

BRENNAN  
CENTER  
FOR JUSTICE

A PROPOSAL FOR AN NYPD  
INSPECTOR GENERAL

Faiza Patel and Andrew Sullivan

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## EXECUTIVE SUMMARY

Over the last decade, the New York City Police Department (NYPD), like state and local law enforcement agencies around the country, has become increasingly involved in collecting counterterrorism intelligence. But the NYPD's counterterrorism and intelligence gathering operations are unique among municipal police departments, both in size and character. The magnitude of these operations vastly exceeds that of similar efforts in other major cities: In 2010, the NYPD's budget for counterterrorism and intelligence was over \$100 million and the two divisions reportedly employed 1000 officers. Equally important, while New York City police cooperate with the Federal Bureau of Investigation (FBI) on counterterrorism matters, they also conduct intelligence operations and investigations completely separate from federal authorities. The creation of this stand-alone capability was a stated goal of Police Commissioner Raymond W. Kelly, and is an accomplishment frequently highlighted by the Department.

Unlike the FBI and other national intelligence agencies, the NYPD's sizable counterterrorism and intelligence operations operate largely free from independent oversight. Currently, oversight of the NYPD – as conducted by the Department's Internal Affairs Bureau, the Commission to Combat Police Corruption and the Civilian Complaint Review Board – focuses almost exclusively on police corruption and individual police misconduct. The City-wide Department of Investigation similarly focuses on corruption, incompetence, and misconduct in 300 municipal agencies and, in any event, does not cover the police. The City Council has supervisory jurisdiction over the police, but has rarely examined its intelligence operations. Control mechanisms established by a 1980s consent decree largely have been eliminated.

In the federal system, Congressional supervision informed by reports from independent inspectors general has been a crucial tool for increasing transparency, accountability, and effectiveness in the realm of intelligence and counterterrorism. This oversight system was developed in the wake of the 1970s Congressional investigations into the FBI's and the Central Intelligence Agency's (CIA) illegal collection of intelligence about Americans, and both agencies have operated for decades under its strictures. Even after the September 11th attacks, this system continues to function well and has, in fact, been strengthened. The FBI, in particular, has benefitted from a robust inspector general who has contributed to the effectiveness of its counterterrorism programs through reviews of issues ranging from the need for the Bureau to develop a comprehensive risk assessment of the terrorist threat to its use of the new intelligence techniques that have been authorized over the last decade.

Given that the NYPD has built an intelligence and counterterrorism capability more in line with the FBI than a traditional urban police force, it is time to build an oversight structure that is appropriate for its size and functions. An independent inspector general should be established for the NYPD. This would be an enormous step forward for police accountability and oversight for several reasons:

- **ENSURING TRANSPARENCY** – The inspector general would be in a position to make policing more transparent, thus allowing the Mayor and the City Council to better exercise their oversight

responsibilities and increase public confidence in policing. Reliable information about how policies and legal constraints are implemented is especially important in the context of intelligence operations, the specifics of which are often necessarily concealed.

- PROTECTING CIVIL LIBERTIES – As the NYPD continues its important work of keeping New Yorkers safe, the inspector general would have the mandate, expertise, and perspective to make sure that it does so consistent with our constitutionally guaranteed liberties.
- REFORMING FROM WITHIN – The inspector general would be in a position to work with the police cooperatively to address any problems in the Department’s operations and to keep track of progress.

## INTRODUCTION

As the nation's largest police force, the NYPD is charged with keeping New York City's diverse population safe, not only from crime but also from terrorism. The Department has been given far-reaching authority to fulfill these duties. Although New York City has seen dramatic drops in crime and has been spared a successful terrorist attack for more than a decade, questions have been raised about some of the NYPD's operations and policies. One longstanding issue has been the extent to which the Department's "stop, question and frisk" policy disproportionately targets minorities.<sup>1</sup> In addition, the Associated Press (AP), in a recent Pulitzer Prize-winning series of stories about the NYPD's intelligence operations, suggested that the Department was monitoring American Muslim communities even where there was no indication of suspicious activity.<sup>2</sup> In both cases, questions have been raised about whether an unintended side effect of these policies and practices has been to alienate the very communities whose cooperation the police sorely need to help keep the City safe.

This report focuses on oversight of the NYPD's intelligence operations. Although a number of substantive legal rules set the boundaries of these types of programs, history has shown that it is exceedingly difficult to ensure that intelligence agencies adhere to these limits. Intelligence gathering, by its very nature, is clandestine and details of operations often cannot be publicly revealed. And while law enforcement agencies should be proactive in their approach to crime and terrorism, broad powers to collect intelligence in pursuit of these goals can, and have historically, bled into abuse.

In grappling with the challenge of ensuring that intelligence agencies comply with the law but retain sufficient room to fulfill their mandate, the federal government has instituted a system of oversight for these agencies, including the FBI and the CIA. Both agencies are monitored by independent inspectors general who report to Congress, and the agencies themselves report regularly to Congressional committees. While this system is by no means perfect, it has contributed significantly to transparency and accountability in federal intelligence operations.

The NYPD has no comparable system of independent oversight. The external oversight structures that are currently in place are severely limited in various ways. Most important, they generally focus on corruption or individual cases of police misconduct and not on the Department's policies and practices. An independent review of NYPD policies and practices is particularly important when it comes to intelligence operations. Because of the secrecy attached to these operations, it can be difficult to evaluate their scope, legality, and effectiveness. Take the case of the deployment of confidential informants and undercover officers at mosques. Internal police documents show that the NYPD had confidential informants and undercover officers in a number of mosques around the City who reported to the police on what people were saying in response to current events. But the Police Commissioner has stated that the Department's policy is to only send these agents into mosques based on specific leads.<sup>3</sup> The very number of mosques monitored by the Department raises questions, but without more information, an outside observer cannot know for certain whether or not the NYPD was following legitimate leads into each of these mosques.

This report outlines the benefits of an oversight system for the NYPD comparable to that which has for decades governed the FBI and the CIA. As with federal oversight, a key aspect of this new system would be an independent inspector general. Section 1 describes what is publicly known about the extent of the NYPD's counterterrorism and intelligence operations, demonstrating that these are of sufficient scope to warrant systematic oversight. Section 2 explains how oversight of federal intelligence agencies has developed since the 1970s and how the establishment of inspectors general has contributed to transparency, accountability, and effectiveness with respect to these agencies. It also examines the movement among local police departments to increase accountability by using independent police auditors. Section 3 turns to oversight of the NYPD's intelligence operations. This section reviews the entities currently responsible for police oversight and concludes that they by and large focus on police corruption and individual cases of misconduct. Meaningful independent oversight of police programs and policies is lacking. Section 4 examines the role of the courts as oversight mechanisms. While courts have an important role to play in ensuring that the police comply with legal requirements, an inspector general could greatly enhance their ability to do so by monitoring implementation of applicable rules on an ongoing basis. Section 5 outlines the factors that have contributed to the success of inspectors general and police auditors. The concluding section of the report recommends the establishment of an inspector general for the NYPD and, drawing on the experience of the federal government and other police departments, identifies the key structural elements necessary to ensure that the inspector general will be successful.

## I. NYPD COUNTERTERRORISM AND INTELLIGENCE OPERATIONS

### A. Size and Scope

With a budget of approximately \$4.5 billion<sup>4</sup> and 34,500 officers, the NYPD is the largest police department in the country,<sup>5</sup> employing as many officers as the next four largest U.S. cities combined.<sup>6</sup> In the wake of the September 11th attacks, the NYPD's Commissioner Kelly concluded that the City could not rely on federal agencies alone to prevent terrorist attacks and should build its own intelligence and counterterrorism capabilities.<sup>7</sup> Commissioner Kelly engaged a former high-level CIA official to restructure the Department's

Intelligence Division and to upgrade its intelligence gathering and analysis capability. He also created a Counterterrorism Bureau, which is charged with designing and implementing counterterrorism projects, training police officers to respond to terrorist attacks, and evaluating threats to the City's infrastructure.<sup>8</sup> Combined, these two units have a budget of more than \$100 million<sup>9</sup> and employ approximately 1,000 officers.<sup>10</sup> By way of comparison, that is more than three times the size of the next largest municipal counterterrorism operation: The Los Angeles Police Department's (LAPD) Counterterrorism and Special Operations Bureau, which has 300 officers.<sup>11</sup>

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The NYPD's intelligence operations are not limited to New York City, but have extended to neighboring states, such as New Jersey.<sup>12</sup> In addition, the Intelligence Division operates an International Liaison Program through which its officers are stationed in 11 overseas locations, including London, Paris, Madrid, Cairo and Tel Aviv.<sup>13</sup> Although these officers' salaries are paid by the Department, all other expenses are covered by the privately funded and managed New York City Police Foundation.<sup>14</sup> The budget for the overseas program is not public and the officers operate independently of federal officials at these stations,<sup>15</sup> but under the supervision of an NYPD assistant commissioner.<sup>16</sup>

In sum, there can be no doubt that the NYPD operates a large, autonomous intelligence operation that covers the City, surrounding states, and several foreign cities.

## **B. Cooperation with Federal Agencies**

The NYPD also participates in some federal counterterrorism initiatives. It is a member of the FBI-led Joint Terrorism Task Force (JTTF), to which it contributes some 125 NYPD detectives and supervisors.<sup>17</sup> JTTFs are the lead investigative entities for federal terrorism investigations. The exact contours of the NYPD's relationship with the New York JTTF are not known because the NYPD has declined to make public the terms of this cooperation.<sup>18</sup> Other cities have, however, released the agreements governing their relationship with the FBI,<sup>19</sup> and the "standard" agreement is available online.<sup>20</sup> Based upon these documents, it is likely that the NYPD officers who work with the JTTF are deputized as federal marshals and work in accordance with FBI rules and regulations on intelligence collection.<sup>21</sup> It is not clear how the NYPD ensures that police officers assigned to the JTTF comply with specific standards on intelligence collection that apply to the Department but not the federal government<sup>22</sup> – e.g., the so-called "Handschu Guidelines" and New York City's racial profiling law, both of which are discussed later in this report.<sup>23</sup>

The NYPD also belongs to the New York State Intelligence Center (NYSIC), established in 2003 by the New York State Police and the New York State Office of Homeland Security. NYSIC is a "fusion center" – i.e., a place where several agencies collaborate to collect, analyze, and disseminate terrorist and criminal intelligence information. The extent of the NYPD's involvement in the NYSIC is not known, although there have been reports that the Department is not fully integrated into the Center's activities.<sup>24</sup>

Finally, it has been reported that the NYPD cooperates with the CIA on intelligence operations.<sup>25</sup> These connections are most apparent in the realm of staffing: the NYPD's intelligence operations were built by a former CIA official, David Cohen;<sup>26</sup> in 2002, another senior CIA operative, Lawrence Sanchez, was brought in to assist with the Intelligence Division and remained employed by the CIA for part of his tenure at the NYPD;<sup>27</sup> NYPD Detective Steve Pinkall trained at CIA training facilities and then returned home to supervise investigations;<sup>28</sup> and in 2011, the CIA sent an unidentified clandestine operative to work as Cohen's special assistant, while remaining on the CIA payroll.<sup>29</sup>

## II. MODELS FOR CONDUCTING INTELLIGENCE OVERSIGHT

Given the extent of the NYPD's intelligence operations, the question naturally arises as to how these operations are best overseen. The federal government has grappled with the issue of intelligence oversight for the last 40 odd years. It has developed a system of congressional oversight informed by the work of independent inspectors general. Indeed, as U.S. intelligence operations have expanded since the September 11th attacks, federal inspectors general have proven a distinctly useful mechanism for monitoring these operations. At the same time, local police departments have increasingly turned to external oversight mechanisms similar to inspectors general (often called police auditors) to address traditional problems of police misconduct and corruption. These developments demonstrate that external oversight can provide a useful means of ensuring the legality and effectiveness of police operations in general, and intelligence activities in particular.

### A. History of Federal Intelligence Oversight

Until the mid-1970s, the federal government followed a *laissez faire* philosophy towards intelligence operations, largely exempting them from the types of regulation and oversight under which other government agencies operated.<sup>30</sup> In 1975, prompted in part by a series of articles in *The New York Times* about CIA spying inside the U.S., Congress began investigating the intelligence community. It launched two investigations: the Church Committee in the Senate<sup>31</sup> and the Pike Committee in the House of Representatives.<sup>32</sup> The White House launched its own more limited probe, led by then-Vice President Nelson Rockefeller.<sup>33</sup> Government investigators uncovered a “startling number of intelligence transgressions,” both international and domestic.<sup>34</sup> The Church Committee in particular exposed the extent of the FBI's spying, including the keeping of intelligence files on over a million American citizens, a plan to spy on Americans who protested the Vietnam War, and the infiltration of a range of civil society groups from universities to churches to newspapers.<sup>35</sup> Perhaps the most notorious of these activities was the FBI's counterintelligence program, code named COINTELPRO, under which agents conducted smear campaigns against civil rights leaders and many others.<sup>36</sup> Loch Johnson, a political science professor who worked on the Church Committee, wrote: “The effects of this catalog of improprieties were profound. From 1975 onwards, America's support for an unbound intelligence capability would have to compete with another principle that had long guided the rest of the government: liberty — the safeguarding of the American people against the power of their own government.”<sup>37</sup>

The recognition that intelligence agencies operating on American soil could pose a potentially serious threat to civil liberties led to a series of reforms. The Senate and the House both established permanent intelligence oversight committees.<sup>38</sup> The Attorney General banned the FBI from opening investigations without a suspicion of criminal activity.<sup>39</sup> Congress passed a number of laws designed to increase review of intelligence operations, including the Foreign Intelligence Surveillance Act, which required warrants for national security wiretaps and established a court to review these warrant requests in secret.<sup>40</sup>

One of the most important of these measures was the Inspector General Act of 1978 (IG Act).<sup>41</sup> While this statute “responded largely to concerns over ‘fraud, abuse and waste’ in federal programs, it was recognized even in that period that [inspectors general], at least in intelligence agencies, had the potential to monitor constitutional concerns.”<sup>42</sup> At first, the IG Act did not cover agencies with intelligence responsibilities. These agencies resisted independent inspectors general, arguing that the office would “jeopardize secrecy, illegally displace executive authority, or otherwise threaten law enforcement and intelligence operations.”<sup>43</sup> But Congress was unpersuaded that these agencies’ unique characteristics precluded the establishment of independent inspectors general.<sup>44</sup> Over the next three decades, inspectors general were established for nearly all major intelligence agencies.

## B. Oversight After 9/11

The inspectors general of federal intelligence agencies have played important roles in making their agencies more effective and in reviewing the impact of national security measures on individual rights. They have increased transparency about these secretive spheres of action and prompted important reforms of agency policies and practices. Inspectors general are particularly suited to supervising the work of intelligence agencies because they provide a relatively unintrusive mechanism that can meet the twin goals of allowing intelligence professionals to do their jobs while ensuring that they operate efficiently and within legal constraints.

