

University of Detroit Journal of Urban Law

SYMPOSIUM

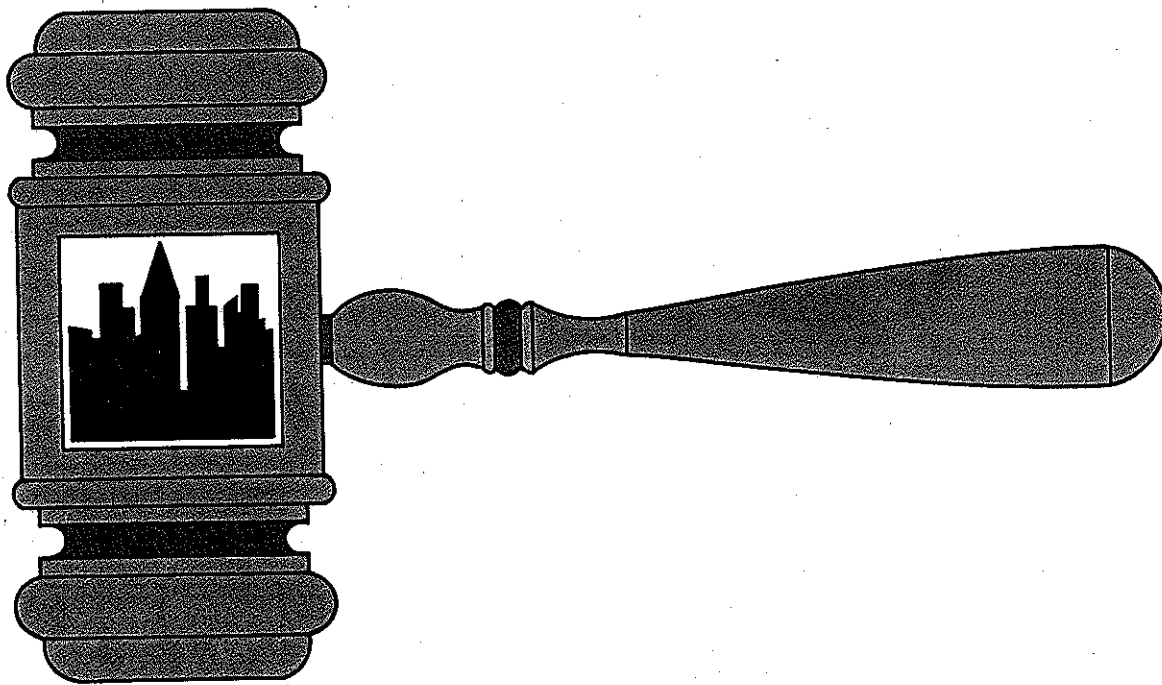
**POLICE SURVEILLANCE OF POLITICAL
ACTIVITY: CONTROLS THROUGH
LITIGATION AND LEGISLATION**



volume fifty-five

issue 4

Summer 1978



mittee on Government Operations "to study the actions of the Division of State Police as they relate to collecting, obtaining, cataloging, retaining, sharing and/or disseminating information about the activities of individuals and organizations who have not been charged with or suspected of any illegal acts within the state"¹⁸

In September of 1977, the Task Force published its findings, conclusions and recommendations in a report entitled *State Police Surveillance, Report of the New York State Assembly Task Force on State Police Non-Criminal Files (New York Report)*.¹⁹ In essence, the Task Force found that the State Police had collected and maintained information on persons and groups they characterized as "subversive."²⁰ Included in this category was a wide spectrum of groups and individuals whose common bond was the advocacy of some form of social change, with particular attention on those advocating racial equality or an end to the Vietnam War.²¹ Information was also collected on pro and anti-abortion organizers, welfare rights activists and opponents of nuclear proliferation.²² Furthermore, police investigations ranged from the collection of information on public and political figures²³ to persons who had merely written letters to various periodicals.²⁴

In regard to organizations, the New York Report states:

18. Res. of N.Y.S. Assem., Standing Committee on Governmental Operations creating the Subcommittee on Human Rights to Study the Actions of the New York Division of State Police, as they relate to certain individuals and organizations, (Dec. 15, 1975). While the resolution directed the Subcommittee on Human Rights to conduct the investigation, the actual investigation was conducted by a Special Task Force of the Subcommittee. The Task Force was chaired by Assemblyman Mark Alan Siegel and had as its additional members, Assemblymen Andrew A. Virgilio and James F. Hurley. Assemblyman Hurley had been a former member of the State Police and a former Sheriff, and thus provided the Task Force with a perspective otherwise not available. Assemblyman Hurley published a dissenting statement.

19. *NEW YORK REPORT*, *supra* note 14.

20. *Id.* 7, 45. As the *NEW YORK REPORT* indicates, the State Police investigated as subversives, individuals and organizations which in fact had no subversive purposes. Interestingly, the FBI collected similar information during this time period. According to the Church Committee, "The labeling of subversive activities was often used as a basis to investigate organizations which did not, at least publicly, advocate a subversive purpose. The subversives are largely a forerunner effort." *Church Committee Hearings*, *supra* note 7, at 11.

In actuality, what was created in New York was a system of what the Church Committee labeled "general Intelligence"; that is, intelligence which is simply a "collection of information about Americans and what they are doing and what they are thinking . . ." *Church Committee Hearings*, *supra* note 7, at 5.

21. *NEW YORK REPORT*, *supra* note 14, at 15.

22. *Id.*

23. *Id.* 21-25.

24. *Id.* 25-27.

