Date: 5/25/07
To: CPRB Members, Solicitors
From: Beth Pittinger
Re: "Candlelight vigil" outside of a police officer's residence, the personalized reaction to a public action, and potentially applicable laws.

I. Issues:

A: Are there applicable laws regarding obstruction of justice and/or intimidation of a witness, or applicable prior restraints to First Amendment Rights?

B: Are there applicable laws regarding the access of personal information about police officers?

C: What laws could be constitutionally enacted to remedy similar situations?

II. Brief Answers:

A: There are applicable laws, particularly pertaining to picketing outside the residence of a witness or court official. However, use of these statues will be limited to occasions where the officer is a witness, usually only if there are ongoing court proceedings.

B: While the courts have recognized limited circumstances for removing home addresses from public records, there is no general exception for police officers. Furthermore, it is unlikely that such a broad exception could be made for all public records on which home addresses appear.

C: Laws restricting residential picketing are generally accepted. In general so long as a law is content neutral, and is narrowly tailored to serve a legitimate government interest, it will pass a test of careful scrutiny, to be deemed constitutional.

III. Facts:

An anti-war demonstration occurred in Shadyside. Several officers and a Sergeant from Zone 4 were on-scene for crowd control. The nature of the protest changed, and a window of a Marine office was broken. The Sergeant confronted a person who was taking pictures with a cellular phone, during the confrontation the phone was knocked out of the photographer's hand. The photographer was cited for disorderly conduct. Allegedly, The Pittsburgh Organizing Group (POG) organized and conducted a "candlelight vigil" in front of the Sergeant's residence. Although the vigil was orderly and there were no arrests, the Sergeant, his family, and neighbors were inconvenienced by the "vigil".

IV. Discussion:

A: United States law forbids picketing outside the residence of a judge, juror, witness, or court officer in any attempt to influence any of these parties, or obstruct or impede the administration of justice. 18 U.S.C. § 1507 (2006). Pennsylvania has a nearly identical statute. 18 Pa.Cons.Stat. §5102 (2006). Pennsylvania also can charge a party for obstructing or impairing the administration of the law, or any other function of the government through force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act. 18 Pa.Cons.Stat. § 5101 (2006). Additionally,

Pennsylvania has laws against threatening unlawful harm or retaliation against any public servant for any exercise of discretion or in an attempt to coerce the public servant into violating their duties. 18 Pa.Cons.Stat. § 4702-03 (2006). Pennsylvania law forbids a person to intimidate a witness or victim into interfering with the administration of criminal justice. 18 Pa.Cons.Stat. §4952 (2006). Finally, a party cannot retaliate for anything a witness or victim legally says or does either civilly or by causing unlawful harm. 18 Pa.Cons.Stat. 4953, 4953.1 (2006).

A wide range of activities have been held, and not held to be intimidation. Generally, the Supreme Court has held that "mere remonstrances or even criticisms of an officer" are not examples of unlawful interference. District of Columbia v. Little. 399 U.S. 1, 6 (1950). *See also* Brooks v. North Carolina Dept. of Correction. 948 F.Supp. 940, 955 (E.D.N.C., 1997). In Landry v. Daley, a case in which a number of African-Americans were arrested during a protest, the court ruled that laws against obstructing a police officer could not apply to a peaceable assembly. 280 F.Supp. 938, 958 (D.C. Ill., 1968), *overturned on different grounds* Boyle v. Landry, 401 U.S. 77 (1971). In another case, the defendant asked witness to lie to investigators, the Grand Jury, and at trial, before eventually offering them money and finally threatening them. United States v. Kulczyk. 931 F. 2d 542, 543 (9th Cir., 1991). The Court held that the simple requests, and even the offers of money, did not amount to witness tampering. Id. at 547-48. The Court held that any non-coercive, non-deceptive act, such as those described above do not constitute of the federal witness tampering laws. Id. It was held in State v. McHugh that a Vermont statute which, among other things, made it illegal to "obstruct or impede, or endeavor to obstruct or impede the due administration of justice" was too broad, and therefore unconstitutional when applied to pickers who stood outside a judge's residence and protested his decision not to release members of their group. 635 A.2d 1200, 1201 (Vt., 1993).

For the purposes of these statutes, the courts have come up with a variety of definitions of what a witness is, however, there does seem to be a generally agreed upon definition. A witness is anyone who "knows, or is supposed to know the material facts, and is expected to testify to or be called on to testify." United States v. Grunewald. 233 F.2d 556, 571 (2d Cir. 1956); Hunt v. United States. 400 F.2d 306, 307 (5th Cir. 1968). In numerous cases, such as Staggs v. State, and People v. Terry, both bribery cases, police officers were held to be witnesses for purposes of relevant obstruction of justice statutes. 299 So.2d 756 ,758 (Ala.Cr.App.,1974); 282 P.2d 19 (Cal., 1955).

