

New School Board of Trustees Statement in response to the Ad Hoc committee's investigative report on events of April 10, 2009

The New School Board of Trustees has read the investigative report commissioned by the Ad Hoc Committee of Review and the Ad Hoc Committee's Memorandum to Chair Studley, transmitting that report and recommending next steps in order to implement the Committee's Statement of General Principles in regard to open expression and demonstrations. We appreciate the effort made by the Ad Hoc Committee of Review and applaud the spirit of collaboration and purpose among its members that infused this endeavor. We are grateful for their effort to address through an independent investigation the confrontational and widely publicized event on our campus that took place on April 10, 2009.

The investigative report describes in detail the events surrounding April 10, 2009 – the actions of a group of New School students and the University Administration's response. We accept the report as representing a thorough, professional and independent investigation of the facts and circumstances of these events.

We believe that the unauthorized occupancy of the building was an intentional trespass, a violation of law and an infringement of the rights of other members of the university community. We condemn such behavior as incompatible with the values of our university. The report also provides the basis for our concluding that under difficult circumstances President Kerrey acted responsibly.

We strongly support the Ad Hoc Committee's recommendations to create a special committee to examine and revise the "Guidelines on Demonstrations in University Facilities" and the "Student Code of Conduct" for student protest and related activities, and the Chair of the Board and President Kerrey will work together to move this recommendation forward. We expect these Guidelines to state unequivocally that the unauthorized occupation of any building or any space that impinges on the rights of others constitutes a serious violation.

We deeply regret that the events of April 10, 2009 resulted in the disruption of the lives and activities of many members of the University community, the disruption of the public community surrounding the University, and its impact on two University employees.

In the period since the April 10 occupation, the University has made significant strides in lessening the mistrust and failures of communication identified in the report. The Board of Trustees is committed to further progress, and particularly invites all segments of the University community to work together to maintain the campus as a place where ideas flourish and challenges to existing ways of thinking are welcomed, but the rights of the University members are respected.

Date: September 14, 2009

To: Julien Studley, Chairman of the Board of Trustees of the New School

From: The Ad Hoc Committee of Review

On May 5, 2009, you and the Co-chairs of the Faculty Senate formed the Ad Hoc Committee of Review to conduct a detailed inquiry into the facts relating to the occupation of 65 Fifth Avenue on April 10, 2009 and subsequent events. This Committee was composed of two of the three co-chairs of the Faculty Senate (Jim Miller and David Howell), two students selected by the chair of the Student Senate (Ben Fox and Meaghan Linick), a representative of the Deans (Lisa Servon), a representative of the Administration (Doris Suarez), the Provost (Tim Marshall), and three Trustees (Bevis Longstreth, Skip Stein, and Bob Mundheim).

The memo creating the committee described its tasks as follows:

- Since there are various versions (often shifting versions) of the facts relating to the events of April 10, the Committee will have as its first task, the development of an accurate and authoritative statement of the facts. The Committee expects to engage independent counsel to assist its inquiry and to make a final report which will be publicly available.
- To review the adequacy of the University's guidelines governing demonstrations and other expressions of dissent in our community and make appropriate recommendations.

The Committee met on May 14 and 19, 2009, to consider the selection of independent counsel. Following the consideration of several firms, the firm of Park & Jensen LLP was retained and the Committee met with the firm on May 28, 2009 to spell out in detail the scope of the assignment. Drafts of the report were discussed by the Committee on July 16, 2009 and August 19, 2009. A final copy of the report was delivered to the Committee on August 31, 2009, prior to its meeting on September 3. A copy of that report is appended as Exhibit 1 to this memorandum.

Although the Committee worked closely with Park & Jensen LLP in the preparation of the report and each member of the Committee had substantial opportunity to make suggestions relating to the report, the report is Park & Jensen's, not the Committee's. However, the Committee believes that the report was the product of an independent, objective inquiry performed with a very high degree of competence under difficult circumstances. The Committee thinks that it provides the most authoritative and comprehensive statement of the facts relating to the April 10 occupation and subsequent events of which it is aware.

To address the second task put to the Committee, it has drafted a statement of General Principles for Guidelines on Open Expression and Demonstrations in the New School community, a copy of which is appended as Exhibit 2 to this memorandum.

The General Principles focus primary attention on the appropriate procedures for addressing issues of open expression and demonstrations in the New School community. Although the Committee believes that a specified person must have the responsibility (and be accountable) for making on-the-spot decisions, it also strongly believes that consultation and inclusion of a broad segment of the University community to the extent practicable in arriving at decisions will result in better decisions and greater community support for them. In this regard, the Committee is underscoring a direction in decision-making in which the University has been increasingly moving in the past months.

The General Principles do not address a number of issues which are important and eventually need to be addressed. These issues include:

- Identification of specific conduct which would violate the Guidelines;
- The appropriate sanctions for specific types of violations;
- Treatment of disruptive conduct by persons who are not members of the University community;
- The circumstances under which members of the University community participating in activities which violate a Guideline would be required promptly to produce to the person designated in paragraph 4(a) of the General Principles evidence of their identity and University affiliation.
- The circumstances under which requiring a permit to engage in demonstrations and other exercises of open expression would be necessary to allow appropriate allocation of available and suitable space for such activities and the amount of advance notice needed;
- The treatment of labor union related activity under the Guidelines.

These General Principles must be translated into a detailed set of Guidelines and Procedures whose formulation should be considered in conjunction with the existing Guidelines on Demonstrations in University Facilities, the Student Code of Conduct, the Non-Academic Disciplinary Procedures, and other policies and procedures governing the conduct of members of the University community. The Committee understands that the Standing Committee on Free Speech Activities and Expression (composed of three students, two faculty members, two administrators, and two public members) has already begun a review of the present Guidelines on Demonstrations in University Facilities. The Committee hopes that the General Principles will inform any on-going review by this group. The Committee strongly recommends the prompt creation of a newly constituted, broad-based group which has the single mission of drafting appropriate policies and procedures governing open expression and demonstrations in the University community.

The Committee thinks it important that a comprehensive review and a restatement of the University's policies and procedures relating to open expression and demonstrations be completed quickly. It hopes that the Trustees will encourage the University to make resources available to allow the necessary work to be accomplished as early this fall as possible. Until such time, the Committee recommends that, to the extent compatible with existing policies and procedures, the General Principles in Exhibit 2 serve as a guide for dealing with issues of open expression and demonstrations which may arise.

May 5, 2009

The Chair of the Board of Trustees and the Co-chairs of the Faculty Senate have agreed to form a Committee, to be convened by the Chairman of the Board, to conduct a detailed inquiry into the facts relating to the occupation of 65 Fifth Avenue on April 10, 2009 and subsequent events. This Committee will consist of three Trustees (Bob Mundheim – Chair, Bevis Longstreth, and Skip Stein), the Provost, a representative of the Deans chosen by the Provost (Lisa Servon), two co-chairs of the Faculty Senate (David Howell and Jim Miller, Committee Co-Chair), two student representatives chosen by the Student Senate from the members of the Standing Advisory Committee on Speech Activities and Expression, and a member of the Administration designated by the President (Doris Suarez). The Committee expects to begin its work as soon as all of its members are chosen.

The Committee will have two tasks:

- Since there are various versions (often shifting versions) of the facts relating to the events of April 10, the Committee will have as its first task, the development of an accurate and authoritative statement of the facts. The Committee expects to engage independent counsel to assist its inquiry and to make a final report which will be publicly available.
- To review the adequacy of the University's guidelines governing demonstrations and other expressions of dissent in our community and make appropriate recommendations.

The New School is precious to all of us. We hope our collective willingness to engage in establishing the facts about what happened on April 10 and thereafter will help us all to move forward while simultaneously building new bridges among students, faculty, academic leaders, the Administration, and the Trustees.

Among the questions we expect our report to inquire into are the following:

1. How was entry into 65 Fifth Avenue effected early in the morning of April 10?
2. How many persons entered the building at that time?
 - (a) How many were students or faculty of the University? How many were not connected with the University?
3. What was the stated purpose of the entry and how was that purpose communicated?
4. Did the persons entering the building threaten or cause physical harm to any persons or property in the building?
5. Did any of the persons in the group that entered wear ski masks, carry weapons, or articles that could be used as weapons or threaten harm to people or property? Did people who had contact with the group and observed its behavior believe they or others or property were being threatened with physical harm?
6. What information about the entry, or the behavior of the entering group was initially communicated to University Security?
 - (a) To whom did University Security communicate this information?
 - (b) Was additional information communicated to University Security? When? Was this information further communicated? To whom?
7. When were responsible senior members of the Administration first notified of the occupation of 65 Fifth Avenue?
 - (a) What was the subsequent chain of notification?
 - (b) When President Kerrey was notified, what facts were communicated to him?

8. Who initially communicated with the police department about the occupation of 65 Fifth Avenue? What information was given to the police department?
 - (a) To which notification did the police respond?
 - i. What was the response?
 - (b) Did any later call provoke a further police response? Whose call and what response?
 - (c) To what extent, if any, did the police respond to specific requests from any non-police department request for specific types or levels of police action? To what extent was police action dictated by internal police guidelines for dealing with similar demonstrations.
9. Were University guidelines relating to demonstrations observed by the occupiers, other students, faculty, and the Administration?
 - (a) What aspects of the guidelines were not followed?
 - i. Were there reasons for their not being followed?
10. How did negotiations for the occupants to leave the building start?
 - (a) At what point were the occupiers asked to leave the building?
 - (b) Did the occupiers request a negotiating intermediary? If so, how long before one was identified?
 - i. What role did the intermediary play?
 - (c) At what point did the occupiers indicate that they would leave the building peacefully?
 - (d) Were the occupiers told that, since the police believed that they occupied the building unlawfully, they would have to be identified and subject to possible criminal sanctions?

- (e) What was the reaction of the occupiers?
 - (f) Did any try to leave the building without being identified?
 - (g) Did occupiers open the doors to let the police into the building? Or did the police force the door open?
 - (h) Did any of the occupiers resist arrest? Were there forcible arrests with injury to the persons arrested or the police?
11. Are there University policies and procedures for communicating about event such as these with the University community and with the general public?
- (a) If such policies and procedures exist, to what extent were they followed?

Julien Studley

Jim Miller

David Howell

Exhibit 2

General Principles for Guidelines on Open Expression and Demonstrations in the New School Community

1. The New School by its nature and its traditions recognizes free speech as a vital part of the University environment. Demonstrations, rallies, picketing, teach-ins, distribution of petitions are appropriate methods of challenging existing ways of thinking in the University or society and have a role in bringing ideas to the attention of the University community.
2. While the University is dedicated to the free expression of ideas, it also has an obligation to impose reasonable restraints on such expression so neither the University nor members of its community are prevented from carrying on their activities
3. These restraints are designed to prevent
 - (a) A risk of harm to persons or property or intimidation of members of the University community
 - (b) Disruption of University functions. University functions includes any authorized operation or activity of the University or members of its community, including instruction, research, study, administration, habitation, social life, space allocation and control, food supply, and other functions directly related thereto. Specifically included are both functions of fixed-time duration (e.g., classes, examinations, lectures, etc.) and functions of continuing duration (e.g., the operation of libraries, research facilities, maintenance shops, computers, business offices, etc.). Also included are functions ancillary to directly educational purposes such as meetings, disciplinary proceedings, and social events sponsored by any University-approved organization.
4. When a demonstration or other expression of ideas appears to violate the Guidelines, an affected member of the university community shall notify [office].¹
 - (a) A designated person within the office or her delegate shall promptly ascertain the facts and, to the extent practicable, seek to consult with appropriate persons in a specially created network of persons chosen from a broad section of the University community.
 - i. Persons chosen for the advisory network should receive appropriate training with respect to the Guidelines and their implementation.