Most files concerning a particular organization seem to be made up of individual reports on its meetings, demonstrations or planned activities, as described above. In certain cases, however, the Police were prompted to investigate a group because they were interested in its ideas or membership, ostensibly to determine if the 'group' had 'subversive' connections or a potential for violence. In many cases, the Police initiated investigations to identify a new group and be aware of its plans and purposes, even though they had received no complaint or indication that the group was of potential concern for law enforcement. This was done well before the group staged, planned or even contemplated activities. Once the group had been identified and information obtained, the case was then closed, but the report was maintained in the Files.²⁵

Information gathered on individuals was often more detailed. Thus, the Task Force found in many files records of credit checks, conversations with employers, neighbors, professors, local government officials and bank officers, notations on participation in political activities, and general comments on the subject's daily activities.²⁶ Additionally, if the individual had spoken at a surveilled event, his or her file would contain at least a synopsis of the speech. According to the New York Report:

[I]n the noncriminal area, the Police appeared concerned with any individual or group which was likely to speak publicly—in a speech, at a demonstration or in the newspapers—and espouse ideas which challenged the status quo. The interest that investigators had in expressions of opinions in local newspapers and in national magazines bears this out²⁷

Responsibility for political surveillance rested with the Special Services Unit of the State Police,²⁸ whose work was described by the

25. *Id.* 15.

26. *Id.* 18-21.

27. *Id.* 47.

28. The Special Services, formerly known as the Criminal and Subversives section, represented a category of work rather than an independently staffed unit. A lieutenant was the full time "Head of Detail" and a variety of clerks worked with him, but the investigative work was shared by the division as a whole. According to the New York Report:

As a Unit of the Bureau of Criminal Investigation, it functioned with very little independent administrative staff. The Lieutenant-Special Services, Head of the Detail, was based at State Police Headquarters, and sometimes had one assistant. According to State Police documents and interviews, one or two Bureau of Criminal

State Police as gathering, recording, analyzing and disseminating information needed by a law enforcement agency to control disorders and other events which take place within its jurisdiction, and which threaten public officials or facilities.²⁹ Under this mandate, information was collected by "the indiscriminate application of criminal investigative techniques to non-criminal matters."³⁰

While the Task Force discovered no substantial evidence of illegality in the collection of information, it did conclude that the investigators were not sufficiently sensitive to their responsibility to prevent infringement of individual rights.³¹ The report suggested the possibility of a chilling effect on the rights of groups and individuals by the activities of the police.

The files revealed instances of police officers impersonating newsmen, checking telephone records, initiating mail covers, employing informants at schools, photographing demonstrators, recording automobile license plate numbers and receiving photostats of financial records, address books and personal diaries, all of which appeared to have been stolen.³² In addition, the Special Service units gathered and indexed articles from newspapers and magazines dealing with its investigated parties.³³ Referring to these techniques, the Task Force concluded: "The methods used to collect information could have resulted in certain infringement of individual's rights and 'chilling' effects on free speech."³⁴ As a result of its findings, the Task Force recommended clarification of the State Police mandate and the establishment of formal legislative devices to control police activities.³⁵ These recommendations were based on the

Investigation Investigators in each of the ten Troops around the State had primary responsibility for Special Services work, but they would also do criminal investigations as necessary. These Investigators reported to their Troop Commander or to the Special Services Lieutenant. The duties of the Lieutenant-Special Services included being aware and keeping Police administration informed of potentially violent activities around the State, supervising appointment investigations for State agencies and reviewing Special Services reports for pertinent information.

Id. 7, 8.

29. *Id.* 7.

30. *Id.* 48.

31. *Id.* 52. It is this author's opinion, however, that political surveillance itself is illegal, in that it violates democratic principles and due process values and represents a challenge to the survival of democratic values. For a provocative discussion of this, see Silver, *The Demand for Order in Civil Society: A Review of Some Themes in the History of Urban Crime, Police, and Riot*, THE POLICE, *supra* note 7, at 1. [hereinafter cited as *The Demand for Order*].

32. NEW YORK REPORT, *supra* note 14, at 31-37.

33. *Id.* 33.

34. *Id.* 52. The NEW YORK REPORT states that the investigators were precluded from contacting file subjects, and were thus unable to give any opinion concerning the use of collected information and its effect on a file subject. *Id.* 48.

35. The recommendations are set forth in text accompanying footnotes 85 to 96 *infra*.

Task Force's recognition of the excessive scope and exercise of police discretion.³⁶ In this regard the New York Report states: "Adequate legislative guidelines would enable the Police to withstand external pressures resulting from overzealous concern about social change, enabling them to properly decline governmental requests to provide intelligence on groups or individuals unrelated to criminal activity."³⁷

III. THE NEW YORK STATE POLICE MANDATE

The legislation creating the New York State Police delegates to the division the authority "to prevent and detect crime and apprehend criminals."³⁸ Noticeably absent from this legislation are guidelines or standards expressing a legislative intent as to the manner in which such delegated authority is to be exercised. Nor does the statute provide for effective legislative review of police activity. Moreover, the legislation fails to outline affirmative police responsibility towards the protection of individual liberties.³⁹

This legislation is typical of the general pattern of state legislation which, according to the ABA Standards, "provides little basis for deciding on the propriety of some specific aspects of police operations, and . . . for setting priorities between and among different objectives when one or more conflict."⁴⁰

36. NEW YORK REPORT, *supra* note 14, at 49-50.

37. *Id.* 51.