Indeed, as Congress has expanded intelligence authorities in order to help fight terrorism, it also has increased oversight by inspectors general, particularly with respect to civil rights and civil liberties. Shortly after the Department of Homeland Security was established, it was assigned an inspector general who was required to designate a senior official to oversee civil rights and civil liberties issues.<sup>45</sup> A new inspector general has recently been established for the intelligence community at large.<sup>46</sup> The USA Patriot Act of 2001 (Patriot Act) explicitly requires the Department of Justice inspector general (DOJ IG) to monitor complaints of individual rights violations.<sup>47</sup> And Congress has on several occasions asked inspectors general to investigate and report on programs that pose particular civil liberties threats, such as the warrantless wiretapping program conducted by the National Security Agency under President George W. Bush<sup>48</sup> and the use of national security letters by the FBI.<sup>49</sup>

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In short, Congress has recognized that increased intelligence authorities must be accompanied by increased vigilance, particularly in evaluating how these authorities affect individual rights, and has designated inspectors general to play a critical role in monitoring and reporting on these matters. The recent example of the DOJ IG – who covers the FBI – demonstrates the important role that an inspector general can play. Glenn Fine, who served as DOJ IG under three administrations from 2000 to 2011, investigated several national security policies that have major implications for individual rights, including the FBI’s intelligence collection operations and its use of immigration detention in the immediate aftermath of 9/11.

Perhaps the best-known examples of Fine's work are his three reports on the use of national security letters.<sup>50</sup> National security letters are administrative subpoenas that the government can use to obtain consumer records (e.g., from phone companies, banks, and internet service providers) without a court order. The Patriot Act made it easier for the government to obtain this information.<sup>51</sup> Fine's reports on national security letters supported the FBI's position that national security letters had been useful for terrorism investigations,<sup>52</sup> but criticized the Bureau for violating its own rules on when to use these letters and for its failure to uncover violations through internal audits.<sup>53</sup> Additionally, Fine found that the FBI had skirted even very lenient requirements for obtaining national security letters in "exigent" circumstances. For example, FBI agents had gathered phone records by "scribbling requests on post-it notes or taking 'quick peeks' at the computer screens of phone company personnel."<sup>54</sup> Fine's national security letter reports recommended a number of changes to FBI procedures to ensure that the FBI itself would catch such problems. Many of these were implemented by the Bureau, with progress tracked by the DOJ IG.<sup>55</sup> In addition, the FBI ended its use of exigent letters.<sup>56</sup>

Fine's reports on national security letters demonstrate how an inspector general can assist Congress in exercising its oversight responsibilities. The reports prompted hearings in both houses that examined the FBI's use of national security letters and its procedures for ensuring that this authority was properly deployed. These hearings were part of Congress's consideration of whether to renew the FBI's authority under the Patriot Act to use these letters and whether it was necessary to impose further safeguards on their use.<sup>57</sup> Although Congress ultimately decided to renew these authorities without further safeguards (albeit with a sunset), it did so with eyes open and with far better information than would otherwise have been the case.

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**Inspector general oversight is not a "one off" event – inspectors general not only point out problems and make recommendations for changes, they also monitor agencies to ensure that necessary reforms are implemented.**

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The DOJ IG's work has not been limited to analyzing the impact of FBI operations on individual rights, but also to improving their effectiveness. Shortly after 9/11, for example, Fine reviewed the FBI's Counterterrorism Program, focusing on: (1) progress toward developing a national-level risk assessment of the terrorist threat; (2) whether the FBI's strategic planning process provided a sound basis to identify counterterrorism requirements; and (3) the amount of resources dedicated to the program.<sup>58</sup> Fine found that the Bureau had not properly followed previous recommendations relating to the need for a comprehensive threat assessment and recommended specific corrective actions.<sup>59</sup> In addition, as the FBI attempted to change its orientation towards counterterrorism intelligence gathering after the September 11th attacks, Fine analyzed whether it had reallocated personnel to reflect new priorities and the impact of such changes on the

Bureau's traditional crime fighting activities.<sup>60</sup> The analysis provided a tool for the FBI's management to "evaluat[e] progress in meeting goals and obtaining a data-based view of the status of FBI operations."<sup>61</sup> Fine recommended that the FBI should conduct this type of review on a regular basis, and in a follow-up audit examined the Bureau's progress in instituting this type of review.<sup>62</sup>

The experience of the FBI demonstrates the value of independent oversight in spotting and curbing abuse and evaluating effectiveness. Importantly, inspector general oversight is not a "one off" event – inspectors general not only

point out problems and make recommendations for changes, they also monitor agencies to ensure that necessary reforms are implemented. Such ongoing oversight is now more critical than ever because intelligence agencies at all levels of government – federal, state and local – have become involved in gathering information about Americans even where there is no suspicion of criminal or terrorist activity.

### **C. Local Police Departments and Independent Oversight**

The federal government is not alone in seeing the virtues of independent oversight. A number of cities have created a range of mechanisms “allowing them to administer an independent oversight process, beyond the reach of the police force.”<sup>63</sup>

One particularly apposite example is the system used by the Los Angeles police, in which an inspector general reports to an independent Board of Police Commissioners. The establishment of an independent inspector general was one of the key recommendations of the commission that was formed in 1991 to review the LAPD’s operations after the videotaped beating of Rodney King made headlines across the country.<sup>64</sup>

Given its origin in traditional police misconduct scandals, the LAPD’s inspector general focuses on the department’s internal disciplinary process.<sup>65</sup> The LAPD inspector general may undertake special investigations directed by the Board or on his own initiative and has reviewed the Department’s counterterrorism operations.<sup>66</sup> Detailed reports on the inspector general’s investigations are provided to the Board of Police Commissioners. Public versions are also made available.

The inspector general’s annual audits of the LAPD’s Anti-terrorism Intelligence Section Unit (LAPD Intelligence Unit) illustrate what an inspector general review of some aspects of a police department’s intelligence operations might look like. The LAPD separates intelligence investigations from criminal investigations.<sup>67</sup> To initiate an intelligence investigation, the LAPD Intelligence Unit generally must have an articulable “reasonable suspicion” (although prompt and limited checking of leads is permitted).<sup>68</sup> The inspector general’s 2008/2009 review analyzed the LAPD Intelligence Unit’s files to determine whether the “appropriate threshold was met” in opening investigations.<sup>69</sup> The review also evaluated whether surveillance operations were properly authorized. LAPD Intelligence Unit investigators requesting surveillance resources are required to complete an Operational Plan which includes “the name of the subject, the rationale for conducting the surveillance and the required signatures indicating the authorization to conduct the operation.”<sup>70</sup> The inspector general found no Operational Plans in 46 percent of the files reviewed, and concluded that LAPD lacked a system for ensuring completion of these plans, risking surveillance that was ineffective and did not comply with established standards.<sup>71</sup> The police responded by standardizing the process for completing Operational Plans and implementing a record-keeping system.<sup>72</sup>

The 2009/2010 audit of the LAPD Intelligence Unit focused on ensuring that criminal investigations were not used to circumvent the stricter rules governing intelligence investigations.<sup>73</sup> As the inspector general explained:

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**LAPD intelligence investigations are subject to extensive scrutiny to guard against constitutional violations involving freedom of association, free speech, and unlawful searches and seizures.**

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“Intelligence investigations are subject to extensive scrutiny to guard against constitutional violations involving freedom of association, free speech, and unlawful searches and seizures.”<sup>74</sup> The inspector general found that while the LAPD was not using criminal investigations to get around the stricter rules for opening intelligence investigations, it should ensure that the steps taken to avoid circumvention were reflected in its files.<sup>75</sup> Also in 2009/2010, the inspector general found that the LAPD Intelligence Unit had not adequately documented “reasonable suspicion” before commencing an open-ended intelligence investigation involving a cluster of cases.<sup>76</sup> In response, the police provided the inspector general with additional

documentation supporting suspicion in the cases at issue and instituted a program to train personnel to ensure that evidence of reasonable suspicion was documented.<sup>77</sup>

The LAPD inspector general is representative of a broader movement to enhance police accountability through the use of permanent external police auditors. As the prominent policing scholar Samuel Walker has pointed out: “Two of the greatest shortcomings of past reform efforts have been the failure to implement recommended reforms and the failure to ensure that reforms, once implemented, are maintained.”<sup>78</sup> A police auditor facilitates the implementation and maintenance of reforms because the auditor’s office is “a permanent government agency with both the authority and the resources to conduct continuing investigations of police issues.”<sup>79</sup> Another advantage of the police auditor model, especially when compared to civilian complaint boards, is that auditors concentrate on systemic issues rather than on individual misconduct.<sup>80</sup> This type of “focus on reviewing policies and procedures for the purpose of changing the organization” is considered by many policing experts to be the best path to deterring police misconduct.<sup>81</sup>

As the next section demonstrates, the NYPD is not subject to oversight in the manner of federal intelligence agencies and several major police departments.

### **III. OVERSIGHT OF NYPD OPERATIONS**

New York, like all major American cities, has a long history of efforts to develop oversight mechanisms for its police force. These have largely been directed at developing ways of ensuring that police officers do not abuse their authority through corruption or misconduct.<sup>82</sup> To this end, New York City established two major investigative commissions: The 1970 Knapp Commission<sup>83</sup> and the 1992 Mollen Commission.<sup>84</sup> The latter’s recommendations prompted efforts by the City Council to create an independent commission to monitor the Department.<sup>85</sup> The independent commission established was challenged by the Mayor and struck down by courts because it included members appointed by the City Council in contravention of the Mayor’s appointment authority under the City Charter.<sup>86</sup> Eventually, then-Mayor Giuliani created the Commission to Combat Police Corruption as an entity independent from the police department, but with limited powers.<sup>87</sup> In addition, the City Charter was revised to establish the Civilian Complaint Review Board (CCRB).<sup>88</sup> The NYPD itself has taken steps to strengthen its internal oversight through its 1993 revamping of the Internal Affairs Bureau (IAB).<sup>89</sup> These efforts to combat police corruption have been only partially successful, with high-profile cases of abuse emerging every few years.<sup>90</sup>

In response to recent calls for stronger oversight of the Department’s intelligence operations, the Police Commissioner has declared that the NYPD is subject to multiple levels of oversight. He has pointed to its own IAB, the Commission to Combat Police Corruption, the CCRB, and New York’s five district attorneys and two U.S. attorneys.<sup>91</sup> But this long list obscures the reality that no neutral observer is charged with monitoring the Department’s policies and practices to ensure they comply with applicable rules, much less for effectiveness.

To begin with, purely internal mechanisms like the IAB are no substitute for independent review by a neutral and objective outsider. And, as the discussion below demonstrates, none of the institutions identified by the Commissioner have ever monitored Department-wide policies for compliance with legal standards. Rather, they focus on issues of corruption or criminal behavior by individual police officers. Other potential oversight bodies not mentioned by Commissioner Kelly – i.e., the Department of Investigations and the City Council – have also not played an active role in oversight.<sup>92</sup>

## **A. Internal Affairs and the Commission to Combat Police Corruption**

The mission of the IAB is to “provide for effective corruption control through analyzing corruption allegations and trends.”<sup>93</sup> It investigates complaints about individual police officers. A review of several of its annual reports shows that it does not assess the legality of policies and practices such as those of the Intelligence Division.<sup>94</sup> Moreover, because the IAB is under the jurisdiction of an NYPD chief who reports to the Commissioner, it is not independent from the Department.<sup>95</sup> Indeed, it was in part because of complaints about the IAB’s lack of autonomy in investigating high-profile cases that Mayor Giuliani, in 1995, established the Commission to Combat Police Corruption (Mayor’s Commission).

The Mayor’s Commission, which consists of five of his appointees, performs audits, studies, and analyses to “assess the quality of the Police Department’s systems for combating corruption” and to examine conditions and attitudes in the Department that may support corruption.<sup>96</sup> It may also accept complaints of police corruption.<sup>97</sup> Because of its small size (until recently it employed only two lawyers and had a budget of \$560,000) and its reliance on the cooperation of the Department (it cannot compel the NYPD to provide witnesses or documents), it is no surprise that doubts have been raised about the Commission’s ability to conduct meaningful oversight of matters relating to police corruption.<sup>98</sup> In addition, the NYPD has taken a narrow view of the Commission’s mandate. In 2005, when the Mayor’s Commission tried to investigate allegations that NYPD officers had downgraded crimes from felonies to misdemeanors to improve crime statistics,<sup>99</sup> the Department declined to cooperate on the grounds that falsifying crime statistics was not “corruption” within the mandate of the Mayor’s Commission.<sup>100</sup>

## **B. Civilian Complaint Review Board**

The CCRB is the civilian body that reviews complaints against individual police officers.<sup>101</sup> Under the City Charter, the CCRB is authorized to hear “complaints by members of the public against members of the police department that allege misconduct involving excessive use of force, abuse of authority, discourtesy, or use of

offensive language.”<sup>102</sup> The CCRB’s authority over complaints about “abuse of authority” by “members” of the Department could theoretically serve as a basis for reviewing the Department’s intelligence operations. But such case-specific and sporadic review, focusing on individual complaints, would not amount to systematic oversight of the NYPD’s policies and practices.

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In practical terms, moreover, the CCRB has not proved effective even in fulfilling its mandate of reviewing complaints against the police. For example, the CCRB has the power to “compel the attendance of witnesses and require the production of such records and other materials as are necessary for the investigation of complaints,”<sup>103</sup> and the NYPD is bound to cooperate fully with its investigations.<sup>104</sup> In practice, however, the police have on several occasions been unresponsive to the CCRB’s requests, particularly where sensitive operations or personnel are involved.<sup>105</sup> Most notably, in 2004, when the CCRB attempted to investigate the NYPD’s arrest of demonstrators at the Republican National Convention, the

NYPD refused to cooperate and declined to make its officers available.<sup>106</sup> Perhaps most important, the CCRB’s credibility as an oversight mechanism is undermined because it can only make recommendations for disciplinary action to the Police Commissioner.<sup>107</sup> These recommendations are often not followed, even in run-of-the-mill police misconduct cases.<sup>108</sup>

### **C. Department of Investigation**

The Department of Investigation (DOI) is a New York City agency that oversees more than 300 City agencies, entities, boards and commissions. Potentially, it has the authority to monitor the NYPD. Under the City Charter, the DOI is “authorized and empowered to make any study or investigation which in [the] opinion [of the Commissioner of Investigation] may be in the best interests of the city, including, but not limited to investigations of the affairs, functions, accounts, methods, personnel or efficiency of any agency.”<sup>109</sup> Its jurisdiction “extend[s] to any agency, officer, or employee of the city, or any person or entity doing business with the city, or any person or entity who is paid or receives money from or through the city or any agency of the city.”<sup>110</sup> The Commissioner of Investigation exercises this authority by appointing inspectors general to monitor City agencies and departments.