¹ [office] shall be an office within the University whose members can receive complaints and act on them promptly. For example, this office could be that of the Vice President for Student Affairs

- (b) If the person designated in 4(a) or her delegate concludes that any activity violates the Guidelines, such person shall communicate her decision to those persons who are violating the Guidelines and direct that such activity cease promptly. Failure to follow such directive is a separate and serious violation of the Guidelines.
 - (c) Even if no directive has been issued with respect to any particular activity, such activity may violate the Guidelines.
- 5. When a directive of the person designated in 4(a) or her delegate is not obeyed, the University must consider how to effect compliance with the directive or the Guidelines.
 - (a) Most commonly compliance can be effected solely by the use of University resources.
 - (b) The President, with the advice of the Provost, shall designate a person who shall have the authority to order and direct the use of such University resources. In exercising such authority, such person shall, to the extent practicable, consult with appropriate persons in the network described in 4(a).
 - (c) If there is a need to resort to non-University resources, the President shall make such decision, after consulting to the extent practicable with the Provost and appropriate persons in the network described in 4(a).
- 6. Any person in the University community who violates the Guidelines shall be subject to disciplinary proceedings.
 - (a) Disciplinary proceedings determine whether a violation of the Guidelines has occurred and, if a violation has occurred, appropriate sanctions for committing the violation.
 - (b) Prompt compliance with a directive of the person designated in 4(a) or her delegate and prompt remediation of any harm caused shall be taken into consideration in determining disciplinary sanctions.
- 7. Decisions in contested disciplinary proceedings shall be made by panels chosen from a specially created pool of faculty, administrators (including persons in the office of a dean), and students. The Provost or the Provost's delegate shall appoint from this pool the panel for each disciplinary proceeding. Each panel in a complex case, as designated by the Provost or the Provost's delegate, shall include at least one faculty member, one administrator, and one student.
 - (a) Decisions by any disciplinary panel may be appealed to a standing appellate panel appointed by the Provost. The Provost shall appoint a panel chair who may designate sub-panels to hear and decide individual appeals.
 - (b) The appellate panel should have jurisdiction to issue advisory opinions.

- (c) Decisions of disciplinary panels and the standing appellate panel shall be published to the University community. Normally a statement of the reasons shall be published with the decision or shortly thereafter.
 - i. Due concern for the protection of privacy interests (e.g., by omitting in appropriate cases the identification of persons subject to the disciplinary process) is not incompatible with informing the University community about decisions made in implementing the General Principles and their rationale.
8. The Guidelines and the name of the office and the person designated in 4(a) should be publicized to the University community at the beginning of the academic year (or whenever the name of the office or person designated changes) and on the University website.

PARK & JENSEN LLP

M E M O R A N D U M

To: Review Committee

From: Tai H. Park

Subject: New School Internal Investigation

Date: May 27, 2009

As discussed at the Committee meeting on May 19, 2009, I set forth a preliminary outline of the factual issues that I understand to be under investigation by the Committee regarding the student demonstration on April 10, 2009 (“the Demonstration”). The Committee will review the outline and provide me with corrections and further clarity on the precise scope of the mandate for investigation. To assist the Committee in understanding the investigative process, I have also included descriptions of the sources of information and the investigative methods that will likely be employed to attempt to reach reliable conclusions as to the factual issues.

Because I created this outline based on a preliminary review of a limited number of materials relevant to the Demonstration, as well as my relatively brief initial meeting with the Committee, the outline may contain items that are either incorrect or irrelevant. It also may omit other matters and issues deemed relevant by the Committee. The Committee will make necessary corrections prior to our next meeting.

Purpose of the Investigation

It is my understanding that the primary purpose of the investigation is to ascertain those facts and circumstances of the Demonstration that will help the Committee reach judgments about what transpired over the course of the Demonstration. These judgments will in turn assist the Committee in making recommendations to the Board of Trustees with respect to the Guidelines on Demonstrations in University Facilities (“the Guidelines”).⁽¹⁾ Another

(1) I was informed that the Administrative Affairs Committee of the Board of Trustees has responsibilities respecting the Guidelines. That entity presumably would work with the Committee in connection with making changes, if any, to the Guidelines.

purpose of the investigation is to provide information to the New School community that explains the events surrounding the Demonstration with as much clarity as can be achieved under the circumstances.

Importantly, I have been informed that this investigation is not intended to reach conclusions about wrongdoing or to ascribe blame. Accordingly, the eventual report of findings will not contain such judgments or conclusions. It is understood, of course, that even a plain recitation of certain facts may at times unavoidably lead to a conclusion of misconduct. We are not being asked to structure the report in such a way as to avoid a factual description of certain conduct just because it may reflect poorly on any person or persons.

Outline of Factual Issues

Assuming the above discussion accurately summarizes the key purpose of the investigation, I believe the factual issues described below could be within the scope of the investigation. I arrived at this list based on my meeting with the Committee on May 19 as well my review of the various emails and other materials sent to me by you May 15, 2009 and sent by other Committee members during the course of last week.

As discussed herein, many of the facts that relate to these issues are not likely to be controverted and are already understood. Nevertheless, the investigation would seek to confirm those facts. The facts that are both not well-understood and important to the Committee's recommendation will receive the greatest focus during the course of the investigation. It should also be understood that in many if not most investigations, new facts and issues come to light that had not been foreseen when the scope of the investigation was initially determined. If that occurs here, I would expect to ask the Committee for instruction on whether to pursue the new line of factual inquiry before doing so.

I have divided the outline of facts into two parts: Relevant Facts and the Facts Requiring Resolution. The former is the general set of facts necessary to a clear understanding of what happened and why on April 10. The latter is the subset of relevant facts that may be of most importance to the Committee and its recommendations. It is this set of factual issues that I believe will require our chief focus.

A. Relevant Facts

1. Events Post-December 15 and Pre-April 10
 - a. Degree of planning for April 10, if any, by students/occupants of Building; involvement, if any, by nonstudents in providing guidance or support

- b. Degree of contingency planning or monitoring, if any, by School administration personnel
 - c. Degree of contingency planning or monitoring, if any, by NYPD
 - d. Relationship if any, between any contingency planning and School personnel actions during morning of April 10.
 - Same for NYPD
2. The Building
- a. Normal Usage by School community
 - Level of disruption to school functions caused by occupation. Actual and perceived.
 - b. Schedule for access by School community
 - Access by public?
3. Persons enter and occupy Building
- a. Number and identity of persons and their affiliation
 - Leadership
 - Purpose(s)
 - Plan/organization
 - b. Manner of entry
 - Dress
 - Equipment
 - Conduct (2)
 - c. Conduct within Building
 - Destruction of property?
 - Blocking access?

2 Questions related to “conduct” will include inquiry into the actor’s state of mind. For example, if ski masks were worn, what was the person’s intent in doing so.

- Interaction with Rodriguez
- d. Rodriguez's subsequent interaction with Benintendo, and with NYPD
 - Interaction with Benintendo
 - Interaction with NYPD, with Mozen (others?)
 - Activity on roof
 - Any efforts to block entry
 - Any efforts to leave
 - Decision to permit entry by NYPD
- 4. School personnel seek NYPD assistance
 - a. Identify all callers from School to NYPD
 - b. Benintendo
 - Reason for his 911 call
 - Any awareness of identity or purpose of occupants
 - Any actions he interpreted as creating harm or threat of harm?
 - Authority to call NYPD; under what circumstances
 - Specific authority to call NYPD on this matter
 - c. Sikorsky
 - Role
 - Level and nature of interaction with NYPD, before and on April 10
 - Interaction with students/occupants
 - d. Kerrey
 - Decision to have School act as complainant
 - Bases
 - Sources of information re occupation

- Level and nature of interaction with NYPD, before and on April 10
- e. As to all personnel: reasons for decision not to seek resolution without NYPD intervention.
- f. Role of other personnel: Marshall, Reimer, Murtha, Suarez
 - Reason for students' insistence on talking only with Marshall
- 5. NYPD Presence and Action
 - a. Identity of units responding and command structure
 - Helicopters?
 - Reason for response in those numbers
 - Response to 911
 - Subsequent arrival of other units
 - b. What told, what done, pursuant to plan or reactive?
 - Level of coordination
 - Hostage Negotiation Unit
 - Unit entering Building
 - Central Command?
 - Any plan to talk students out
 - Interaction with Mozen, Reimer, Marshall
 - Deceptive assurances given?
 - Timing of decision to effect arrests
 - Importance of Administration's decision to act as complainant.
 - Timing and Nature of interaction with Building occupants
 - Timing of entry into the Building
 - Attempted entry prior to Sikorsky's announcement?
 - Use of Force?
 - Nature of interaction with public outside Building

- Use of Force?
 - Interaction with security videos and citizen videographers
 - Evidence recovered
 - Compliance with NYPD Guidelines?
 - Guidelines on school demonstrations?
 - b. NYPD personnel involved in monitoring student activities prior to April 10?
 - Nature of School relationship with NYPD in filling security needs
 - Role of December 15 demonstration and/or interaction with Kerrey personally in the police response on April 10.
6. Post April 10 – Response to Event
- a. Administration accounts to press and Community
 - Accuracy, bases?
 - b. Suspension of students
 - Process, bases?
 - c. Enhancement of security levels; monitoring?

B. Facts Requiring Resolution

- 1. Manner of entry by Occupiers/Students and its effect:
 - a. Breaking and entering or entry permitted by another student who stayed in Building overnight?
 - If person stayed overnight, what if any rules relate to such overnight presence in the Building?

- b. Did the occupation result in disruption to normal School functions or have the potential for doing so?
 - c. Was the intent of the occupiers/students to disrupt normal School functions?
 2. Conduct in Building:
 - a. Threatening demeanor and behavior toward Rodriguez?
 - b. Even if not intended, was the effect on Rodriguez one of fear and threat to safety?
 - c. Destruction of School property?
 - d. Injury inflicted on Benitendo?
 3. Calling in NYPD:
 - a. What precisely were the facts and assumptions that caused a 911 call to be made, and were there any other calls that led to presence of large police force.
 - b. Alternative to calling in NYPD meaningfully considered? If not, why not?
 - Did Guidelines require or provide for consultative process prior to calling in police?
 - Did Administration and NYPD plan for contingency of another student occupation after December 15; and if so what if any impact did such planning have on the events of April 10?
 4. Police Conduct:
 - a. Did NYPD engage in undercover monitoring of student activities prior to April 10.
 - b. On April 10, who was in command, what were the instructions, plan and agenda?
 - c. What priority was placed on coordinating the resolution of the Demonstration through negotiation, and were police divisions aware of the efforts of the NYPD Hostage Negotiation Team?
 - d. Was police conduct and presence consistent with addressing student occupation of university property?
 - e. Did their conduct otherwise comply with NYPD guidelines and regulations?

5. Post April 10:
 - a. Was incorrect information knowingly issued to the press or School community regarding the facts and circumstances of April 10 and if so, why?
 - b. What was the basis for suspension of the students?
 - Was the suspension consistent with School guidelines?

