

## Written Statement

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**Oversight Hearing:  
“The U.S. Park Police Attack on Peaceful Protesters at Lafayette Square Park”**

**2167 Rayburn House Office Building  
United States House of Representatives  
Committee on Natural Resources**

June 29, 2020

### I. INTRODUCTION

Chairman Grijalva, ranking member Bishop, members of the Committee on Natural Resources, my name is Jonathan Turley, and I am a law professor at George Washington University where I hold the J.B. and Maurice C. Shapiro Chair of Public Interest Law.<sup>1</sup> It is an honor to appear before you today to discuss the controversy over the clearing of Lafayette Park.

For roughly fourteen years, I was one of the lead counsels in the World Bank protest litigation, which produced guidelines and case law currently applied in mass demonstration events like the one at Lafayette Park.<sup>2</sup> Much of this litigation centered on the mass arrest of hundreds of protesters in Pershing Park and Freedom Plaza, not far from Lafayette Park, in 2002. I appear today in the hope that I can offer a legal perspective on the governing standards that apply to such cases and the key facts that would determine how a court would likely review the current controversy. In so appearing, I should disclose that I have previously discussed this matter. As a long-time

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<sup>1</sup> I appear today on my own behalf and my views do not reflect those of my law school, my colleagues, CBS News, the BBC, or the newspapers for which I write as a columnist. My testimony was written exclusively by myself, though I received inspired editing assistance from Nicholas Contarino, Thomas Huff, and Seth Tate.

<sup>2</sup> There are multiple lawsuits involved in this litigation. See, e.g., *Chang v. United States*, 738 F. Supp. 2d 83 (D.C. Cir. 2010); *Barham v. Ramsey*, 434 F.3d 565 (D.C. Cir. 2006). Our *Chang* case was the first filed and the last to settle. The long and complex litigation was only possible due to the commitment of Bryan Cave Leighton Paisner LLP and my co-lead counsel Daniel Schwartz. In the over decade of intense litigation, over 30 lawyers joined our effort including Jake Kramer, Dan O’Conner, PJ Meitl, Heather Goldman, Jennifer Mammon, and many others. They represent the very best of the bar and its commitment to the public interest.

free speech advocate,<sup>3</sup> I criticized the level of force used to remove the protesters and called for a congressional investigation into the purpose, timing, and means of the operation. I also stated that an attack on Australian journalists appeared unjustified and unlawful. I continue to hold those opinions and will explain them in more detail below.

The standards derived from prior cases like *Chang* and *Barham* are important not only for establishing unlawful conduct but also for enabling litigants to overcome qualified immunity defenses. Qualified immunity shields federal officials from damages absent a showing that (1) that the official violated a statutory or constitutional right, and (2) that the right was “clearly established” at the time of the challenged conduct.<sup>4</sup> The Supreme Court has “repeatedly told courts . . . not to define clearly established law at a high level of generality.<sup>5</sup> Rather, the qualified immunity doctrine demands a “more particularized” inquiry.<sup>6</sup> This testimony is an effort at a more particularized analysis of confirmed facts.

I have been called not as a witness or a litigant but as an expert on the underlying law. I will give you my best assessment of the various legal claims that have been raised in the aftermath of the Lafayette operation, including widely reported theories that now appear to be without sufficient legal or factual foundation. In so doing, we can hopefully focus on the real issues to come before Congress and the courts. After briefly discussing the Pershing Park case, I will focus on the two most important legal questions surrounding the authority to clear the park and the manner in which it was done. I believe this investigation and the other ongoing inquiries are important steps to guarantee both a full record and complete accountability for the actions on June 1, 2020.

## II. THE PERSHING PARK LITIGATION

On September 27, 2002, during demonstrations in protest of the International Monetary Fund and the World Bank, the District of Columbia Metropolitan Police Department (“MPD”), the United States Park Police, and other law enforcement personnel carried out a mass arrest at Pershing Park in Washington, DC. Specifically, police officers from these agencies encircled Pershing Park and arrested roughly 400 individuals who were in the Park. Among those arrests were student journalists and observers who became the first to file against the MPD, the Park Police, and other agencies and individuals.<sup>7</sup> The central figure in this unconstitutional mass arrest was

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<sup>3</sup> I have litigated free speech issues and write regularly in support of free speech values. My blog, ResIsa ([www.jonathanturley.org](http://www.jonathanturley.org)), is focused in large part on issues related to free speech and the free press.

<sup>4</sup> *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

<sup>5</sup> *Id.* at 742.

<sup>6</sup> *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

<sup>7</sup> Our clients included but were not limited to RayMing Chang, a first-year law student at George Washington University who attended the demonstration as a neutral legal observer affiliated with the National Lawyers Guild; Young Choi, Leanne Lee, and

then Assistant Police Chief Peter Newsham (who is now serving as the Chief of Police)<sup>8</sup> and then Chief of Police Charles Ramsey. We specifically included the Park Police as a defendant in our action based on its critical role in the encirclement of the area to carry out the “trap and arrest” operation.<sup>9</sup>

Newsham ultimately acknowledged he gave the order to trap and then arrest hundreds of people, including tourists and journalists, without affording them any warning or opportunity to disperse. He explained his decision in the following way: “[I]t appeared to me that the demonstrators . . . were continuing to act as an organized group and would at some point leave the Park to continue their unlawful demonstrations in the streets. I determined that I should not and would not allow this to occur.” He admitted that he declined to give warnings precisely because he did not want people to escape: “I was concerned that if orders were given to clear the Park, the demonstrators would leave the Park as an organized group, or groups, and unlawfully take to the streets as they had previously done, thus exacerbating the situation rather than resolving it.”

