MPD Officers were stationed behind them with neon yellow jackets. When people attending the inauguration attempted to pass through, the protesters remained in their formation and would tell the inauguration attendees to find another entrance. A few inauguration attendees complied however some attempted to get through and pushed into the wall of the protesters. When MPD noticed an attendee trying to get through, they responded by physically pulling the protesters apart to create a passage way for the attendees. Many of the protesters held onto each other as MPD officers attempted to separate them. MPD appeared to have to use some degree of physical force in order to separate the protesters. When MPD would respond to let someone through, many of the protestors in the human wall would sit down while continuing to hold onto each other's arms. An unidentified protester explained to an OPC monitor that they did this so that the police would not knock them over when they tried to create a passage. The unidentified protester also informed the OPC monitor that one of the officers had been striking protesters earlier in the day in order to get them to comply. Another unidentified protester explained that this same officer pulled a protester's hair to get her to move.
- Activity first began in the Franklin Square Park area when a group carrying "Honor the Treaties" signs was marching in the area and then began to ignite fireworks in the park. It was at this time that MPD officers responded to Franklin Square Park, including CDU officers. This area continued to be the site of protester and MPD activity for the remainder of the afternoon and evening.
- At 12th and L Streets N.W., a police line was set up using yellow tape, MPD bicycles, and motorcycles, to keep people away from protesters gathered on the corner. Protesters, or any other people, within the police line were not permitted to leave. Officers were outfitted in riot gear and were carrying less than lethal weapons⁷, such as OC spray dispensers. The crowd outside the police line shouted repeatedly "let them go!" MPD then began to arrest those inside the police line. U.S. Park Police officers were also in riot gear near-by and appeared to have set up their own police line.
- At 12th and L Streets N.W., the crowd was getting louder but still remained behind the caution tape set up by the police. An unidentified officer was yelling at an individual to

⁷ MPD officers with various less than lethal weapons were observed by OPC monitors. OC spray dispenser refers to Oleoresin Capsicum Spray Dispensers, which resemble a small fire extinguisher containing 14-48 ounces of solution, depending on the particular model, with a typical range of 25-30 feet. Stingers refer to an explosive device the releases smoke, rubber pellets, and a chemical irritant within a radius of approximately 50 feet, depending on the particular model. Smoke flare refers to an explosive device that releases smoke.

back up although it appeared that she did not cross the police line. Multiple individuals in the crowd were yelling “Be peaceful” and “Remain peaceful” to other protesters in the crowd. An unidentified officer extended his OC spray dispenser and discharged it into the crowd without issuing a warning or command. The crowd did not initially react to this spray, however another officer then discharged his OC spray dispenser in the same general direction and the crowd began to retreat. At this time, an OPC monitor observed another officer point his OC spray dispenser in the direction of OPC monitors, and others in the area who were not involved in any protest activity. As the OPC monitors turned away to leave the scene with the rest of the crowd, an OPC monitor, who was dressed in distinctive clothing identifying him as an OPC monitor, was sprayed in the back of the head and side of the face with OC spray as he turned. OPC investigators repositioned themselves down 12th Street at a safe distance from the police line. Once at a safe distance they noticed many other bystanders and protesters who had been sprayed. A small group of protesters wearing masks then began throwing objects at the police. The vast majority of individuals did not engage in this conduct. The OPC monitors had not observed any objects being thrown prior to the deployment of the OC spray. MPD deployed a smoke flare that discharged red smoke near their front line. MPD then deployed what appeared to be stingers. The crowd continued to disperse. OPC monitors continued to move further away. Once at a safe distance, they could hear multiple other stingers being deployed. The MPD officers pushed the crowd back towards 12th and K Streets N.W., by walking forward with their shields raised. The protesters and others moved voluntarily as the officers moved forward. MPD officers began to clear the protesters from the street, and then the officers moved down K Street, towards 13th Street. At this point the officers appeared to indiscriminately deploy more stingers and OC spray to move the crowd, that appeared to include bystanders and news media. The police line made it to K Street and 13th Street and maintained their position at this location for an extended period of time.