Investigation Processes

Upon the Committee's approval of the scope of our investigation, we would expect to begin the investigation by reviewing and organizing the information collected by the Committee to date. Videos, transcripts of interviews and other records would fall in this category. We would also promptly send out requests for other relevant records, some of which will likely be readily accessible and some of which may not be accessible for several months, if at all. The following represents a nonexhaustive list of records we would seek:

<i>Source</i>	<i>Records</i>
Administration	Email records of a select group of witnesses; All security videos; Building layout and schedule of usage; Policies and guidelines re discipline of students; Telephone records; Policies or procedures regarding response to demonstrations other than Guidelines
NYPD Legal Department	911 Call record for April 10; All other radio transmissions re Event on April 10; Videos; Evidence vouchered; Reports filed; Report of other police activities regarding students between Dec. 15 and April 10.
CCRB	Record of all complaints filed in connection with Event
Manhattan D.A.'s Office	Charging instruments; Case files (subject to defense disclosures)

Defense Counsel

Defense statements (if defendants will not be made available)

(Members of the Committee may identify other potential sources of relevant records. Moreover, as we conduct interviews of witnesses, we will likely learn of additional sources).

Ideally, we would not begin the interview process until after we have had a chance to review the relevant records. As a practical matter, however, given the short time frame for the investigation, we would expect to “double-track” the interviews with the document collection. This may mean that we may have to interview some witnesses more than once to circle back to a witness if documents received subsequent to the first interview require follow-up.

Based on our preliminary review, we would expect to ask to speak with between 20 and 30 witnesses. They include: Kerrey, Murtha, Suarez, Reimer, Marshall, Mozen, Benitendo, Sikorski, Rodriguez, select persons arrested inside the Building (and/or their defense counsel), videographers responsible for the relevant videos made public, and select members of the NYPD command who consent to speak with us.

We would strive to conclude our investigation and issue a report to the Committee within 6 weeks of receiving authorization to commence the investigation. It should be noted that if we are unable to obtain relevant records or the cooperation of individual witnesses, we may not be able to make a finding of fact as to certain of the issues in this time frame. In that event, the report will so indicate.

I look forward to speaking with the Committee about this memorandum at our next meeting.

PARK & JENSEN LLP

To: Review Committee of the Board of Trustees
Of the New School

From: Tai H. Park
Douglas R. Jensen

Subject: Report of Internal Review of April 10 Occupation

Date: August 31, 2009

We set forth herein the report of our findings regarding the occupation of 65 Fifth Avenue on April 10, 2009 (“the Occupation”). We note that we have not received information from the individuals arrested during the Occupation or from the New York City Police Department. We do not believe that the conclusion set forth in the last section of this report is likely to be materially altered by additional information that these sources might be prepared to offer at a later point in time. We have agreed that if the students arrested and/or the police department subsequently do provide material information, we will supplement this report as necessary.

The report is in four parts: (I) introduction, (II) description of the scope of our review and the methodology employed, (III) findings of fact, and (IV) conclusion.

I. Introduction

On April 10, 2009, nineteen individuals (the “Occupants”) were arrested by members of the New York City Police Department (“NYPD”) for illegal entry into and occupation of a New School (“University” or “School”) building at 65 Fifth Avenue (“the Building”). Three other individuals outside the Building were arrested on charges relating to obstruction of police functions. Prior to and during their arrests, these three individuals and police officers engaged in a physical struggle. Moreover, during the course of the day, police officers directed pepper spray at certain of the Occupants through a side door of the Building. Of the twenty-two persons arrested, fourteen are current or former University students, with the other eight having no association with the University of which we are aware. All arrested persons face criminal prosecution and the University student Occupants also face school disciplinary proceedings.

In the wake of the Occupation, the Board of Trustees of the University delegated to a special review committee (“the Committee”) the task of studying the facts and circumstances surrounding the Occupation and determining whether University policy regarding responses to school demonstrations should be clarified or otherwise modified.¹ Different groups in the New School community had criticized the manner in which the University handled the Occupation.

¹ The Committee is comprised of: three members of the Board of Trustees, the provost, two members of the student body, two co-chairs of the faculty senate, a Dean, and a representative of the non-academic Administration.

Some suggested that it was unnecessary to have the NYPD called in to take control over what they viewed as a peaceful demonstration. Others questioned the extent of the force used by members of the NYPD to deal with the Occupation. The Committee decided to engage outside counsel to conduct an independent review of certain facts deemed relevant to its task. On May 27, 2009, our firm was selected to conduct that review.

While there are myriad issues arising from the Occupation that different members of the New School community believe to be important, the Committee directed our firm to focus on those issues that address the core purpose of the investigation: to ascertain those facts and circumstances of the Occupation that will help the Committee determine whether it should recommend any measures to the Board of Trustees, including any amendments or modifications to the Guidelines on Demonstrations in University Facilities (“the Guidelines”). The Committee made clear that the review was not intended to reach conclusions about wrongdoing or to ascribe blame. Based on our review of certain preliminary materials as well as our discussions with the Committee, we isolated those factual issues that required attention. The issues are set forth in our memorandum, dated May 27, 2009, addressed to Robert Mundheim, Board of Trustees member and co-chair of the Committee (“Issues Memorandum”). That Memorandum is annexed hereto as Exhibit 1.

II. Scope and Methodology

The scope of our review is described in the Issues Memorandum.

In carrying out our review, we interviewed key members of the non-academic Administration (the “Executive Staff”), including Robert Kerrey and James Murtha, as well as members of the academic Administration, including Dean Lisa Servon and Interim Provost Tim Marshall (the “Academic Administration”). We also interviewed members of the University Security department, including Tim Sikorski and John Benintendo, as well as maintenance worker Carlos Rodriguez. We spoke to members of the Committee, some of whom had substantial personal knowledge of the events discussed in this Report, as well as members of the faculty and the student body.

Due to ongoing criminal proceedings against them, the Occupants declined to speak with us. The District Attorney’s office provided very basic information such as copies of the criminal complaints. The NYPD did not grant us access to its chiefs and detectives known to be at the scene around the Building during the occupation. A former student (“the Former Student”), who was in contact with the police and at least one of the Occupants on the morning of April 10, 2009, also declined to speak with us.

There was a substantial body of documents, in both written and video form, that provided important information. We initially reviewed the preliminary materials provided by various members of the Committee. These included a provisional timeline created by Professor Jim Miller along with the correspondence between Professor Miller and the Former Student and Provost Tim Marshall that went into the timeline's creation as well as the Guidelines on Demonstrations and other emails dated around the time of the Occupation.

Thereafter, we also reviewed various primary materials, which we obtained in coordination with members of the Committee, faculty, Executive Staff and Security department. Such materials included emails from each of the witnesses to whom we sent requests. Additional documentation included phone records, internal reports, invoices, medical records, the Student Code of Conduct, the University's Disciplinary Procedures, and the Guidelines on Demonstrations in University Facilities.

Finally, we acquired additional primary written materials online through the New School Website, the New School in Exile Website, the Reoccupied Blog, President Kerrey's blog, Twitter postings, and various student blogs and articles. Video evidence reviewed included: surveillance video containing footage between 2:00 a.m. and 6:00 am from four cameras inside the Building; over 20 videos containing footage relating to the December

occupation, the April Occupation, various New School in Exile events, and other gatherings and demonstrations held in the wake of the April Occupation that were available online.

Despite our requests, we were unable to acquire materials from counsel to the students arrested in connection with the April Occupation. In addition, the NYPD did not provide any materials for our review, although on July 17, 2009, they indicated that pursuant to New York Freedom of Information Law (“FOIL”), they could provide certain information, including 911 call information, within four to five weeks of our request. We do not anticipate that the charges against the students will be resolved until mid September at the earliest. We do not anticipate that these sources of information will provide information that would materially affect our conclusions.

III. Findings of Fact

A. Conflicts Emerging in December 2008

1. Faculty Vote of No Confidence

On December 8, 2008, president Bob Kerrey transmitted a University-wide email announcing the departure of then-provost Joseph Westphal. In that announcement, Kerrey also stated that, until a new provost was found, Kerrey himself would assume the role of chief academic officer.

On December 10, 2008, the faculty senate convened a special meeting to discuss Westphal's resignation and Kerrey's assumption of the role of provost. At the meeting, overwhelming majorities of the faculty passed resolutions expressing the senior faculty's lack of confidence in the leadership of president Kerrey and executive vice president James Murtha.

Among other cited reasons for the votes of no-confidence were:

- “[T]he constant turnover of provosts”;
- The “widespread perception that the President has allowed the Executive Vice President to frustrate and sometimes sabotage many of the academic initiatives of the Provost, Deans and faculty”;
- Kerrey's unilateral dismissal of Westphal and appointment of himself as provost for an interim period; and
- “unilateral, impulsive, and sometimes secret decision-making, concentrating power in the hands of the President and Executive Vice President, without due deliberation or proper consultation with Deans and Faculty.”

The last regular Board of Trustees meeting of the semester also took place on December 10, the same day as the faculty vote. At the meeting, president Kerrey declared an executive session to address the no-confidence vote. The Board of Trustees offered their support for Kerrey at the meeting.

On December 12, 2008, Kerrey transmitted a letter to the faculty and deans stating: “[m]y critics are right about my decision to assume the responsibilities of chief academic

officer during the search for a new provost.” In the letter, Kerrey indicated that he would work with the deans and faculty to find a suitable interim provost.

On December 16, 2008, Kerrey attended a faculty town hall meeting held in the Tishman auditorium, in which the president responded to statements made by faculty. As explained below, also in attendance were approximately ten students with duct tape over their mouths in symbolic protest of the Executive Staff’s policies. The meeting consisted largely of faculty statements of opposition to Kerrey and his management of the School.

2. Student Response to Votes of No-Confidence

On Sunday, December 14, 2008, a group of about 30 student activists from various student organizations and affiliated with various schools at the University convened a meeting to address concerns regarding the Executive Staff and to discuss a response to the faculty votes of no-confidence. At the meeting, students expressed dissatisfaction with Kerrey and Murtha as well as the School’s library and student space, the opacity in the management of the School’s finances, the cutting of educational programs without input from faculty or students, and the general top-down organization of the Executive Staff which increasingly “corporatized” the school, and did not allow for academic input into many University decisions which had substantial impact on academic life.

Students at the December 14th meeting decided to organize a protest at the faculty town hall meeting with president Kerrey scheduled for December 16, 2008. On the morning of December 16, 2008, about 40 student protesters arrived at Tishman auditorium with duct tape over their mouths and handed out printed statements voicing their complaints about the mismanagement of the University. Although the meeting was for faculty only and Security moved to prevent entry by the student protestors, about ten students managed to physically push past Security and enter Tishman auditorium where the meeting was being held. The students sat in the second row of the auditorium refusing to leave the meeting, but did not otherwise cause a disturbance.

Another student meeting was held the day following the faculty town hall meeting protest. This time 70-80 students, both graduate and undergraduate, attended. According to a student who attended the meeting, the graduate students from the New School for Social Research took a lead role in the meeting. At some point during this meeting the name New School in Exile was coined for the group.

The group itself, however, remained an informal association, which never sought official recognition from the School. The group as a whole was concerned with transparency in investing activities, involvement of students in matters affecting the University, adequate study and library space, including maintaining for student use the Building at 65 Fifth Avenue – which

was scheduled to be demolished, addressing faculty salary issues, and removing Kerrey and Murtha from office.

As described below, there is reason to believe that the members of the NSIE did not always agree on the agenda to be pursued or the means to be employed.