Although the DOI’s mandate as expressed in the City Charter is theoretically quite broad, in practice the agency operates under a series of executive orders and investigates only “corrupt or other criminal activity, conflicts of interest, unethical conduct, misconduct and incompetence.”<sup>111</sup> One might view the DOI’s jurisdiction over “misconduct” as sufficiently broad to cover policies that potentially violate constitutional rights. However, a review of publicly available reports suggests that the DOI takes a more limited view of its role. The Brennan Center’s research has not uncovered any instances where the DOI has investigated whether any agency’s policies or practices violate constitutional rights.<sup>112</sup> Instead, it appears that the DOI regards its role as focused on corruption and individual misconduct in the manner of the IAB. The fact that no DOI inspector general is assigned for the Department supports this view.<sup>113</sup>

## D. New York City Council

Under the New York City Charter, the City Council has both the authority and the obligation to oversee the NYPD. The Council, or its committees, are required to “review on a regular and continuous basis the activities of the agencies of the city.”<sup>114</sup> Each standing committee of the Council must hold at least one annual hearing relating to each agency under its jurisdiction.<sup>115</sup> In addition, the City Council has the authority to investigate “any matters within its jurisdiction relating to the property, affairs, or government of the city.”<sup>116</sup> When performing this role, standing and special committees of the Council have the power to “require the attendance and examine and take testimony under oath of such persons as it may deem necessary” and to require agencies to produce “books, accounts, papers, and other evidence relative to the inquiry.”<sup>117</sup>

Despite this broad authority, the City Council has exercised only limited oversight of the NYPD’s intelligence and counterterrorism operations, and Council officials have suggested that they lack the institutional capacity to do more.

From September 11, 2001 until May 2012, the City Council’s Committee on Public Safety, which is the standing committee with jurisdiction over the NYPD, held 94 hearings, including two hearings per year on the Department’s budget.<sup>118</sup> Four hearings touching upon the NYPD’s counterterrorism operations were held between 2001 and 2003. A fifth was held in October 2011 to address “Safety in NYC Ten Years After 9/11,” shortly after the AP’s initial revelations of the Department’s systematic surveillance of American Muslim communities. This was the first hearing since the Intelligence Division was formed in 2002 at which members of the Council asked the Commissioner about the activities of the Intelligence Division.<sup>119</sup> City Council members also raised questions about these operations at the NYPD’s March 2012 budget hearing.<sup>120</sup>

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One reason why the City Council has not been more active in supervising the NYPD’s operations may be a perceived lack of institutional capability. The Chair of the City Council’s Public Safety Committee, Peter Vallone, Jr., has noted that the Council does not have the expertise to oversee the NYPD’s sophisticated intelligence operations.<sup>121</sup> Vallone has also pointed out that his committee has a small staff and thus does not have the resources to devote to policy-oriented oversight.<sup>122</sup> An independent monitor with the expertise and resources to produce useful information about, and analyses of, the NYPD’s operations would go far toward enabling the Council to more effectively fulfill its oversight responsibilities.

## E. U.S. Attorneys and District Attorneys

New York U.S. Attorneys and District Attorneys do not exercise broad or regular oversight over the Department. Investigations of systematic civil rights violations by local police departments are normally undertaken by the Justice Department’s Civil Rights Division, not the U.S. Attorneys’ Offices.<sup>123</sup> District Attorneys focus on criminal matters and do not generally play a role in these types of systemic investigations.<sup>124</sup>

More fundamentally, the notion that oversight should come in the form of a criminal prosecution or a civil enforcement action by the Justice Department is misguided. Such a response should be the last resort, not the mechanism of choice to nudge the NYPD back on the right path if it starts to go astray. It constitutes both too much oversight, in the sense that it brings the full weight of law enforcement down on the NYPD when a simple recommendation to amend a policy may be sufficient, and too little oversight, in the sense that DOJ and the District Attorneys have no mandate to proactively keep an eye on the NYPD's operations.



As the above discussion demonstrates, external oversight of the NYPD is limited. Where it exists, it is focused primarily on police corruption and individual misconduct rather than the type of ongoing, systematic review of policies and practices that is performed by inspectors general in federal agencies and police auditors in major local police departments.

## IV. COURT OVERSIGHT AND ENFORCEMENT

In addition to the various bodies discussed above, one must also consider the role of the courts in “overseeing” the NYPD's activities. After all, courts can conclusively determine if police actions are lawful. But while judicial review has its place, the courts are not the sole or even the best solution to the need for oversight. Litigation can be time-consuming and expensive, both for the plaintiffs and for the taxpayers who subsidize the Department's defense. It can take years, during which time the police operate in a legal limbo – continuing the challenged practice at their peril or avoiding risk by ceasing activities that may in fact be lawful. Moreover, courts are retrospective institutions

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**While judicial review has its place, the courts are not the sole or even the best solution to the need for oversight.**

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and generally only act after an alleged legal violation has occurred. They play no role in vetting potential policies and practices; they can rarely step in to prevent an illegal policy before it is implemented. Their review is naturally limited to legality and does not touch upon the efficacy of a policy or practice. Finally, litigation often generates a hostile dynamic in which the parties become entrenched in their positions, minimizing any possibility of self-examination and self-regulation.

Where courts have stepped in to fashion specific rules for the police, an inspector general can be extremely valuable in ensuring sustained implementation of reforms. A review of the most significant consent decree involving the NYPD's surveillance activities, *Handschu v. Special Services Division*, demonstrates this point.

### A. Handschu

In 1971, a civil rights lawyer named Barbara Handschu and other activists brought suit claiming that the NYPD had spied on and attempted to disrupt a number of political groups.<sup>125</sup> Fourteen years later, the Department settled *Handschu v. Special Services Division* and agreed to follow a set of guidelines for investigations related to

political activity (1985 Handschu Guidelines).<sup>126</sup> These guidelines were a mix of substantive rules about what the police can and cannot do when conducting investigations of political activity and included an oversight mechanism for these types of investigations. They “limited the NYPD’s investigation of political activity to those circumstances where there was specific information of criminal activity” and established the Handschu Authority to “oversee compliance.”<sup>127</sup> In particular, before investigating political activity, the police were required to file a statement setting out the criminal predicate for the investigation with the Handschu Authority, a three-member panel made up of two high-level police officers and one civilian member appointed by the Mayor.<sup>128</sup> This procedure did not appear to result in any undue burdens on the police – the Handschu Authority rarely denied a request to authorize surveillance and no violation ever resulted in the NYPD being found in contempt of court. Rather, the supervising judge generally only issued informal reprimands or recommendations for further training.<sup>129</sup>

Following the September 11th terrorist attacks, the NYPD asked the judge charged with supervising the *Handschu* consent decree to “eliminate the restrictions contained in the [original] Handschu Guidelines and the oversight of the Handschu Authority with respect to those restrictions.”<sup>130</sup> The court agreed and approved a new set of guidelines (2003 Handschu Guidelines) that expanded the NYPD’s authorities and reduced oversight requirements.<sup>131</sup> While the court initially trusted the NYPD’s representations that it would abide by the agreed-upon rules,<sup>132</sup> the Department’s 2003 arrest and interrogation of 247 anti-war protestors led the presiding judge to incorporate the guidelines into the consent decree.<sup>133</sup>

Because the 2003 Handschu Guidelines are part of the consent decree, the judge retains the authority to ensure that the police abide by them. There is, however, no independent monitor charged with ensuring that the Handschu restrictions are implemented. Rather, issues relating to the NYPD’s compliance are raised sporadically when normally secret information becomes public through one means or another. An inspector general would be well placed to monitor compliance with these types of rules on a continuing basis and to supplement court oversight.

The 2003 Handschu Guidelines include: 1) the rules relating to police *investigations* that touch on political activity, which remain tethered to suspicion of criminal or terrorist activity; and 2) a new section that authorizes the police to collect *intelligence* apart from any particular investigation – i.e., even where there is no suspicion of criminal or terrorist activity.

## 1. Investigations

The 2003 Handschu Guidelines govern “investigations of possible unlawful or terrorist related activity that involve political activity,”<sup>134</sup> which is defined as “the exercise of a right of expression or association for the purpose of maintaining or changing governmental policies or social conditions.”<sup>135</sup>

Three levels of investigation are authorized: checking of leads; preliminary inquiry; and full investigation. The lowest level of investigative activity, the “prompt and extremely limited checking of leads” is to be undertaken when “information is received of such a nature that some follow-up as to the possibility of unlawful activity is warranted.”<sup>136</sup>

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**Under the Handschu Guidelines, the police are not limited to conducting investigations – they are also authorized to mount a broad range of other intelligence activities. The NYPD is, however, prohibited from retaining information obtained from such visits unless it “relates to potential unlawful or terrorist activity.”**

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This aspect of the 2003 Handschu Guidelines resurfaced recently when the media released internal police documents showing that NYPD undercover officers and confidential informants were reporting what was said by people in mosques in response to international events (e.g., worldwide protests about the publication of cartoons depicting the Prophet Mohammed in Danish newspapers)<sup>137</sup> and local occurrences (e.g., when a small plane crashed into a building in Manhattan in October 2006).<sup>138</sup> The Police Commissioner responded that: “As a matter of Police Department policy, undercover officers and confidential informants do not enter a mosque unless they are following up on a lead vetted under Handschu.”<sup>139</sup> Since the conversations recorded in police documents do not pertain to criminal or terrorist activity and a large number of mosques were apparently under surveillance, questions relating to whether the NYPD had specific leads and the nature of such “leads” remain unanswered.

The evaluation of this type of issue would lie squarely within the competence of an inspector general who would have access to normally secret police documents and could evaluate compliance on a regular basis without intruding unduly on the Department’s operations. Indeed, as discussed previously, the LAPD inspector general conducts precisely this type of review.<sup>140</sup>

Progressively higher levels of suspicion are required to open the next two investigatory levels: (preliminary inquiries<sup>141</sup> and full investigations<sup>142</sup>) and the police are given greater flexibility in opening investigations of terrorist conspiracies.<sup>143</sup> As with assessing whether the police properly complied with the rules regarding for following up on leads, an independent inspector general would be in a position to evaluate whether the police are complying with the rules for opening various types of investigations.

## *2. Intelligence Collection*

Under the Handschu Guidelines, the police are not limited to conducting investigations – they are also authorized to mount a broad range of other intelligence activities. As Commissioner Kelly has pointed out, the 2003 Handschu Guidelines permit the NYPD to “visit any place and attend any event that is open to the public, on the same terms and conditions as members of the public generally” for the “purpose of detecting or preventing terrorist activities.”<sup>144</sup> Attending political events or religious services even where there is no suspicion of a link to terrorist activity – which was previously off limits to the NYPD<sup>145</sup> – is now authorized unless it violates some other provision of the law.

The NYPD is, however, prohibited from *retaining* information obtained from such visits unless it “relates to potential unlawful or terrorist activity.”<sup>146</sup> This ban is critical because it ensures that the police do not maintain dossiers on wholly innocent persons. In the wake of the AP’s investigation, the *Handschu* attorneys sought discovery from the NYPD to determine whether the police were violating this prohibition.<sup>147</sup> Nine months later, when the attorneys were finally allowed to question the NYPD official in charge of the Intelligence Division, it became apparent that the police have no system for complying with the *Handschu* prohibition on keeping irrelevant 1<sup>st</sup> Amendment protected information.<sup>148</sup> Ensuring that such a system was in place would be part of the job of an inspector general, who would also audit police files to ensure that the system worked and prohibited information was not retained.

In short, compliance with the types of rules contained in the 2003 Handschu Guidelines, both for investigations and for intelligence operations, could be effectively and systematically reviewed by an independent inspector general.

## B. Other Litigation

Of course, the NYPD must abide by many legal requirements in addition to those contained in the 2003 Handschu Guidelines and litigation continues to be used to challenge a variety of police policies and practices.

Most recently, a case has been filed in New Jersey, challenging the Department's surveillance of American Muslims. *Hasan v. City of New York* claims that these practices violate the Equal Protection Clause of the Fourteenth Amendment and section 1983 of the Civil Rights Act because they discriminate on the basis of religion and that the surveillance program contravenes the Free Exercise and Establishment Clauses of the First Amendment because it is not neutral with respect to religion.<sup>149</sup>

The Department has also been engaged in ongoing litigation with respect to its stop and frisk policy.<sup>150</sup> The settlement in the first stop and frisk lawsuit, *Daniels v. City of New York*, required the Department to maintain a written anti-racial profiling policy that complied with the U.S. and New York State Constitutions and was binding on all NYPD officers.<sup>151</sup> In 2002, the NYPD issued an internal order prohibiting "reliance on race, ethnicity, religion or national origin as the determinative factor in initiating police action against an individual."<sup>152</sup> The ban was subsequently enshrined in a 2004 New York City law.<sup>153</sup> Despite these steps, the attorneys who brought the case faced continued difficulties in monitoring compliance with the consent decree.<sup>154</sup> At the same time, stops of minority men, which had prompted the initial litigation, continued to rise dramatically.<sup>155</sup> This led to yet another class action lawsuit challenging the same practices on the same Fourth Amendment and Equal Protection grounds.<sup>156</sup> This case, *Floyd v. City of New York*, was recently certified as a class action.<sup>157</sup>

There is no question that these types of lawsuits play an important role in addressing violations of the law by police and vindicating individual rights. But they are not a substitute for ongoing oversight. We rely, in the first instance, on our institutions of government to ensure that executive officials are operating within the law and to correct any violations. New York's history of attempts to reform police practices through litigation shows the many challenges associated with such efforts and the ways in which an independent inspector general could work on an ongoing basis to identify needed reforms and to ensure that they are implemented.



The oversight mechanisms used in the federal government and other police departments provide models for the NYPD. These mechanisms are geared towards ensuring that law enforcement agencies have the flexibility to conduct legitimate activities while at the same time providing a check against the potential for abuse.

## V. LESSONS LEARNED FROM THE INSPECTOR GENERAL AND POLICE AUDITOR OVERSIGHT MODELS

The success of an inspector general – or indeed any similar oversight model, such as police auditors – is not guaranteed. Within the federal government we have seen more and less effective inspectors general;<sup>158</sup> the same is true for police auditors.<sup>159</sup> A close examination of the workings of federal inspectors general and police auditors indicates that there are several factors that contribute to the success of these types of oversight mechanisms: credibility, access to information, and the support of the relevant government institutions.<sup>160</sup>

### A. Credibility

Credibility is established, in part, by ensuring that the person appointed to the position is viewed as neutral and as having the requisite expertise. For example, the federal IG Act provides for presidential appointment and Senate confirmation of inspectors general without regard to political affiliation and solely on the basis of integrity and demonstrated ability.<sup>161</sup> Inspectors general are generally not tied to specific administrations. Fine, for example, was appointed as the inspector general of the DOJ by President Clinton and continued to serve under both Presidents Bush and Obama.<sup>162</sup> An inspector general normally has broad discretion in selecting the subjects to be reviewed and in carrying out investigations, thus establishing independence from both the agency being overseen

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**An inspector general normally has broad discretion in selecting the subjects to be reviewed and in carrying out investigations, thus establishing independence from both the agency being overseen and political forces.**

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and political forces. The IG Act authorizes inspectors general to “undertake audits and investigations, access documents within and beyond their agencies, and carry out audits and investigations without interference from agency leadership. Within their very broad mandate, IGs may select issues for investigation as they see fit.”<sup>163</sup>

Another aspect of credibility, that is particularly important for a police department, is how the community that it serves perceives the oversight mechanism. Traditionally, community leaders and activists who work on police accountability have been unconvinced that a police auditor can play an important role in police oversight.<sup>164</sup>

One reason for this skepticism is that an auditor (like an inspector general) can only make recommendations which can be rejected by the police department. In many cases, however, the transparency provided by police auditors has contributed significantly to revealing to the public the practices of traditionally closed police departments. “[T]he power to dig deep into police departments, issue public reports, and conduct follow-up investigations has enormous value that should not be underestimated.”<sup>165</sup> Moreover, even if the police department rejects the auditor’s or inspector general’s recommendations, the Mayor or City Council can always choose to take action, once armed with the information provided by the independent monitor.