- At Franklin Square Park, police moved west on K Street, dispersing the crowd. During this operation, OPC monitors observed a person, wearing a mask that covered his mouth and chin, stop about 15 feet from the police line. He held his hands out in a gesture that could have been interpreted as challenging however he was far from the police, his hands were empty, and he did not attempt to engage them. One officer with a large OC spray dispenser, discharged a cloud of spray at the individual without warning. As the officers moved west on K Street, an officer discharged a spray of OC into the crowd to his right in the park. There did not appear to be any provocation for this action, nor a warning or command before it happened. Shortly later a stinger was released into the crowd on K Street, west of the police line.
- An OPC monitor walked through Franklin Square Park and stood on the curb of the sidewalk of the Park at K Street, near where a limousine fire had been extinguished. She observed an officer spray the crowd in front of him with OC spray without an order or

warning, and then the line of officers started shouting “back up” and stepped forward. She then saw an individual from the crowd throw an empty plastic water bottle. Officers then threw stingers in the air⁸ into the crowd, which contained bystanders and news media. The OPC monitor was struck in both legs in multiple places with the rubber pellets from the stinger.

OPC was limited in its ability to observe all police actions due to the wide variety of events occurring simultaneously in different geographic areas, and concerns for the safety of the observers. OPC has also reviewed news media, social media, and other outlets’ video and print media coverage of the events of the day to obtain additional context of the events. The events received significant local and national media coverage.

For example, The Washington Post reported “protesters arrived at the Franklin Square area and clashed with police. The protesters were throwing rocks, bricks and chunks of concrete and taking newspaper boxes and barriers and putting them on the streets. Meanwhile police appeared to be using a flurry of flash-bang grenades and chemical spray to hold the protesters back, pushing them block-by-block west along K Street, from 12th Street toward 14th Street.” The story continued that “the protesters started a fire in the middle of the street using garbage bins and newspaper boxes, and some climbed trees and light poles. About 100 officers in riot gear, carrying shields, stood in a line blocking off K Street.”⁹

In addition, U.S. News & World Report wrote that as of January 25, 2017 “seven journalists have been identified as being among the 230 adults charged with felony rioting.” The story continued, “The arrests followed a chaotic chase through the streets of downtown Washington during which windows were smashed and projectiles flung at police, who responded with generous amounts of pepper spray and flash-bang grenades before penning in part of the anti-capitalism march.”¹⁰

The District of Columbia Bar Association reported accounts by legal observers. One attorney stated “The vast majority of people in the protests were just protesting

⁸ An OPC investigator was informed during MPD training that stingers are only to be rolled on the ground when they are deployed, to avoid having a rubber pellet strike anyone in the face. However, several OPC monitors observed MPD officers throwing stingers toward the crowd in the air. OPC is not aware of any written MPD directives on the proper deployment of stingers.

⁹ Theresa Vargas, Taylor Hartz, and Peter Hermann, *Inauguration protesters vandalize, set fires, try to disrupt Trump’s oath, as police arrest more than 200*, Washington Post, Jan. 20, 2017.

¹⁰ Steven Nelson, *D.C. Police Chief Won’t Comment on Journalists Charged With Felony Rioting After Inauguration Mass Arrest*, U.S. News & World Report, Jan. 25, 2017.

peacefully... There were members of the media there, there were legal observers—both lawyers and law students—and many of them were arrested.”¹¹

Many news and social media reports also included other stories of, or interviews with, people who were corralled and arrested by MPD, even though they claimed to have not taken part in any rioting or acts of vandalism.¹² Further, multiple media reports and observations include that those involved in the rioting were dressed in all black, yet many who were cordoned off and then arrested wore press identification or green legal observer hats, differentiating them visibly from those engaged in unlawful acts.¹³

III. ANALYSIS

Two concerns illustrated through the observations of the OPC monitors in the Franklin Square Park area are that some arrests may not have been carried out according to the Standard Operating Procedures, and that less than lethal weapons were used indiscriminately and without adequate warnings in certain instances.¹⁴ In addition it appears that there was not always a clear inter-agency chain of command or direct communication network between the various law enforcement entities directly engaged in some activities. Specifically, in the area of Franklin Square Park, there was at least MPD and U.S. Park Police presence, although other law enforcement agencies may have been on the scene as well. In briefings leading up to inauguration day, OPC was informed that MPD would be the primary law enforcement agency to respond to any incidents requiring riot gear, however, U.S. Park Police officers were also in riot gear, and appeared at times to be acting independently of MPD.