38. N. Y. EXEC. LAW § 223 (McKinney 1972).

It shall be the duty of the superintendent of the state police and of members of the state police to prevent and detect crime and apprehend criminals. They shall also be subject to the call of the governor and are empowered to co-operate with any other department of the state or with local authorities. They shall have power to arrest, without a warrant, any person committing or attempting to commit within their presence or view a breach of the peace or other violation of law, to serve and execute warrants of arrest or search issued by proper authority and to exercise all other powers of peace officers of the state of New York. Any such warrants issued by any magistrate of the state may be executed by them in any part of the state according to the tenor thereof without indorsement. But they shall not exercise their powers within the limits of any city to suppress rioting and disorder except by direction of the governor or upon request of the mayor of the city with the approval of the governor. Any member of the rank of sergeant or above may take pre-arraignment bail from any defendant in the amounts and under the circumstances and conditions that police may take bail.

39. See NEW YORK REPORT, *supra* note 14, at 49. It is stated that: "[t]here is little State law . . . which specifically limits the actions of the Police or defines in any way where the Police's desire for information must give way to avoid infringements of individual's privacy."

40. ABA STANDARDS, *supra* note 1, at 48. Professor Davis notes that;

What has happened is essentially that all the forms, all the machinery, all the organizational arrangements, and all the procedures are built on the false assumption, constantly furthered by many officers, that policy-making power is not being exercised The legislative bodies have never knowingly delegated policy-

In this atmosphere of unrestricted power, the New York State Police were able to determine their own objectives, choose their own methods and, in general, define their responsibilities according to their own conception of their function.⁴¹ Moreover, the absence of guidelines left the State Police extremely vulnerable to both public and political pressure which, during the period under investigation, encouraged additional political surveillance.⁴²

IV. THE POLICE FUNCTION

In theory, the function of police in a democratic society is crime fighting, coupled with an obligation to protect individual liberties.⁴³ As one commentator aptly stated, the police must maintain order "in ways that preserve and extend the precious values of a democratic society."⁴⁴ Similarly, the ABA Standards identify police responsibilities as crime prevention and the protection of constitutional guarantees.⁴⁵ The Standards also list as a general police objective the safeguarding of freedom,⁴⁶ by stating, "effective policing in a democratic society must go substantially beyond the mere enforcement of governmental regulations. Enforcement responsibilities must be carried out with full regard for the value of individual freedom, the protection of individual liberty, and the free exercise of certain basic rights."⁴⁷

The police conception of their role, however, differs dramatically from this theoretical outline. In general, the police view their primary responsibility as crime fighting,⁴⁸ a vision generally shared by the public. A characteristic description of this view of the police function is offered by one commentator:

making power to the police. . . . Yet the policy-making power has grown tremendously.

See K. DAVIS, *DISCRETIONARY JUSTICE*, *supra* note 1, at 89.

41. See text accompanying notes 59 through 84, *infra*.

42. The NEW YORK REPORT stated:

There appears to have been little oversight of State Police activities by either the Legislature or the Governor's Office. In fact, it appears that often it was the members of the Legislature or the Governor's Office interested in the activities of political groups who requested intelligence information from the State Police. Thus, State government appears to have encouraged intelligence gathering without seeking to control or limit the activities of the Police.

43. See note 6 *supra*.

44. Hall, *Police and Law in a Democratic Society*, 28 *IND. L.J.* 133, 146 (1953). See also, *REPORT OF THE PRESIDENT'S COMMISSION*, *supra* note 6, at 93.

45. ABA STANDARDS, *supra* note 1, at 53.

46. *Id.* 74.

47. *Id.* 75.

48. The police self-conception has been created and fostered by a variety of factors, including, *inter alia*, police history and tradition, the "police personality," *POLICE IN AMERICA*, *supra* note 1, at 28-57; SKOLNICK *supra* note 6; police training, Quick, *Attitudinal Aspects of Police Compliance with Procedural Due Process*, 6 *AM. J. CRIM. L.* 25 (1978); and external pressures.

The policeman views criminal procedure with the administrative bias of the craftsman, a prejudice contradictory to due process of law. That is, the policeman tends to emphasize his own expertness and specialized abilities to make judgment about the measures to be applied to apprehend "criminals", as well as the ability to estimate accurately the guilt or innocence of suspects. He sees himself as a craftsman, at his best, a master of his trade. As such, he feels he ought to be free to employ the technique of his trade, and that the system ought to provide regulations contributing to his freedom to improvise, rather than constricting it.⁴⁹

As the New York Report indicates, the New York State Police share this conception of their function.⁵⁰ This view was substantiated by a statement of the Superintendent of State Police, in which the Superintendent adopted part of the dissenting statement of the report. Before a hearing held by the Subcommittee on Human Rights, the Superintendent stated "[t]he proponents of this report would like to have us think that after these illegal acts are done, that would be the time for the police to react. This is an irresponsible position because law enforcement's primary responsibility is to *prevent* and *detect* crime."⁵¹ Moreover, this view of crime fighting as the primary police function is an extremely durable and deeply rooted view. Thus, the Superintendent, when called on to comment on the New York Report's recommendations, warned as follows:

Gentlemen, if you are going to remove the duty of the prevention of crime from your police American society cannot survive; only those wealthy enough to hire private personal guards would be able to enjoy our present liberties.

The report attempts to separate non-criminal from criminal information. This differentiation cannot be determined until an investigation is conducted. Gentlemen be wary of removing the responsibility of the police of investigating all allegations reported to them.⁵²

49. SKOLNICK, *supra* note 6, at 196.

50. The entire thrust of NEW YORK REPORT is directed toward the police failure to consider individual rights in the exercise of their authority.