### B. Access

Access to information and relevant personnel is critical for an inspector general’s success. Federal inspectors general can obtain all records within the agency they cover and can acquire records from other federal agencies.<sup>166</sup> Employees who come forward to provide information to inspectors general are protected from retaliation and their identities

concealed if possible.<sup>167</sup> Similarly, the LAPD inspector general has broad access to information. Employees of the department have “an affirmative duty to cooperate fully with the Inspector General and to provide complete, unrestricted and prompt access to inspect and/or photocopy all Los Angeles Police Department records accessible to the Board ... including ongoing and in-progress matters” and the inspector general has subpoena power.<sup>168</sup> The LAPD inspector general must be given “prompt access” to employees and those who complain to the inspector general are protected against retaliation.<sup>169</sup>

### C. Support from other Governmental Bodies

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**Access to information and relevant personnel is critical for an inspector general's success.**

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Finally, much of the power of federal inspectors general comes from their relationship with Congress. Even though federal inspectors general are located within the agencies they serve, they have a dual reporting role – in addition to reporting to their agency head, they must also submit detailed semiannual reports to Congress. This “helps Congress overcome information problems in supervising agencies.”<sup>170</sup> Congress in turn ensures that inspectors general have the funding to carry out their vital oversight functions. Without the provision of adequate resources, the best-structured oversight model will fail. Congress’s ability to determine the appropriate level of resources was recently enhanced when the IG Act was amended to require budget submissions to Congress to include a statement from any inspector general about the adequacy of his or her budget.<sup>171</sup>

In the local policing context as well, the failure to provide resources can doom even the best conceived oversight efforts. In New York, chronic funding and staffing problems at the CCRB have contributed negatively to its image.<sup>172</sup> Often this failure to provide financial support is attributed to a lack of “political will.” Indeed, given the difficulties the CCRB has faced in obtaining resources, credibility, and the cooperation of the NYPD, one can reasonably ask how one could expect an inspector general to succeed where the CCRB has failed.

Part of the answer lies in the nature of an inspector general’s duties. The CCRB is called upon to act when someone complains that a police officer has violated the law or police regulations; this tends to place it in an adversarial position vis-à-vis the NYPD. In contrast, an inspector general works to analyze policies and practices in an ongoing and non-adversarial fashion which should encourage greater cooperation from the police.

Another part of the answer lies in the unique reporting relationship between an inspector general and supervising bodies such as legislatures and independent police boards. Because Congress relies on federal inspectors general to provide it with information to perform its own oversight duties, it has an incentive to ensure that inspectors general are adequately funded and, where necessary, to provide them with political backing. Similarly, the LAPD’s Board of Police Commissioners depends on the inspector general there to conduct the detailed reviews that allow the Board to assess how the police force is functioning. In the context of the NYPD, the City Council and the Mayor would have an incentive to support the work of an inspector general because it would help them do their jobs. Certainly factors like political will, how the inspector general is perceived by the agency being reviewed, and even the integrity and qualifications of the individual appointed to the job are

important, and cannot be entirely controlled by legislation. Nonetheless, structural incentives can nudge these variables in the right direction.

## **NYPD OVERSIGHT PROPOSAL**

Since the attacks of September 11th, federal intelligence agencies have been given enormous discretion to collect information about ordinary Americans. At the same time, oversight of these agencies has been enhanced. In contrast, the NYPD has created an enormous intelligence agency of its own that operates without any meaningful independent oversight.

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**Without the provision of adequate resources, the best-structured oversight model will fail.**

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The experience of the federal government shows that independent oversight by an inspector general can increase the transparency, accountability, and effectiveness of intelligence operations. Major federal intelligence agencies – including the FBI and the CIA – have operated under this system for decades. This type of oversight is a democratic society’s first line of defense against the threat that intelligence operations can pose to our civil liberties. Municipal police departments too have found independent oversight helpful in addressing traditional police misconduct concerns. Such oversight could also increase public confidence in how the Department is carrying out policies that disproportionately affect minority communities, including stop and frisk.

In recognition of how an inspector general can help the Department, there recently have been efforts to bring the NYPD within the DOI fold, with the introduction of a bill to that effect in the New York State legislature.<sup>173</sup> According to its sponsors, the bill was prompted by “a growing pattern of behavior [that] has emerged from the New York Police Department that inhibits public accountability and transparency.”<sup>174</sup> Another bill, supported by a bipartisan majority of the New York City Council, would establish an inspector general outside the DOI to oversee the Department.<sup>175</sup> Whatever mechanism is ultimately selected, it should incorporate those elements of other inspector general models that have been critical to success. In particular, legislation should: provide for an inspector general who is independent and has sufficient powers to carry out the mandate, including the ability to collect necessary information; require regular reporting to the Mayor and the City Council to increase the transparency of the Department’s policies and practices; protect confidential information; and allocate sufficient resources.

### **The NYPD Inspector General: Key Points**

#### **Independence**

- The success of inspectors general depends greatly on their independence (real and perceived) from the agencies they monitor. To enhance independence, the appointment of the inspector

general should be made without regard to political affiliation and solely on the basis of integrity and demonstrated ability in relevant fields.

- In the federal system, inspectors general usually reside within the agency they monitor, but that is not generally the case for auditors and inspectors general who oversee police departments. Regardless of whether the inspector general is placed inside or outside the NYPD, there should be a requirement of regular reporting both to the Mayor and the City Council. If the Mayor and the City Council view the inspector general as useful in helping them to carry out their oversight responsibilities, they will be more likely to protect the inspector general's independence.

## Authority

- The inspector general should be free to determine which reviews to conduct, but the City Council should be permitted to suggest subjects for review. This would allow the inspector general discretion in mounting reviews; but elected officials, representing various communities, could also direct the office's attention to particular issues.
- To ensure there is sufficient documentation to support oversight, the inspector general's first task should be to review the NYPD's record-keeping practices, particularly with respect to intelligence gathering. Such a review would set a baseline for future work.
- The inspector general should have access to all relevant documents and personnel available to the NYPD.
- It should be clear that the inspector general's authority does not extend to requiring the NYPD to take corrective action of any kind. Rather, the inspector general should be limited to offering recommendations. The Mayor, the Police Commissioner, and the City Council must decide whether and how to act on the inspector general's recommendations.

## Transparency

- Reporting to the Mayor and the City Council should be regular and systematic. In addition to keeping them informed about the findings of reviews, the inspector general should monitor and report on the status of prior recommendations. This transparency could be achieved through semiannual reports, as well as special reports on particularly serious matters. The Police Commissioner should, of course, be allowed the opportunity to present the Department's view on inspector general reports, thus ensuring a full airing of the issues.
- To promote transparency and access to government information, the inspector general should maintain a public website that would include reports and a portal for questions or complaints.

## Confidentiality

- It is critical to protect confidential information when conducting police oversight. The inspector general should redact from reports any information that is legally prohibited from disclosure, as well as any sensitive, non-public information that pertains to ongoing investigations of criminal or terrorist activity. The Police Commissioner should be authorized to prevent the inspector general from disclosing the names and personally identifying information of informants, other sources, witnesses, and suspects. The inspector general should also consider additional requests to redact information when the Commissioner believes disclosure would cause a specific and imminent threat to safety. In those instances in which information is redacted, the inspector general should issue two versions of the report: a non-public version containing all information for City officials, and a redacted version for the public.
- The identity of officers who make good-faith complaints to the inspector general should remain confidential, whenever possible. These officers should also be protected against any form of retaliation. These practices are intended to encourage candor from officers, and augment the inspector general's effectiveness.

## Resources

- The inspector general's budget should be adequate to achieve the office's mandate. One way of increasing transparency about resources would be to require that the inspector general's budget be separately identified. The inspector general should also have an opportunity to comment on the proposed budget if he or she believes that the requested funds are insufficient to perform mandated duties.

## CONCLUSION

An inspector general is not a panacea that will prevent or address every complaint about the NYPD. But the experience of the federal government and several local police departments shows that systematic, ongoing oversight by an independent outside monitor can help bring transparency and accountability to police operations. This type of oversight is particularly important for the NYPD, which has created a large, worldwide intelligence agency. When a police department undertakes extensive activities in this realm, where almost all actions are clandestine, it is critical that there be an independent and neutral entity charged with the responsibility for ensuring that the police operate within the law. An inspector general would also greatly assist the City Council and the Mayor in responsibly exercising their own oversight over the Department through regular reporting that uncovers and assesses any problems or deficiencies. These institutions must, however, play their part. Creating an inspector general for the NYPD would be a first step in fulfilling these responsibilities and would lead to a stronger, more effective, police department.



## ENDNOTES

<sup>1</sup> The number of street stops by the New York City Police Department [hereinafter “NYPD”] has skyrocketed over the last decade, exceeding 685,000 in 2011 and totaling three million since 2004. A large majority of those stopped, questioned and frisked were African-American or Latino, although the number of arrests resulting from stops is lower for minority targets than for Caucasians. Andrew Gelman, Jeffrey Fagan & Alex Kiss, *An Analysis of the New York City Police Department’s “Stop-and-Frisk” Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS’N 813, 820-22 (2007); N.Y. CIVIL LIBERTIES UNION, NYCLU BRIEFING: STOP-AND-FRISK 2011 (2012), available at [http://www.nyclu.org/files/publications/NYCLU\\_2011\\_Stop-and-Frisk\\_Report.pdf](http://www.nyclu.org/files/publications/NYCLU_2011_Stop-and-Frisk_Report.pdf); THE CTR. FOR CONSTITUTIONAL RIGHTS, RACIAL DISPARITY IN NYPD STOPS-AND-FRISKS (2009), available at [http://ccrjustice.org/files/Report\\_CCR\\_NYPD\\_Stop\\_and\\_Frisk\\_1.pdf](http://ccrjustice.org/files/Report_CCR_NYPD_Stop_and_Frisk_1.pdf); CTR. FOR CONSTITUTIONAL RIGHTS, NYPD STOP-AND-FRISK STATISTICS 2009-2010, available at [http://ccrjustice.org/files/CCR\\_Stop\\_and\\_Frisk\\_Fact\\_Sheet.pdf](http://ccrjustice.org/files/CCR_Stop_and_Frisk_Fact_Sheet.pdf). The NYPD’s maintenance of records on the individuals stopped under this policy – 90 percent of whom were not suspected of any wrongdoing whatsoever – led the state to enact a law prohibiting the NYPD from electronically storing identifying data from such stops. N.Y. CRIM. PROC. § 140.50(4). See also Al Baker & Colin Moynihan, *Paterson Signs Bill Limiting Stop-and-Frisk Data*, N.Y. TIMES (July 16, 2010), <http://cityroom.blogs.nytimes.com/2010/07/16/paterson-signs-bill-limiting-street-stop-data/>.

<sup>2</sup> The major stories and key documents relating to the Associated Press (AP) investigation can be found at <http://ap.org/media-center/nypd/investigation>.

<sup>3</sup> See *infra* text accompanying notes 137-139.

<sup>4</sup> N.Y.C. COUNCIL, HEARING ON THE MAYOR’S FISCAL 2013 PRELIMINARY BUDGET AND THE FISCAL 2012 PRELIMINARY MAYOR’S MANAGEMENT REPORT I (2012) [hereinafter “NYPD 2012 BUDGET”], available at <http://council.nyc.gov/html/budget/PDFs/2013/056%20Police%20Department.pdf>.

<sup>5</sup> *NYPD Frequently Asked Questions*, OFFICIAL N.Y.C. WEBSITE, [http://www.nyc.gov/html/nypd/html/faq/faq\\_police.shtml](http://www.nyc.gov/html/nypd/html/faq/faq_police.shtml) (last visited July 5, 2012).

<sup>6</sup> *Full Time Law Enforcement Employees by State by City in 2009*, FED. BUR. OF INVESTIGATION, [http://www2.fbi.gov/ucr/cius2009/data/table\\_78.html](http://www2.fbi.gov/ucr/cius2009/data/table_78.html) (last visited July 5, 2012).

<sup>7</sup> *Transcript of “The Counter-Terrorism Bureau,”* 60 MINUTES, CBS NEWS (Sept. 25, 2011), [http://www.cbsnews.com/2100-18560\\_162-20111059.html](http://www.cbsnews.com/2100-18560_162-20111059.html) (quoting Commissioner Kelly: “I knew that we had to supplement, buttress our defenses of this city. We couldn’t rely on the federal government alone. I believed that we had to create our own counter-terrorism capacity, indeed our own counter-terrorism division.”); Craig Horowitz, *The NYPD’s War on Terror*, N.Y. MAG. (Feb. 3, 2003), [http://nymag.com/nymetro/news/features/n\\_8286/](http://nymag.com/nymetro/news/features/n_8286/) (“I knew we couldn’t rely on the federal government,” Kelly says finally. “I know it from my own experience. We’re doing all the things we’re doing because the federal government isn’t doing them. It’s not enough to say it’s their job if the job isn’t being done. Since 9/11, the federal government hasn’t taken any additional resources and put them here.”). See also Mitchell D. Silber, *Who Will Defend the Defenders?*, COMMENTARY June 2012, 3 (after 9/11, “the department determined it would have to make systematic and autonomous changes in how to protect the city from further attack”).

<sup>8</sup> *NYPD Counterterrorism Units*, OFFICIAL N.Y.C. WEBSITE, [http://www.nyc.gov/html/nypd/html/administration/counterterrorism\\_units.shtml](http://www.nyc.gov/html/nypd/html/administration/counterterrorism_units.shtml) (last visited July 5, 2012) [hereinafter “*NYPD Counterterrorism Units*”].

