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Testimony of

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I am Lloyd Burton, a professor of law and public policy in the University of Colorado's School of Public Affairs, Downtown Denver campus. There I direct our School's Program Concentration in Emergency Management and Homeland Security, and teach a course on the law of all-hazards management. On behalf of the university and of my school, I wish to express my gratitude for being invited to appear here today, to offer an academic perspective on the important issues you are examining. That being said, I must also add that the analysis, views, and opinions I offer here today are solely my own.

My remarks are informed by a research project I am now conducting on governmental preparations for the 2008 National Democratic Convention, to be held in Denver in August of next year. The subject of the research is interagency and intergovernmental relations and coordination, with specific regard to four dimensions of those relationships: (1) the federal, state, and local laws that mandate the missions of these agencies, and empower them to carry out those mandates: (2) administrative and technological interoperability (that is, how well agencies at all level of government share necessary information and coordinate their activities); (3) the allocation of fiscal burdens; and (4) relationships between the agencies and the public -- both with the residents of the Denver area, and with those attending the convention.

In my remarks here today I will be emphasizing in particular the second and fourth of these dimensions: that is, administrative interoperability and relations with the public. This is because these two issues have been particularly significant ones in governmental management of similar events in the past, and I believe they may feature prominently in Denver's experience of hosting the 2008 Democratic Convention. And a useful way of understanding them is to begin by placing them both within the legal context they share.

The Constitutional Roots of Interagency and Public Relationships. In recent years, both private and public sector organizations have placed great emphasis on the importance of having a mission statement, the purpose of which is to succinctly state what it is the organization seeks to accomplish and how it seeks to do it. Such a need was not lost on the framers of the newly minted United States Constitution, as they were preparing the document for debate and (hoped for) adoption by the thirteen colonies.

Their eighteenth century version of a mission statement is the Constitution's Preamble, and it consists of six spare yet potent phrases: "to form a more perfect Union, to establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity . . .". Nowhere in the document do the framers give a hint as to whether these goals stand in a hierarchical or equilateral relationship, leaving most constitutional scholars to conclude that what the framers intended was for the federal government to simultaneously achieve all these goals all the time at some threshold level -- the exact level of each one contingent on historical circumstances.

The framers surely understood that insuring domestic tranquility and providing for the common defense on the one hand while concomitantly assuring the blessings of liberty on the other would require a balancing act, which is where institutions for the establishment of justice (principally the courts) come in. But while the framers may have been shy on details for how to achieve such a balance on a moving fulcrum, the ratifiers of the document were a good deal more explicit on the subject of what it means to secure the blessings of liberty to ourselves and our posterity.

In fact, their condition for adopting the document as the supreme law of the land was that it be immediately amended to spell out what these liberties to be secured are -- the Bill of Rights. And it is one of those rights -- that "of the people to peaceably assemble, and to petition the Government for a redress of grievances" that features most prominently in planning for the 2008 Democratic National Convention.

Interoperability. This dimension has two aspects: (a) the familiar problem of a lack of adequate *technological* interoperability; and (b) the less familiar but equally dangerous problem of inadequate *administrative* interoperability -- the inability of agencies at all levels of government to share vital information and to adequately coordinate their efforts. Agencies experiencing this difficulty often point to conflicting statutory mandates (legal authority) as the reason. However, in the public management literature, a more commonly cited cause is that of *organizational culture clash*. This is a phenomenon that arises when two or more organizations with divergent norms, goals, and professional ethical orientations are compelled by circumstance to merge their efforts, resulting in conflicts over locus of control, and resistance to a public manager's worst nightmare: significant responsibility without adequate authority.

Reference back to the preamble can help contextualize the nature of this problem. In the executive branch of the federal government, one cabinet-level department and a host of subordinate agencies within it have the sole mission of providing for the common defense (The Department of Defense). Others are responsible for promoting the general welfare (the Departments of Health and Human Services, Agriculture, Education, Transportation, Commerce, and Interior, and the EPA); another for ensuring domestic tranquility (Department of Homeland Security); and yet another for pursuing the cause of justice on behalf of the American people (Department of Justice).