A case in which a defendant made threatening statements to the chief of police regarding the release of a third party was ruled not to be a violation of the federal obstruction of justice statute. United States v. Knife. 371 F. Supp 1345, 1348 (D.C.S.D., 1974). The court justified this ruling by explaining that the police chief was no longer involved in either the defendant's trial or the third party's trial, and therefore serving as simply a local police officer, the defendant's act was not obstruction of justice. Id. at 1348. Using that fact, Knife was distinguished from Hodgdon v. United States. 371 F.Supp. at 1348; 365 F.2d 679 (8th Cir., 1966). In Hodgdon, the defendant placed a pistol on the desk of a Federal Commissioner and expressed his displeasure with the way "things were run". 365 F.2d at 682. This was found to be a violation of the federal obstruction of justice statute, as the Commissioner was a regular officer of the court. Id. at 686.

As applied to the present facts, it is of some question as to whether a police officer could be a valid victim. A police officer may be considered a witness under the general definition of Grunewald, or the examples of Staggs or Terry. 233 F.2d at 571; 299 So.2d at 758; 282 P.2d at 19. However, if court proceedings have already occurred, then, under the rule from Knife, a local police officer may not be considered either a witness or a court officer. 371 F.Supp at 1348.

Even if the officer is found to be a viable target under the applicable laws, it is very unlikely a peaceful protest outside the residence of the officer would be considered either obstruction, intimidation, or retaliation. Under the plain language of the statutes, there has to be either an actual identifiable harm or threat of harm arising from an illegal act, or threat of illegal act. 18 Pa.C.S.A. §4701-03, 4953-53.1. In the facts, there is little chance a court would find actual harm has occurred sufficient to meet the meaning of the law. Furthermore, such harm can come only from an illegal activity. The only possible law that could be violated under this act sufficient to meet these laws would be the obstruction of justice statutes.

It should first be noted that obstruction of justice statutes usually contain language limiting offences to impairing officers "in the discharge of his duty." 18 Pa.C.S.A. §5102. Picketing outside the residence of an officer while they are off duty is not likely to be construed as an interference with the discharge of their duty. Furthermore, the jurisprudence around obstruction of justice does not suggest a protest would be deemed a violation of the law. Most notably, Landry, addressed that exact issue, and concluded that a lawful, peaceable assembly is not an obstruction of justice. 280 F. Supp. at 958. Similarly, the Court in Little held that verbal criticisms of police officers do not support an obstruction of justice claim. 399 U.S. at 6. In Kulczyk the defendant asked witnesses to lie, and even offered them money, and both actions were not deemed sufficiently coercive or deceptive. 931 F. 2d at 547-48.

However, the Pennsylvania obstruction statute also prohibits pickets near a residence occupied by a judge, juror, witness, or court officer. 18 Pa.C.S.A. §5102. The relevant inquiry, again, is whether an officer falls into any of these categories. If there is an ongoing trial, the officer will most likely be a witness under the Grunewald, Staggs, Terry standards. 233 F.2d at 571; 299 So.2d at 758; 282 P.2d at 19. However, in the absence of on-going court proceedings, a local officer is not likely to be considered either a witness or a court officer under Knife and Hodgdon. 371 F.Supp. at 1348; 365 F.2d at 686. Furthermore, attempts to prosecute under the language in the Pennsylvania law forbidding any attempt to interfere with justice would most likely be ruled unconstitutional as applied to protestors outside the residence of a police officer who is not a witness, similar to McHugh. 635 A.2d 1200.

In summary, the Pennsylvania obstruction of justice statute, 18 Pa. C.S.A. § 5102, can stand alone as a potential remedy for the particular facts. The statute may also be used with other Pennsylvania statutes, 18 Pa. C.S.A. §4702-03, 4953-53.1, as the element of illegal activity. In the latter case though, there must still be harm incurred. Furthermore, both potential remedies are most likely limited to situations where there are ongoing court proceedings, and the officer is likely going to be called as a witness.

B: According to Pennsylvania law, a public record, among other things includes an account of the receipt of funds by any governmental agency, limited by things that

would impair a person's reputation or personal security. 65 P.S. §66.1. Pennsylvania's "Right to Know" law provides that unless otherwise provided by law, all public records will be available for inspection and duplication. 65 P.S. §66.2 (a). Another provision in the law allows any such public records to be accessible electronically. 65 P.S. §66.2 (e). Finally the law provides that a request for public records cannot be denied because of the intent of the requestor. 65 P.S. §66.3-1.

In Times Pub. Co., Inc. v. Michel, the court held that in certain cases home addresses could be exempted from the normal public record description for the personal security exception. 633 A.2d 1233, 1236 (Pa.Cmwlth., 1993). Specifically, the case pertained to retired police officers who were applying for licenses to carry firearms. Id. at 1234. The court ruled that a balancing test should be applied in cases where personal security interests run contrary to the public interest in access to information. Id. at 1239. In this particular case, it was determined that public records indicating the home address at which guns could be found created a substantial enough security concern to warrant removing the home addresses and social security numbers of the officers from the public records. Id. at 1240.