The Standard Operating Procedure (SOP) for Handling First Amendment Assemblies and Mass Demonstrations was updated on December 13, 2016 and disseminated to all members of MPD in advance of inauguration day.¹⁵ The SOP outlines the procedures that are to be followed by officers when a protest turns violent and arrests are required. The SOP provides that warnings are to be given before arrests using amplification devices. The SOP requires that there must be at least one warning given, and absent exigent circumstance, three warnings are to be

¹¹ David Boyle, *When Crowds Protest, Legal Observers Serve as Neutral Force*, available at <https://www.dcb.org/about-the-bar/news/legal-observers-as-a-neutral-force.cfm>. Viewed on 2/16/17.

¹² See Dick Uliano, *DC police review strategy during inauguration, protests, march*, WTOP, Jan. 22, 2017. See also *supra* note 7 and 8.

¹³ *Supra* note 8.

¹⁴ As of February 22, 2017, OPC had received four formal complaints, and one pending formal complaint, related to January 20, 2017. Two of the formal complaints are related to use of force allegations. In addition, OPC has received 17 additional contacts from concerned community members, eight of which are related to people observing use of force.

¹⁵ MPD Standard Operating Procedure 16-01 (Handling First Amendment Assemblies and Mass Demonstrations) Effective Date December 13, 2016.

given. The purpose of these warnings is to give people the opportunity and time to disperse, and thus avoid arrest. However, when MPD corralled people, at 12th and L Streets, they were not allowed to leave. In addition, there is no indication in witness reports, nor any observations by OPC monitors, that any warnings were given either before or after the police line cordoned off those who were later arrested.

Further, the SOP also states that if arrests become necessary, they must be based on “probable cause of those participating in violations of law.” It is clear from OPC monitors, and multiple other sources, that those committing the acts of vandalism and violence were dressed primarily in all black, yet many of those held and arrested, were visibly wearing items that identified them as not being associated with these protesters. While it is not in the PCB’s purview to make a determination on probable cause, it seems that proximity to the area where property damage occurred was a primary factor, based on OPC monitor observations that many arrested seemingly did not meet the description of the majority of those who appeared to engage in property destruction. Some observations indicate that it would likely be a challenging task to make a probable cause determination for each person arrested under the circumstance present in the Franklin Square Park area.

Lastly, while the SOP permits the use of less than lethal weapons at first amendment assemblies¹⁶, it does not provide a specific procedure to follow for their use. It does include them listed as a tool for a commander to use to deal with unlawful activity, which might imply that they can only be used pursuant to a command directive on the scene, but this is far from clear. The SOP is silent as to whether a warning is required in advance of deploying a less than lethal weapon. It is evident that this lack of direction in the SOP led to widespread use of the weapons on inauguration day, and they appeared to be deployed as a means of crowd control, and not necessarily in response to an unlawful action. In many instances, it seemed to OPC monitors that a verbal command to step back should have preceded the use of the weapon, and that would have been sufficient to move the crowd. Without a command to move, or a warning of the weapon’s use, many in the crowd were impacted by the deployment that might have otherwise left the scene.

OC Spray is separately covered by a General Order, which does provide specific guidance for its use.¹⁷ The general order clearly states, “members shall issue a warning that OC Spray is going to be used against the subject, unless resistance ends provided that a warning would not endanger the officer or others.”¹⁸ The general order also specifically prohibits use of

¹⁶ SOP-16-0, Section IV, E, 2, d, at page 7.

¹⁷ General Order 901.04, Oleoresin Capsicum (OC) Spray Dispensers

¹⁸ *Id.* at page 4.