Interestingly, assuring the blessings of liberty is not the primary mission of any department or subordinate agency in the federal executive branch of government. Historically, that role has been left principally to the federal judiciary, the result of which has been a substantial amount of federal judicial oversight over executive branch behavior.

Where does the authority of one agency stop and another's start? And equally to the point, where does the authority of one level of government end and its preemption by a higher level of government begin? These questions are of crucial importance in the

governmental realm of the all-phases management of all forms of hazard, whether those hazards be naturally accidentally, or deliberately poised to threaten the safety and security of the American public.

Our recent national history is replete with tragic examples of what can happen when disaster response agencies are unable to adequately communicate and coordinate their actions, from the terrorist attacks of 9/11 to Hurricane Katrina. None of these agencies -- civilian or military, federal, state, or local -- was led or staffed by professionals intent on thwarting the efforts of another agency to save lives and care for the traumatized. Yet serious breakdowns in coordination occurred anyway.

Each of these organizations has its own sense of internal cohesion, intense organizational loyalty and integrity, *esprit de corps*, and standards of acceptable practice and procedure. The problem is that these qualities, which make them so effective in accomplishing the single purpose missions for which they were created when functioning in stand-alone mode, are the very same ones that can impede their ability to work well together. And the same holds true for the professional values and qualities of the persons who lead them.

Mitigating organizational culture clash among agencies responsible for collaborative all-hazards management is too broad a topic to cover in any detail here, although I have begun to do so elsewhere.[1] Instilling an ethic of genuinely cooperative interagency and intergovernmental hazards management will be a work in progress for a long time to come, and that progress will be incremental. It may well await the next generation of all-hazards management leaders to bring this level of cross-agency functioning fully into effect, at least at the federal level. Meanwhile, below are some proposed measures that might accelerate the process.

Two of the reasons such cooperative coordination is too often extolled in theory but slighted in practice are the reward structure for hazards management leaders, and the after-action reporting system. As to the first, currently there are relatively few meaningful incentives for agency leaders to yield over some measure of their decisional authority in the cause of better cooperation and coordination, and few sanctions when they fail to do so.

Moreover, under the current after-action reporting system, federal agencies are basically instructed to fill out their own report cards. Under such an arrangement, it is not entirely reasonable to expect agency leaders to be too searchingly self-critical in characterizing their organization's behavior, in either a training exercise or an actual high-security event or disaster response. Being too honest might mean talking oneself out of one's job. This holds true especially in the realm of reporting on interagency cooperation or the lack thereof.

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[1] See Burton, "The Constitutional Framework for All-Hazards Management: Mapping and Mitigating Organizational Culture Clash". Paper given at the Federal Emergency Management Agency's 10th Annual Higher Education Conference, Emmitsburg, MD, June 4-6, 2007

More continuous training and cross-training among agencies called upon to cooperate in certain kinds of emergencies is one obvious remedial action that can and should be taken. However, the culture clash problem is deeply rooted enough that additional measures are also called for.

Several state governments and some of the larger metropolitan ones use performance auditors external to their incident command systems -- and in some cases external to government altogether -- to monitor agency actions across several dimensions (including cooperative interagency coordination). They have also been used to prepare after-action reports on major training exercises and disaster management events. This is a practice that, in my view, is worth experimenting with at the federal level as well.

Thus, my principal suggestion on this matter is that a system of real-time performance auditing and after-action reporting be established for all National Special Security Events and all disasters -- whatever their cause -- in which federal agency aid is sought and rendered. Such a system would function in parallel with rather than as a replacement of the existing after-action reporting procedures now in place within federal agencies.