3. The December Occupation

The first occupation involving the Building took place between December 17, 2008 and the early morning hours of December 19, 2008 (the “December occupation”).

At some point during the December 16th meeting in which the NSIE was formed, more militant action, including an occupation of the Building, was suggested. The idea for the occupation was ultimately put to a vote. At first, certain members of the Radical Student Union (“RSU”), a recognized school organization, disagreed with the strategy and timing of occupation, arguing that it was too late in the semester to stage such a protest and suggesting that more organization of the student body and study of the strategy was required. Other students at the meeting urged immediate action as early as the night of the 16th. Eventually the group voted and approved the strategy of occupation, with the RSU putting its weight behind the strategy as well. It was decided that the occupation would commence the following day.

The occupation began on December 17, 2008 between 7:00 and 8:00 p.m., when a group of about 30 NSIE members dropped banners announcing the occupation of the cafeteria of the Building and their intention to remain there unless their loosely defined set of demands – including the resignation of Kerrey and Murtha and broader access to student space – were met. The occupation was not initially publicized to the student body. However, reporters from Democracy Now! and the New York Times were in attendance and reporting on it. Furthermore, students participating in the occupation spread the word through email and online video.

In the initial day of the occupation, the remainder of the Building was still in operation and accessible by students of the New School and affiliated campuses. As such, student movement inside of the Building was unrestricted, and students in occupation were allowed access to lavatories and study halls and were allowed to receive food, liquid, and snacks being delivered to the Building. Likewise, additional students were granted entrance into the Building, so long as they presented a valid student ID and indicated a valid reason for entering the Building. Some students entering the Building in this manner made their way to the cafeteria into which they were granted access by the NSIE students inside. Apparently, non-students were also able to gain access to the Building and enter the cafeteria, though it is not clear how they did so. In this manner, additional students and other individuals also joined the occupation. The students maintained regular communication with the Executive Staff throughout the first day.

Senior Vice President of Student Services Linda Reimer was present inside the Building and in contact with the individuals inside the cafeteria, as was the head of Security, Tom Iliceto.

The Executive Staff decided to allow the students to remain in the Building beyond its normal operating hours. At approximately 11:00 p.m., when the Building was supposed to close, Iliceto informed the students that the Building was closed and that they were there without authorization, but that because “no one’s safety ha[d] been threatened and no property ha[d] been damaged” the students would be permitted to remain in the Building for the evening, although anyone leaving would not be permitted re-entry during the night. Security estimated that approximately 50 to 60 students remained. Security maintained an overnight presence in the Building. All reports indicate that the first day of the occupation passed in relative peace and calm.

On the second day, December 18, at 7:30 a.m., the Building was re-opened for normal operation despite the fact that the cafeteria was still occupied by student and non-student protesters. But the occupation grew more intense. Certain students launched a New School in Exile blog explaining the motivations for the occupation, providing updates, and calling for support and solidarity. At around 10:00 a.m., members of the occupation moved to “take control” of the side entrance to the Building at 13th street so that they could allow additional

individuals into the Building. In response, members of Security assembled at that entrance, and confrontations ensued between students and Security.

Video footage of these confrontations, which appears to have been taken shortly before noon, shows a disorderly scene inside the Building. At one point, a Security officer is jostled by dozens of students as he tries to pass through the hallway adjoining the 13th street exit. At another, a student is grabbed by a member of Security and shortly thereafter another student is knocked down.

The NYPD was notified, and officers from the Sixth Precinct responded to the scene. In the early to late afternoon, police secured the perimeter, and began removing the barricades set up by the protesters from the 13th street exit. Police also removed a number of individuals from the Building who may have been involved in erecting the barriers. Outside of the Building, police also arrested a student from the New School for Social Research (“NSSR”). We received conflicting reports from the Executive Staff and Security regarding the basis for this arrest, the former recalling that it related to the fact that the student did not possess valid ID, and the latter indicating that the arrest was for disorderly conduct.

Between 5:00 and 7:00 p.m. members of the occupation set up barricades at the cafeteria fire exit. Apparently, the decision to set up these barricades was not made unanimously

by the entire group inside the cafeteria. At one point, members of the occupation used crates containing admissions files to barricade the cafeteria, but after being notified of the presence of admissions files in the crates, the individuals provided the crates to the Executive Staff and used other materials for barricades. At another point, individuals chained the fire exit shut to prevent police entry, but after being warned that the chains represented a fire hazard, they replaced the chains with desks and garbage cans.

Throughout this period, Reimer remained in contact with members of the occupation, acting as a liaison for the Executive Staff.

At approximately 6:30 p.m. a negotiating process between the students and the Executive Staff began, with NSSR psychology professor Bill Hirst serving as mediator. The students voted to negotiate through Hirst rather than speak to president Kerrey directly. Four students were elected to the student negotiating committee. The negotiation process was conducted outside the cafeteria in the reading room. According to an Executive Staff official negotiations proceeded slowly because the student negotiating team had to check in with the protesters in the cafeteria to vote on any changes in their demands. Furthermore, the students were reluctant to abandon their demand that president Kerrey and executive vice president Murtha resign.

The number of students in the cafeteria also fluctuated throughout the day, and a solidarity protest began to form outside of the Building. Reportedly, a faculty member held a final semester class for his students in the cafeteria as well.

A further escalation of activity began around 6:45 p.m., when all access to the Building was shut down by the Executive Staff. This action presented a setback in the negotiations as it was unanticipated, and the students viewed it as a bad faith tactic by the Executive Staff. Apparently responding to blogs from the protestors inside, a crowd of around 200-300 people congregated outside of the Building. Among the crowd, there was also at least one faculty member demanding to be let into the Building.

At approximately 10:30 p.m. members of the crowd outside the Building moved into Fifth Avenue, blocking southbound traffic on Fifth Avenue at the corner of 14th street. The police called for additional resources to move the protestors back to the sidewalk, but during the course of this response, a group of the protestors outside gathered at the 14th street fire exit of the Building.

At approximately 10:40 p.m., a protestor inside the Building apparently opened the fire exit door and 50-60 individuals from outside hastily entered. One Executive Staff official reported hearing what sounded like an “elephant stampede” as the crowd rushed through

a secondary doorway in the hallway, breaking it in the process. Security moved to confront the intruders, and physical confrontation ensued as the intruders ran across the floor just above the cafeteria and then attempted to enter it. The confrontation continued for a brief number of minutes before Murtha ordered Security to disengage. By 11:00 p.m. the new party of 50-60 individuals had entered the cafeteria and joined the 60 or so protestors already barricaded inside.

Thereafter, NYPD officers entered the lobby of the Building and began recommending security measures to prevent further intrusions and maintain order inside the Building. The School, however, did not at that point, or any other during the December occupation, act as complainant² or authorize police to make arrests. Executive Staff officers have explained that, unlike the April 10 Occupation, when the Building was physically and visually sealed-off, and they had no idea who was in the Building or what they were doing, in the December occupation they were able to see the occupiers and engage in a face-to-face dialogue with them, and did not have the same concerns over safety that they had in April.

² By acting as a complainant, a person effectively identifies himself as the victim of a crime and commits, in an often-used colloquialism, to “press charges.” For example, in a criminal trespassing case, a necessary element of the crime is lack of consent for the trespasser to enter the property. In order for the police to make an arrest, then, they must have a statement by the property owner that the offender lacked such consent. The Occupants arrested on April 10 in the Building are in fact charged with criminal trespassing, and the complaints filed in court recite that the police were informed by the University that “defendant had no permission or authority to enter” the Building.

Once a person has agreed to serve as complainant, it is legally possible to withdraw that agreement. However, once a victim has gone on record, for example, as stating that a defendant lacked consent to enter property, the District Attorney’s office will scrutinize carefully a subsequent withdrawal of such a statement. While the District Attorney’s office is not interested in devoting resources to cases in which the victim has recanted or lost interest, it also must

At around 11:30 p.m., president Kerrey arrived at the Building through a side entrance. He briefly spoke to Professor Hirst. At around 12:00 a.m., Kerrey left the Building, returning to his residence, surrounded by Security. A group of protesters outside the Building followed him as he left. Video of this incident was taken and shows a vocally hostile crowd surrounding Kerrey who, along with his security detail, eventually attempts to run from the crowd to his residence.

In the early morning hours of the third day, December 19, at approximately 12:30 a.m., the recommendations of the NYPD were implemented. Police informed the protesters that they were free to leave, but that if they left the cafeteria for any reason they would be escorted out of a side entrance of the Building and not permitted to return. Food and water deliveries into the premises were also terminated. Thereafter, only the student negotiation team was allowed to exit the cafeteria to continue negotiations with the Executive Staff. About 30 students left the Building, apparently in direct response to the new measures.

At around 1:30 a.m., Kerrey returned to the Building to address additional demands of the occupation. At approximately 3:15 a.m., a resolution was reached, with the President agreeing to (1) an amnesty to all participants in the occupation; (2) new library space in

protect the public interest in seeing that the laws are faithfully enforced and avoiding situations in which private litigants seek to use the threat of criminal prosecution as a tool.

Arnhold Hall as of the spring semester along with additional study space by the end of the spring, and a promise to involve students in the plans to create new student facilities; (3) student voting representation in the search committee for Provost and interim Provost; (4) working to establish a socially responsible investment committee with student involvement and convening a body to establish such a committee by the first week of April 2009; (5) granting the University Student Senate the ability to communicate to the entire student body through email; and (6) recommending that the Board of Trustees allow a non-voting student and faculty representative to attend meetings of the Board. For their part, after discussing it internally, the protesters dropped their demand that Kerrey and Murtha resign.

The occupation ended shortly after 3:15 a.m. The remaining occupiers exited and were joined by protestors outside in celebration. By 3:40 a.m., the crowd dispersed.

B. The Aftermath of the December Occupation

Following the December occupation, the University's Security staff, consisting of approximately 65 members working in three shifts, began to communicate with the NYPD on a frequent basis. Students claimed that they noticed undercover police or Security following them subsequent to the December occupation. The Executive Staff and Security have denied that any such measures were employed by or at the direction of the University.

In addition, the Executive Staff renewed meetings of the Crisis Management Team, a group responsible for addressing various emergency situations and comprised of senior Executive Staff members, though not president Kerrey. The Team had been convened on previous occasions to address the University's response to events such as September 11 and the New York Blackout. Since at least the 2007-2008 academic year, the Team was comprised of numerous members of the Executive Staff, along with the head of Security and the Provost. After the December occupation, the Team began meeting to discuss how to address militant student action and a potential second occupation.³ One Executive Staff member, with whom we spoke, indicated that there was a sense that another occupation would be attempted.

1. Dissemination of Guidelines on Demonstrations

On December 23, 2008, Kerrey communicated to the Board of Trustees regarding the New School's Guidelines on Demonstrations in University Facilities ("Guidelines"), which had been formulated in consultation with the University community after a series of demonstrations in the 1990s. Among other things, the Guidelines quote from the American Civil Liberties Union's policy on college student's civil liberties, which states that demonstrations "are legitimate activities whether they are instigated by events outside the campus or directed against

³The position of Provost was unoccupied between December 2008 and early March 2009, but vice provost Elizabeth Ross from the Provost's office was included in the Crisis Management Team during that time. Marshall's formal term as interim provost began on March 16.

the college administration, and should not be prohibited, nor should students be penalized for engaging in them.” However, the ACLU policy also notes that demonstrators have no right to “physically obstruct the movement of others; or otherwise disrupt the educational or institutional processes in a way that interferes with the safety or freedom of others.”