OC spray to disperse a crowd, or to use OC spray on a person whom the officer does not have legal cause to take into custody.¹⁹ Based on OPC monitors observations, it appeared that these prohibitions were not followed, as OC spray was deployed to move the crowd, without warnings, and in many instances it was used on people who were simply standing in the wrong place.

IV. CONCLUSION AND RECOMMENDATIONS

Based on OPC's observations, the PCB offers the following:²⁰

(1) An independent consultant should be appointed to investigate and examine all aspects of MPD's actions on January 20, 2017. This consultant should be allocated adequate resources to fully and independently review all of the planning, procedures, and activities employed by MPD, especially with respect to the events that occurred in the area of Franklin Square Park. This should also include MPD's coordination with the various other law enforcement agencies in preparation for inauguration day, and the coordination and communication that took place on that date. This is necessary to fully understand the activities that took place, and whether the responses from MPD were appropriate. Of most concern are the potential violations of the First Amendment Assemblies Act related to: limiting arrests and citations to specific non-compliant demonstrators for whom there is probable cause; providing multiple audible warnings, a clear dispersal route, and sufficient time to disperse, when dispersal is deemed necessary; and refraining from using police lines to surround demonstrators unless there is widespread unlawful conduct.

While OPC monitors were able to observe some MPD actions, their limited numbers and safety concerns, prevented them from observing the full scope of MPD conduct. In addition, the monitors were unable to hear or observe orders that may have been given from commanding officers in many instances, and have not been able to review documentation of events from that day that would presumably provide more detailed information such as what those orders were. OPC has requested documentation from MPD for January 20, 2017, that would provide greater insight into whether actions were in compliance with the Act and applicable best practices, however no documentation has been provided as of the date of this report.²¹

¹⁹ *Id.* at page 3.

²⁰ PCB recognizes and appreciates the cooperation of MPD Interim Police Chief Peter Newsham, and Commander Jeffrey Carroll of MPD's Special Operations Division, in providing assistance to OPC as it planned and carried out its monitoring efforts.

²¹ On January 23, 2017, OPC requested all Commanders Mass Demonstration Event Log Form 759-b, all Demonstration Reportable Force Report Form 901-m, any individual UFIR Form 901-e or 901-g, and any other reports or information that may be of assistance in preparing this protest monitor report.

The PCB also recognizes that multiple chaotic and confusing events unfolded during the afternoon and evening that required significant MPD response. This has created a voluminous amount of body-worn camera footage, in addition to an enormous amount of other video footage taken by the media and civilians. This large amount of evidence requires an in-depth, independent review. An independent consultant would require access to all MPD body worn camera footage, stationary and aerial videos, and all MPD documents related to January 20, 2017, in order to conduct a thorough examination of the day's events, and to make a full report on MPD's actions.

Based on the observations of OPC monitors, and other third party sources, it appears that certain provisions of the Act and Standard Operating Procedures for arrests at first amendment assemblies may not have been followed. This initial observation should not be construed as a final determination that MPD violated provisions of the Act during the events of January 20, 2017. A determination cannot be final or conclusive without a full examination, and an independent consultant would provide the best means of conducting such an examination.

(2) The Standard Operating Procedure for Handling First Amendment Assemblies should be reviewed and updated to include that warnings should be given when practical for all uses of less than lethal weapons in a crowd control situation, and there should be written guidance on the proper deployment and use of each less than lethal weapon. OPC monitors observed multiple instances over the course of several hours where less than lethal weapons were used and no warning or commands to the crowd preceded their use. The SOP gives very little direction on when and how to deploy less than lethal weapons for crowd control, and there should be more guidance in place to ensure that their use is not indiscriminate or unreasonably dangerous.

January 20, 2017 was a day that presented MPD with many challenging situations throughout the District of Columbia. Many were handled properly. However, it is clear that there are also many things MPD can learn from this day that will help officers be better prepared for future events while enabling them to protect the first amendment rights of all those involved. In a jurisdiction that has at least one first amendment assembly of varying size virtually every day, volatile situations are always a possibility; MPD should be equipped to handle them when they occur and continue to evolve their practices and procedures based upon these experiences.

APPENDIX