This parallel system would be organizationally located completely outside the National Incident Management System command structure. This could be a specially trained team of performance auditors within the Inspector General's Office of the Department of Homeland Security, or within the Government Accountability Office. Alternatively, during its pilot phase, the design and implementation of such a system could be assigned to an all-hazards management performance auditing firm or consortium.

If outsourced, however, it is imperative that the firm, organization, or consortium chosen for this task be held to the same standards of "arms' length" relationship to the agencies being audited as that of financial auditing firms to publicly traded corporations. The judgments of such an external auditor cannot be clouded by the potential for conflicts, of interest. Also, in order for such an external monitoring and reporting system to have the desired effect, there must be clearly understood criteria by which agencies and their leaders will be rated, as well as clearly recognized rewards for effective levels of cooperation, and sanctions for their absence.

Public and Community Relations. The potential for conflict and culture clash inherent in trying to compel single-purpose agencies to perform multi-purpose functions is nowhere more evident than in the realm of government agency relations with the public. For instance, an agency whose sole function is law enforcement or national security has by nature of its mission a different attitude toward and relationship with the public than does one whose mission is the provision of emergency public health or other life-saving and life-sustaining public services.

One example of this single purpose/multiple purpose conundrum is the role of the U.S. Secret Service relative to other emergency preparedness agencies. It is a sad fact of American public life that we as a nation have a history of periodically assassinating or attempting the assassination of our national political leaders. The future of our democracy relies in part our ability to ensure that our leaders can fulfill their duties free from intimidation and fear of death at the hands of those who violently oppose their actions.

This crucial, democracy-preserving function is the sole mission of the Secret Service. This explains in part why, while the mission statement of its recently established cabinet-level home -- the Department of Homeland Security -- contains language about "safeguarding our freedoms", no such concepts appear in the mission statement of the Secret Service. The organization does not countenance any responsibility for preserving or even acknowledging the public's liberty interests. That is not what Congress established it to do. It is charged with the gravest of responsibilities -- protecting the lives and well-being of our most senior national political figures -- and nothing more.

Yet at National Special Security Events, the Secret Service is charged with fulfilling this responsibility in coordination with other agencies at other levels of government (such as local police and fire departments, public health departments, and the National Guard) that have other and sometimes quite divergent duties to fulfill. These include protection of the public's health and welfare (at the behest of legislative mandates); and assuring the right of the people to peaceably assemble for a redress of grievances, within which context to speak freely on matters of public concern (usually at the behest of court orders).

Under NSSE procedures, the Secret Service assumes incident command authority for all matters associated with the safety of the political leaders they have responsibility for protecting, which means that the missions of the agencies alluded to in the previous paragraph become subordinate to that of the Secret Service during the period it is in control. Yet this arrangement does not relieve these temporarily subordinate agencies of their legal duties to discharge their sometimes divergent duties.

By way of example, just such an intergovernmental conundrum faced both the agencies and the federal courts in the days immediately prior to the 2004 Democratic National Convention in Boston, Massachusetts. Recognizing the dilemma described above, a year in advance of the convention, the City of Boston convened negotiations with local chapters of the American Civil Liberties Union and the National Lawyers Guild on the issue of how government should balance the safety and security of convention attendees (including national political leaders) with the rights of citizens to voice their views of the policies of those attending.

Four months in advance of the convention, ACLU and NLG representatives expressed opposition to the city's plans, with the result that the city set about finding a venue for the expression of political dissent within closer proximity to the convention site. However, it was not until a week before the convention that the protest zone was

actually physically established, at a former construction site under low-hanging commuter rail stanchions, and within which protesters would have no opportunity for direct contact with convention goers.[2] Though closer to the convention site than the zone originally proposed, in the words of the court this "demonstration zone" resembled more an "internment camp" than it did a forum for the peaceful expression of dissenting political opinions to national leadership.