- <sup>9</sup> NYPD 2012 BUDGET, *supra* note 4, at 7.
- <sup>10</sup> Michael R. Bloomberg, Testimony before the Comm'n on the Prevention of Weapons of Mass Destruction Proliferation and Terrorism, Sept. 10, 2008, *available at* [http://www.nyc.gov/portal/site/nycgov/menuitem.c0935b9a57bb4ef3daf2f1c701c789a0/index.jsp?pageID=mayor\\_press\\_release&catID=1194&doc\\_name=http%3A%2F%2Fwww.nyc.gov%2Fhtml%2Fom%2Fhtml%2F2008b%2Fpr351-08.html&cc=unused1978&rc=1194&ndi=1](http://www.nyc.gov/portal/site/nycgov/menuitem.c0935b9a57bb4ef3daf2f1c701c789a0/index.jsp?pageID=mayor_press_release&catID=1194&doc_name=http%3A%2F%2Fwww.nyc.gov%2Fhtml%2Fom%2Fhtml%2F2008b%2Fpr351-08.html&cc=unused1978&rc=1194&ndi=1). Approximately two-thirds of these resources are allocated to the Intelligence Division and a third to Counterterrorism. NYPD BUDGET, *supra* note 4, at 7. *See also* Richard A. Falkenrath, Testimony before the Sen. Comm. on Homeland Sec. and Governmental Affairs, Sept. 12, 2006, *available at* <http://www.investigativeproject.org/documents/testimony/259.pdf> (testifying that in 2006 the NYPD budget for counterterrorism and intelligence was some \$200 million).
- <sup>11</sup> *See* Frank Stoltze, *LAPD Key Player in Preventing Attacks, Chief Says*, S. CAL. PUB. RADIO (Sept. 11, 2011), <http://www.scp.org/news/2011/09/11/28770/lapd-key-player-in-preventing-terrorist-attacks-ch/>.
- <sup>12</sup> *See* Press Release, The State of New Jersey, Office of the Attorney General, Office of the Attorney General Takes Steps to Address Out-of-State Law Enforcement Activity in New Jersey After Fact-Finding Review (May 24, 2012), *available at* <http://www.nj.gov/oag/newsreleases12/pr20120524b.html>; Rocco Parascandola & Helen Kennedy, *NYPD isn't Sorry for Spying*, N.Y. DAILY NEWS (Feb. 24, 2012), [http://articles.nydailynews.com/2012-02-24/news/31093006\\_1\\_newark-police-newark-mayor-cory-booker-nypd-deputy-commissioner](http://articles.nydailynews.com/2012-02-24/news/31093006_1_newark-police-newark-mayor-cory-booker-nypd-deputy-commissioner). *See also* Barbara Goldberg, *Muslims Sue New York Police over New Jersey Mosque Spying*, ASSOCIATED PRESS (June 6, 2012), [http://newsandinsight.thomsonreuters.com/Legal/News/2012/06\\_-\\_June/Muslims\\_sue\\_New\\_York\\_police\\_over\\_New\\_Jersey\\_mosque\\_spying/](http://newsandinsight.thomsonreuters.com/Legal/News/2012/06_-_June/Muslims_sue_New_York_police_over_New_Jersey_mosque_spying/). Internal police documents also show that the NYPD deputized an officer to attend a human rights conference in New Orleans and report on the speakers and films there. N.Y. POLICE DEP'T, DEPUTY COMMISSIONER'S BRIEFING (2008) 1, *available at* <http://hosted.ap.org/specials/interactives/documents/nypd/dci-briefing-04252008.pdf>. In addition, there have been reports that the NYPD has sent undercover officers to Pennsylvania and Massachusetts. LEONARD LEVITT, NYPD CONFIDENTIAL: POWER AND CORRUPTION IN THE COUNTRY'S GREATEST POLICE FORCE 263 (2009).
- <sup>13</sup> Raymond W. Kelly, *9/11: 10 Years Later*, THE POLICE CHIEF 78 (September 2011): 20–25.
- <sup>14</sup> LEVITT, *supra* note 12, at 238-239.
- <sup>15</sup> The NYPD's presence in foreign capitals has reportedly caused friction with the federal intelligence agencies that traditionally cover these issues as well as concerns about how officers are tasked and supervised. Jeff Stein, *NYPD Intelligence Detectives Go Their Own Way*, WASH. POST (Nov. 10, 2010), [http://voices.washingtonpost.com/spy-talk/2010/11/nypds\\_foreign\\_cops\\_play\\_outsid.html](http://voices.washingtonpost.com/spy-talk/2010/11/nypds_foreign_cops_play_outsid.html).
- <sup>16</sup> According to NYPD spokesman Paul Browne, the Assistant Commissioner “does inspections overseas, and like other managers in the Intelligence Division reviews all spending or reimbursement, regardless of source, as does [sic] our budget personnel.” *Id.*
- <sup>17</sup> *NYPD Counterterrorism Units*, *supra* note 8.
- <sup>18</sup> On June 7, 2011, the Brennan Center filed a Freedom of Information Law request seeking a copy of the NYPD-FBI Memorandum of Understanding. In its response, the NYPD stated that it had searched its files, but had not located any responsive records.
- <sup>19</sup> San Francisco has made its Joint Terrorism Task Force (JTTF) agreement publicly available. Chicago, Houston, Minneapolis, Philadelphia, Saint Paul, and Washington, DC have made their JTTF agreements available to the

Brennan Center in response to freedom of information requests. For a discussion of Portland's approach to this issue, *see infra* note 22.

- <sup>20</sup> See FED. BUREAU OF INVESTIGATION, FBI JOINT TERRORISM TASK FORCE STANDARD MEMORANDUM OF UNDERSTANDING, *available at* <http://info.publicintelligence.net/FBI-JTTF-MOU.pdf>.
- <sup>21</sup> *See id.* § VII.
- <sup>22</sup> The need to ensure that local police operate within the bounds of state and local law when cooperating with the FBI has been at the forefront of discussions about JTTFs in several states. For example, Portland (Oregon) elected not to renew its JTTF agreement with the FBI and formally withdrew from the JTTF in 2005 over concerns about Portland police officers' adherence to Oregon's statutory and constitutional limits on police intelligence gathering. AM. CIVIL LIBERTIES UNION, ACLU BACKGROUNDER (2011), *available at* [http://aclu-or.org/sites/default/files/JTTF\\_Backgrounder\\_Feb\\_2011\\_0.pdf](http://aclu-or.org/sites/default/files/JTTF_Backgrounder_Feb_2011_0.pdf). Last year, Portland decided to rejoin the JTTF. The agreement between the FBI and Portland is reflected in a city law which specifically requires Portland police officers assigned to the JTTF to adhere to Oregon law and provides for supervision by the Portland Police Bureau. *See* PORTLAND, OR., CITY COUNCIL RESOLUTION 36859 (2011). In San Francisco, complaints about surveillance of American Muslim communities have led to a push to exert more local control over San Francisco Police Department officers working with the FBI. The city recently enacted the Safe San Francisco Civil Rights Ordinance, which calls for annual reports uncooperation between San Francisco police and the FBI and requires hearings to be held before the conclusion of any formal cooperation agreement. S.F., CAL., ADMIN. CODE § 2A.74 (2012); *see also* Sarah Medina, *Safe San Francisco Civil Rights Ordinance: Landmark Law Requires Community Input on Police Cooperation With FBI*, HUFFINGTON POST (May 10, 2012), [http://www.huffingtonpost.com/2012/05/10/safe-san-francisco-civil-rights-ordinance\\_n\\_1507344.html](http://www.huffingtonpost.com/2012/05/10/safe-san-francisco-civil-rights-ordinance_n_1507344.html).
- <sup>23</sup> *See infra* text accompanying notes 125-148, 151-157.
- <sup>24</sup> Dan Verton, *Is It Time for the Feds to Rein in the NYPD?*, AOL GOVERNMENT (Oct. 13, 2011), <http://gov.aol.com/2011/10/13/is-it-time-for-the-feds-to-rein-in-the-nypd/>. The NYPD's Intelligence Division performs many of the functions of a fusion center, and has been referred to as such on occasion by Commissioner Kelly. *See* Raymond Kelly, Comm'r, New York City Police Dept., Address to the Council on Foreign Relations, *The Post-9/11 NYPD: Where Are We Now?* (Apr. 22, 2009), *available at* <http://www.cfr.org/homeland-security/post-911-nypd-we-now/p19198>. However, the Department of Homeland Security has not officially designated the Intelligence Division as a fusion center. *See Fusion Center Locations and Contact Information*, DEPARTMENT OF HOMELAND SECURITY, [http://www.dhs.gov/files/programs/gc\\_1301685827335.shtm](http://www.dhs.gov/files/programs/gc_1301685827335.shtm) (last visited July 5, 2012).
- <sup>25</sup> The NYPD's cooperation with the CIA has raised concerns about the blurring of the line between the CIA's foreign intelligence operations and the gathering of domestic intelligence information. Although the public perception is that the CIA does not conduct intelligence operations within the United States, in reality the extent of restraints on such activities is not quite that clear, and since 9/11 restrictions have been eased even more. *See* Memorandum from the Center for National Security Studies to the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction (Feb. 15, 2005), *available at* [www.cnss.org/WMD%20memo%20dom%20intel.doc](http://www.cnss.org/WMD%20memo%20dom%20intel.doc).
- <sup>26</sup> Adam Goldman & Matt Apuzzo, *With CIA Help, NYPD Moves Covertly in Muslim Areas*, ASSOCIATED PRESS (Aug. 23, 2011), <http://ap.org/Content/AP-In-The-News/2011/With-CIA-help-NYPD-moves-covertly-in-Muslim-areas> [hereinafter "AP Aug. 23, 2011 Article"].

- <sup>27</sup> *Id.* It is not unknown for CIA agents to work in other agencies temporarily, but it is apparently unusual for them to remain on the CIA payroll and maintain offices at the CIA during that time, as Mr. Sanchez reportedly did. Last year, in response to concerns about CIA-NYPD cooperation, the CIA Inspector General investigated and reportedly faulted the agency for sending Sanchez to New York with little oversight and then leaving him there too long. Adam Goldman & Matt Apuzzo, *CIA to Pull Officer from NYPD After Internal Probe*, ASSOCIATED PRESS (Jan. 16, 2012), <http://ap.org/Content/AP-In-The-News/2012/CIA-to-pull-officer-from-NYPD-after-internal-probe> [hereinafter “AP Jan. 16, 2012 Article”].
- <sup>28</sup> AP Aug. 23, 2011 Article, *supra* note 26.
- <sup>29</sup> *Id.* The unidentified CIA clandestine operative subsequently left the NYPD. See AP Jan. 16, 2012 Article, *supra* note 27.
- <sup>30</sup> Loch K. Johnson, *Ostriches, Cheerleaders, Skeptics, and Guardians: Role Selection by Congressional Intelligence Overseers*, 28 SAIS REV. INT’L AFF. 93, 94-95 (2008) [hereinafter “Johnson, *Congressional Intelligence Overseers*”].
- <sup>31</sup> The full name of the Church Committee was the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities. It is popularly known as the Church Committee after its Chairman, Senator Frank Church. Loch K. Johnson. *The Church Committee Investigation of 1975 and the Evolution of Modern Intelligence Accountability*, 23 INTELLIGENCE AND NAT’L SEC. 198 (2008).
- <sup>32</sup> The full name of the Pike Committee was the House Select Intelligence Committee. It is popularly known as the Pike Committee after its second Chairman, Congressman Otis Pike. *Id.* at 200.
- <sup>33</sup> *Id.*
- <sup>34</sup> Johnson, *Congressional Intelligence Overseers*, *supra* note 30, at 95.
- <sup>35</sup> See SENATE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES (CHURCH COMMITTEE), FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 94-755 (1976), available at <http://www.intelligence.senate.gov/churchcommittee.html>.
- <sup>36</sup> *Id.* For a description of the information discovered by the Church Committee, see Frederick A.O. Schwarz Jr. and Aziz Z. Huq, UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR 21-49 (New Press 2007).
- <sup>37</sup> Johnson, *Congressional Intelligence Overseers*, *supra* note 30, at 96.
- <sup>38</sup> The role played by these committees, the U.S. Senate Select Committee on Intelligence and the U.S. House of Representatives Permanent Select Committee on Intelligence respectively, in overseeing intelligence operations has been the subject of extensive discussion in academic and policy circles. See, e.g., Johnson, *Congressional Intelligence Overseers*, *supra* note 30; Christopher M. Ford, *Intelligence Demands in a Democratic State: Congressional Intelligence Oversight*, 81 TUL. L. REV. 721 (2007); Sen. Ron Wyden, et al., *Law and Policy Efforts to Balance Security, Privacy and Civil Liberties in Post-9/11 America*, 17 STAN. L. & POL’Y REV. 331 (2006); Robert F. Blomquist, *Congressional Oversight of Counterterrorism and Its Reform*, 11 ROGER WILLIAMS U. L. REV. 1 (2005); *Serious Intelligence Reform*, AMERICAN ENTERPRISE INSTITUTE (Mar. 5, 2004), <http://www.aei.org/events/2004/03/05/serious-intelligence-reform-event/>; *The Role of Congress in the War on Terrorism*, BROOKINGS INSTITUTION (Apr. 17, 2002), <http://www.brookings.edu/events/2002/0417terrorism.aspx>.

- <sup>39</sup> Over time, the restrictions placed by the Attorney General Guidelines on FBI investigations have been weakened and the current version removes the requirement that the FBI act only where there is a suspicion of criminal activity. For a discussion of the original Attorney General Guidelines and their evolution, see EMILY BERMAN, BRENNAN CTR. FOR JUSTICE, DOMESTIC INTELLIGENCE: NEW POWERS, NEW RISKS 21-22 (2011), available at [http://brennan.3cdn.net/b80aa0bab0b425857d\\_jdm6b8776.pdf](http://brennan.3cdn.net/b80aa0bab0b425857d_jdm6b8776.pdf).
- <sup>40</sup> Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified in scattered sections of U.S.C.). After 9/11, the Foreign Intelligence Surveillance Act was amended to allow the executive branch greater flexibility in obtaining wiretaps. Further intelligence authority was granted by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, §§ 206, 215, 115 Stat. 272, 282, 287 (codified as amended in scattered sections of U.S.C.) [hereinafter “Patriot Act”]. The loosening of the standards governing intelligence collection was not, however, accompanied by any change in the oversight mechanisms. Indeed, as federal agencies accumulate more authority to collect intelligence about Americans at home, the need for strong oversight of these operations becomes even more pressing. See *infra* text accompanying notes 45-62.
- <sup>41</sup> Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (codified as amended at 5 U.S.C. App. 3).
- <sup>42</sup> Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. (forthcoming 2013) (manuscript at 9), available at <http://ssrn.com/abstract=2025186>.
- <sup>43</sup> *Id.*
- <sup>44</sup> See STAFF OF S. COMM. ON GOV'T OPERATIONS, 100TH CONG., THE NEED FOR A STATUTORY INSPECTOR GENERAL IN THE DEPARTMENT OF JUSTICE (1988).
- <sup>45</sup> Inspector General Act of 1978, 5 U.S.C. App. 3 § 8I(f) (2003).
- <sup>46</sup> Intelligence Authorization Act for Fiscal Year 2010, Pub. L. No. 111-259, § 405, 124 Stat. 2654, 2709 (2010) (codified in scattered sections of U.S.C.). Congress has also expanded the powers of administratively appointed inspectors general at the National Security Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency and the National Reconnaissance Office. Sinnar, *supra* note 42 (manuscript at 10).
- <sup>47</sup> Patriot Act § 1001.
- <sup>48</sup> Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, § 301(b)(1), 122 Stat. 2436, 2471 (2008).
- <sup>49</sup> USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 119, 120 Stat. 192 (2006).
- <sup>50</sup> INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS (2007) [hereinafter “DOJ IG 2007 REPORT”], available at <http://www.justice.gov/oig/special/s0703b/final.pdf>; INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FBI'S USE OF NATIONAL SECURITY LETTERS: ASSESSMENT OF CORRECTIVE ACTIONS AND EXAMINATIONS OF NSL USAGE IN 2006 (2008) [hereinafter “DOJ IG 2008 REPORT”], available at <http://www.justice.gov/oig/special/s0803b/final.pdf>; INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF EXIGENT LETTERS AND OTHER INFORMAL REQUESTS FOR TELEPHONE RECORDS (2010) [hereinafter “DOJ IG 2010 REPORT”], available at <http://www.justice.gov/oig/special/s1001r.pdf>.