Beyond the ACLU language, the University’s Guidelines also provide that a demonstration may not violate, among other things, city, state or federal law or fire and building codes or any other code and regulation for public safety. The Guidelines provide that the Secretary of the University or other officer designated by the president “will be responsible for approving requests to use space inside university facilities for speech activities and for establishing any conditions for their conduct.” Under the Guidelines, such demonstrations require at least 24 hours advance notice to the Secretary of the University “in order to allow for the exchange of information about other activities that may be scheduled and to assure public safety.” Furthermore, the Guidelines indicate that “demonstrators will not be permitted to remain in any university building beyond its normal closing hour,” and that demonstrations lasting more than one day or using symbolic structures require a permit, which the Secretary will grant on a content neutral basis, subject to considerations relating to the following community interests:

- protecting health and safety,
- preventing damage or risk of damage to property,
- preserving unimpeded mobility within buildings and unimpeded entrance to an departure from buildings

- providing for competing uses of facilities
- avoiding interference with other university activities
- reasonably limiting costs to the University for increased security, potential University liability, Insurance coverage, and cleanup and repair after an event.

With respect to student violations of the Guidelines, the policy provides that the range of penalties indicated in the Code of Conduct is applicable. The range includes: a warning, restitution for damage, probation, restriction on the use of facilities or on other student privileges, suspension or expulsion. Furthermore, the Guidelines note that “the university may, at its discretion, depending on the gravity of the violation, file a criminal or civil complaint with the appropriate public official.” The Guidelines, however, do not address the circumstances under which it is appropriate to call in police to deal with a demonstration.

Finally, the Guidelines establish a Standing Advisory Committee on Free Speech Activities (“Standing Advisory Committee”), comprised of faculty, students, staff and members of the general public to work on specific issues arising during demonstrations and to advise the president with regard to them.

In his email of December 23 to the Trustees, Kerrey described the Guidelines and stated “In our effort to negotiate with individuals occupying 65 5th Avenue last week, we ignored our own guidelines to accommodate the demands of these demonstrators. This was a mistake that I do not intend to repeat in the event of future, similar actions.” Kerrey indicated that he planned

on distributing the Guidelines to the faculty and student senates, and he subsequently did so in mid-January.

On February 23, 2009, following the winter break, Kerrey also distributed the Guidelines to the entire student body and invited comments and suggestions regarding them. He also noted that he had solicited nominations from the faculty and student senates as the Executive Staff sought to reestablish the Standing Advisory Committee.

Some students and faculty were concerned about the content of the Guidelines and mistrustful of the Executive Staff's motivations in invoking the Guidelines. In particular, the 24-hour notice provision, the manner of determining guilt, and the limited guidance on what violations would prompt which administrative responses concerned them. One question raised was: could the Executive Staff suspend students and/or cause their arrest for engaging in a form of civil disobedience without providing 24 hour notice? The potential for arbitrary application of the Guidelines to prevent demonstrations was viewed as a real problem.

With respect to the application of the Guidelines over the course of the spring semester, Executive Staff witnesses stated that they repeatedly demonstrated restraint and tolerance in their implementation of the Guidelines. Even though the NSIE did not give 24 hour notice or seek permission to conduct teach-ins, for example, the Executive Staff did not prohibit

the meetings. We have reviewed written communications among Executive Staff members that verify their decisions to ignore certain Guidelines infractions. On the other hand, students and faculty believed there was a great deal of inconsistency and arbitrariness in the Executive Staff's application of the Guidelines. They cite, for example, warnings given by Executive Staff personnel to students participating in a teach-in on February 24, where the students were told they could be suspended or arrested. This teach-in is described in greater detail below and video footage confirms these warnings were given.

While there is evidence of meetings among the Executive Staff and the deans and faculty regarding the Guidelines, there appears never to have been a concerted and sustained effort to reach agreement on how the Guidelines would be applied. A faculty leader recalls the discussions more as threats and ultimatums rather than meaningful consultation, citing as an example, a meeting Kerrey had with the faculty senate on February 24, discussed below.

2. Evolution of the NSIE

After the December occupation, the NSIE, which began as a loose coalition of student groups and platforms, became more fractured both in agenda and method. While certain core identified members of the NSIE continued to press for the issues that had been among the original demands made in the December occupation, such as a greater student voice in the direction of the University, other voices and perspectives were added to the NSIE blogs that

supported more radical agendas and methods. Some have referred to these individuals as “Insurrectionists.” Moreover, of the NSIE members who remained focused on the University issues, some advocated and engaged in highly provocative action, while others warned against such action.

Beginning in January 2009, both publicly and in private, the more extreme students espoused and engaged in the following behavior:

- Some group of individuals issued a manifesto that tied the objectives of the students at the University with broader political themes that, purportedly, were shared by a global network of radicals who promoted revolution and overthrow of established regimes. The manifesto and messages on blogs also used violent rhetoric: “an occupation is . . . a car bomb. The university is our automobile, that vehicular modern of pure alienation We use our spaces and bodies as bombs and shields in this conflict with no name.” “The coming occupations will have no end in sight, and no means to resolve them.”
- On February 9, 2009, three members of the NSIE were arrested for stealing thousands of issues of the school newspaper, Free Press. They later explained that the reason they did so was because that issue of the Free Press divulged the names of certain members of the NSIE who had granted interviews on condition of anonymity, and, contrary to an alleged prior agreement with the NSIE, the paper prematurely disclosed the group’s ultimatum, which was intended to be released the following day
- At approximately 3:55 a.m. on March 12, 2009, three masked individuals were seen riding bicycles late at night and spray-painting the president’s residence with the words: “Bye Bob.” Only one of the individuals was apprehended. This person was a member of the NSIE.

3. The April 1 Ultimatum

One of the key events leading up to April 10 was a statement by an NSIE representative in which she threatened that the NSIE would “shut down” the University.

One day after the theft of the newspapers, a faculty meeting was held at Tishman auditorium on February 10. At the meeting, faculty and deans voiced their continuing concerns with president Kerrey’s administration. The New York Times reported that in one unanimous voice vote, the faculty urged the deans of the university’s eight divisions to “reach out to every trustee” and convey the “strong and continuing faculty sentiment of no confidence” in the university’s current non-academic leadership.

Although the meeting was intended as a forum for faculty members, a student representative was allowed to address the gathering. She read from a prepared statement on behalf of the NSIE announcing that the group was calling for the resignation of Bob Kerrey and Jim Murtha by April 1st. She continued, stating that “[i]f, on that day, the current leadership remains in place, we will shut down the functions of the university. . . We will bring it to a halt. We will make it stop.” Various reports indicate that the assembled faculty members roundly applauded the speech.

Whether the faculty members who applauded were doing so in response to the entire speech or to the ultimatum, which was the last paragraph of the prepared statement, is unclear. But the applause could have been construed by the NSIE as supporting civil disobedience that involved shutting down the school. In fact, at the February 24 teach-in described below, which was video-taped, a student can be heard stating that the faculty is supportive of the shut-down, as evidenced by the faculty's applause after the NSIE speech.

The threat was repeated at a "press conference" by masked individuals who read from a statement on February 12, 2009.

At his interview, Kerrey made clear that when that threat was made, he knew he would have "zero tolerance" if the students acted to "shut down" the school. He would remove any students and would call in the police to do so. The University Security department understood that they were to prevent any effort to shut down the school. A faculty member recalls a meeting on February 24, 2009 when Kerrey addressed the full faculty senate and expressed anger at the threat of a shut down and warned that he would not tolerate such conduct.

In February, the Crisis Management Team circulated among itself an Emergency Response Protocol identifying communications protocols for various natural and man-made crises. In two types of crises -- where demonstrators committed criminal acts against school

personnel or property, and where demonstrators occupied a building past its operating hours – the Protocol listed the NYPD as among the entities that should be contacted. Furthermore, at a deans and officers meeting on April 1, 2009, head of Security Tom Iliceto reportedly described additional response protocols. In certain of the hypothetical situations described -- for example, demonstrations involving criminal mischief causing damage to New School Buildings, -- the protocols indicate “PD to respond.”

There were two meetings between University Security and the NYPD in the wake of the December occupation. The first was held with the 6th precinct, and in it a course of action was discussed whereby police would be notified of events of concern to the Executive Staff. Officers would be summoned to such events and stationed on-call a few blocks away. The School itself would monitor the events and would call on police assistance in the event a need arose. Thereafter, Security was in routine contact with the 6th precinct’s community affairs sergeant.

Subsequently, at some point in March, Executive Staff and Security representatives met with Manhattan South Commander Tuller, among others, and discussed the April 1st ultimatum. They informed the NYPD that the University would not permit its operations to be shut down. The NYPD shared some information, which they indicated was obtained through Internet research, on various student groups at the University. It was agreed

that the situation would continue to be monitored and that police would place extra forces at the ready in the event an incident occurred at the School.

The notion that certain conduct might lead to a police response appears to have made its way to the students, although it is not clear precisely how. At the first NSIE teach-in on February 24, students can be observed on video discussing a potential occupation, with at least one student indicating that, unlike the December occupation, it was likely the police would be called in by the School to effect arrests.

4. Efforts to Dissuade the NSIE

Neither the faculty nor the deans published a formal statement denouncing the concept of an occupation, but, as described further below, members of the faculty did make efforts to warn NSIE members repeatedly, and there is evidence to suggest that the student organization understood that an occupation of a building would not be supported by the larger school community. Those members of the faculty who viewed the December occupation as a successful demonstration began to fear that the extreme elements might undo the positive changes that had been achieved through more moderate and traditional democratic processes. The new interim provost also sought to mediate between the more moderate students and the Executive Staff, urging the Executive Staff at one point to avoid alienating the more moderate faction lest it embolden the extreme.

Moreover, on or about March 10, 2009, just prior to the School's spring break vacation, the deans transmitted a note to the University community that highlighted the progress – “including the formation of a robust provost's office with real powers” – achieved through effective negotiations with the Executive Staff. The note concluded with an invitation to concerned students “to join the Deans and faculty in capitalizing on the current atmosphere of openness and hope, for expanding the scope of academic freedom; shared faculty governance; and student rights.” This message appeared to be an indirect statement to students to avoid conduct that could jeopardize these advances.

Other, less extreme student organizations, such as the RSU, appear to have gradually drifted away from the NSIE over the course of the spring 2009 semester. These groups did not participate or support the methods employed by the more radical members of the NSIE, and, as the April 1st deadline approached, various students openly expressed concern about the consequences of another occupation and the Executive Staff's reaction. One of the major concerns of these students was that an occupation would imperil the successes which student groups achieved following the December occupation. The advances included: student participation in the provost search committee, significant strides in the creation of a committee for socially responsible investing, and dialogue regarding student representation at board of trustees meetings.

Moreover, as radical members of the NSIE began holding meetings excluding more moderate groups and voices in order to discuss another occupation, these concerns intensified. Accordingly, when certain students heard rumors about an occupation scheduled for late March, they informed members of the faculty. Faculty conveyed these rumors to the provost who shared them with the Executive Staff and Security. As a result, as described below, members of Security and NYPD arrived on the scene and thwarted an occupation on March 30.