Ramsey admitted that he was fully informed of the intent to arrest everyone in the park. However, despite being present and speaking with Newsham and others about the operation, he denied giving the order. Ramsey would only say that he “supported” Newsham’s decision to arrest and, at most, gave his “tacit approval.” Nonetheless, two officers came forward at great personal risk and contradicted Ramsey, insisting that he did give the order. These officers (who were standing separately and on either side of Ramsey as he spoke with Newsham) testified that Ramsey ordered Newsham to “lock those mother\*\*\*\*ers up,” to “teach them a lesson” and “get them off the street.”

The Park Police, Secret Service, and other police agencies participated in the mass arrest. Like many, our plaintiffs were held for over 24 hours. They were hog-tied (wrist being cuffed to their ankle), despite there being no allegations that they had engaged in violence or were likely to be violent.

Numerous lawsuits were brought over the mass arrest, ultimately costing the city

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Christopher Zarconi who attended the demonstration as student journalists or photojournalists affiliated with *The Hatchet*, an independent newspaper at George Washington University.

<sup>8</sup> Many of us involved in the World Bank, and civil libertarians, opposed Newsham’s appointment by Mayor Muriel Bowser due to his key role in one of the most costly and unconstitutional mass arrests in the history of the city. See Peter Hermann & Ann Marimow, *Mayor names Peter Newsham as District’s police chief*, THE WASHINGTON POST (Feb. 23, 2017), [https://www.washingtonpost.com/local/public-safety/newsham-to-be-named-dc-police-according-to-officials-familiar-with-the-process/2017/02/23/a35f882c-d1b6-11e6-a783-cd3fa950f2fd\\_story.html](https://www.washingtonpost.com/local/public-safety/newsham-to-be-named-dc-police-according-to-officials-familiar-with-the-process/2017/02/23/a35f882c-d1b6-11e6-a783-cd3fa950f2fd_story.html). Newsham’s involvement in the current protest controversies can only be described as tragically ironic. See Jonathan Turley, *What Mayor Bowser will not state about real history of police abuse*, THE HILL (June 9, 2020, 9:00 AM), <https://thehill.com/opinion/criminal-justice/501772-what-mayor-bowser-will-not-state-about-real-history-of-police-abuse>.

<sup>9</sup> Jonathan Turley, *Un-American Arrests*, THE WASHINGTON POST, Oct. 6, 2002, at B8 (describing the operation as a “trap and arrest” tactic).

millions of dollars in settlements and litigation costs. A settlement reached with some of those other litigants included guidelines for future mass demonstration operations based on litigation. The *Chang* plaintiffs did not agree to such a settlement at the time because we felt that there had not been sufficient accountability for the actions in Pershing Park and we were not satisfied that the guidelines were sufficiently stringent or enforceable. One unresolved issue was the loss of key pieces of evidence in the possession of the District. For example, the “running resume,” which contained a record of orders from top officials, was never found. District employees also allegedly gave false declarations and statements to the Court on the existence of different records and their mysterious loss.

The litigation in all of the World Bank protest cases took roughly 14 years before the Honorable Emmet Sullivan of the United States District Court for the District of Columbia. In future mass demonstration events, the court reaffirmed in all of these cases that the Park Police, as well as the MPD, could not enclose or otherwise prevent demonstrators from leaving areas of unlawful gatherings. Warnings were to be repeated three times with sufficient amplification and separation to allow both officers and citizens to understand the order to disperse. Moreover, reasonable exits would be available after warnings are given. The court further emphasized the need for probable cause and the ability to identify the individuals who commit illegal acts before arrests are made.

### **III. THE LAFAYETTE PARK LITIGATION**

Applying these standards and controlling case law to the Lafayette Park operation can hopefully clarify the legal and policy issues for Congress in addressing the two most important questions (the clearing of the Park and the level of force in the operation). There is however a lingering question about why the clearing of the Park was ordered in the first place. The motivation for such an operation is relevant but not necessarily determinative. If the government has the authority to clear the park, it can usually exercise that authority at its discretion. There would remain, however, the question of the abuse of that discretion.

This controversy has long been framed by one overarching narrative that the park was cleared for a photo op. Shortly after the Park was cleared, President Donald Trump held a photo op outside of St. John’s Church. It was widely criticized and I joined in that criticism. Even so, the more salient legal question is whether the park was cleared for the purpose of holding the photo op, as alleged by many in the media. The timing of the operation fueled such speculation. The operation occurred shortly before the 7 p.m. curfew imposed by the city. At 6:29 p.m., Park police and supporting agencies started to move toward the protest line. At around 6:35 p.m., the first deployment of pepper bullets or non-lethal devices were reportedly used to push back the protesters. At 7:02 p.m., President Trump began his walk to the Park and ultimately to the church. By 7:06 p.m., he was holding a bible in his photo op and ultimately called over military and civilian leaders, including Attorney General Barr for pictures.

Given that timeline, it is hardly surprising that people would believe that there was a relationship between the plan for a photo op and the park operation shortly before. It appears, however, that the hundreds of stories claiming that the Park was cleared for

the purpose of the photo op may be an example of how “correlation does not imply causation.” In other words, the fact that two variables occur in close sequence or association does not mean that one is caused by the other. I do not, however, believe that the record is complete on this question. Assuming that the current record is accurate, the original order to clear the park was not related to the photo op. Yet, there remains an open question as to whether there was any last-minute consideration of a delay in the clearing of the park and whether the photo op was raised as part of such a decision. The D.C. National Guard’s arrival appears to have delayed the operation past 5 pm and it is not known if anyone raised the possibility of waiting until the following morning for the fence installation given the size of the crowd in the park. The answer from Attorney General Barr is that he had no such discussion on the photo op and the Park Police appears to have also rejected that possibility. Rather, it appears that, once both the fencing material and the guardsmen were in place, the operation proceeded as planned. Yet, it is a fact that should be clearly established.