- <sup>51</sup> See Patriot Act § 505.
- <sup>52</sup> DOJ IG 2007 REPORT, *supra* note 50, at 48-51, 65.
- <sup>53</sup> *Id.* at 66-67, 103-07.
- <sup>54</sup> Sinnar, *supra* note 42 (manuscript at 21) (citing DOJ IG 2010 REPORT, *supra* note 50, at 45-47).
- <sup>55</sup> The 2008 report on national security letters noted that the upward trend in the use of the NSLs continued, but also that the FBI and DOJ were committed to correcting the problems identified in the first report and had made significant progress in doing so. DOJ IG 2008 REPORT, *supra* note 50, at 109-111, 119-120, 157-161.
- <sup>56</sup> DOJ IG 2010 REPORT, *supra* note 50, at 212.
- <sup>57</sup> See The Inspector General's Independent Report on the FBI's Use of National Security Letters: Hearing Before the House of Representatives Comm. on the Judiciary, 110<sup>th</sup> Cong. (2007); Misuse of Patriot Act Powers: The Inspector General's Findings of Improper Use of the National Security Letters by the FBI: Hearing Before the Senate Comm. on the Judiciary, 110<sup>th</sup> Cong. (2007); Responding to the Inspector General's Findings of Improper Use of the National Security Letters by the FBI: Hearing Before the Senate Comm. on the Judiciary, 110<sup>th</sup> Cong. (2007); National Security Letters Reform Act of 2007: Hearings on H.R. 3189 Before the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the House of Representatives Comm. on the Judiciary, 110<sup>th</sup> Cong. (2008); National Security Letters: The Need for Greater Accountability and Oversight: Hearing Before the Senate Comm. on the Judiciary, 110<sup>th</sup> Cong. (2008).
- <sup>58</sup> OFFICE OF THE INSPECTOR GEN., A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S COUNTERTERRORISM PROGRAM: THREAT ASSESSMENT, STRATEGIC PLANNING, AND RESOURCE MANAGEMENT (2002), *available at* <http://www.justice.gov/oig/reports/FBI/a0238.htm>.
- <sup>59</sup> *Id.*
- <sup>60</sup> See INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE INTERNAL EFFECTS OF THE FEDERAL BUREAU OF INVESTIGATION'S REPRIORITIZATION (2004), *available at* <http://www.justice.gov/oig/reports/FBI/a0439/final.pdf>.
- <sup>61</sup> *Id.* at ix.
- <sup>62</sup> INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE EXTERNAL EFFECTS OF THE FEDERAL BUREAU OF INVESTIGATION'S REPRIORITIZATION EFFORTS (2005), *available at* <http://www.justice.gov/oig/reports/FBI/a0537/final.pdf>.
- <sup>63</sup> CITIZENS CRIME COMM'N OF N.Y.C., NATIONAL POLICE OVERSIGHT MODELS, *available at* <http://www.nycrimecommission.org/policeoversight.php>.
- <sup>64</sup> The need for strong oversight was starkly reinforced six years later when the so-called Rampart scandal revealed that the LAPD was rife with abusive practices, including framing suspects, planting evidence, fabricating probable cause, lying in court and physically abusing suspects. See RAMPART RECONSIDERED: THE SEARCH FOR REAL REFORM SEVEN YEARS LATER (2006), *available at* <http://www.lapdonline.org/assets/pdf/Rampart%20Reconsidered-Full%20Report.pdf>.

<sup>65</sup> See L.A. Bd. of Police Comm'rs, POLICIES AND AUTHORITY RELATIVE TO THE INSPECTOR GENERAL I (2000) [hereinafter "LAPD POLICIES AND AUTHORITY RELATIVE TO THE INSPECTOR GENERAL"], available at <http://www.oiglapd.lacity.org/documents/policies&authority.pdf>. The inspector general's staff "receives copies of every personnel complaint filed, and tracks selected cases along with any resultant litigation." In addition, the office audits selected investigations and conducts "systemic reviews of the disciplinary system to ensure fairness and equity." *Office of the Inspector General*, L.A. POLICE DEP'T, [http://www.lapdonline.org/police\\_commission/content\\_basic\\_view/1076](http://www.lapdonline.org/police_commission/content_basic_view/1076) (last visited July 5, 2012).

<sup>66</sup> The independent Board of Police Commissioners may, however, prevent the Inspector General from conducting an inspection. L.A., CAL., CHARTER AND ADMIN. CODE § 573(b), (c).

<sup>67</sup> L.A. POLICE DEP'T, STANDARDS AND PROCEDURES FOR ANTI-TERRORIST DIVISION (2003) [hereinafter "LAPD INTELLIGENCE UNIT STANDARDS"], available at <http://documents.law.yale.edu/sites/default/files/Standards%20and%20Procedures%20for%20Anti-Terrorist%20Division-ocr.pdf>. In addition to the intelligence investigations discussed here, the LAPD participates in the Suspicious Activity Reporting System and has been the subject of considerable criticism on that front. See Letter from Peter Bibring, Senior Staff Att'y, Am. Civil Liberties Union, to Charlie Beck, L.A. Police Dep't Chief, and Michael Downing, L.A. Police Dep't Deputy Chief (Mar. 2, 2012), available at <http://www.chirla.org/sites/default/files/20120312SARSACLUCHIRLA.pdf>. The LAPD recently announced reforms to this system. See David Finnigan, *LAPD Modifies Surveillance Program of Muslims*, WASH. POST (May 21, 2012), [http://www.washingtonpost.com/national/on-faith/lapd-modifies-surveillance-program-of-muslims/2012/05/21/gIQARJnGgU\\_story.html](http://www.washingtonpost.com/national/on-faith/lapd-modifies-surveillance-program-of-muslims/2012/05/21/gIQARJnGgU_story.html).

<sup>68</sup> LAPD INTELLIGENCE UNIT STANDARDS, *supra* note 67, at § IV(A). "Reasonable Suspicion" is defined as "[a]n honest belief based on known articulable circumstances which would cause a reasonable and trained law enforcement officer to believe that some activity relating to a definable criminal activity or enterprise may be occurring or has potential to occur."

<sup>69</sup> OFFICE OF THE INSPECTOR GEN., LOS ANGELES POLICE COMMISSION ANTI-TERRORISM INTELLIGENCE SECTION AUDIT, FISCAL YEAR 2008/09 I (2009), available at [http://www.oiglapd.lacity.org/Reports/A-T\\_IntellSecfy08-09\\_4-9-09.pdf](http://www.oiglapd.lacity.org/Reports/A-T_IntellSecfy08-09_4-9-09.pdf).

<sup>70</sup> *Id.* at 4.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 5.

<sup>73</sup> OFFICE OF THE INSPECTOR GEN., LOS ANGELES POLICE COMMISSION ANTI-TERRORISM INTELLIGENCE SECTION AUDIT, FISCAL YEAR 2009/2010 I (2012), available at [http://www.oiglapd.lacity.org/Reports/ATIS\\_FY09-10\\_1-19-12.pdf](http://www.oiglapd.lacity.org/Reports/ATIS_FY09-10_1-19-12.pdf).

<sup>74</sup> *Id.* at 4.

<sup>75</sup> *Id.* at 5.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 5-6.

<sup>78</sup> SAMUEL WALKER, *THE NEW WORLD OF POLICE ACCOUNTABILITY* 175-176 (2005).

<sup>79</sup> *Id.* at 176. Walker lists 12 police auditors in the United States, covering 11 law enforcement agencies. These are: Austin (Texas) Police Monitor; Boise (Idaho) Community Ombudsman; Los Angeles County (California) Sheriff's Department, Special Counsel; Los Angeles County (California) Sheriff's Department, Office of Independent Review; Nashville (Tennessee) Metropolitan Police Department, Office of Professional Accountability; Omaha (Nebraska) Public Safety Auditor; Philadelphia (Pennsylvania) Integrity and Accountability Office; Portland (Oregon) Independent Police Review Division; Sacramento (California) Office of Police Accountability; San Jose (California) Independent Police Auditor; Seattle (Washington) Police Department, Office of Professional Accountability; Tucson (Arizona) Independent Police Auditor. *Id.* at 137.

<sup>80</sup> For a discussion of New York's civilian complaint mechanism, *see infra* text accompanying notes 101-108.

<sup>81</sup> WALKER, *supra* note 78, at 38.

<sup>82</sup> Corruption is the abuse of police authority for personal gain – such as bribery, extortion or selling stolen goods or drugs. Misconduct refers to a broader category of banned police behavior. It includes breaches of police department rules and regulations, violations of state or federal criminal laws, and infringements of civil rights. There is an extensive body of federal law specifically targeting police misconduct. It is unlawful for anyone acting with police authority to deprive or conspire to deprive another person of any right protected by the Constitution or laws of the United States. 18 U.S.C. § 241 (2006). It is also unlawful for state or local police to engage in a pattern or practice of conduct that deprives persons of their rights. 42 U.S.C. § 14141 (2006). Enforcement is the responsibility of the Department of Justice. For a discussion of police corruption and misconduct issues, *see generally* U.S. COMM'N ON CIVIL RIGHTS, *REVISITING WHO IS GUARDING THE GUARDIANS?* 57 (2000), *available at* <http://www.usccr.gov/pubs/guard/ch3.htm>.

<sup>83</sup> *See* COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE CITY'S ANTI-CORRUPTION PROCEDURES, *THE KNAPP COMMISSION REPORT ON POLICE CORRUPTION* 4 (1972).

<sup>84</sup> *See* COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT, *COMMISSION REPORT* app. 1 (1994), *available at* [http://www.parc.info/client\\_files/Special%20Reports/4%20-%20Mollen%20Commission%20-%20NYPD.pdf](http://www.parc.info/client_files/Special%20Reports/4%20-%20Mollen%20Commission%20-%20NYPD.pdf).

<sup>85</sup> *Id.* at 7, 90; *see also* Selwyn Raab, *New York's Police Allow Corruption, Mollen Panel Says*, *N.Y. TIMES* (Dec. 29, 1993), <http://www.nytimes.com/1993/12/29/nyregion/new-york-s-police-allow-corruption-mollen-panel-says.html?pagewanted=all&src=pm>.

<sup>86</sup> *See* *Mayor of N.Y. v. Council of N.Y.*, 235 A.D.2d 230 (1<sup>st</sup> Dept. 1997); *Mayor of N.Y. v. Council of N.Y.*, 280 A.D.2d 380 (1<sup>st</sup> Dept. 2001).

<sup>87</sup> OFFICE OF THE MAYOR OF N.Y.C., RUDOLPH W. GIULIANI, EXECUTIVE ORDER No. 18 (1995) [hereinafter "1995 EXECUTIVE ORDER"]. For a discussion of the mandate and work of the Commission to Combat Police Corruption, *see infra* text accompanying notes 96-100.

<sup>88</sup> *See* New York City Civilian Complaint Review Board, *History of the CCRB*, OFFICIAL N.Y.C. WEBSITE, <http://www.nyc.gov/html/ccrb/html/history.html> (last visited July 5, 2012).

<sup>89</sup> *See* NEW YORK CITY POLICE DEPARTMENT INTERNAL AFFAIRS BUREAU CORRUPTION PREVENTION AND ANALYSIS UNIT, *INTERNAL AFFAIRS BUREAU 1993 ANNUAL REPORT* 2 (1993) [hereinafter "IAB 1993 Report"], *available at* [http://www.nyclu.org/files/nypd\\_reports/NYPD\\_IAB\\_1993\\_Annual\\_Report.pdf](http://www.nyclu.org/files/nypd_reports/NYPD_IAB_1993_Annual_Report.pdf).

- <sup>90</sup> A recent example is the 2006 shooting of the unarmed Sean Bell as he was leaving his bachelor party. Robert D. McFadden, *Police Kill Man After a Queens Bachelor Party*, N.Y. TIMES (Nov. 26, 2006), <http://www.nytimes.com/2006/11/26/nyregion/26cops.html?ref=seanbell>. In the last year, moreover, NYPD officers have been charged in ticket fixing and gun running scandals. William K. Rashbaum & Al Baker, *Authorities Move to Charge 16 Officers After Widespread Ticket Fixing*, N.Y. TIMES (Oct. 27, 2011), <http://www.nytimes.com/2011/10/28/nyregion/16-officers-ordered-to-surrender-in-ticket-fixing.html?ref=ticketfixingscandal>; William K. Rashbaum & Joseph Goldstein, *8 City Officers Charged in Gun Smuggling Case*, N.Y. TIMES (Oct. 26, 2011), <http://www.nytimes.com/2011/10/26/nyregion/new-york-officers-accused-of-smuggling-guns.html?pagewanted=all>. They have also been implicated in attempting to silence an officer seeking to expose police corruption by placing him in a psychiatric ward. Graham Rayman, *The NYPD Tapes Confirmed*, VILLAGE VOICE (Mar. 7, 2012), <http://www.villagevoice.com/2012-03-07/news/the-nypd-tapes-confirmed>.
- <sup>91</sup> The Council of the City of New York, Committee on Public Safety, Transcript of the Minutes, March 15, 2012 84 [hereinafter “City Council Mar. 15, 2012 Transcript”] (Commissioner Kelly: “We have five district attorneys, we have two U.S. attorneys, we have the Committee [*sic*] to Combat Police Corruption, we have our own internal oversight”); *see also* David W. Chen, *An Independent Monitor for the Police is Proposed*, N.Y. TIMES, (June 12, 2012), <http://www.nytimes.com/2012/06/13/nyregion/city-council-to-weigh-inspector-general-for-the-police-dept.html?smid=tw-nytmetro&seid=auto> (NYPD spokesman Paul Browne noting that that the Department is subject to oversight by two United States attorneys, five district attorneys, the Civilian Complaint Review Board and the Commission to Combat Police Corruption.)
- <sup>92</sup> In addition to the various bodies discussed in this section, the Comptroller of New York City has the power to audit and investigate all matters relating to the City’s finances. N.Y.C. Charter § 93. Over the last 10 years, Comptroller’s audits of the NYPD have reviewed issues such as: the cost to the city of claims of improper police conduct, custody controls, tracking systems, a review of NYPD pensioners working for the city after retirement, and the security of computer systems. *See, e.g.* N. Y.C. OFFICE OF THE COMPTROLLER, CLAIMS REPORT FISCAL YEARS 2009 & 2010 34-35 (2011), *available at* [http://comptroller.nyc.gov/bureaus/bla/pdf/2011\\_Claims\\_Report.pdf](http://comptroller.nyc.gov/bureaus/bla/pdf/2011_Claims_Report.pdf); N.Y.C. OFFICE OF THE COMPTROLLER, AUDIT REPORT ON PENSIONERS OF THE NEW YORK CITY POLICE DEPARTMENT WORKING FOR THE CITY AFTER RETIREMENT JANUARY 1, 2009 – DECEMBER 31, 2009 (2011); N.Y.C. OFFICE OF THE COMPTROLLER, AUDIT REPORT ON THE CASH AND FIREARM CUSTODY CONTROLS OF THE MANHATTAN PROPERTY CLERK DIVISION OF THE POLICE DEPARTMENT (2008); N.Y.C. OFFICE OF THE COMPTROLLER, AUDIT REPORT ON THE DEVELOPMENT AND IMPLEMENTATION OF THE POLICE DEPARTMENT’S AUTO POUND SYSTEM (2002).
- <sup>93</sup> IAB 1993 Report, *supra* note 89, at 4. The actual order establishing the IAB is apparently not publicly available. The Brennan Center filed a Freedom of Information Law request for the order on May 1, 2012, but has not yet received the correct responsive documents from the Department.
- <sup>94</sup> The Brennan Center reviewed Internal Affairs Bureau annual reports from 1993 to 2007. *See* N.Y. POLICE DEPT., COMPILATION OF ANNUAL REPORTS OF THE NYPD INTERNAL AFFAIRS BUREAU 1993-2007, *available at* <http://www.nyclu.org/news/nyclu-releases-16-years-of-nypd-corruption-reports>.
- <sup>95</sup> The IAB’s handling of police misconduct investigations has been severely criticized, including recently by current and former prosecutors. William K. Rashbaum, Joseph Goldstein & Al Baker, *Experts Say N.Y. Police Dept. Isn’t Policing Itself*, N.Y. TIMES (Nov. 2, 2011), [http://www.nytimes.com/2011/11/03/nyregion/experts-say-ny-police-dept-isnt-policing-itself.html?\\_r=2&pagewanted=1&ref=nyregion](http://www.nytimes.com/2011/11/03/nyregion/experts-say-ny-police-dept-isnt-policing-itself.html?_r=2&pagewanted=1&ref=nyregion). It is also highly unlikely that the IAB has the capacity and resources to undertake this type of review since it appears to be struggling to handle its current mandate. IAB reports show that between 1994 and 2006 tips about suspected police corruption tripled, but the number of serious misconduct investigations dropped from 2,258 to 1,057. Al Baker & Jo Craven McGinty, *N.Y.P.D. Confidential*, N.Y. TIMES (Mar. 26, 2010), <http://www.nytimes.com/2010/03/28/nyregion/28iab.html?pagewanted=all>.