As a result, during this last week before the convention, groups wishing to express organized dissent against the policies of the Democratic Party and its leadership filed a motion in federal district, seeking a preliminary injunction against implementation of the security plan with its designated demonstration zone. The judge hearing the case visited the contested construction site/protest zone, and reported in his decision on the case that it conveyed

> the symbolic sense of a holding pen where potentially dangerous persons are separated from others. Indeed, one cannot conceive of what other design elements could be put into a space to create more of a symbolic affront to the role of free expression . . . the design of the DZ is an offense to the spirit of the First Amendment. It is a brutish and potentially unsafe place for citizens who wish to exercise their First Amendment rights [3]

Nevertheless, in his decision, handed down the weekend before the convention was to begin, he was understandably unwilling to substitute his judgment for that of the U.S. Secret Service and the Boston Police Department as to what measures were necessary to protect the health, safety, and security of convention goers and national leaders. The judge held that "the potential hardships to the City, which must protect delegates . . . and the public interest, which includes the delegates' safety in addition to the demonstrators' free speech, counsel against issuance of a preliminary injunction."[4]

On appeal from the district court decision, the U.S. Court of Appeals for the First Circuit came to the same conclusion, and for the same reasons.[5] Appeals Court Judge Lipez's concurring opinion placed particular emphasis on the severe time constraints placed upon the courts in this last-minute appeal of the security plan:

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[2] Coalition To Protest The Democratic National Convention**,** et al., Plaintiffs, v. City Of Boston, 327 F. Supp. 2d 61, 67 (D.Mass. 2004).
[3] Id. at 74-76.
[4] Id. at 77.
[5] Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8, 10 (1st Cir. 2004)

> Thus I return to the point where I began - the inescapable need for judges and litigants to have adequate time to resolve these difficult First Amendment/security issues. Although the district court did a superb job under difficult circumstances of analyzing the competing interests at stake and offering its best judgment as to how those interests must be addressed, the press of time inescapably constrained its ability to grant any of the relief sought by the appellant. For us, even further removed from the scene and from the facts, and with the Convention already under way, the constraints were even greater.[6]

This appellate court concurrence closes with some advice for those facing these same planning challenges in preparation for the 2008 national political conventions:

> There is good reason for the district court's lament that "the design of the DZ is an offense to the spirit of the First Amendment." In the future, with more time for court intervention when court intervention is needed, with the choice of more flexible sites by event planners, and with procedures in place for giving the court the event specific information it should have, that spirit, hopefully, will not be offended again.[7]

In reading both the district court and appellate court opinions, one gets the impression that the federal judges in these cases felt caged by time and circumstances in much the same way that political dissenters were physically caged at both the Democratic and Republican National Conventions of 2004.

In my view, agency leaders at all levels of government would be well advised to follow Judge Lipez's advice on this matter, as they plan and prepare for the 2008 national political conventions. There is plenty of time now for consultation with all the parties that be on the issue of how to balance security concerns with First Amendment rights to the expression of political dissent.

The City of Boston also started such a planning effort a year before the convention. But what all parties evidently thought might be a workable agreement broke down at the last minute, when the specifics of the location and management of the demonstration zone were disclosed. By this time it was far too late for the courts to fashion anything approximating a remedy that would adequately address the two vital public interests of safety and security on the one hand and meaningful time, place, and manner expressions of political dissent on the other. Thus, in planning for the 2008 conventions, it will be necessary to take the process a step further to assure that the courts' advice is heeded -- principally by involving the federal courts at an earlier stage in the planning process, as elaborated on below.

The task is made no easier by the fact that the highest profile protest organization planning to voice dissent at the 2008 convention here in Denver is named "Recreate '68".

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[6] Id. at 19.
[7] Id.

As explained on its website, the name is a reference to the 1968 Democratic National Convention in Chicago, Illinois. This was an event at which thousands of protesters swarmed the streets of Boston, expressing opposition to the party establishment and to the presidential front-runner, for continuing to support the war in Vietnam. It turned out to be the most violence-plagued national political convention in twentieth century American political history.