51. *Hearings on Recommendations Made by the New York State Assembly Special Task Force on State Police Non-Criminal Files, Before the Subcommittee on Human Rights of the Assembly Standing Committee on Governmental Operations*, (Nov. 15, 1977) (Statement of W. Connelie, Supt. of New York State Police).

52. *Id.*

What is particularly noteworthy about this statement is that it was offered at a hearing into methods to prevent or control the collection, maintenance and dissemination of information which the State Police, not the New York Report, characterized as non-criminal.⁵³ In addition, it was made subsequent to the report's publication. The above statement indicates that police are simply unable or unwilling to recognize the impropriety of political surveillance, and view any inquiry into these activities as an interference with their crime fighting function. Thus, the Superintendent's statement implies that any Task Force prompted legislation imposing greater oversight of law enforcement activities will interrupt investigative criminal activities.

Assuming that by "allegations" the Superintendent referred to complaints sufficient to raise a suspicion of criminal activity by the complained of party, his concern is clearly unwarranted. In fact, the Superintendent's suggestion ignores the fact that while some files were created after receipt of citizen complaints,⁵⁴ many investigations were initiated at the top levels of police administration "to determine 'subversive' affiliations"⁵⁵ Additionally, individual investigators had wide discretion to commence noncriminal investigations. According to the New York Report, many investigations were actually initiated by Special Service Investigators in the field.⁵⁶ In these instances, the investigators generally needed no clearance from superiors to initiate such investigations. Furthermore, little or no oversight was provided by higher echelon police officials to determine whether the investigator initiated inquiry represented an efficient allocation of police manpower.⁵⁷ The New York Report even indicates that investigators were encouraged to investigate any political activities, regardless of their origin or purpose.

Historically, the New York legislature has been unaware of the dichotomy between the theoretical and police conception of the police function, and has assumed that in the discharge of its responsibilities the State Police have conformed to and upheld democratic standards as well as the mandates of the legislature. In practice, however, such has not been the case, because police concern traditionally has been, and continues to be exclusively with crime fighting. Thus, it has been found that police will often adopt procedures most consistent with this concern, regardless of the effect of such

53. NEW YORK REPORT, *supra* note 14, at 12.

54. *Id.* 32.

55. *Id.* 32.

56. *Id.*

57. *Id.*

policies on the maintenance of constitutional freedoms. This contrast is provocatively portrayed by Professor Skolnick:

The idea of law enforcement in such a society, taken seriously, suggests that legally constituted institutions such as the police exist not only to preserve order, but to serve the rule of law as an end in itself. On the other hand, the circumstances of the occupational environment, with its associated requirements that the police maintain order, might develop a very different conception of law in police, a conception without articulation or explicit philosophical justification, but existing nevertheless.⁵⁸

In this context, the exchange between the Task Force and the Superintendent represents institutional conflict, which generates substantive questions concerning societal goals and values; jurisdiction over the definition of criminal activity, and procedures for enforcing criminal statutes. From an administrative perspective, the Superintendent's primary concern is the efficiency with which his agency attains its crime control goal, and thus he considers the imposition of any restraints thereon as obstacles to his ministerial success.

V. THE NEED FOR INFORMATION AND THE CRIME FIGHTING FUNCTION

Clearly, the collection and maintenance of relevant information is essential to any criminal investigation.⁵⁹ The obviousness of the above postulate, however, clouds the complexity of the problem created by the need for information concerning the police conception of their function as crime fighters. From this point of view, with its emphasis on administrative efficiency, police regard the unrestricted collection of information as the most important tool in the performance of their function. Thus, a federal law enforcement official⁶⁰ appearing before the Church Committee,⁶¹ responded as follows to a concern expressed by Senator Church over the number of files maintained by the FBI and the apparent unwillingness of the agency to close investigations and files no longer active: "I don't think we can ever stop the accumulation of information. I don't

58. SKOLNICK, *supra* note 6, at 18.

59. As has been simply stated by two noted students of police activity: "Awareness of infraction is one foundation of any social contest system. . ." Later in the same essay it was stated, "before legal controls can be invoked, there must first be official knowledge of the criminal act." Skolnick and Woodworth, *Bureaucracy, Information and Social Control: A Study of a Morals Detail*, *supra* note 7, at 99-100.

60. James B. Adams, the Deputy Associate Director of the FBI, recently appointed Deputy of the FBI.

61. *Supra* note 7.

know an investigative agency in the world, a law enforcement agency that does not have to accumulate information."⁶²

The superintendent of New York State Police has stated with regard to this topic that:

In addition to several Supreme Court decisions, seven Presidential Commissions commencing with the Presidential Commission on the Assassination of John Kennedy up to and concluding with the National Advisory Commission on Criminal Justice Standards and Goals have addressed this issue. All of these commissions reached a common conclusion that police departments being responsible for preventing crime must "improve their preparation for anticipating, preventing and controlling group disorders." If the police are to do the job of law enforcement, they need accurate, up-to-date information. Only if they are well informed can the police know how to and when to react and equally important when not to react.⁶³

For police then, the crime fighting conception of their function provides justification for the massive collection of information on a broad spectrum of individuals and organizations who admittedly were not suspected of participating in criminal activities. In New York State alone, this operation resulted in the political surveillance of several hundred thousand individuals and organizations.⁶⁴

VI. SUBVERSIVES AND DISSIDENTS—POLICE AS LEGISLATORS IN NEW YORK

As noted above,⁶⁵ police political surveillance during the period investigated focused on individuals and organizations advocating social and political change. The New York Report states:

We believe that this skewing and the overzealousness of the Police in conducting their investigations was due partially to the tenor of the 1960's and to external and internal pressures upon the State Police. In the sense that there were scores of demonstrations, marches, sit-ins and racial

62. *Church Committee Hearings, supra note 7, at 102.*

63. *Connelie Statement, supra note 51.*

64. Skolnick's and Woodworth's comments on this point are particularly illuminating. Our experiences in observing police in various areas of enforcement have indicated to us that police desire to have as much information as possible, even if much of it cannot be admitted as evidence in court. As an agency charged with enforcing a broad spectrum of rules, they simply cannot know in advance whether stray bits of information will prove useful.