It should be obvious that the closing of the park for such a purpose would be as disgraceful as it would be abusive. Indeed, despite knowing Attorney General Barr for many years and testifying at his confirmation hearing in the Senate,<sup>10</sup> I would immediately call for him to step down if this operation was ordered simply to give President Trump a photo op in front of the church.

As the record stands, Attorney General Barr and the Park Police have repeatedly denied that the plan to clear the park had anything to do with the photo op.<sup>11</sup> To the contrary, both assert that the plan came from the Park Police long before any photo op was contemplated and Barr has insisted that he was unaware of any such plan by the President. Acting Park Police Chief Gregory T. Monahan has given a detailed account supporting the two reasons for the delay: the arrival of the fencing and the arrival of the personnel needed to clear the park to install the fencing:

“Following the violence that continued on May 30th where officers were hit with bricks and assaulted, the USSS and USPP had initial discussions regarding adjustments to the collective posture in Lafayette Park and potentially obtaining fencing. As violence and destruction continued in Washington, DC, putting both the public and law enforcement at risk, on Sunday, May 31, USSS confirmed with USPP that the anti-scale fencing would be procured and potentially delivered on Monday for installation along H Street.

On Monday, June 1, USPP received confirmation from the USSS that the fencing would be delivered during the day with the expectation of being

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<sup>10</sup> United States Senate, Committee on the Judiciary, *The Confirmation of William Pelham Barr As Attorney General of the United States Supreme Court*, Jan. 16, 2019 (testimony of Professor Jonathan Turley), available at <https://www.judiciary.senate.gov/imo/media/doc/Turley%20Testimony.pdf>.

<sup>11</sup> See Rob Hotakainen, *Bernhardt defends Park Police actions*, E&E NEWS (June 8, 2020), <https://www.eenews.net/greenwire/stories/1063352991/search?keyword=park+police>.

installed in the evening. Both agencies concurred with a plan to clear H Street to prevent a repeat of the protestors' attacks and destruction that occurred on Friday, Saturday, and Sunday and to create a safe environment for the fence to be installed. Pedestrians were to be moved from the immediate area of the 1600 block of H Street to the following points: H Street & Connecticut Avenue on the west, 16th & I Streets to the north, H St. east of Vermont Avenue to the east.

The timing of implementing the plan was contingent upon having enough resources on scene. Given that the majority of law enforcement personnel did not report until later in the day, a late afternoon or early evening operation was inevitable.”

That account can be easily investigated by reviewing the records documenting the delivery of the fencing and the arrival time of reinforcements.

The underlying violence cited as the reason for the plan can also be investigated. Aside from video evidence, media accounts, and police reports, an objective record is also available based on the injuries recorded on both sides in the Park during the critical period of Saturday through Monday. The government has claimed over 100 federal officers were injured around this time. The Park Police alone has asserted that “51 members of the USPP were injured; of those, 11 were transported to the hospital and released and three were admitted.”<sup>12</sup> The government has cited repeated and confirmed incidents of arson and property destruction in and around Lafayette Park. That would be a sufficient and lawful reason to close the park, which has been closed in prior years to protect the park or the White House complex.

The government has also offered a timeline that can be easily verified. Government officials have stated that the plan was discussed two days in advance based on ongoing violence in the park.<sup>13</sup> Barr said that he personally witnessed such violence in the park and approved the plan. Barr also said that an order was sent out to all agencies around 2 p.m. Again, he insists that the no one had discussed a visit to the church or the Park by the President with him. Various media organizations have reported sources confirming that the order was unrelated to the photo op outside of St. John's. Absent new evidence that all of these individuals and agencies are lying, the timeline of events would seem to support that the clearing of the Park was not ordered to make way for the Trump

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<sup>12</sup> Statement From United States Park Police Acting Chief Gregory T. Monahan, June 4, 2020, available at [https://www.nps.gov/subjects/uspp/6\\_2\\_20\\_statement\\_from\\_acting\\_chief\\_monahan.htm](https://www.nps.gov/subjects/uspp/6_2_20_statement_from_acting_chief_monahan.htm).

<sup>13</sup> Aaron C. Davis, Carol D. Leonnig, Josh Dawsey, & Devlin Barrett, Officials familiar with Lafayette Square confrontation challenge Trump administration claim of what drove aggressive expulsion of protestors, THE WASHINGTON POST (June 14, 2020), [https://www.washingtonpost.com/politics/officials-challenge-trump-administration-claim-of-what-drove-aggressive-expulsion-of-lafayette-square-protesters/2020/06/14/f2177e1e-acd4-11ea-a9d9-a81c1a491c52\\_story.html](https://www.washingtonpost.com/politics/officials-challenge-trump-administration-claim-of-what-drove-aggressive-expulsion-of-lafayette-square-protesters/2020/06/14/f2177e1e-acd4-11ea-a9d9-a81c1a491c52_story.html).

photo op.<sup>14</sup> Congress should certainly examine whether these representations are true. The need to confirm the motivation behind the operation is heightened by the abridgment of core free speech rights of protesters who assembled to denounce police abuse. Courts have previously recognized First Amendment claims in similar circumstances.<sup>15</sup>

Congress can play a critical role in resolving this question. However, even assuming that the order to clear the park was unrelated to the photo op (as it currently appears), it may still have been unlawful under the standards laid out in the World Bank litigation and other controlling case law. It is to those questions that I now turn.