In Goppelt v. City of Philadelphia Revenue Dept. the court considered whether it was proper to publicize the names and addresses of delinquent tax payers under the "Right to Know" law. 841 A.2d 599, 600 (Pa.Cmwlth., 2004). The Court in that case found it was, and generally is valid to publish addresses, under a balancing test. Id. at 604-05. However, the court in a dicta portion of the opinion suggested that disclosure of addresses of judges, prosecutors and others in law enforcement could be protected. Id.

Currently under Pennsylvania's Right to Know Act, there is no exception for public officials, or police officers in particular. 65 P.S. §66. The courts have limited access to the home addresses of public officials in documents that might pose a personal security risk, such as documents that list the home address of a gun owner. 633 A.2d at 1240. There is some suggestion that this particular exception could be expanded to all public officials. 841 A.2d at 604-05. However, given the benign nature of many public records, it is unlikely that a broad exception would be made for all police officers, judges, and others.

C: The United States Constitution guarantees freedom of speech, the right to peaceably assemble, and the right to petition the government for a redress of grievances. U.S. Cont. amend. I. Generally, picketing is a protected activity. Pursley v. City of Fayetteville. 820 F.2d 951, 954 (8th Cir., 1987). Picketing has been described as a form of protected speech. 635 A.2d at 1201. It has also been described as a petition for government action. Gaylord Entertainment Co. v. Thompson. 958 P.2d 128, 143 (Okla., 1998). However, this right is not absolute. Carey v. Brown. 447 U.S. 455, 470 (1980); Garcia v. Gray. 507 F.2d 539, 543 (10th Cir., 1974). It has been ruled that Constitutional provisions are not meant to interfere with the reasonable exercise of police powers. State v. Hopson. 263 A.2d 205, 207 (N.J.Super., 1970). Specifically, targeting picketing at a particular home has been deemed to be outside the bounds of Constitutional protections in Tompkins v. Cyr. 202 F.3d 770, 780 (5th Cir., 2000). However, another court found that residential picketing is protected under the First Amendment. Dean v. Byerley. 354 F.3d 540, 551 (6th Cir.) Regardless, the ability to limit residential picketing is not absolute. A statute in which people could be arrested for peaceable assemblies and

speech if it annoyed others was deemed to be an overbroad restriction on free speech. Coates v. City of Cincinnati. 402 U.S. 611, 614 (1971).

A statute which seeks to limit any First Amendment Right is subject to careful scrutiny. 447 U.S. at 462; Veneklase v. City of Fargo. 248 F.3d 738, 743 (8th Cir, 2001). The government may regulate the time, place and manner of First Amendment freedoms, if the regulations are viewpoint neutral, and only if the law is narrowly tailored to serve a significant government interest, and leaves open ample alternative channels of communication. 354 F.3d at 550; 248 F.3d at 744; 635 A.2d at 1201. It has been ruled that the government has a greater interest in restricting demonstrations outside of specific residences than it does outside of businesses, and other public locations. Operation Rescue-National v. Planned Parenthood of Houston and Southeast Texas, Inc. 975 S.W.2d 546, 568 (Tex., 1998). In general city ordinances restricting residential picketing have been upheld as constitutional under this test. E.g., 354 F.3d at 546-47 *but cf.* (Michigan statute banning residential picketing only applied to labor disputes and could not be used to prosecute residential picketing that was not based on a labor dispute.); 248 F3d. at 744-45; 507 F.2d at 545; 820 F.2d at 955-57 *but cf.* (Prohibition against residential picketing was overbroad, because it would prohibit picketing outside of residences in busy commercial areas, even if residences not the target of the protest.); State v. Abbink. 616 N.W.2d 8, 12 (Neb., 2000); State v. Baldwin. 908 P.2d 483, 486 (Ariz.Ct.App., 1995).

The relevant cases suggest that there could be a legislative solution to the issue. Maintaining the tranquility of residential areas has been deemed to be a legitimate government interest for the purposes of restricting First Amendment Rights. 507 F.2d at 545. It is also likely that if the law were further tailored to limit picketing outside the residences of police officers or other public servants, the law would stand an even greater chance of both being deemed to be narrowly tailored and serving a legitimate government interest. Likewise such laws are generally considered to be content neutral. Id. Finally, given the number of alternate routes for protesting police action, such as civilian review boards, internal police review procedures, the democratic process, and the ability to stage such protests outside police stations, and other municipal buildings, there is no shortage of other ways in which people can get their message out. In sum, there is room for legislation to prohibit this sort of response in the future, and so long as it is drafted with some care, it should withstand any constitutional challenges that arise.

NOTE: The CPRB declined to pursue further action on this matter. – ecp

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