Skolnick and Woodworth, *supra note 7, at 101.*

65. *See text accompanying notes 19 through 27 supra.*

disturbances, it is understandable that Police agencies and other parts of government were deeply concerned with keeping order. This concern with order created pressure upon the Police from the Legislature, the Governor, the Criminal Justice System and from citizens, to be cognizant of any disturbance that was likely to occur within their jurisdiction.⁶⁶

Unfortunately, this pressure to maintain public order, combined with the failure of the police to recognize limitations on their crime fighting function, resulted in numerous police violations of the right to privacy and other basic constitutional rights.⁶⁷

According to the New York Report, the police concern for information even remotely suggestive of disorder resulted in the creation of an intelligence system directed toward the surveillance of political and social ideas. Ideology was viewed as the precursor of violence and thus the police placed great emphasis on the views of various individuals and groups, without particular regard to individual liberties.⁶⁸

To a large extent, this methodology was a product of police experiences with similarly perceived threats during the late 1940's and early 1950's. New York, like most states, had passed "anti-subversive" statutes,⁶⁹ which the State Police were charged to enforce. Since an individual's beliefs were the subject of such statutes, the police were compelled to surveil ideas, a procedure they expanded in the 1960's. The New York Report states:

The Police have operated anti-subversive operations since the 1940's, during periods when the extent of unrest was small and when public opinion was more solidly behind them. Governmental policies on both a State and Federal level in the 1950's, officially sanctioned the use of intelligence to determine the subversive affiliations of individuals and groups. It was during these decades that present Police methods of intelligence-gathering and file-keeping were developed.⁷⁰

66. NEW YORK REPORT, *supra* note 14, at 46.

67. See text accompanying notes 101 through 104 *infra* and note 7 *supra*.

68. NEW YORK REPORT, *supra* note 14, at 46.

69. See, e.g., NEW YORK PENAL LAW § 240.15 (McKinney 1975) Criminal Anarchy. The New York Penal Law of 1909 which was in existence until 1967 contained additional provisions restricting as criminal anarchial activities. See APPENDIX TO NEW YORK PENAL LAW, §§ 220.00 to end (McKinney).

70. See NEW YORK REPORT, *supra* note 14, at 46. From both a sociological and political theory perspective, it can be argued that even the most violent of demonstrations represented

A full explanation of police political surveillance during the 1960's, however, cannot rest solely on events occurring in the 1950's. Nor can it be explained by the information needs and collection procedures resulting from the police conception of their function. What must be understood is that the broad discretion accorded police permits them to characterize as "criminal," activities alien to their own conception of order. Thus, they are able to assume legislative power to proscribe certain activities under the veil of police responsibility.

In this regard, the New York Report states that individual officers were left to determine for themselves the type and propriety of their investigative actions. As a result of this individual judgment, the personal biases of a single officer often determined to a substantial degree what would be characterized as illegal or subversive.⁷¹ In contrast, actions favorable to the social or political views of the same officer(s) were often ignored.⁷²

There are many examples of this phenomenon set forth in the New York Report. Several which aptly illustrate the point include the investigations of a high school teacher distributing Tolstoy's *Advice to a Draftee* to his class,⁷³ another teacher who would not lead a class in reciting the Pledge of Allegiance,⁷⁴ and a college professor who delivered a speech on the Vietnam War to a women's luncheon.⁷⁵ An even more extreme illustration of overzealous police political surveillance is the case of the Collaberg School.⁷⁶ Allegedly as a result of a death which occurred at a school operated under a similar educational philosophy, the Governor's office⁷⁷ requested that the State Police investigate the Collaberg School.⁷⁸ Upon receipt of this initial police report, which partially detailed the school's educational philosophy,⁷⁹ it was decided at a meeting of

a form of rational communication of dissatisfaction with a government, which was perceived as being out of touch with the populace and in fact, acting illegally. In that context, the activities of the police were basically political and directed internally toward the repression of a government perceived threat to its power. See generally *The Demand for Order*, *supra* note 31.

71. *Id.* 32.

72. The Report stated:

We note that two potentially disruptive demonstrations—one a pro-Vietnam rally by construction workers and the second, a loyalty parade by a Veteran's group—were covered only in brief reports noting the event, as opposed to full investigative reports.

Id.

73. *Id.* 20.

74. *Id.*

75. *Id.*

76. *Id.* 28-30. The school followed the Summerhill philosophy of education.

77. *Id.* 29.

78. *Id.*

79. *Id.*

representatives of various executive departments of state government⁸⁰ that further information was necessary. According to the New York Report, it was agreed that further inspections for health and fire hazards at Collaberg and other schools should be conducted. In the event that violations of the health and fire codes were found, it was said that the police would be notified to take proper action.⁸¹ This further investigation was accomplished, at least partially, by use of a non-police volunteer who, posing as a prospective parent, spent considerable time at the school gathering information about the school's philosophy rather than its safety conditions.⁸² Although no arrests were made, some violations were reported. According to a newspaper report, however, students and faculty members were continuously harassed by State Police and other governmental officials to a point where eventually the school closed.⁸³ This activity is far beyond the mandated responsibilities of the State Police and is certainly outside theoretical notions of the proper police function. As a direct result of an overzealous police concern for order and conformity, however, the school was viewed as a spawning ground for dissidents and thus became a subject of police action.