### **A. The Clearing Of Lafayette Park**

Any court reviewing the decision to clear Lafayette Park will start with several established framing elements. First, the demonstration took place on federal land near an area (the White House) that is afforded particularly high levels of security. Second, this was a demonstration that was proceeding without a permit or permission from the federal government. Third, there was a high level of injuries to federal officers and property destruction in the prior 24 hours. Those facts ordinarily give the government the discretion to order people from the federal property at its discretion. The actual dispersal actions at issue appear to have lasted less than 30 minutes and did not result in arrests.<sup>16</sup> On the current record, the order approved Monday morning to clear the park to install fencing is likely to be viewed as lawful and within the discretion of the government.

These facts, however, do not give the government *carte blanche* to clear the park in any manner that it desires. As stated by the court in the Pershing Park litigation, Park Police are supposed to give protesters a minimum of three audible warnings that are both amplified and spaced apart. This is meant to give protesters notice that they are in violation of the law and facing arrest. The Park Police must also give reasonable avenues for the crowd to disperse in accordance with such instructions. In the World Bank litigation, it was confirmed that no warnings were given and thus no probable cause was

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<sup>14</sup> Dalton Bennett, Sarah Cahlan, Aaron C. Davis & Joyce Lee, The crackdown before Trump's photo op, THE WASHINGTON POST (June 14, 2020), <https://www.washingtonpost.com/investigations/2020/06/08/timeline-trump-church-photo-op/?arc404=true>.

<sup>15</sup> See, e.g., *Dellums v. Powell*, 566 F. 2d 167, 194 (D.C. Cir. 1977) (recognizing a cause of action under the Constitution for the violation of the First Amendment rights of both individuals demonstrating at the U.S. Capital and a congressman addressing the demonstrators); *Gibson v. United States*, 781 F.2d 1334 (9th Cir. 1986), cert. denied, 479 U.S. 1054 (1987) (finding that a claim against Federal Bureau of Investigation agents who impermissibly curbed plaintiff's protected speech was properly cognizable as a *Bivens*-type action under the First Amendment).

<sup>16</sup> Reviewing various government and media timelines, it seems to me that, if (as likely) the warnings were spaced apart by a couple minutes at a minimum, the time from the movement of the line to the securing of the park was likely around 25 minutes. However, it seems unlikely that it was much longer than 30 minutes.

established for the arrests.<sup>17</sup> The Court enforced “the binding authority in this Circuit,” established by *Dellums v. Powell*, that there is a “‘bright-line rule’ that groups with nonviolent or obstruction individuals may not be arrested as a group ‘without fair warning or notice and the opportunity to come into compliance and disperse.’”<sup>18</sup>

In this case, no arrests were made but there is still a requirement for warnings under the guidelines. The Park Police has stated that it complied with these guidelines. Here is the official response:

“On Monday, June 1, the USPP worked with the United States Secret Service to have temporary fencing installed inside Lafayette Park. At approximately 6:33 pm, violent protestors on H Street NW began throwing projectiles including bricks, frozen water bottles and caustic liquids. The protestors also climbed onto a historic building at the north end of Lafayette Park that was destroyed by arson days prior. Intelligence had revealed calls for violence against the police, and officers found caches of glass bottles, baseball bats and metal poles hidden along the street.

To curtail the violence that was underway, the USPP, following established policy, issued three warnings over a loudspeaker to alert demonstrators on H Street to evacuate the area. Horse mounted patrol, Civil Disturbance Units and additional personnel were used to clear the area. As many of the protestors became more combative, continued to throw projectiles, and attempted to grab officers’ weapons, officers then employed the use of smoke canisters and pepper balls. USPP officers and other assisting law enforcement partners did not use tear gas or OC Skat Shells to close the area at Lafayette Park. Subsequently, the fence was installed.”

Various media outlets have confirmed hearing one or more warnings<sup>19</sup> and some members of the crowd were reportedly moving back. Moreover, the line of officers did not appear to encircle the protestors so individuals could disperse. Congress should confirm that the Park Police used a sufficient amplification system, like the Long Range Acoustic Device (LRAD)<sup>20</sup>, and that the warnings were sufficiently clear and spaced

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<sup>17</sup> *Barham v. Ramsey*, 434 F.3d 565, 573 (D.C. Cir. 2006).

<sup>18</sup> *Barham v. Ramsey*, 338 F. Supp. 2d 48, 58 (D.D.C. 2004) (citing *Dellums v. Powell* 566 F.2d 167 (D.C. Cir. 1977)).

<sup>19</sup> See, e.g., Karl Gelles, *how police pushed aside protesters ahead of Trump’s controversial church photo*, USA TODAY (June 11, 2020, 1:15 PM), <https://www.usatoday.com/in-depth/graphics/2020/06/05/george-floyd-protests-trump-church-photo-curfew-park/3127684001/>.

<sup>20</sup> LRAD is used by the Park Police and is an extremely powerful system for such warnings. The LRAD 100X unit, for example, is 20 – 30 decibels louder than typical vehicle-based P.A. systems that were once commonly used for dispersal orders. *See*

apart. If that did occur in Lafayette Park, a court would likely hold that the park could be cleared so long as at least three warnings were given and protestors were provided an opportunity to disperse.