5. A Series of Demonstrations

Following the December occupation, a series of student demonstrations provide further context to the Occupation on April 10.

a. NYU Occupation

On February 18, 2009, a student organization calling itself Take Back NYU occupied the third floor dining room in NYU's Kimmel Center. Press reports indicate that the occupying students, about 70 in all, issued a list of demands including greater financial transparency from the university. The group, which consisted both of NYU students and others, barricaded themselves into the dining room. The NYU administration was relatively tolerant with the occupation at first, allowing the students to remain in the dining room on the night of the 18th. However, the following day an additional group of students surged into the dining room

and, according to reports from the NYU administration, injured a guard. Later, the occupying students made their way to an open balcony of the building, breaking a lock in order to gain access to that area. Reports indicated that the NYU administration had previously reached an agreement with the protesters that they would not move into that area.

On Friday morning, February 20, after NYU announced that those remaining in the dining room would be suspended, most of the students left the building. About two dozen were still in the room when NYU security guards moved in. All of the NYU students who remained in the dining room after the NYU administration's announcement regarding suspensions were in fact suspended.

New School Security prepared a report of the NYU occupation, and the report identified more than 20 New School students – including the three students identified as being involved in the Free Press newspaper theft, and two students who later participated in the April Occupation – as having participated in the NYU demonstration.

b. NSIE Teach-In on February 24, 2009

Among the sources of information reviewed in our investigation, video footage of a teach-in on February 24 was one of the most instructive.

On February 23, 2009, the NSIE announced on its website “the first in a series of

teach-ins/discussion groups to be held at the New School.” The teach-in was scheduled to take place the following day in the courtyard of the Eugene Lang Building located at 66 West 12th street. The group had not submitted a request for the space to Student Services.

Upon learning of the event, members of the Crisis Management Team discussed the appropriate response. One Executive Staff official with whom we spoke indicated that there was concern that the event could evolve into another occupation, and noted that there was the sense that the Executive Staff had been lenient enough and that it “did not want to get railroaded.” Members of the Team investigated the possibility of threatening the teach-in attendees with arrest, but concluded that so long as those in attendance were students with valid IDs, the only credible warning was to tell them they may be disciplined.

At the Crisis Management Team’s direction, Linda Reimer, Roger Ward, and Carol Cantrell attended the teach-in. They handed out notices to arriving students indicating that “while [the] students [we]re encouraged to use university facilities for all kinds of events . . . these spaces, including the Lang courtyard, must be reserved in advance.” The notice went on to state that no request had been made to reserve the space for the teach-in, and advised that unauthorized use of the space “may constitute a violation of the Student Code of Conduct and may result in disciplinary action.”

Due to cold weather outside, the students assembled in the lobby at Lang rather than in the courtyard. Video of the event shows that the teach-in was conducted in a calm, orderly and open manner, with approximately 30-40 people in attendance. In addition, it appears that entrance and egress from the lobby was not obstructed by the teach-in. Video also shows that there were some faculty members in attendance, although they appear to be monitoring the meeting rather than participating in it.

After a lengthy discussion of the history and founding of the New School, the structure of power at the University, student activism at the School, the accomplishments of the December occupation, and the grievances of the students, the floor was opened for comments by the students in attendance.

Among other things, a student directed the discussion toward the April 1st ultimatum and the threat and content of a school-wide action if president Kerrey and executive vice president Murtha had not resigned by that date. Among the many comments, various students can be seen on video discussing the following:

- Practical measures to take-over the School, such as preparing a curriculum and schedule for their own classes, putting up artwork and playing music, holding demonstrations outside, and occupying parts of the School.
- How protesters could link together to prevent their being moved by security or police. (This student was involved in the graffiti spray-painting incident)

- Another student, whom we believe was involved in the April Occupation, explained how to ameliorate the effects of pepper spray or tear gas.
- Students debated whether the New School would summon the NYPD to effect arrests in the event of another occupation. One student, who we believe was later involved in the April occupation, indicated that the School would “instantly” call in the police, while another noted that that was not necessarily clear.
- When one student asked about possible faculty support, another student explained that the ultimatum had received warm applause by faculty at their February 10th meeting.

By the outset of the teach-in, Security had shut down the lobby to visitors and students without ID. In addition, twice during the earlier part of the teach-in, an Executive Staff official notified the students assembled that the event was unauthorized, and that those present could face disciplinary action. On both occasions, the students challenged him and he walked away, letting the teach-in continue. On the second occasion he also noted that the students could be arrested and suspended. The student response to these threats and to the prepared notice distributed at the outset of the meeting was that it was another example of the Executive Staff’s arbitrary use of power and refusal to work with students to address both sides’ concerns.

One Executive Staff official, with whom we discussed the administrative response, indicated that once the members of the Executive Staff who were present understood that the teach-in would remain peaceful and orderly, they decided to monitor the event rather than confront the participants. In an email response to a student who demanded a justification

for the threat of suspension and arrest, an Executive Staff official further indicated that “[u]nauthorized assemblies, particularly when widely advertised to the public, compromise our ability to protect our community. In addition, refusal to acknowledge the role of university officials hinders the opportunity for productive dialogue.”

Following the February teach-in, the Executive Staff took the approach of letting the NSIE hold its unauthorized events while monitoring them to ensure that the group was not doing anything that would disrupt the University.

c. NSIE Teach-in on March 4, 2009

On March 3, 2009, the same date that the New School announced the appointment of interim provost Tim Marshall, the NSIE publicized a flier about a second teach-in to be conducted in the Parsons lobby on the following day. Members of the NSIE were asked by a faculty leader whether the students had requested permission for the space. The professor warned them against holding an event for the purpose of provoking the Executive Staff rather than carrying on a legitimate teach-in. He advised the students that the Executive Staff would react aggressively, and the students risked alienation from the student body at large.

On March 4, the teach-in proceeded without incident. Marshall attended and discussed the students’ grievances with them. Professor Miller and NSSR Dean Michael

Schober were also in attendance. Upon learning of the teach-in, the Executive Staff continued its strategy of monitoring events it considered potentially threatening but did not interfere.

d. Attempted Occupation

In mid to late March, certain students heard rumors that an occupation was scheduled for the end of March instead of April. These students informed members of the faculty which, in turn, conveyed the rumors to the Interim Provost, intending that he share the information with the Executive Staff and Security. As a result, both were on high alert in late March.

On March 30th, Security and police thwarted an attempted occupation. Head of Security Tom Iliceto arrived on the scene of the Building together with a group of police officers. We infer that the heavy police presence may have deterred the students from moving forward with a planned occupation. No individuals were confronted in the incident.⁴

In the immediate aftermath of the thwarted occupation, on March 30, the Interim Provost convened an informal meeting among members of the Executive Staff and the faculty. In view of the continuing threat of an occupation, the Interim Provost has informed us that he believed it would be productive to bring representatives of the faculty and the Executive Staff

into the same room to share information and ideas. Up until this point, based on the email record as well as witnesses' recollections, it appears that there was limited communication among the faculty, the Executive Staff and the Interim Provost concerning the manner in which the University should respond to these demonstrations or a potential occupation.

We have interviewed several of the participants at the March 30 meeting. While recollections differ in several respects, all concurred that the meeting was a constructive exchange. An Executive Staff member reported being pleasantly surprised at learning that members of the faculty shared certain of the Executive Staff's concerns about the threatened conduct. A faculty member reported feeling encouraged that the Executive Staff had listened to and apparently understood the faculty member's information and views about the nature of the student movement. All parties reportedly left the meeting with the understanding that further communication and consultation by the Executive Staff with the Academic Administration would be beneficial and constructive. In the pressurized events of April 10, however, as discussed below, it appears that such consultation did not take place.

⁴ The thwarting of this attempt may have led to some distrust among the students. Certain students we spoke with indicated that, following the March 30 incident, they were not made aware of the plans for the April 10 Occupation, and were themselves caught by surprise when it occurred.

C. The April 10 Occupation

1. Entry By Occupants

Building surveillance video footage reveals that at around 4:30 a.m. on the morning of April 10, 2009, cleaning personnel began arriving at the Building. As per their routine, they assembled and divided up the cleaning assignments in the various New School buildings. By 5:00 a.m., all of the cleaning staff, except for Carlos Rodriguez exited the Building to attend to their daily assignments. Rodriguez had been assigned to the Building that day and he began his cleaning duties in the cafeteria.

At approximately 5:15 a.m., while patrolling the neighborhood in his car, night Security supervisor John Benintendo noticed several individuals outside the Building who looked out of place, some were carrying knapsacks, and many were on their cell phones. At one point, two women and two men split off from the group and began walking in the direction of Kerrey's residence. Benintendo followed them by car, but the party soon turned around. Benintendo then continued down the one way street, and drove around the block to return to 65 Fifth Avenue. By the time he returned to the Building, the sidewalk had cleared out and everything appeared to be normal.

Just before 5:30 a.m., video footage from the surveillance camera inside the Building, stationed atop the West 13th street fire exit, shows what appears to be two sets of legs

on the stairs leading down from the second floor of the Building. Thereafter, a single masked and hooded individual, appearing to be holding a cell phone to his ear, approaches the camera from the stairs and disables⁵ it just after 5:30 a.m. The other cameras around the Building are systematically disabled in a similar fashion in subsequent minutes.

While far from conclusive, we believe the surveillance video footage supports the suggestion that an occupant stayed in the Building overnight and did not enter from the outside through locked doors. None of the cameras reveals anyone entering the Building from the outside after the cleaning personnel are seen leaving the Building. The first image of the occupying party is, as described above, a masked person coming down the stairs from a higher floor to disable the first camera.

2. Carlos Rodriguez

At around 5:30 a.m., Rodriguez heard a loud bang which he thought came from something in the supply room or the elevator. He continued his work in the cafeteria believing he was alone. Suddenly he encountered a number of masked and hooded individuals. He was immediately fearful. He estimated the number to be 20 to 30 individuals. Rodriguez saw two groups of people, one small group consisting of five or six individuals who entered the cafeteria from a back entrance, and another larger group working in the lobby. Surveillance footage from

⁵The cameras appear to have been disabled through the use of duct tape over their lenses.

the lobby camera confirms that, commencing just before 5:32 a.m. a number of masked and hooded individuals entered the lobby and began working at various tasks. Rodriguez observed the group carrying sleeping bags, rope, and relatively heavy chains.

One individual from the smaller group which had entered the cafeteria through its back entrance approached Rodriguez, while the rest of the group began locking the door behind them. The individual who approached Rodriguez told him to stop what he was doing because the group was taking over the Building. Rodriguez replied that he was working. The individual told him that he should not worry about that. Throughout this brief conversation, individuals from the lobby shuttled in and out of the cafeteria placing their bags there. Rodriguez was then escorted out of the cafeteria, through the lobby, and towards the West 13th street exit. The individual escorting him did not push him, but did place his hand on Rodriguez's shoulder.

While being escorted out of the Building, Rodriguez saw members of the group locking the doors and moving chairs and desks to barricade the front entrance to the Building. As the incident was recounted to us by Rodriguez, the entire group operated quickly and quietly, so that the only sounds they made came from the chains they were using to lock doors.

As Rodriguez entered the hallway leading to the 13th street exit, he saw that members of the group were working to lock that door as well, but they cleared a path for

Rodriguez to exit. Before being escorted out, another individual approached him and, without saying anything, took Rodriguez's radio. Rodriguez moved to take the radio back, but the individual taking it indicated that he could not have it, and that he had to leave.

The encounter with the Occupants lasted no more than three minutes, to Rodriguez's recollection, but, as he recounted it to us, he expressed strong anxiety regarding the events and indicated that the incident has had a lasting impact on him.