Later investigation showed that the greatest number of violent confrontations with protesters were felony assaults by members of the Chicago Police Department. Yet for this 2008 protest group to even choose this name is disquieting. Although violent confrontation is nowhere advocated on its website in text that might be considered its mission statement (as of July 27, 2007), neither is "peaceable assembly" for the redress of grievances, or a pledge to nonviolent tactics.

Furthermore, the organizational icon posted at Recreate '68's website is a raised, closed fist. So it is a reasonable enough assumption on the part of agencies preparing for the convention that they should plan for the possibility of sometimes violent confrontations with protesters -- even if those bent on violent provocation comprise only a small percentage of the dissenting public.

Yet as the trial court judge asserted in the 2004 Boston decision,

> Protesters, demonstrators, and dissidents outside a national political convention are not meddling interlopers who are an irritant to the smooth functioning of politics. They are participants in our democratic life. The Constitution commands the government to treat their peaceful expressions of dissent with the greatest respect -- respect equal to that of the invited delegates.[8]

What happened at both the Democratic and Republican National Conventions in 2004 is that members of the public expressing dissent against the policies of convention goers were essentially quarantined, as if they had a dangerous communicable disease. And by limiting the number of persons allowed inside the demonstration zones as well as limiting the ingress and egress of those being allowed to express dissent within these zones, the ability of quarantined dissenters to effectively convey their message was almost entirely thwarted.

This is the functional equivalent of trying to prevent the spread of tuberculosis by forcibly confining everyone who has a cough. It categorizes everyone who disagrees with the policies of the regime in power as a potential enemy of the state -- automatically suspect by virtue of their decision to express dissent. Unchecked, this automatic suspicion of and physical confinement of dissent at political events may pose a greater danger to the values American society purports to cherish than do threats to our safety and security.

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[8] Coalition, *supra* note 2, at 77.

To remedy the problems the federal courts identified at the 2004 conventions, perhaps the most effective measure that can be taken is to include the federal courts at a much earlier stage of the convention planning process than was the case in 2004, as Judge Lipez recommended in the appellate court ruling on the Boston case. Federal judges frequently review security-sensitive information *in camera*, out of public view and off the public record, in order to ensure that the proper balance between liberty and security interests is being struck. The same could be done much earlier in the planning process for the 2008 convention than was the case in 2004.

No responsible federal judge will substitute his or her judgment for those of national security and law enforcement professionals on the eve of a National Special Security Event, which is the decision situation the courts found themselves facing in Boston in July of 2004. By contrast, allowing for some form of judicial monitoring if not oversight of the free speech accommodation planning for the 2008 national conventions could go a long way toward ensuring that the agencies have learned enough from past experience to do a better job of defending democracy in every sense of those words.

Philosopher George Santayana's observation that those who cannot learn from history are doomed to repeat it certainly applies to this situation. The 2004 national political conventions took place a scant three years after the most deadly terrorist attacks on American soil since the founding of the republic. Authorities were understandably apprehensive that these conventions would be perfect opportunities for the next offensive in this conflict. Yet while the conventions were safe from terrorist assault, considerable harm was done nonetheless. The casualty was the democratic process itself, as the desire to express political dissent became a reason for segregation, confinement, and social stigmatization.

In conclusion, there are two ways the local, state, and federal agencies responsible for managing the 2008 conventions might not adequately discharge their responsibilities. The first is to not exercise sufficient vigilance to keep everyone healthy, safe, and secure. The other is to this so diligently and so single-mindedly that no meaningful freedom of expression is allowed. And there is only one way they can succeed, which is to find a way to simultaneously achieve both of these goals at some acceptable threshold level.

As a nation and as a government, we have the ability to learn from our history on these matters. What remains to be seen over the course of the next twelve months is whether we also have the will to do so. One can only hope that we do, since the future of the American democratic process depends upon it.