## **B. The Use of Pepper Balls and Other Means in The Operation**

If the government is found to have told the truth about providing warnings and a reasonable opportunity for dispersal, there remains the question of the means used for the clearing operation. On this point, there is a factual dispute over the use of what witnesses described as “tear gas.” Attorney General Barr has said that he did not give the order to disperse the crowd but supported the decision made by Park Police to use dispersal tactics if necessary. He and the Park Police insisted that no tear gas or “OC Skat shells” were used in the operation as opposed to smoke canisters and pepper balls, though a spokesman later said that pepper spray has the same effect as tear gas.<sup>21</sup> The debate has turned into a debate over the colloquial versus technical uses of the term “tear gas,” which may not be determinative to our analysis. Officials insist that they did not deploy CN and CS (or 2-chlorobenzalmalononitrile products), defined by the Centers for Disease Control and Prevention as the “most common” forms of tear gases. The government refers to “pepper spray” as a “riot control agent.” One photo purportedly shows a clearly labeled “Skat Shell OC.”<sup>22</sup> Oleoresin Capsicum refers to an irritant derived from pepper plants but it has the same effect of what people associate with tear gas. Congress should be able to confirm if the Park Police has misrepresented the devices used in the operation. However, the agencies have continued to maintain, including in communications with Congress, that no tear gas was used in the operation.

For the purposes of legal analysis, the technical distinction may prove less important to the conclusions. Courts often group the use of tear gas and pepper spray together in court orders. The question is whether it was lawful to use non-lethal devices ranging from possible smoke canisters to pepper balls to tear gas. That question is likely to turn on the far more significant conflict in the accounts of the violence level in the park. In reviewing video footage, there was clearly significant violence in the park in the preceding days. On the day of the operation, some protestors could be seen throwing projectiles at officers. However, the crowd appeared largely peaceful, an impression reaffirmed by journalists in the crowd.

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[https://genasys.com/lrad\\_products/lrad-100x/](https://genasys.com/lrad_products/lrad-100x/). The LRAD system has a range that far exceeds the relatively small space of the Park. However, cancelling noise of protests can defeat even the best system, which is why three warnings are required.

<sup>21</sup> Rebecca Beitsch, *U.S. Park Police Say It Was A Mistake To Say No Tear Gas Was Used In Lafayette Park*, THE HILL (June 5, 2020, 3:11 PM), <https://thehill.com/homenews/administration/501372-us-park-police-say-it-was-a-mistake-to-say-no-tear-gas-was-used-in> (quoting Park Police spokesman Sgt. Eduardo Delgado as saying “I’m not going to say that pepper balls don’t irritate you. I’m not saying it’s not a tear gas, but I’m just saying we use a pepper ball that shoots a powder.”).

<sup>22</sup> *Id.*

Courts tend to defer to law enforcement in circumstances where they face immediate threats to their safety or the safety of others.<sup>23</sup> The Supreme Court has stressed that officers are often “forced to make split-second judgments [] in circumstances that are tense, uncertain, and rapidly evolving.”<sup>24</sup> Under a fourth amendment analysis, such use of force must be shown to be “objectively unreasonable.”<sup>25</sup> Objective unreasonableness is in turn “judged from the perspective of a reasonable officer on the scene,” in light of “the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”<sup>26</sup>

The *Graham* analysis has been applied to the use of non-lethal devices by police. For example, in *Fogarty v. Gallegos*, the Tenth Circuit found such use to be unreasonable, noting:

“With respect to the use of pepper balls and tear gas, we acknowledge that our precedential opinions have not directly addressed the Fourth Amendment implications of what defendants call ‘less lethal’ munitions. Nevertheless, a reasonable officer would have been on notice that the *Graham* inquiry applies to the use of these methods just as with any other type of pain-inflicting compliance technique. We find it persuasive that, in prior cases, we have assumed that the use of mace and pepper spray could constitute excessive force.”<sup>27</sup>

An important distinction comes into play at this point in the analysis. In this case, the officers were using the force to disperse a crowd rather than deter or control an individual. Attorney General Barr has stated that the Park Police made this decision but that they had the authority to do so when faced with violent opposition. In videos, the crowd as a whole appears in flux with some responding to the dispersal order and others not responding, including a few seen resisting or obstructing the advancing line of officers.

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<sup>23</sup> See, e.g., *Bell v. Irwin*, 321 F.3d 637, 640 (7th Cir. 2003) (“It is easy in retrospect to say that officers should have waited, or should have used some other maneuver ... but the fourth amendment does not require second guessing if a reasonable officer making decisions under uncertainty and the press of time would have perceived a need to act.”); *Mitchell v. City of Indianapolis*, No. 1:18-cv-00232-SEB-TAB, 2020 U.S. Dist. LEXIS 55274, at \*1 (S.D. Ind. Mar. 31, 2020) (Under the circumstances, a reasonable officer could have also reasonably concluded... that lesser uses of force, including physically removing [the suspect], would be both less effective at securing compliance and more dangerous for the Officers.”).

<sup>24</sup> *Graham v. Connor*, 490 U.S. 386, 397 (1989).

<sup>25</sup> *Id.* at 397.

<sup>26</sup> *Id.* at 396.

<sup>27</sup> *Fogarty v. Gallegos*, 523 F.3d 1147, 1161 (10th Cir. 2008).

There are comparatively few cases on the use of pepper spray to disperse crowds than there are individual cases of alleged excessive use of force. Some cases support the claim of the journalists in this case. In reviewing the attack on Amelia Brace and her colleagues at Seven Network, I cannot see any conceivable justification for the police conduct. This is not the first such attack on journalists. A similar case was litigated recently in *Quraishi v. St. Charles Cty.*, where police fired rubber bullets and tear gas at Al Jazeera America journalists reporting on the events in Ferguson on August 13, 2014. The court ruled that it would obviously be unreasonable for the police to deploy tear gas against non-violent individuals who are also not committing a crime.<sup>28</sup> Likewise, prior cases have distinguished between people who are agitating and those observing or recording scenes. In *Jones v. City of Minneapolis*, the district court granted summary judgment against plaintiffs' claims of excessive force when the officers used mace on a crowd because the crowd "[tried] to restrict their movement," someone throw a "glass of booze" in one officer's face, and the police believed they were responding to an officer in distress.<sup>29</sup> However, the court refused to dismiss the claims of a videographer who was individually assaulted by police.<sup>30</sup> Courts have also refused to dismiss cases as categorically barred under immunity arguments in such cases.<sup>31</sup>