This example illustrates how, in the absence of legislative guidelines, the police may be influenced by external political forces, in this case the Governor's office and other executive agencies. Viewed from an administrative law perspective, the process here is easily understandable, for to the degree that police are permitted to act like a legislature in framing their own policy, to the same degree will they be vulnerable to political forces. Commenting generally on this process, two noted administrative law scholars have stated:

One important implication is that if administrative agencies must function as a legislature, one must expect that they will behave as such. Insofar as an agency is given broad legislative-type discretion and responsibility, it is difficult, if not impossible, to avoid the kind of political influences that characterize the legislative process.⁸⁴

VII. REMEDIES

In response to what he considered lawless activity by the Bureau of Investigation,⁸⁵ Attorney General Harlan Fiske Stone warned

80. *Id.* Representatives were from the Departments of Education and Welfare.

81. *Id.*

82. *Id.* 29-30.

83. Donovan, "School was target under Rocky," *NEWSDAY*, March 28, 1976, at 5.

84. Gelhorn & Robinson, *Perspectives on Administrative Law*, 75 *COL. L. REV.* 771, 778 (1975).

85. For a description of the political setting in which this statement was made, see

in 1924 of the dangers to a free society when law enforcement agencies are permitted to abuse their power and the constitutional rights of others. Commenting on necessary controls for the effective functioning of law enforcement agencies, he stated:

It is important that its activities be strictly limited to the performance of those functions for which it was created and that its agents themselves be not above the law or beyond its reach The Bureau of Investigation is not concerned with political or other opinions of individuals. It is concerned only with their conduct and then only with such conduct as is forbidden by the laws of the United States. When a police system passes beyond these limits, it is dangerous to the proper administration of justice and to human liberty, which it should be our first concern to cherish.⁸⁶

Four decades later, the New York experience has evidenced the validity of Stone's concern. When viewed from an administrative law perspective, however, the New York experience also illustrates an inconsistency in the Stone view which, if ignored, will hamper attempts to curtail political surveillance. In stressing the importance of police conformity to their mandated responsibilities, Stone assumed that these responsibilities were clear and not the product of conflicting conceptions of the police function. This assumption, at least in New York, is quite simply incorrect.

To avoid a repetition of previously condemned police political surveillance, it must be understood that the police themselves will never exercise their discretion in a manner which they perceive as a limitation on their function as crime fighters. Remedies for political surveillance must therefore, come from external sources.⁸⁷ As one member of the FBI stated before the Church Committee:

What we need is a legislative mandate which is the will of Congress in order to tell us what our role should be in this area. I think that the main thing that would come out of all of this, I hope, is some more definitive guideline where we all know what the will of the people is as expressed by Congress.⁸⁸

CHURCH REPORT, *supra* note 7, at 21-23.

86. *Id.* 23.

87. Professor Davis believes that police abuse of discretion can be remedied by police rule-making. See Davis, *An Approach to Legal Control of the Police*, 52 TEX. L. REV. 703 (1974). Given the police conception of their function, however, rule-making seems inappropriate for the curtailment of political surveillance.

88. *Church Committee Hearing, supra* note 7, at 95.

With reference to this type of remedy, the New York Report makes three basic recommendations:

Legislation should be enacted to limit the scope of Police power to conduct intelligence operations to matters clearly relating to the commission of criminal acts.⁸⁹

The Legislature should enact statutes which would recognize an individual's right to privacy and create a cause for civil action for violation of this right. This right could also be extended to prohibit purely political surveillance, harassment, provocation and selective law enforcement in this area.⁹⁰

The Assembly Governmental Operations Committee should conduct a review of State Police operations at regular intervals and issue public reports.⁹¹

The first recommendation is straightforward, and calls for an amendment to the enabling legislation, which would prohibit political surveillance.⁹² Additionally, such an amendment might include restrictions on investigations into alleged criminal activities related to matters protected by the First Amendment,⁹³ and limitations on the type of information which may be collected in any criminal investigation. The direct nature of this remedy precludes any possibility that the police will misconceive their function, and limits the opportunities for police preemption of legislative authority. Police investigative efforts would then be directed against only those who are reasonably suspected of engaging in criminal activities. The reasonable suspicion standard, of course, will have to be measured in the context of a particular situation,⁹⁴ but this standard could not

89. The NEW YORK REPORT, *supra* note 14, at 56.

90. *Id.* 59.

91. *Id.* 57.

92. Presently, Assemblyman Siegal, who chaired the Task Force, is working on a bill to amend Section 223 of the NEW YORK EXECUTIVE LAW, *supra* note 39, to affirmatively preclude state police from performing political surveillance. The term political surveillance is presently defined for purposes of this bill as, "Political Surveillance" - The term political surveillance means the collection, indexing, filing, maintenance, storage, dissemination of information or other investigative activity relating to any person's beliefs, opinions, associations, or speech." *Id.*

93. The draft bill includes limitations on police investigation of certain enumerated crimes which are related to the exercise of First Amendment rights. These include riot, unlawful assembly, criminal anarchy and disorderly conduct. In regard to these crimes the statute establishes an investigation scheduled with a mechanism to insure internal accountability and responsibility. *Id.*

94. The police must be able to commence an investigation upon receipt of a citizen complaint, but the initial suspicion loses its reasonableness if an initial investigation does not substantiate the claim.

be used as a justification for the present "vacuum cleaner" approach⁹⁵ to collecting information. Moreover, amending the enabling legislation will insulate politically active groups and individuals from changing political winds which create pressures for political surveillance. From a practical point of view, however, the directness of this approach will assure substantial opposition. Illustrative of this is a statement of the Superintendent of New York State Police, regarding security preparations for the 1980 Winter Olympic games.

