

**Written Testimony of Emily Gunston, Deputy Legal Director,
Before the Council of the District of Columbia,
Committees on Facilities and Procurement and the Judiciary and Public Safety**

**Public Oversight Roundtable on The Metro Transit Police Department's Policing Practices
and Their Impact on Communities of Color**

November 12, 2019

The Metro Transit Police Department (MTPD) operates in the shadows with little or no public oversight, free from meaningful supervision by any of the local jurisdictions, immune from most lawsuits, without a civilian complaint body, and with limited obligations to provide records to the public. Unlike most urban police departments, its policies and procedures are not available to the public and police officials are not accountable to any elected official.

At the same time, there appear to be serious problems in the operation of MTPD. Cell-phone videos and eye-witness accounts show a pattern of unnecessary and excessive force. What little data is provided by the department suggests widespread and profound racial discrimination in stops and encounters and the department admits that it uses pretext stops that target young men of color.

MTPD is allowed to conceal its conduct – and misconduct – because of the structure of the interstate compact. This is authority given to MTPD by the District, Maryland and Virginia. The Council has the power to insist on changes to the compact that will create greater accountability and transparency.

There are indications that the Metro Transit Police Department engages in patterns of unlawful, ineffective, discriminatory policing in the District.

The Metro Transit Police Department polices Metrorail and Metrobus. It has nearly 500 sworn officers and has arrest powers throughout a 1,500 square mile area that includes Maryland, Virginia, and the District of Columbia for crimes that occur in or against Transit Authority facilities.

Although it is difficult to get detailed information about its practices, there are strong indications that MTPD's policing strategies in the District are discriminatory and ineffective. MTPD officers have used egregious levels of force against African-American Metro riders, particularly young African-American riders, who were suspected of low level offenses. We know that MTPD officers enforces the fare evasion law in a discriminatory manner for the express purpose of using them as a pretext to search and run warrant checks on riders—and almost everyone they stop for this purpose is black.

MTPD's policing of the Metro system appears designed to discourage the District's African-American residents, particularly those who are young, from using Metro and to keep them

confined to particular areas of the City. Its policing strategies are not consistent with the values that the District professes to hold. This Council should take action, including through its determination of who sits on the Washington Metropolitan Area Transit Authority's (WMATA) Board of Directors, to ensure that accountability and transparency mechanisms are built into the WMATA compact, and to use their authority on the board to gather information about MTPD's practices.

A. MTPD uses pre-text stops in a discriminatory manner.

In our analysis of data obtained from MTPD through a public information request, the Washington Lawyers' Committee for Civil Rights and Urban Affairs (the Washington Lawyers' Committee) found that MTPD was enforcing the fare evasion statute almost exclusively against Black people, particularly in African-American neighborhoods or in parts of the City in which African-American riders come in contact with white riders. Ninety-one percent of the tickets were issued to Black people, and 46% of tickets were given to Black youth. Our review of data found that MTPD was targeting stops heavily used by youth of color—15% of the stops were at Gallery Place.¹ Recently, WMATA released information purporting to show that incidents of fare evasion are increasing. Without releasing its methodology, it did disclose that, of the 13 “gate sensors” it has put in place at Metro rail stops to detect fare evasion, 11 of them are at the Gallery Place station.²

The reason for this racial disparity is clear. MTPD uses the fare evasion statute to engage in pretext stops—stops that are conducted so officers can search and run warrant checks on the person. In its November 29, 2018 letter to the Council, the WMATA board of directors stated that “stopping individuals for fare evasion and the ability to check identification is an important tool for Metro Transit Police Officers.” It went on to describe 3 arrests for violent offenses MTPD officers had made in a sixth month period 2018 as a result of fare evasion stops. It is important to note that MTPD officers stopped more than 17,000 people for fare evasion in 2018, almost all of whom were Black. MTPD's Twitter account also espouses pretext stops as a crime-fighting tool: It frequently tweets about fare evasion stops officers conducted that resulted in arrest for a more serious crime. This broken windows theory of policing has been proven ineffective and has a high societal cost—a cost that has been borne almost exclusively by the District's African-American residents.

WMATA's admission that it actually is using stops for low level offenses as pretext to conduct searches explains the dramatic racial disparities in the fare evasion data. If MTPD is looking to run warrant checks and conduct searches on young Black men, it is no surprise that overwhelmingly young Black men are stopped. If MTPD believes that young Black men are a threat to White riders, it is no coincidence that the greatest number of stops are at stations where white and Black riders are most likely to mix.