3. Benintendo's Encounter and Injury

Upon emerging from the Building, Rodriguez went across the street to the building at 72 Fifth Avenue, where his co-worker Jessie Lynch was located that day. Rodriguez called Lynch using his cell phone and Lynch quickly came down to him. Together they alerted University Security of the break-in.

When Benintendo returned to Security headquarters at 55 West 13th street, he was informed by the night security guard that masked individuals had just entered the Building. Benintendo drove to the Building where he saw masked individuals chaining the main entrance doors inside the Building. At approximately 5:40 a.m., he attempted to enter through the doors but was unable to do so. Benintendo then ran to the fire exit of the Building at 13th street. Using

his electronic key card, he was able to open the door, and upon doing so, he saw masked figures inside.

Based upon his training, Benintendo placed his leg in the door to prevent it from closing. Members of the occupying party tried to pull the door shut, jamming Benintendo's leg between the frame and the door. Still, Benintendo was able to knock the masks off of three of the Occupants and see their faces, and that they were young adults in their 20s. While Benintendo's leg was still stuck in the doorway, the occupiers began chaining the door. At the same time, Benintendo dialed 911.⁶ He informed police that a burglary was in progress. Shortly thereafter, Benintendo was able to extricate his leg from the doorway, at which point the door was immediately slammed shut.

Benintendo then tried to enter the Building through a second fire exit on 13th street, but could not open the door and he believed it had been crazy glued shut from the inside. Thereafter, at approximately 5:45 a.m., he made a second call to police. Within minutes, an NYPD unit arrived on the scene. Benintendo explained to police that there were masked individuals inside the Building. He stated that he did not know their identity but that he knew

⁶ The fact that a call was made is based on statements from Benintendo and the arrival of police units to the scene very early in the chronology of events. We have no reason to question that he made that call. We note, however, that we have not yet seen a transcript of the 911 call. We requested a copy from the NYPD and have been informed that we may be provided a copy in four to five weeks.

that they were not peaceful. Together with Benintendo, the police attempted to enter the Building through the 14th street fire exit, but found that it too was crazy glued shut.

After returning to the front of the Building, Benintendo observed more police arriving on the scene. Through the glass doors at the entrance of the Building, he also saw figures moving quickly inside the Building. Eventually, the Occupants placed cardboard over the front doors, so that they could not be observed through them. When police suggested breaking through the doors, Benintendo told them that he first needed to get approval from one of his superiors. Benintendo then called Assistant Director of Security Tim Sikorski for guidance. Benintendo informed Sikorski that he did not know whether the occupiers were students or outside agitators.

When asked by police whether he wanted an ambulance summoned, Benintendo replied that, although he was in pain, he wanted to remain on the scene. Later in the day, however, after the occupation had ended, Benintendo took an ambulance to St. Vincent's Hospital to have his leg examined. He was found to have soft tissue damage to his left thigh, for which he was prescribed Ibuprofen.

Medical records received from Benintendo include a form bearing St. Vincent's letterhead that reflects a visit to the hospital on April 10.

4. The Former Student's Interaction with the Occupants

At approximately 6:00 a.m., the Former Student, an alumna with at least one friend among the Occupants, arrived at the scene. The Former Student declined to speak with us during the course of our review. However, she previously provided a statement to Professor Miller regarding her actions and observations on April 10th. She also spoke before an April 13th school assembly regarding the events of April 10th. The details set forth herein are based on these previous statements provided by her.⁷

The Former Student stated that, upon arriving at the scene, she joined a protest that had begun to gather outside of New Valentino's Market opposite the Building across Fifth Avenue. At 6:11 a.m., she used her cell phone to call her friend among the Occupants. She asked him if he had any instructions for her. Her friend requested that she open a line of communication with the police and inform them that the occupation was non-violent.

At some point thereafter, the Former Student stated, she subsequently crossed the street and approached Benintendo who was with police in front of the Building. She informed Benintendo that she had a contact among the occupying party inside the Building and that the group was nonviolent.

⁷ Without interviewing the Former Student, we cannot definitively assess the accuracy of these accounts, although certain of her assertions are consistent with information received from other sources.

5. Sikorski's Report and Kerrey's Decision

At approximately 6:15 a.m., Sikorski arrived at the scene and found police securing all entrances to the Building. He interviewed Benintendo and Rodriguez separately, and found that the latter was frightened. Sikorski told us that he did not learn that anyone outside the Building had made contact with the occupying party inside until approximately 8:30 a.m. When Police asked Sikorski how to respond to the occupation, he told them to maintain the scene until the administration decided on a course of action.

At approximately 6:27 a.m., Sikorski transmitted an email via his blackberry to a number of members of the Crisis Management Team, including Jim Murtha, Carol Cantrell, Roy Moskowitz, and Linda Reimer, informing them that the Building had been taken over by "about 40 students." Sikorski then attempted to call Jim Murtha who did not answer. After leaving Murtha a message, Sikorski called Reimer and told her about the break-in. Sikorski then asked Reimer to call Kerrey. Reimer said she would do so. However, after hanging up she realized she did not have Kerrey's number, so instead, at 6:41 a.m. she transmitted an email to Kerrey relaying the facts that Sikorski had indicated in his email to the Crisis Team. Within several minutes of her conversation with Sikorski, Reimer, who lives near the Building, arrived at the scene.

Following his conversation with Reimer, Sikorski went to the Security office to look at the cameras inside the Building, but found that they had all been disabled. Then, at around 6:45 a.m., Murtha called Sikorski, and Sikorski went over the facts of the break-in again. Murtha explained to him that he was in Westchester and that he wanted Sikorski to go to Kerrey's residence and explain the situation to him.

Sikorski traveled by foot to Kerrey's residence, and spoke to the president. He relayed the facts as known to him at the time: there were between 30-40 masked individuals inside the Building; Rodriguez had been removed from the Building and was very upset; and Benintendo had sustained a leg injury that had left him limping.

Kerrey promptly made the decision, at approximately 7:00 a.m., to inform the NYPD that he would be a complainant and that he wanted the occupying party removed from the Building.⁸ Kerrey stated that when he was informed by Sikorski that persons had occupied the Building, that a maintenance worker had been ejected from the premises, another security officer injured and the doors locked from inside, he was decisive. He had effectively made up his mind in February to show "zero tolerance" if there was an attempt to shut down the University, and the

⁸ As noted above, footnote 2, by acting as a complainant, Kerrey provided the NYPD with the legal basis for entering University premises to effect arrest of persons found in the premises without the consent of the University. At that point, while the University could work with the NYPD and make recommendations or requests, the means used by the NYPD to carry out its law enforcement functions was not within the control of the complainant University.

facts reported to him on April 10 seemed to him to meet his conditions for imposing a zero tolerance response. Accordingly, he informed Sikorski that he would be the complainant without consulting with others. Later that morning, at approximately 7:30 a.m., he attempted to reach provost Marshall but was unable to reach him. Marshall picked up the voicemail later in the evening when he returned home from dealing with the Occupation as described below.

Moreover, while there was a Standing Advisory Committee (comprised of certain members of the Executive Staff, faculty, and student body, among others) in existence at the time, the Executive Staff informed the committee that it would not be convened. At approximately 8:45 a.m., Katarzyna Gruda, a faculty representative on the Committee, emailed Doris Suarez, who served as chair of the committee, asking whether the committee would be convened. Suarez informed her that the committee would not be convened. At 9:10 a.m. Suarez emailed the entire committee, informing them of the break-in, and indicating that there was little information about the incident. She indicated however, that the incident was not an authorized demonstration, and that the NYPD was on the scene and had taken control of the situation. She concluded that “since the matter is more or less now out of the university’s hands and the guidelines have clearly been violated” the committee would not be convened. She later provided updates to the committee.

6. Implementing Kerrey's Decision

After his discussion with Kerrey, Sikorski walked back to the scene of the incident to comply with Kerrey's directive. When he returned to the scene, the perimeter was already being managed by the NYPD, with additional ranking officers arriving. At around 7:00 – 7:15 a.m., Sikorski learned that Deputy Chief Tom Chan of the Manhattan South command was the ranking officer at the scene, and informed him that the University would act as a complainant. Sikorski requested police assistance in regaining entry and control of the Building and informed Deputy Chief Chan that the School wanted the occupiers prosecuted. He also conveyed the facts he had collected to that point. By that point, Sikorski estimated that there were 50-60 police on the scene already.

At around the same time, Reimer also learned of Kerrey's desire for the police to move in and end the incident swiftly. At approximately, 7:04 a.m., she notified Murtha of Kerrey's decision. By that time, Murtha had already transmitted an email to the Crisis Management Team members whom Sikorski had originally contacted, requesting that the group assemble in an 8th floor conference room in 80 Fifth Avenue. At 7:39 a.m., the Team was then directed by email to gather in Roy Moskowitz, the General Counsel's office at 9:00 a.m. Moskowitz's offices were also located on the 8th floor of 80 Fifth Avenue, with a view overlooking the Building. The Team then spent the morning at that location, receiving regular

reports of developments from Reimer and others. Its members, including Murtha and Moskowitz, communicated with Kerrey and others regarding matters, such as press statements.

Reimer and Sikorski indicated that they had additional sporadic contact with Kerrey throughout the day. At approximately 7:43 a.m., Linda Reimer transmitted an email in which she indicated that Kerrey said he wanted the other Buildings on campus to remain open. Primarily, however, these calls reportedly consisted of Kerrey asking for updates of the situation on the scene, and expressing impatience with the length of time the police were taking to act. Both Reimer and Sikorski indicated that Kerrey was eager to have police end the incident swiftly. At one point in the morning, he asked to speak directly to Commander Tuller to inquire why the operation was moving slowly, and did so. Following that conversation, it appears that Tuller called for additional officers to respond to the location.

7. The Former Student has Further Contact with the Occupants

According to the Former Student's statements, at approximately 6:30 a.m., police began clearing the sidewalk in front of Valentino's Market. At that point, Benintendo approached the Former Student, who was in front of the market with a New School facilities worker named Tony whom she had known for some time. Benintendo asked her to contact her friend inside the Building to see if the occupying party would allow Tony to enter the Building. At approximately 6:34 a.m. she called her friend and relayed Benintendo's request. Her friend

informed her that the occupying party would consider letting Tony inside. The Former Student then went with Tony to the lobby of 80 Fifth Avenue to wait for a response. Eventually, however, Tony had to leave the scene to attend to other obligations.

At around 7:00 a.m., the Former Student received a call from her friend saying that the occupying party was still considering letting Tony inside. Thereafter, she sought out Benintendo but, when she was unable to find him, she eventually approached police at the scene instead. She was then put in touch with Detective Sal Abiuso of the NYPD Hostage Negotiation Team, and eventually his superior as well. The three went to Valentino's for coffee, and, while there, the officers asked the Former Student numerous questions about the protesters, their intentions, and the School. She answered the questions and repeatedly reiterated that the occupying party was non-violent.

At the request of the Hostage Negotiation Detectives, the Former Student called her friend again at 7:39 a.m. to confirm that the occupying party was non-violent and willing to negotiate. After confirming that this was the case, her friend indicated that the party would only negotiate with the School's provost, Tim Marshall. The Former Student conveyed this information to the Detectives.

8. Marshall's Role

Immediately thereafter, at 7:40 a.m. the Former Student called another friend not involved in the occupation to get the provost's name and phone number. She received and conveyed this information to the Detectives.