- <sup>96</sup> 1995 EXECUTIVE ORDER, *supra* note 87, §§ 2(a) and (b). Since its inception in 1995, the Mayor’s Commission to Combat Police Corruption (Mayor’s Commission) has issued more than 20 reports on various aspects of the NYPD’s operations that bear on police corruption in addition to its annual reports. See COMM’N TO COMBAT POLICE CORRUPTION, COMPILATION OF REPORTS FROM 1996-2012, *available at* <http://www.nyc.gov/html/ccpc/html/reports/reports.shtml>.
- <sup>97</sup> Complaints received by the Mayor’s Commission may be referred to the Police Department and “such other agency as the Commission determines is appropriate, for investigation and/or prosecution.” 1995 EXECUTIVE ORDER, *supra* note 87, § 2(c).
- <sup>98</sup> See Al Baker, *Vow to Fight Police Misconduct Faces Skepticism*, N.Y. TIMES (Jan. 13, 2012), [http://www.nytimes.com/2012/01/13/nyregion/bloombergs-pledge-to-fight-police-misconduct-faces-skepticism.html?\\_r=1&scp=2&sq=al%20baker&st=cse](http://www.nytimes.com/2012/01/13/nyregion/bloombergs-pledge-to-fight-police-misconduct-faces-skepticism.html?_r=1&scp=2&sq=al%20baker&st=cse). The staff of the Mayor’s Commission has recently been increased to six full-time attorneys. See Comm’n to Combat Police Corruption, *About the Commission*, OFFICIAL N.Y.C. WEBSITE, <http://www.nyc.gov/html/ccpc/html/about/about.shtml> (last visited July 5, 2012).
- <sup>99</sup> Such allegations first surfaced in remarks from the Patrolmen’s Benevolent Association and the sergeants’ union in 2004. See Shalia K. Dewan, *Union Leaders Allege Fudging of Statistics on City Crime*, N.Y. TIMES (Mar. 24, 2004), <http://www.nytimes.com/2004/03/24/nyregion/union-leaders-allege-fudging-of-statistics-on-city-crime.html?ref=patrickjlynch>; Paul Moses, *Corruption? It Figures*, VILLAGE VOICE (Mar. 22, 2005), <http://www.villagevoice.com/2005-03-22/news/corruption-it-figures>.
- <sup>100</sup> See *NYPD Oversight Reform Timeline*, CITIZENS’ CRIME COMM’N OF N.Y.C., <http://www.nycrimecommission.org/policeoversight.php> (last visited July 5, 2012). See also William K. Rashbaum, *Police Corruption Panel Is Losing Its Chairman*, N.Y. TIMES (Apr. 22, 2005), <http://query.nytimes.com/gst/fullpage.html?res=9D0CE7DF1431F931A15757C0A9639C8B63>. In addition, the Chairman of the Mayor’s Commission, Mark F. Pomerantz, stated that the Mayor’s Commission did not receive cooperation from the Police Department with respect to fraudulent overtime claims and sexual misconduct by officers because the Department did not consider these issues to be ones within the Mayor’s Commission’s mandate. The Council of the City of New York, Committee on Public Safety, Transcript of the Minutes April 18, 2005, 137-144.
- <sup>101</sup> The Civilian Complaint Review Board (CCRB) consists of thirteen members: five appointed by the mayor, five by the City Council, and three by the Police Commissioner. N.Y.C. Charter § 440(b)(1).
- <sup>102</sup> *Id.* § 440(c)(1).
- <sup>103</sup> *Id.* § 440(c)(3).
- <sup>104</sup> *Id.* § 440(d)(1).
- <sup>105</sup> See N.Y. CIVIL LIBERTIES UNION, MISSION FAILURE: CIVILIAN REVIEW OF POLICING IN NEW YORK CITY 1994-2006 (2007) [hereinafter “N.Y. CIVIL LIBERTIES UNION, MISSION FAILURE”], *available at* [http://www.nyclu.org/files/publications/nyclu\\_pub\\_mission\\_failure.pdf](http://www.nyclu.org/files/publications/nyclu_pub_mission_failure.pdf).
- <sup>106</sup> Michael Wilson, *Top Officers Are Said to Ignore Complaint Board’s Inquiry*, N.Y. TIMES (Sept. 15, 2005), <http://query.nytimes.com/gst/fullpage.html?res=9804E7D71131F936A2575AC0A9639C8B63>.
- <sup>107</sup> The section of the Charter regarding the cooperation of the NYPD with the CCRB states that its provisions “shall not be construed to limit or impair the authority of the police commissioner to discipline members of the department.” N.Y.C. Charter § 440(d)(3)(e).

<sup>108</sup> In the CCRB’s 2010 annual report, the most recent available, the NYPD refused to seek discipline in 17 percent of the substantiated cases (i.e., in cases where the CCRB finds there is credible evidence that an officer engaged in misconduct). CIVILIAN COMPLAINT REVIEW Bd., 2010 ANNUAL REPORT 2 (2011), *available at* <http://www.nyc.gov/html/ccrb/pdf/ccrbann2010.pdf>. This was a decrease over previous years where the NYPD refused to discipline substantiated cases 31 percent of the time in 2008 and 27 percent of the time in 2009. *Id.* at 16. Even where the NYPD has sought discipline, the Department most frequently imposes the mildest form of discipline. In 2010, 60 percent of officers in these cases received “instructions,” which are considered the lightest form of discipline. *Id.* Despite its focus on individual complaints, the CCRB has on occasion examined what might be termed “policy” issues. But in doing so, the CCRB has relied on publicly available literature or its own docket of complaints rather than reviewed the Department’s records as an inspector general would. For example, when CCRB examined the issue of stop and frisk, its report explicitly noted that it did not “describe the Police Department’s stop-and-frisk practices,” but rather offered “an interesting and useful picture of those individuals who filed complaints with the CCRB after being stopped by the police, the officers involved, the nature of those encounters, and the results of the complaints.” CIVILIAN COMPLAINT REVIEW BOARD, STREET STOP ENCOUNTER REPORT: AN ANALYSIS OF CCRB COMPLAINTS RESULTING FROM THE NEW YORK POLICE DEPARTMENT’S “STOP & FRISK” PRACTICES (2001), *available at* <http://www.nyc.gov/html/ccrb/pdf/stop.pdf>.

<sup>109</sup> N.Y.C. Charter § 803(b).

<sup>110</sup> *Id.*

<sup>111</sup> OFFICE OF THE MAYOR OF N.Y.C., EDWARD I. KOCH, EXECUTIVE ORDER NO. 16 § 3A (1978), *available at* <http://www.nyc.gov/html/doi/html/about/report.shtml>. The DOI’s description of its mission on its website states that it focuses on fraud, waste and corruption. N.Y.C. Dep’t of Investigation, *Our Mission*, OFFICIAL N.Y.C. WEBSITE, <http://www.nyc.gov/html/doi/html/about/mission.shtml> (last visited July 5, 2012). The inspectors general in the DOI originally reported directly to the head of the agency to which they were assigned and to the Commissioner of Investigation. *Id.* In 1986, the system was consolidated so that there was “an Inspector General for each agency who shall report directly to the Commissioner [of Investigations] and shall be responsible for the investigation and elimination of corrupt or other criminal activity and conflicts of interest within the agency to which he or she is designated.” OFFICE OF THE MAYOR OF N.Y.C., EDWARD I. KOCH, EXECUTIVE ORDER NO. 105 (1986), *available at* <http://www.nyc.gov/html/doi/html/about/report.shtml#eo105>.

<sup>112</sup> The Brennan Center reviewed all available DOI year-end releases and public reports for the period 2002 to 2012. *See* N.Y.C. DEP’T OF INVESTIGATION, COMPILATION OF REPORTS AND YEAR-END RELEASES 2002-2012, *available at* <http://www.nyc.gov/html/doi/html/pr/annual-reports.shtml>; N.Y.C. DEP’T OF INVESTIGATION, COMPILATION OF PUBLIC REPORTS UNDER COMMISSIONER GILL HEARN 2002-2012, *available at* <http://www.nyc.gov/html/doi/html/pr/public.shtml>.

<sup>113</sup> The DOI’s website identifies the NYPD as one of three agencies that has an “internal” inspector general. *See* N.Y.C. Dep’t of Investigation, *List of DOI Inspectors General*, OFFICIAL N.Y.C. WEBSITE, <http://www.nyc.gov/html/doi/html/contact/inspectors.shtml> (last visited July 5, 2012). The two other agencies identified as having internal inspectors general are the Metropolitan Transportation Authority and the New York City Health and Hospitals Corporation. The DOI has on occasion conducted reviews of activities related to the Department, although not of the Department itself. Our research uncovered one such example: in 2001, the DOI investigated the circumstances surrounding the mishandling of cases of police misconduct that were being considered by the CCRB. *See* Press Release, N.Y.C. Dep’t of Investigation, DOI Issues Report on Civilian Complaint Review Board (Dec. 6, 2000), *available at* <http://www.nyc.gov/html/doi/downloads/pdf/pr120600.pdf>.

<sup>114</sup> N.Y.C. Charter § 29.2.

<sup>115</sup> *Id.* § 29.2.

<sup>116</sup> *Id.* § 29.1.

<sup>117</sup> *Id.* § 29.3.

<sup>118</sup> A list of hearings broken down by committee is available on the City Council's website. Transcripts, testimony, and minutes are available as records online at <http://legistar.council.nyc.gov/DepartmentDetail.aspx?ID=6913&GUID=BCE87221-FD8F-40B5-94D4-66C5F4F643E7>.

<sup>119</sup> *Id.* See also The Council of the City of New York, Committee on Public Safety, Transcript of the Minutes, Oct. 6, 2011, 37-41, 47-67.

<sup>120</sup> City Council Mar. 15, 2012 Transcript, *supra*, note 91, at 85-95.

<sup>121</sup> Matt Apuzzo & Samantha Gross, *Councilman Says City Can't Oversee NYPD Spy Unit*, ASSOCIATED PRESS (Oct. 13, 2011), <http://www.nbcnewyork.com/news/local/NYPD-Spy-Unit-Councilman-Peter-Vallone-Muslim-Surveillance-Secret-Operation-Investigation-131318324.html>.

<sup>122</sup> Jeff Stein, *NYPD Intelligence Detectives Go Their Own Way*, WASH. POST (Nov. 10, 2010), [http://voices.washingtonpost.com/spy-talk/2010/11/nypds\\_foreign\\_cops\\_play\\_outsid.html](http://voices.washingtonpost.com/spy-talk/2010/11/nypds_foreign_cops_play_outsid.html).

<sup>123</sup> See *Addressing Police Misconduct Laws Enforced by the Department of Justice*, DEP'T OF JUSTICE, <http://www.justice.gov/crt/about/spl/documents/polmis.php> (last visited July 5, 2012) (noting that where police are alleged to have engaged in violations of constitutional rights, "The DOJ must be able to show in court that the agency has an unlawful policy or that the incidents constituted a pattern of unlawful conduct."); see also *Conduct of Law Enforcement Agencies*, DEP'T OF JUSTICE, <http://www.justice.gov/crt/about/spl/police.php> (last visited July 5, 2012) (explaining that the Special Litigation Section of the Civil Rights Division "works to protect the rights of people who interact with state or local police or sheriffs' departments.").

<sup>124</sup> In this context, the jurisdiction of New York City's five District Attorneys is criminal, not civil; the District Attorney's offices probe corruption and malfeasance by particular police officers in their jurisdiction, but they do not investigate civil rights or civil liberties violations by the department as a whole. See, e.g., *Investigation Division*, N.Y. CNTY. DIST.'S OFFICE, <http://manhattanda.org/node/174/22> (last visited July 5, 2012) (noting that the Official Corruption Unit of the Manhattan DA's office investigates only criminal conduct by police officers, and that the Public Integrity Unit does not cover police activity); *Integrity Bureau*, QUEEN'S DIST. ATT'Y'S OFFICE, <http://www.queensda.org/integrity.html> (last visited July 5, 2012) (prosecution of criminal police action by the Queens DA's office); *Bureaus, Units, and Divisions*, KING'S CNTY. DIST. ATT'Y'S OFFICE, <http://www.brooklynda.org/kcda-bur-units-divisions/kcda-bur-unit-div.htm> (last visited July 5, 2012) (listing Brooklyn DA's Civil Rights and Police Integrity Bureau, which "investigates and prosecutes crimes committed by members of the law enforcement community"); OFFICE OF THE BRONX DIST. ATT'Y, <http://www.bronxda.nyc.gov/frames.html> (last visited July 5, 2012) (indicating that the Bronx DA's Rackets Bureau investigates excessive use of force by police).

<sup>125</sup> See *Handschu v. Special Servs. Div.*, 349 F. Supp. 766 (S.D.N.Y. 1972); see also Chris Hawley, *Barbara Handschu Likens NYPD Spying on Muslims to Spying on Free Speech Advocates*, HUFFINGTON POST (Nov. 17, 2011), [http://www.huffingtonpost.com/2011/11/17/in-nypd-spying-a-yippie-l\\_n\\_1099479.html](http://www.huffingtonpost.com/2011/11/17/in-nypd-spying-a-yippie-l_n_1099479.html).