¹ Washington Lawyers' Committee for Civil Rights and Urban Affairs, “UNFAIR: Disparities in Fare Evasion Enforcement by Metro Police,” available at https://www.washlaw.org/pdf/2018_09_13_unfair_disparity_fair_evasion_enforcement_report.PDF

² WMATA Fare Evasion Quarterly Update, November 7, 2019, p. 3, available at <https://www.wmata.com/about/board/meetings/board-pdfs/upload/4A-Fare-Evasion-Quarterly-Update.pdf>.

B. There have been a series of incidents in which MTPD officers used excessive force against African-American riders who were suspected of low level offenses.

We know very little about MTPD's force practices. MTPD does not publish any force data, or report publicly on any internal auditing of its force practices. It also does not make its force policies public, so we do not know under what circumstances MTPD authorizes its officers to use force; how and when officers must report force; or what mechanisms the department uses to ensure officers' use of force complies with the law. It also does not release information on its force training, and whether officers are encouraged and trained to deescalate encounters to avoid having to use force. The information we do have is that MTPD officers have used very high levels of force against African-American riders who have been stopped on suspicion of very low level crimes. That information paints a deeply troubling picture of the department's force practices overall. Below are just a few examples of incidents that have received public attention in recent years.

- On September 18, 2019, an MTPD officer pepper-sprayed a young African-American woman sitting on a Metro train because she refused his commands to get off the train.³
- On June 22, 2019, MTPD officers tased and arrested an African-American man at the U Street Metro Station after he asked why the officers were questioning two juveniles on the platform.⁴
- On September 19, 2018, MTPD officers arrested and pepper-sprayed a group of African-American teens for what bystanders say began as a fare evasion stop.⁵
- On May 21, 2018, an MTPD officer arrested a 24-year old African-American woman for fare evasion at the Fort Totten Metro station. During the arrest, the officer pinned her to the ground with a Taser and ripped her shirt off, exposing her chest. A cellphone video of the arrest shows the woman straddled by one officer holding a Taser while another officer holds her down; her top is pulled down, and her breasts were exposed to the gathered crowd.⁶

³ Diana DiGangi, ABC7, "Metro transit officer captured on video pepper spraying woman during altercation," September 17, 2019, available at <https://wjla.com/news/local/metro-transit-officer-captured-on-video-pepper-spraying-woman>

⁴ Christian Paz and NBCWashington Staff, "Metro Transit Police Open Internal Investigation After Video Shows Officer Use Taser on Man," June 23, 2019, available at <https://www.nbcwashington.com/news/local/Metro-Transit-Police-Opens-Internal-Investigation-After-Video-Shows-Officer-Taser-Man-511703281.html>

⁵ Eve Zhurbinskiy, Greater Greater Washington, "A new report highlights the stark racial disparities in Metro fare enforcement," September 20, 2018, available at <https://ggwash.org/view/69171/a-new-report-highlights-the-stark-racial-disparities-in-metro-fare-enforcem>

⁶ WJLA, "VIDEO: Woman held down during arrest at Fort Totten Metro station sparks controversy," May 21m 2018, available at <https://wjla.com/news/local/video-woman-held-down-arrested-at-fort-totten-metro-station-sparks-controversy>

- On February 16, 2018, MTPD Officer Andra Vance used his baton to strike an African-American man multiple times and then choked him with the baton. This event occurred at the Anacostia Metro Station. The Justice Department indicted Vance in July 2019 on two civil rights violations.⁷
- In February 2018, Diamond Rust, a Ballou Stay High School student, was arrested for fare evasion by an undercover officer on the bus W4 bus. In front of her children, the officer slammed her face into a fence and then slammed her on the ground. Ms. Rust's injuries required twelve stitches.⁸
- In October 2016, MTPD officers at the Columbia Heights Metro station pushed a high school student to the ground as he arrested her because she refused to throw away a bag of potato chips and a lollipop.⁹

Because MTPD does not make public any data about the rate at which it uses force or its force policies, it is not possible to discern the details of MTPD's force practices. But that there have been so many problematic incidents that have become public is strong evidence that that these incidents of excessive force are part of a larger pattern of unlawful force by MTPD.

The Metro Transit Police Department is Highly Secretive and is Not Accountable to Any Jurisdiction.