I am also requesting that you do not give up many of the protections you now enjoy because a study although finding no misuse of information asks restrictions on its collection. The State Police is presently preparing for the 1980 Olympics for which it has the primary responsibility for protection of the competing athletes and dignitaries. This is an awesome task. Please do not make it possible for another Munich to occur.⁹⁶

From both a police and administrative perspective, the Superintendent's opposition to proposed reform is expected. People entrusted with power are not easily relieved of it, particularly when they view proposed restrictions as complicating the performance of their duties.

The second recommendation provides sanctions to assure continuing police protection of individual rights in conformity with the amended enabling legislation. According to the New York Report: "[C]ivil sanctions might suffice to induce a Police agency to reach the proper balance between valid and necessary intelligence and overly broad activities that would violate rights."⁹⁷ The rationale for this type of legislation is self-evident and requires no further expansion. Moreover, to insure its effectiveness it may be argued that the state be made liable for damages to injured parties.

Arguing in favor of this type of legislation, Professor Davis articulated four reasons for shifting liability for such deprivations of rights to government units.

- (1) Officers will more diligently protect the public interest, for they will be relieved of the fear of personal liability if they make a reasonable choice that turns out to be wrong.
- (2) The quality of justice to officers will be improved in that they will no longer be personally liable for such choices.
- (3)

95. CHURCH REPORT, *supra* note 7, at 165.

96. Connelie Statement, *supra* note 51.

97. NEW YORK REPORT, *supra* note 14, at 59.

The quality of justice to injured persons will be improved in that they will no longer lack a remedy if the officer happens to be judgment-proof. (4) The proposed system will more effectively deter the commission of deliberate torts.⁹⁸

The third recommendation concerns the need for continuous review of what the Church Committee characterized as "the natural tendency of Government . . . toward abuse of power," which compels administrators, whose primary interest is efficiency, to disregard personal liberties.⁹⁹ Administrative agencies in general and the police in particular have acquired much power simply as a result of legislative deference to administrative expertise, and in the case of police, misconceptions concerning the police function and the nature of its performance. Legislatures have defaulted in their duty to monitor and control police activities, which has essentially exempted the police from the system of governmental checks and balances. The tension created between a properly functioning oversight committee and the police would restrict unconstitutional police activity. The requirement of public reports would also aid in this tightening process.

This need for regular review includes more than a time requirement. The oversight authority must be granted to a legislative committee whose particular area of concern is civil rights. Institutionalizing oversight in this manner will create a counter-balance to the police conception of their function, and will also give the legislature both substantive and procedural experience in monitoring police activity. In regard to this latter point, the New York effort suffered from confusion concerning the mechanics of the investigation and, more importantly, hesitancy on the part of many legislators to enter what, at the time, was considered uncharted waters. While it has been suggested that "legislative review of police conduct should be achieved in conjunction with the traditional budgetary review process"¹⁰⁰ a separate oversight process would be more effective, in that it would assure maximum concentration on particular police activity and would highlight both for the police and general public the democratic conception of the police function.

VIII. PROPOSED STATUTE

AN ACT to amend the executive law in order to prohibit political surveillance by the New York State Police.

98. Davis, *supra* note 87, at 721.

99. CHURCH COMMITTEE REPORT, *supra* note 14, at 291.

100. See Vanagunas, *Toward Checks and Balances of Police Authority*, 57 MARQ. L. REV. 505, 512 (1974).

The people of the State of New York represented in Senate and Assembly do enact as follows:

Section 1. Article eleven of the executive law is hereby amended by adding a new section two hundred twenty-three-a to read as follows:

Section 223-a Political surveillance prohibition

1. The words and phrases used in this section shall have the following meaning;

(a) "Political Surveillance"—The term political surveillance means the collection, indexing, filing, maintenance, storage, and dissemination of information or other investigative activity relating to any person's beliefs, opinions, associations, or speech.

(b) "Reasonable Suspicion"—The term reasonable suspicion means specific and articulable facts, which, taken together with rational inferences from these facts, give rise to a reasonable suspicion that specified activity has occurred, is occurring, or is about to occur.

(c) "Probable Cause"—The term probable cause means specific and articulable facts within the possession or knowledge of a person that when taken together would convince a reasonable person that a specific criminal act has been committed, is being committed, or is about to be committed.

(d) "Security Investigation"—The term Security Investigation means an investigation of offenses defined in sections 195.05, 240.05, 240.08, 240.10, 240.15, 240.25 of the penal law.

2. The New York State Police shall not engage in political surveillance.

3. The New York State Police shall conduct security investigations in the following manner.

(a) No security investigation shall be continued after thirty (30) days unless authorized by the troop commanding officer or bureau of investigation assistant deputy superintendent. Such authorization shall include a statement of the facts that justify the investigation and outline a reasonable suspicion that the person or persons being investigated has committed, is committing or is about to commit a specific act which violates the criminal statute. Such authorization shall also include a description of the investigative techniques to be employed.

(b) No security investigation shall be continued after the additional ninety (90) days without the written authorization of the superintendent of state police. Such authorization shall include a statement that probable cause exists and that there is an imminent likelihood that the person under investigation has committed, is committing, or is about to commit a specific criminal act.

(c) A security investigation may be terminated at any time by the New York State Police and shall be terminated promptly whenever the standards for authorization for continuance of an investigation can no longer be met.