However, the use of pepper spray is subject to a reasonableness standard based on the totality of the circumstances in a given case, such as the use of pepper balls fired into crowds.<sup>32</sup> Courts have upheld the use of forms of gas or pepper sprays to generally repel or disperse unruly crowds.<sup>33</sup>

There are cases, including some recent holdings, where courts reject the use of such devices against an entire demonstration as opposed to individual violent demonstrators. Courts have held that the proper response to violent individuals is to arrest those individuals rather than to generally deploy tear gas or other irritants. This is

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<sup>28</sup> *Quraishi v. St. Charles Cty.*, No. 4:16-CV-1320 NAB, 2019 U.S. Dist. LEXIS 97254, at \*1327–28 (E.D. Mo. June 10, 2019).

<sup>29</sup> *Jones v. City of Minneapolis*, No. 04-4856 (DWF/AJB), 2007 U.S. Dist. LEXIS 56280, at \*10–11 (D. Minn. Aug. 1, 2007), *aff'd* 337 F. App'x 596 (8th Cir. 2009).

<sup>30</sup> *Id.* at \*27–28.

<sup>31</sup> *See, e.g.*, *Lamb v. City of Decatur*, 947 F. Supp. 1261 (C.D. Ill. 1996) (rejecting qualified immunity claims under 42 U.S.C.A. § 1983); *Nelson v. City of Davis*, 2012 WL 2821931 (9th Cir. 2012).

<sup>32</sup> *See, e.g.*, *Buck v. City of Albuquerque*, 549 F.3d 1269 (10th Cir. 2008).

<sup>33</sup> *See, e.g.*, *Dalrymple v. United States*, 460 F.3d 1318, 1327–28 (11th Cir. 2006) (“Based on these undisputed findings of fact, we agree with the district court that [the demonstrator surging towards the front of the barricade while throwing objects including rocks, bottles, a stool, and coolers at the agents] justified the use of either pepper spray or tear gas and was objectively reasonable under the circumstances.”); *Young v. Akal*, 985 F. Supp. 2d 785, 803 (W.D. La. 2013) (“Given the crowd's refusal to adhere to the officers' warnings [over four hours], this Court concludes the deputies acted within their authority to disperse the crowd with tear gas in order to unblock the streets and remove the hazards to others.”).

particularly the case with regard to dispersing crowds engaged in free speech activities. In *Collins v. Jordan*, the Ninth Circuit held “the proper response to potential and actual violence is for the government to ensure an adequate police presence, and to arrest those who actually engage in such conduct, rather than to suppress legitimate First Amendment conduct as a prophylactic measure.”<sup>34</sup> Pepper ball devices have been specifically flagged as causing added risks in crowded conditions. In *Nelson v. City of Davis*, the Ninth Circuit observed:

“The dual nature of the pepperball projectile creates additional risks not present with a strictly projectile object . . . [n]onetheless, even if considered as a purely projectile object, the officers in this case were aware that pepperballs fired from their guns could, as in this instance, cause substantial harm, and that there was a substantial risk of hitting individuals in vulnerable areas given the inability to accurately target their weapons at the distance at which they fired them . . . [A] reasonable officer would have known that firing projectiles, including pepperballs, in the direction of individuals suspected of, at most, minor crimes, who posed no threat to the officers or others, and who engaged in only passive resistance, was unreasonable.”<sup>35</sup>

Recently, a Seattle court banned the use of tear gas, despite evidence from police of “significant arson events, assaults on civilians and officers, as well as wide-spread looting and property destruction.”<sup>36</sup> The Court issued the temporary restraining order even though it acknowledged that “This, no doubt, poses a serious threat to officer life and safety.” The Seattle case notably included both tear gas and pepper spray within its injunction. The court defined the scope of the injunction as:

“(1) any chemical irritant such as and including CS Gas (“tear gas”) and OC spray (“pepper spray”) and (2) any projectile such as and including flash-bang grenades, “pepper balls,” “blast balls,” rubber bullets, and foam-tip projectiles. This Order does not preclude individual officers from taking necessary, reasonable, proportional, and targeted action to protect against a specific imminent threat of physical harm to themselves or identifiable others or to respond to specific acts of violence or destruction of property. Further, tear gas may be used only if (a) efforts to subdue a threat by using alternative crowd measures, including pepper spray, as permitted by this paragraph, have been exhausted and ineffective and (b) SPD’s Chief of Police has determined that use of tear gas is the only reasonable alternative available.”

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<sup>34</sup> *Collins v. Jordan*, 110 F.3d 1363, 1372 (9th Cir. 1996).

<sup>35</sup> *Nelson v. City of Davis*, 685 F.3d 867, 885–86 (9th Cir. 2012).

<sup>36</sup> *Black Lives Matter v. City of Seattle*, 2:20-cv-00887-RAJ, 2020 U.S. Dist. LEXIS 103346, at \*9 (W.D. Wash. June 12, 2020).