C. The Metro Transit Police Department is not transparent.

Although MTPD is a public agency, it is extremely difficult to learn anything about how it operates. It makes almost nothing public. Beyond daily crime reports that show the time and location of arrests, reports and citations, it does not post any data on its website. It also does not post any of its policies. The Washington Lawyers' Committee made public information requests related to fare enforcement activities and the collection of data on fare enforcement, but WMATA did not provide any relevant documents. Although there is a mechanism on MTPD's website to make a complaint, the website does not include any information about how those complaints are handled; an explanation of the complaint investigation process; or a time line for response. MTPD does not make public any data about the complaints it receives or their outcomes, or whether it analyzes the complaints for patterns to evaluate MTPD's practices. There is no oversight agency to which the public can direct complaints, and MTPD does not

⁷ Natalie Delgadillo, dcist, "Former Metro Transit Police Officer Indicted for Civil Rights Violations While on Duty," July 26, 2018, available at <https://dcist.com/story/19/07/26/former-metro-transit-police-officer-indicted-for-civil-rights-violations-while-on-duty/>

⁸ Michael Quander, WUSA9, "Graphic arrest pictures spark debate over Metro fare evasion," February 11, 2019, available at <https://www.wusa9.com/article/news/local/dc/graphic-arrest-pictures-spark-debate-over-metro-fare-evasion/65-517431966>

⁹ Martine Powers, The Washington Post, "Metro Transit Police arrest teenager for carrying chips and lollipop into station," October 19, 2016, available at https://www.washingtonpost.com/local/trafficandcommuting/metro-transit-police-arrest-teenager-for-carrying-chips-and-lollipop-into-station/2016/10/19/1360a014-9627-11e6-bb29-bf2701dbe0a3_story.html

seem to engage in any outreach or community engagement to share or collect information about its practices and their effectiveness. In short, MTPD is incredibly opaque.

There also is reason to suspect MTPD is not entirely forthcoming in its public statements about its activities. The Washington Lawyers' Committee's attempts to obtain information about MTPD's fare evasion practices is a salient example. During the public debates leading up to the Council's vote on the fare decriminalization bill, WMATA made various public statements that MTPD officers rarely, if ever, arrested riders for fare evasion alone—that anyone arrested for fare evasion has also committed a second, more serious offense. The Washington Lawyers' Committee then submitted a public information request for incident reports associated with each arrest for fare evasion in which fare evasion was the only charge for which the person was arrested between January 2016 and December 2018. Instead of responding that there were no such documents, as would have been consistent with WMATA's public statements, WMATA denied the request as overly burdensome, stating that there were 2200 arrests for fare evasion alone during that time period.

WMATA has made various statements to the Council, including in its recent budget presentation, about the amount of revenue it loses through fare evasion. But WMATA has never explained how it is collecting that data. In each of the requests Washington Lawyers' Committee has made seeking that underlying methodology, WMATA has not provided any responsive documents.

In addition to making it difficult to understand and provide feedback to and oversight of MTPD, this opacity is itself indicative of deeper cultural issues within MTPD. Most modern police departments have come to understand that it cannot be effective without partnering with the community to increase public safety. And although many police departments are by nature guarded, they provide much more information about their mission, stated values, and practices. Most major police departments post at least some of their policies on line; they engage with some sort of civilian oversight; they hold community meetings; they provide audits and reports on stop, search, and arrest data, and their use of force. That MTPD does not see the value in engaging with the community or providing any information about its practices or policies is a troubling indicator of how it views its role vis-a-vis the people it is sworn to serve.

D. There is little oversight of Metro Transit Police and it is not accountable to any entity.

A large part of the reason MTPD does not feel compelled to share with the public any information about its policies and practices likely is that there is almost no entity to whom the department is accountable. The fact that MTPD exists pursuant to an interstate compact between Maryland, Virginia, and Washington, DC that is approved by Congress, authority for oversight is spread between these four entities. As a practical matter, none of these entities can exercise any oversight over the MTPD. And the current WMATA compact does not provide for any mechanism for community or external oversight. It does not require any public reporting of any kind. Another effect of the fact the WMATA exists pursuant to an interstate compact is that it enjoys immunity from suit pursuant to the Eleventh Amendment to the United States Constitution. Functionally, that means that a victim of MTPD misconduct can sue individual

officers, but it cannot sue MTPD or WMATA and therefore can never address systemic issues through litigation.

Taken together, these facts mean that MTPD is answerable to literally no one, including the courts. It is no surprise, then, that MTPD has chosen to operate as if it is answerable to no one. As we have seen, this kind of immunity—immunity from public input, from oversight from elected representatives, and from suit—results in an agency that engages in patterns of misconduct with impunity.

The Council must determine how it could achieve some amount of oversight. It should develop oversight mechanisms, including a civilian oversight body, that could be included in the next compact, and then work with Maryland and Virginia to ensure these provisions are included in the next iteration of the compact. In choosing its representatives for the WMATA Board, it must require that those representatives commit to taking steps to increase oversight of and accountability within MTPD, including by requiring MTPD to provide information about its activities to the Board.

Conclusion

No police department should be beyond public scrutiny and oversight by elected officials. Police are given extraordinary powers and, as we have seen, without accountability and transparency, these powers are subject abuse. As Justice Brandies said: “Sunshine is said to be the best disinfectant and electric light the best policeman.” We needs some sunshine and electric light on MTPD by changing the compact.