(d) Upon termination of a security investigation because of an insufficient factual basis to warrant continuing the investigation all investigative files shall be sealed.

1) Personal information contained in a sealed file shall not be disseminated except to —

i) a law enforcement agency or other unit of government upon receipt of a valid subpoena or search warrant issued by a court pursuant to law.

ii) to the subject of the investigation if requested pursuant to law.

2) No personal information shall be added to a file which has been sealed or deleted unless pursuant to a lawful request by the subject of the investigation.

4. Ten (10) years after the initial sealing, a sealed file shall be destroyed by the New York State Police unless the state police counsel or the attorney general certifies that the files are required for civil or criminal litigation or the sealed files are subject to a valid subpoena or search warrant issued by a court pursuant to law.

5. Without regard to sealing, all personal information that is irrelevant to lawful investigative purposes, that pertains to first amendment activity, that is false or defamatory, or that was acquired by illegal means shall be purged as soon as practicable by officials and units of the New York State Police.

6. The New York State Police shall inform in writing a person who is the subject of a sealed investigative file of the existence of that investigative file;

(a) i) within six months after the sealing of the investigative file, and

ii) six months prior to the destruction of the sealed investigative file,

(b) Upon written request the New York State Police shall inform the subject of a sealed investigative file of the existence of that file and make the contents of that file available to the subject except such portions as would jeopardize the privacy of others.

(c) Any person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, or of the State of New York may move to suppress any facts, information or evidence contained in New York State Police files which would serve to reveal the identity of an informant or source.

7. (a) The New York State Police shall establish procedures that allow each person who is the subject of a sealed investigative file or his duly authorized representative to contest the accuracy, completeness, pertinence, timeliness, relevance or dissemination of personal information or the denial of access to such data maintained in a sealed file.

(b) The New York State Police shall permit personal information to be corrected, amended, or deleted when the person or his duly authorized representative so requests and there is no disagreement concerning the change to be made.

(c) The New York State Police shall include a statement explaining that the information contained in the file is disputed in any subsequent disclosure or dissemination, when there is disagreement as to whether a correction should be made. This shall not constitute a waiver of judicial redress to correct, amend, or delete personal information in a sealed file.

8. The New York State Police shall not release personal information from a sealed file in response to a valid subpoena prior to notification to the subject of the file.

(a) A minimum of fourteen days written notice shall be given to the subject of the file before release. Such notice shall include a photocopy of the subpoena and shall be sent by first class mail. The New York State Police shall obtain a certificate of mailing properly endorsed by the postal service. The fourteen day period shall begin to run upon the mailing of such notice.

(b) The court or state legislative body issuing a subpoena for sealed files of the New York State Police may order the provisions of this subdivision be waived upon certification

that notice to the subject would impede a felony investigation.

9. All New York State Police files which do not meet the criminal investigative standard set forth in Section 1 of this Act or which violate the express prohibitions of this Act shall be subject to the provisions of Section 2 Subdivision B of this Act.

10. The State of New York and any official or employee of the New York State Police acting under color of law shall be jointly and severally liable to a person injured by a violation of the provisions of this section, in an action at law or in equity. A court may grant equitable relief, actual damages and punitive damages.

11. Any willful violation by an official or employee of the New York State Police of the provisions of this section shall be punishable for each separate violation by a fine of not more than \$5000 or imprisonment for not more than one (1) year, or both.

12. The New York State Police may issue such rules and regulations as are necessary to implement the provisions of this Act, and such rules and regulations shall be published at least sixty (60) days prior to their effective date in order that the public may have the opportunity to comment.

IX. CONCLUSION

In reviewing police political surveillance in New York State, it is important not to pursue the simple path of using the police as scapegoats. As has been argued throughout this Article, the problem is far more complex, and is rooted in legislative and public attitudes toward governmental intrusion into the privacy of the individual, which Justice Brandeis appropriately characterized as "the most comprehensive of rights and the right most valued by civilized men."¹⁰¹ The above remedies are premised upon a belief in the critical importance of the value of privacy and legislative responsibility for assuring its continued vitality. While in the abstract the affirmation and protection of individual privacy may appear uncontested, in fact, legislators and the general public appear to be more ambivalent about its value in the face of demands for governmental effectiveness. The New York police experience is illustrative of this. Society is concerned about the perceived threats of crime and disorder. The concern for safety permeates social attitudes, which creates a demand for order. In response to this demand, the police concep-

101. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). To Brandeis, the right of privacy was the right to be left alone, which he considered to be fundamental to all constitutional guarantees.

tion of their own function as crime fighting flourishes, and the police engage in political surveillance. This dynamic is not isolated in the law enforcement context, but can easily be found in the general administrative process.¹⁰²

From this perspective, the remedies suggested above require the public and the legislature to reaffirm the worth of privacy as "the most valued" right.¹⁰³ It is not enough to ask whether the accumulation of great amounts of information on citizens not suspected of participating in criminal activities will keep order (in New York it probably did not) or whether the collection of a mass of information about welfare recipients will curtail welfare fraud (it probably does). In this constitutional system, the right of privacy is primary, a preferred right. It is not to be sacrificed because of claims that it produces greater "order" or efficiency.

As Justice Brandeis has warned:

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.¹⁰⁴

102. Recently, in a conversation with a counsel to a large state administrative agency, I was told that the agency recognized the invasion of privacy effected by their massive use of computer systems but that they felt justified based upon public pressure for the reduction of fraud and the absence of legislative guidelines to the contrary.

103. 277 U.S. at 478.

104. *Id.* at 479.