Likewise, in another recent decision, a federal district court rejected the use of tear gas even when police submitted evidence of “the breaking of the windows of the Justice Center and other buildings, setting off fireworks, property destruction, looting, setting fires in the Justice Center and other areas of downtown, throwing and launching deadly projectiles at the police, and attempting to dismantle a fence put up to protect the Justice Center.”<sup>37</sup> The court order that “[Portland Police Bureau] be restricted from using tear gas or its equivalent except as provided by its own rules generally.”<sup>38</sup> In addition, tear gas use was limited to situations in which the lives or safety of the public or the police are at risk, including the lives and safety of “those housed at the Justice Center.”<sup>39</sup> It expressly barred the use of “[t]ear gas ... to disperse crowds where there is no or little risk of injury.”<sup>40</sup>

A similar order was imposed in Denver where the court enjoined the use of tear gas and pepper spray after seeing videotapes “in which officers used pepper-spray on individual demonstrators who appeared to be standing peacefully, some of whom were speaking to or yelling at officers, none of whom appeared to be engaging in violence or destructive behavior.”<sup>41</sup> The Court however did allow the use of tear gas and pepper spray when a senior officer gives such an order “in response to specific acts of violence or destruction of property that the command officer has personally witnessed.” The court specifically allows for such use “after an order to disperse is issued” and “[a]ny and all orders to disperse must be followed with adequate time for the intended audience to comply, and officers must leave room for safe egress.” The Park Police has already argued that such criteria were fulfilled.

Attorney General Barr has stated that he approved the plan but did not give specific or “tactical” dispersal orders, including the use of the pepper balls.<sup>42</sup> The position of the Park Police is that officers on the scene made these decisions based on specific resistance and not a general use of non-lethal agents. The Park Police said that smoke canisters and pepper balls were used when officers reported protesters grabbing their weapons and throwing projectiles at them. In other words, the position of the government is likely to be that the use of the agents was defensive and not offensive in this circumstance. That is challenged by witnesses and journalists who allege virtually random use of pepper balls and canisters.

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<sup>37</sup> *Don’t Shoot Portland v. City of Portland*, No. 3:20-cv-00917-HZ, 2020 U.S. Dist. LEXIS 100801, at \*11–12 (D. Or. June 9, 2020).

<sup>38</sup> *Id.* at \*13.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Abay v. City of Denver*, No. 20-cv-01616-RBJ, 2020 U.S. Dist. LEXIS 99523, at \*3 (D. Colo. June 5, 2020).

<sup>42</sup> Tal Axelrod, *Barr says he didn’t give ‘tactical command’ to clear Lafayette protesters*, THE HILL (June 5, 2020, 10:33 PM), <https://thehill.com/homenews/administration/501448-barr-says-he-didnt-give-tactical-command-to-clear-lafayette-protester>.

The reasonableness of that response is likely to turn on the record now being created in this and other forums. The government has produced reports of a high degree of injuries, including hospitalizations, of federal officers in this area. It can also show that serious property damage, including arson, had already taken place just the day before in the Park. It can also show that property damage has continued with the defacing and attempted destruction of the iconic Andrew Jackson statue in Lafayette Park just a few days ago.<sup>43</sup> The St. John's Church itself was again vandalized and, reportedly with the support of the church, was also cordoned off with the same fencing erected around Lafayette Park to protect it against further damage.<sup>44</sup> Moreover, there are statements from the Attorney General and high-ranking federal officials that on the day of the clearing, officers were injured and one may have been hospitalized before the decision to clear the park. The fact is that the record of law enforcement injuries, arson, and property damage contradict a claim of entirely peaceful protests on that weekend or Monday night, including media reports.<sup>45</sup>

A glimpse at the likely government record for trial was supplied by Department of the Interior Secretary David Bernhardt, who has described the prior two days leading to the clearing of the Park. That includes violence on the Saturday before the arson at St. John's and other damage on Sunday:

“Beginning on Saturday, May 30, 2020, the USPP were under a state of siege, and routinely subject to attack by violent crowds. The incidents are numerous and include USPP officers having their police cars vandalized; being subject to bombardment by lighted flares, Molotov cocktails, rocks, bricks, bottles and other projectiles; and physical assault so violent that to date over 50 area law enforcement officers have been injured . . . [to]

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<sup>43</sup> Fredrick Kiunkle, Susan, Svrluga, & Justin Jouvenal, Police thwart attempt by protestors to topple statue of Andrew Jackson near White House, THE WASHINGTON POST (June 23, 2020), [https://www.washingtonpost.com/local/public-safety/dc-police-and-protesters-square-off-near-whitehouse/2020/06/22/cec8c88c-b4c7-11ea-a510-55bf26485c93\\_story.html](https://www.washingtonpost.com/local/public-safety/dc-police-and-protesters-square-off-near-whitehouse/2020/06/22/cec8c88c-b4c7-11ea-a510-55bf26485c93_story.html). Of course, the Jackson incident cuts both ways. It shows that these are not purely peaceful demonstrations, but it also shows that the federal officers were able to regain control of the area without the use of the prior level of force. The Park Police is likely to argue that it did not encounter the same level of resistance around the Jackson statue.

<sup>44</sup> Egan Millard, St. John's church in Washington Vandalized Again, EPISCOPAL NEWS SERVICE (June 23, 2020), <https://www.episcopalnewsservice.org/2020/06/23/st-johns-church-in-washington-vandalized-again/>.

<sup>45</sup> Marissa J. Lang, Michael E. Miller, Hannah Natanson & Peter Jamison, Tensions between police and protesters flares in front of the White House before vandalism and sporadic fires, THE WASHINGTON POST (May 31, 2020, 2:32 AM), [https://www.washingtonpost.com/local/public-safety/trump-accuses-dc-mayor-of-refusing-to-help-secret-service-at-white-house-demonstration-over-killing-of-george-floyd/2020/05/30/9bb59212-a276-11ea-9590-1858a893bd59\\_story.html](https://www.washingtonpost.com/local/public-safety/trump-accuses-dc-mayor-of-refusing-to-help-secret-service-at-white-house-demonstration-over-killing-of-george-floyd/2020/05/30/9bb59212-a276-11ea-9590-1858a893bd59_story.html).

include[] one USPP officer so violently attacked that he required emergency surgery.”<sup>46</sup>

The current record would make it unlikely that the court would treat these demonstrations as entirely peaceful. However, the real significance of this information will only be established when we look at the specific pattern of injuries over the course of the three days and particularly those occurring on Monday before the decision to order the operation to move forward with the clearing of the Park.