<sup>126</sup> *Handschu v. Special Servs. Div.*, 605 F. Supp. 1384 (S.D.N.Y. 1985) [hereinafter "*Handschu 1985 Decision*"]. The original Handschu Guidelines are included in Appendix A to this decision. *Id.* at 1420-1424 [hereinafter "*1985 Handschu Guidelines*"].

- <sup>127</sup> *Handschu v. Special Servs. Div.*, 288 F. Supp. 2d 411, 420 (S.D.N.Y. 2003) [hereinafter “*Handschu Aug. 2003 Decision*”].
- <sup>128</sup> 1985 *Handschu Guidelines*, 605 F. Supp. at 1420-1424.
- <sup>129</sup> See Chisun Lee, *The NYPD Wants to Watch You*, VILLAGE VOICE, Dec. 17, 2002, available at <http://www.villagevoice.com/2002-12-17/news/the-nypd-wants-to-watch-you/>.
- <sup>130</sup> *Handschu v. Special Servs. Div.*, 273 F. Supp. 2d 327, 346 (S.D.N.Y. 2003) [hereinafter “*Handschu Feb. 2003 Decision*”]. The NYPD did not seek to eliminate the Handschu Authority’s mandate to investigate an individual’s complaint that the police had engaged in unconstitutional conduct in the investigation of political activity and the Authority theoretically retains this role. *Id.* at 334.
- <sup>131</sup> The 2003 *Handschu Guidelines* are based on the guidelines issued in 2002 by the Attorney General of the United States for the conduct of FBI investigations. The version of the FBI guidelines used can be found at: OFFICE OF THE ATT’Y GEN., THE ATTORNEY GENERAL’S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND TERRORISM ENTERPRISE INVESTIGATIONS (2002), available at <http://www.fas.org/irp/agency/doj/fbi/generalcrimes2.pdf>.
- <sup>132</sup> *Handschu Feb. 2003 Decision*, 273 F. Supp. 2d at 346.
- <sup>133</sup> *Handschu Aug. 2003 Decision*, 288 F. Supp. 2d at 420. The revised *Handschu Guidelines* have to a great extent been incorporated into the NYPD’s Patrol Guide. See N.Y. POLICE DEP’T, NYPD PATROL GUIDE, § 212-72 (2011) [hereinafter “P.G.”]. In some instances, however, the formulation in the Patrol Guide does not match the formulation contained in the consent decree, which is found in the *Handschu Aug. 2003 Decision*. In such instances, precedence is given to the formulation in the consent decree and variations between the consent decree and the Patrol Guide are noted if relevant.
- <sup>134</sup> P.G., *supra* note 133, § 212-72 (Purpose).
- <sup>135</sup> *Id.*, § 212-72 (Definitions).
- <sup>136</sup> *Handschu Aug. 2003 Decision*, 288 F. Supp. 2d at 422. The NYPD Patrol Guide defines “lead” for purposes of the Guidelines as either: 1) information “submitted to or obtained or developed by the Intelligence Division concerning an ongoing investigation,” or 2) information “that may be used to initiate a new investigation.” P.G., *supra* note 133, § 212-72 (Definitions). When describing the procedure for following up on a lead the Patrol Guide specifically states that the lead should involve “possible unlawful or terrorist related activity.” *Id.* § 212-72 (Procedure).
- <sup>137</sup> See N.Y. POLICE DEP’T, NYPD INTELLIGENCE NOTE: NYC MOSQUE STATEMENTS ON DANISH CARTOON CONTROVERSY (2006), available at [http://hosted.ap.org/specials/interactives/documents/nypd/nypd\\_cartoons.pdf](http://hosted.ap.org/specials/interactives/documents/nypd/nypd_cartoons.pdf). In some instances, these reports covered several days. For example, there were reports from the Jamaica Muslim Center on three dates: February 3<sup>rd</sup>, 4<sup>th</sup> and 7<sup>th</sup>. Reports over multiple days were also recorded for the Iqra Mosque, the Makki Mosque and the Islamic Cultural Center of New York (ICCNY). *Id.*
- <sup>138</sup> See N.Y. POLICE DEP’T, NYPD INTELLIGENCE NOTE (2006), available at [http://hosted.ap.org/specials/interactives/documents/nypd/nypd\\_planecrash.pdf](http://hosted.ap.org/specials/interactives/documents/nypd/nypd_planecrash.pdf).

<sup>139</sup> Raymond W. Kelly, Police Comm’r, N.Y. Police Dep’t, Remarks by Police Commissioner Kelly to Fordham Law School Alumni (Mar. 3, 2012) [hereinafter “Kelly Fordham Speech”], *available at* [http://www.nyc.gov/html/nypd/html/pr/pr\\_2012\\_03\\_03\\_remarks\\_to\\_fordham\\_law\\_school\\_alumni.shtml](http://www.nyc.gov/html/nypd/html/pr/pr_2012_03_03_remarks_to_fordham_law_school_alumni.shtml). Such vetting, said the Commissioner, consists of “written authorization from the Deputy Commissioner of Intelligence.” *Id.*

<sup>140</sup> *See supra* text accompanying notes 64-81.

<sup>141</sup> Preliminary inquiries are intended to “allow[ ] the NYPD to respond in a measured way to ambiguous or incomplete information, with as little intrusion as the needs of the situation permit. This is especially important in such areas where there is no complaint involved or when an allegation or information is received from a source of unknown reliability.” P.G., *supra* note 133, § 212-72 (Appendix B(V)(B)(2)). A preliminary inquiry is permitted when the police have “information or an allegation not warranting an investigation - because there is not a ‘reasonable indication’ of unlawful activity - but whose responsible handling requires some further scrutiny beyond the prompt and extremely limited checking out of initial leads.” *Id.* § 212-72 (Appendix B(V)(B)(1)). In a preliminary inquiry, without any prior authorization of a supervisor, an investigator may conduct physical, photographic or video surveillance, interview the subject or other people who could have information about the investigation, examine governmental or other public records and police files, and interview previously established informants. *Id.* § 212-72 (Appendix B(V)(B)(6)).

<sup>142</sup> A full investigation is authorized when “facts or circumstances reasonably indicate that an unlawful act has been, is being, or will be committed.” *Id.* § 212-72 (Appendix B(V)(C)). The reasonable indication standard is “substantially lower than probable cause;” but “[s]pecific facts or circumstances indicating a past, current, or future violation” are required and a “mere hunch” is insufficient to meet this standard. *Id.* § 212-72 (Appendix B(V)(C)(1)). Once a full investigation is launched, the police are explicitly authorized to use the full panoply of investigatory techniques available to them.

<sup>143</sup> Terrorism enterprise investigations (TEI) may be initiated when facts or circumstances reasonably indicate that two or more people are engaged to further “political or social goals wholly or in part through activities that involve force, violence or other unlawful acts” or engage in certain defined terrorist or criminal activity. *Id.* § 212-72 (Appendix B(V)(D)(1)(a)). In opening a TEI, the police must meet the normal standard for a full investigation – i.e., they must have a “reasonable indication” that an unlawful act has been, is being, or will be committed – but they may also consider “the magnitude of the threatened harm.” *Id.* Since the threatened harm is likely to be large in most (if not all) suspected terrorist conspiracies, the threshold for opening a TEI is effectively significantly lower than that for opening a normal criminal investigation. Other factors that may be considered are: the likelihood that harm will occur, the immediacy of the threat, and the danger to privacy or free expression from the investigation.

<sup>144</sup> P.G., *supra* note 133, § 212-72 (Appendix B(VIII)(A)(2)). Commissioner Kelly has repeatedly emphasized this aspect of the Handschu Guidelines. *See* City Council Mar. 15, 2012 Transcript, *supra* note 91, at 6; Kelly Fordham Speech *supra* note 139.

<sup>145</sup> The original Handschu Guidelines required that police complete an investigation statement specifying the factual predicate for an investigation before they could attend public events. 1985 Handschu Guidelines, 605 F. Supp. at 1422.

<sup>146</sup> P.G., *supra* note 133, § 212-72 (Appendix B(VIII)(A)(2)).

<sup>147</sup> The order to show cause filed by the *Handschu* attorneys is available at [http://www.nyclu.org/files/releases/Order\\_to\\_Show\\_Cause\\_and\\_Declaration\\_10.3.11.pdf](http://www.nyclu.org/files/releases/Order_to_Show_Cause_and_Declaration_10.3.11.pdf), and related court filings are available at <http://www.nyclu.org/news/court-filing-seeks-information-nypd-surveillance-targeting-muslims>.

- <sup>148</sup> Handschu v. Special Servs. Div., No. 71CIV.2203, Galati Dep. 128-129 (June 28, 2012), available at [http://www.nyclu.org/files/releases/Handschu\\_Galati\\_6.28.12.pdf](http://www.nyclu.org/files/releases/Handschu_Galati_6.28.12.pdf).
- <sup>149</sup> Complaint, Hassan v. City of New York, No. 12CV03401 (D.N.J. filed June 6, 2012).
- <sup>150</sup> Although this practice is commonly referred to as “stop and frisk,” including in this report, it consists of three elements: the stopping of individuals, questioning them and frisking them.
- <sup>151</sup> Stipulation of Settlement at 5, Daniels v. City of New York, No. 99 Civ. 1695 (SAS) (S.D.N.Y. Sept. 24, 2003), available at [http://ccrjustice.org/files/Daniels\\_StipulationOfSettlement\\_12\\_03\\_0.pdf](http://ccrjustice.org/files/Daniels_StipulationOfSettlement_12_03_0.pdf).
- <sup>152</sup> N.Y. POLICE DEPT., OPERATIONS ORDER 11: DEPARTMENT POLICY REGARDING RACIAL PROFILING (2002).
- <sup>153</sup> The City law bars the police from relying on race, ethnicity, religion or national origin as the “determinative factor in initiating law enforcement action against an individual.” N.Y.C., N.Y., ADMIN. CODE § 14–151. As is typical of bans on racial profiling, the New York City law allows the police to rely on race or ethnicity as part of a suspect description. *Id.* § 14-151(1). This law does not, however, explicitly provide for a private right of action and the issue of whether this remedy is available has not yet been tested in court.
- <sup>154</sup> See Al Baker and Emily Vasquez, *Number of People Stopped by New York Police Soars*, N.Y. TIMES (Feb. 3, 2007), <http://www.nytimes.com/2007/02/03/nyregion/03frisk.html?pagewanted=print>.
- <sup>155</sup> See *supra* note 1.
- <sup>156</sup> See Floyd v. City of New York, 813 F. Supp. 2d 457 (S.D.N.Y. 2011).
- <sup>157</sup> See Floyd v. City of New York, No. 08 Civ. 1034, 2012 WL 1868637, at 13-14 (S.D.N.Y. May 16, 2012). The very same day, the Police Commissioner announced three steps he was taking to “increase public confidence” in stop and frisk: 1) republishing the NYPD order prohibiting racial profiling; 2) requiring review of stop and frisk paperwork; and 3) implementing audits of stop and frisk paperwork. Letter from Police Commissioner Kelly to New York City Council Speaker Christine Quinn (2012), available at <http://www.nytimes.com/interactive/2012/05/17/nyregion/17stopandfrisk.html>. Ten years after the *Daniels* settlement, the Department is implementing measures of the type that the court had originally imposed as part of the consent decree in that case.
- <sup>158</sup> See Sinnar, *supra* note 42 (manuscript at 32-33).
- <sup>159</sup> See WALKER, *supra* note 78, at 163-167.
- <sup>160</sup> In April 2003, all 12 police auditors drafted a set of Core Principles for an Effective Police Auditor’s Office. These are reproduced as a diagram in Walker’s book. The principles essentially track the elements of success identified here. See *id.* at 168, Figure 6.2.
- <sup>161</sup> Inspector General Reform Act of 2008, Pub. L. No. 110-409 § 2, 122 Stat. 4302 (2008) (codified at 5 U.S.C. App. 3 § 8G(c)). Although inspectors general serve at the President’s pleasure, the statute requires that the reasons for the dismissal of any inspector general must be communicated to Congress at least 30 days prior to removal. *Id.* § 3(b) (codified at 5 U.S.C. App. 3 § 8G(e)(2)) Prior to the Inspector General Reform Act of 2008, the President was required to communicate the reasons for dismissal of an inspector general to Congress, but there was no requirement to do so 30 days prior to removal. Inspector General Act of 1978, § 3(b) Pub. L. No. 95-452.

- <sup>162</sup> See Charlie Savage, *Glenn Fine is Leaving Justice Department*, N.Y. TIMES (Nov. 29, 2010), <http://thecaucus.blogs.nytimes.com/2010/11/29/glenn-fine-is-leaving-justice-department/>.
- <sup>163</sup> Sinnar, *supra* note 42 (manuscript at 11). Despite granting inspectors general these broad powers, Congress accommodated national security concerns by permitting the Departments of Defense, Justice and Homeland Security, among others, to block inspector general investigations involving sensitive information, the release of which would seriously threaten national security. Inspector General Act of 1978, 5 U.S.C. App. 3 §§ 8(b), 8E(a), 8I(a). Any invocation of this exception requires a written explanation to the inspector general and Congress. *Id.* Federal agencies “have rarely invoked these escape clauses. The Department of Homeland Security has never invoked its authority under § 8I. The Department of Justice has invoked its § 8E authority just once, in 1989, when it blocked for six months the release of an IG report on whether U.S. government officials had protected Southern California drug dealers linked to the Nicaraguan Contras.” *Id.* at 12.
- <sup>164</sup> WALKER, *supra* note 78, at 163. Recognizing this hurdle, some police auditors have initiated active community outreach programs. *Id.* at 141.
- <sup>165</sup> *Id.* at 163.
- <sup>166</sup> Inspector General Act of 1978 § 6(a).
- <sup>167</sup> *Id.* § 7(b), (c).
- <sup>168</sup> LAPD POLICIES AND AUTHORITY RELATIVE TO THE INSPECTOR GENERAL, *supra* note 65, §§ III, VII.
- <sup>169</sup> *Id.* § IV.
- <sup>170</sup> Sinnar, *supra* note 42 (manuscript at 10).
- <sup>171</sup> Inspector General Act of 1978 § 6(f)(3)(E).
- <sup>172</sup> N.Y. CIVIL LIBERTIES UNION, MISSION FAILURE, *supra* note 105, at 13, 45.
- <sup>173</sup> S. B. 6407, 2011 Gen. Assemb. (N.Y. 2012); Assemb. B. 09304, 2011 Gen. Assemb. (N.Y. 2012).
- <sup>174</sup> N.Y. LEGIS. MEMORANDUM, S.B. S6407-2011 (N.Y. 2012), *available at* <http://open.nysenate.gov/legislation/bill/S6407-2011>. The memorandum accompanying the bill cited “an increase in abuses whether by individual officers or in broader policies such as stop and frisk, the treatment of the Occupy Wall Street protestors, and the wholesale surveillance of the Muslim community in New York City and other jurisdictions” as evidence of this trend. *Id.*
- <sup>175</sup> New York City Council, Int. 0881-2012, Session 2010-2013 (2012) *available at* <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1138391&GUID=46EF84F3-F4D4-4B84-BCB2-042A5AC7E674&Option=s=ID|Text|&Search=881>.



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