### C. Summary

There are significant and troubling issues to be addressed over the operation at Lafayette Park. If we are to effectively address those issues, we need to speak frankly about the record as it stands today, particularly in terms of how a court might view these facts. First, the widespread claim that the Park was cleared for the Trump photo op is currently unsupported and contradicted by the available evidence. Second, it does not appear that tear gas was employed on protesters, though it has been confirmed that pepper balls with similar effects were used. Third, it is not true that the protests in the Lafayette Park were entirely peaceful. There was extensive property damage, serious arson crimes, and continuing attacks on federal law enforcement on Saturday, Sunday, and Monday. Finally, it is also true that most of the protestors in the Park on Monday evening were peaceful. Our understanding of these facts may of course change as a result of this and other investigations. Yet, it is important to focus on what we know and do not know in addressing legal and policy questions going forward.

A court is likely to find that a plan to close off the park submitted on Sunday night and approved Monday morning was within the legal discretion of the government. It is also likely to recognize that there was some exigency in the operation to install the fencing due to the proximity to the White House. Given that mixed record, a constitutional challenge to the decision to clear the park is unlikely to succeed absent new countervailing evidence. A challenge to the use of pepper balls as a general means for crowd dispersal could be a closer issue, but might still favor the Park Police absent additional information on the issues discussed above. From what I can deduce from video footage and timelines, the actual clearing maneuver (from the line movement to the establishment of a perimeter line) in the park lasted less than 30 minutes with no arrests. A court could (as I do) have objections to the use of the pepper balls and aggressive tactics but still find that this was within the realm of reasonable discretion of the officers on the scene.

As this and other committees go forward, I would strongly encourage an effort to secure some of the information highlighted in this testimony. This includes, but is not limited to: (1) all emails, memoranda, and other records of the planning to clear the park, including any discussion on Monday for delaying the operation to the following morning; (2) the “running resume” or other record of radio calls and orders given around the Park

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<sup>46</sup> Letter from David Bernhardt, Secretary, U.S. Dep’t of the Interior, to Rep. Raúl Grijalva, Chair, H. Comm. on Nat. Res. (June 5, 2020)

from Saturday through Monday; (3) the specific PA system or technology used to convey the three warnings and any video or audio tapes of the warnings showing their range and spacing; (4) the equipment record of the exact number of canisters, pepper ball, and other material used to clear the Park; (5) the record of all injuries reported and treated in the park for both law enforcement and non-law enforcement; (6) all property damage and criminal reports filed on those three days in and around the Park; (7) all pictures, videotapes, body camera recordings, and other photographic records on the points of contact between the advancing line of officers and protests during the clearing operation, including aerial footages and rooftop surveillance; (8) all reports from officers and other personnel on the incidents of attacks on or near officers and executive officials; (9) any memoranda of understanding (MOUs) with cooperating non-USPP units on the operation and instructions on the operation, including a full list of all non-USPP forces present in the park during those three days; and (10) any of the above information or material held by other cooperating non-USPP units or forces, including whether the deployment of pepper balls or smoke canisters were the actions of non-USPP personnel.

Many of us were upset by what happened on June 1, 2020, so it can be difficult to even acknowledge such likely judicial findings on the existing record. This is simply what we know now. Yet, what we know should be enough to focus people of good faith on both the need for further inquiry and possible reforms. There remains the question of how the park was cleared and specifically the aggressive response of the Park Police. We also know that many peaceful protesters and journalists were placed in an extremely dangerous situation by the use of smoke canisters and pepper balls to disperse a crowd that already appeared to be moving back. At a minimum, the rapid advancement of the police line raises concerns over execution of the order when further delay might have allowed more people to move out of the area. Few courts would look kindly on such rapid escalation of force by law enforcement in the middle of a protest over police abuse.

#### **IV. CONCLUSION**

The foregoing legal analysis may help answer whether the government acted unconstitutionally in either the clearing of Lafayette Park or the means used to carry out that objective. I will end by again stressing that such analysis does not answer the equally important question of whether that decision was the right one. I do not believe the decision to disperse the crowd that night was right under these circumstances, notwithstanding the authority to clear to the Park. In addition to a rapid advancement of the police line, the move before the curfew only magnified the confusion for the crowd. The police should have waited until after 7 pm to give people a chance to move out of the park. The fact that the Park does not appear to have been cleared for a photo op does not validate the decision to move forward that evening in such a relatively encapsulated period. The government's claim that they cleared the park when necessary due to the late arrival of fencing and additional law enforcement officers has not been contradicted. Yet, it has also not been adequately explained why that delay did not prompt a decision to delay clearing the park until curfew or even until the morning so as to avoid direct confrontation with such a large crowd. The government could have intervened if violence increased or further property damage occurred that evening. The record seems to suggest that the operation was simply delayed and immediately moved forward once resources

were in place, without considering the timing and conditions. Even then, the line might have been able to move forward without the use of the deployment of the smoke canisters and pepper balls. As a result, civilians and law enforcement officers have suffered harm. Having the authority to clear the park does not mean that such authority was used wisely or correctly.

Various investigations are now occurring in both the legislative and executive branches into this controversy. Federal cases have been filed that will also pursue discovery on the underlying decisions made in Lafayette Park. All of those efforts to get a full record are essential to guarantee full accountability, which all parties should favor.

Once again, thank you for the honor of appearing before you to discuss these important issues. I am happy to answer any questions that you might have on the underlying legal standards that apply to this controversy.

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