She was then invited to the New School Welcome Center at 72 Fifth Avenue where police had set up headquarters. When she arrived, she saw that Reimer was also present at the Center at that time. The Detectives asked the Former Student if the occupying party would be willing to speak to Reimer. She expressed doubt as to that possibility, and emphasized the occupying party's wish to speak to the provost. The Former Student was then asked to wait outside of the Welcome Center while police used the room for meetings.⁹

In any event, police asked Reimer whether she would be willing to negotiate with the occupying party and Reimer indicated that she would. They also asked her to find Marshall. Accordingly, at 7:57 a.m., Reimer emailed Carol Cantrell to ask her to track him down. At around 8:10 a.m., Cantrell spoke to Marshall by phone and asked him to report to police at the scene.

⁹ Without speaking with the Occupants or the Former Student, we cannot determine why the Occupants insisted on speaking only with Marshall. Student and faculty witnesses, however, opined that the Occupants viewed Reimer with some mistrust and as a representative of the Executive Staff. Marshall, on the other hand, was the new provost, had had open meetings with the NSIE at the March teach-in and was thus viewed as a University leader who might be willing to listen.

At approximately, 8:30 a.m., Marshall arrived at the scene and presented himself to the NYPD officers. He was subsequently questioned by the officers and his name and phone number taken. However, the officers questioning him repeatedly told him there was nothing further he could do.

At approximately 9:15 a.m., according to the Former Student's statements, she was invited back into the Welcome Center by the Hostage Negotiation Team. She was asked to contact her friend and inquire whether the occupying party (1) was willing to negotiate, (2) was aware of the consequences of its actions, and (3) was willing to end the incident peacefully. She asked the officers to clarify what they meant by 'consequences' but they declined to do so.

At 10:14 a.m., the Former Student reached her friend and posed the NYPD questions. The occupying party's responses to her were that it: (1) was willing to negotiate, (2) was not aware of the consequences of the occupation, and (3) was interested in a peaceful conclusion to the incident. She relayed these answers to the Detectives. Again she emphasized that the occupying party wanted to speak to provost Marshall, and she asked police about his whereabouts. In response, police reportedly told the Former Student that they wanted to use her for negotiations as the Executive Staff was not willing to negotiate.

Nevertheless, at 10:25 a.m., provost Marshall was contacted by the Hostage

Negotiation Team and asked to join them at the Welcome Center. At 10:30 a.m. Marshall arrived at the Welcome Center and was questioned by police there about his job and why he thought the students wanted to speak with him. After responding to these questions, he was granted entry into the room in which the Former Student was located, and was introduced to her. Detective Abiuso and his superior then explained the negotiation process to the Former Student and Marshall. The two were told that if the occupants surrendered peacefully, they would only get desk charges.

We have not been able to determine why the NYPD was so slow to involve Marshall in the negotiation process. Based on the Former Student's statement, as well as our interview of Executive Staff officials, the NYPD understood as of 8:00 a.m. that the occupying party wished to deal with Marshall. He arrived at the scene no later than 8:30 a.m. Yet, it was apparently not until two hours later that he was brought to the Welcome Center where the Hostage Negotiation Team was based and even then he was kept outside the room where the Former Student was located and asked questions that seemed pointless to Marshall. In the meantime as described further below, other units of the police were dealing with incidents at the 14th street entrance, and Marshall never got the chance to speak with the occupying party before police went in.

Under the pressurized circumstances of that morning, it appears that the Executive

Staff and Marshall were unable to coordinate, notwithstanding various efforts to remain in contact. As of early that morning, Kerrey had already determined that the NYPD should go in and arrest the students. At 9:44 a.m., Suarez transmitted an email to the Board of Trustees on behalf of President Kerrey stating the following:

I write to update you what is now happening at the university. At approximately 5:30 AM a group forcefully broke into and entered one of our buildings at 65 Fifth Avenue. They removed a maintenance man who was cleaning the building, injured the leg of one of our security personnel, chained themselves inside the building, barricaded the doors, and crazy glued the locks. Following established procedures the New School contacted the New York Police Department and filed a complaint. NYPD will remove and arrest all occupants of the building. The Manhattan District Attorney and the laws of the City of New York will determine what course of action will be taken following their arrest. If any of the individuals are students of the New School they will be immediately suspended pending administrative review.¹⁰

While Marshall was copied on earlier emails containing draft versions of the above update to the Board, he did not see these messages during the morning. He also met briefly with Moskowitz at 80 Fifth Avenue before having to attend to other meetings, including with the Hostage Negotiation Team described above. In addition, while the vice provost Elizabeth Ross was a member of the Crisis Management Team, she was inadvertently not included in the email communications to the Team that morning.

9. Activity in and Around the Building

In the period between approximately 7:00 a.m. and 9:00 a.m., members of the

¹⁰ At 10:32 a.m., Suarez forwarded the same message to the Standing Advisory Committee.

occupying party, wearing hoods and masks, began appearing on the roof for different intervals of time. Reports indicate that during these intervals the occupants read a list of complaints regarding the University as well as manifestos criticizing the capitalist system. They also reportedly used a megaphone to tell outside protesters to ignore police orders, saying “these are our streets this is our school.” Sikorski indicated that the occupants’ statements over the megaphone were distorted and difficult to make out. In addition, the occupants waved flags and unfurled banners declaring the occupation.

One banner read “April Fools, motherfucker.” Because the Occupation was on April 10, it is not clear what this banner was intended to suggest. One possibility is that the banner was created at a time when the group planned to occupy the Building on April 1 as initially threatened. Another possibility is that the group intentionally misled the community about the April 1 date in order to avoid detection as they accessed the Building, and the banner was taunting the Executive Staff with their successful ruse.¹¹

While on the roof of the Building, members of the occupying party also apparently placed tape on an electronic device situated there, which resembled a camera, but

¹¹ In this connection, we note that certain students stated that the Occupants did not entirely trust other students who were initially involved in discussions about the Occupation. As noted previously, a prior occupation in late March was thwarted after the Executive Staff learned of rumors that were forwarded from students to faculty and then passed on to Marshall. Students we spoke with stated that after that incident, they were not made aware of the new plans and were themselves caught by surprise when the Occupation was announced.

which was actually responsible for certain internet services at the School.

Inside the Building, the occupying party began a blog declaring the occupation and calling for supporters to protest outside. At some point during the day, the occupying party posted a “Frequently Asked Questions” (“FAQ”) message indicating their goals and demands. The FAQ indicated that there were 60 students inside the Building, that the Occupation was not sponsored by the NSIE or RSU, and that it was intended as a safe and non-violent form of civil disobedience. With regard to demands, the FAQ stated:

This is an occupation without a list of demands, besides the obvious. Kerrey and Murtha need to go. After that a new system needs to be set that accounts for student authority over how our money is spent and how our school is operated. As of now we have been systematically eliminated from that process. Sick of not having a library? Sick of high tuition? No space to do your work? Are there a hundred things you're pissed about? Look at what we won at the last occupation. This time we're going all in.

Outside in the street, a crowd began congregating before 6:00 a.m. Security reported that the protesters numbered around 25 people by approximately 6:30 a.m., but as the day progressed more people arrived on the scene. Protesters held up signs and voiced chants calling for Kerrey and Murtha's resignation. At some point during the day, the Occupants' FAQ was reportedly distributed outside as well. At around 7:00 a.m., a news truck arrived and began reporting from the scene.

10. Confrontation outside of the 14th Street Fire Exit

The police became involved in a number of skirmishes outside of the Building on 14th Street. At approximately 10:40 a.m., certain members of the occupying party apparently unlocked and opened the fire exit door to the Building on 14th street apparently in an attempt to leave the Building. Police converged on the fire exit, and it is not clear whether any of those inside escaped. In the ensuing police efforts to keep the fire exit door closed, at least one officer can be seen on video directing pepper spray into the interior of the doorway. We have learned that certain students were struck by the spray in the face. Because neither the Occupants nor the NYPD have agreed to speak to us, we have not been able to learn exactly what caused this incident.

Apparently in response to police actions around the fire exit, protesters outside the Building approached the area. From video footage of the scene, it appears that approximately three protesters picked up and hurled a metal barrier at police around the fire exit. A large group of protesters then fled east on 14th street, into an area which the police had cordoned off. Additional police officers ran to the scene and gave chase. One of the protesters, an NYU student, was apprehended. Video footage shows that while she was being detained, another student from Brooklyn College briefly attempted to pull her from the arresting officer before dashing away. This student was also apprehended by police. Video footage shows both arrestees

struggling with the police as they effect arrests.

A third arrest involved David Benzaquen, a student of the University. Video footage of the incident shows him yelling “shame on you” repeatedly to the officers effecting the arrest of the male Brooklyn College student. He is several feet from the arresting officers and appears merely to be protesting the arrest. The video shows an officer approaching Benzaquen and striking out at him with his right hand. Benzaquen is shown dropping to the ground and writhing while making sharp cries of either surprise or pain. Other officers then immediately engage him on the ground and effect his arrest.

In their criminal complaints, the three students are all charged with resisting arrest. Benzaquen and the NYU student are also charged with disorderly conduct and obstruction of governmental administration as a result of their presence within a restricted police area. In addition, the students are all identified as having approached the metal barrier that was hurled at police. The Brooklyn College student is specifically identified as one of the individuals who threw the barrier and is also charged, among other things, with Assault in the Second Degree.

11. The NYPD Effects Arrests

According to the Former Student’s statement, at 11:03 a.m., shortly after the incident at 14th street, she called her friend inside the Building to begin the negotiations.

However, her friend indicated that police had already started breaking into the Building. This may have been a mistaken reference to the activity on 14th street as we have seen no evidence that the police in fact sought to enter the Building as of that time.

According to the Former Student's statement, Detective Abiuso called one of his superiors to find out what police action was occurring and to try to get it to stop while negotiations were ongoing. Abiuso was reportedly unable to get the police action to cease. At around 11:10 a.m., at the request of Detective Abiuso, the Former Student urged her friend to stop talking, put the phone down, and make sure no one among the Occupants had anything in their hands.

At 11:03 a.m. an Executive Staff official sent an email to the Crisis Management team indicating that the riot squad had assembled in front of the Building.

At some point after 11:03 a.m. Sikorski was approached by Chief of Department Esposito and put in touch with an officer in the Legal Bureau. The officer asked Sikorski to announce that he was an agent for the school informing the Occupants that they were illegally occupying the Building without the School's authorization and that police would enter the Building and arrest them.

Shortly before 11:30 a.m., Sikorski approached the front doors of the Building.

Through a small hole in the cardboard covering the front doors he could see the youths, now unmasked, sitting in the lobby inside. He used the megaphone to make the announcement requested by police to the students. A lieutenant from the Hostage Negotiation Team, whom Sikorski understood had had made contact with someone inside, then requested that someone inside open the front doors.

One male and one female approached the doors, unlocked the chains around their handles and pulled the chains out. The police then waited for the two to go back and sit with the rest of their party. The lieutenant then told the party that the police were entering the Building and that the Occupants should remain calm and not try to hide.

The police then entered the Building and the Occupants were arrested without incident. The NYPD's TARU video unit taped the entrance and the arrests, and their footage shows a quiet, orderly process.

Nineteen individuals were arrested and removed from the Building. In compliance with the NYPD Patrol Guide arrest protocol, the individuals were placed in handcuffs and removed to the 6th precinct for processing. The Patrol Guide directs police to place all arrestees, including those being arrested for desk charges, in handcuffs.

Marshall recalls that once the arrests had been made, Abiuso left the Welcome

Center to observe the scene. He returned shortly thereafter and reported to Marshall and the Former Student that more serious charges would be pressed against the members of the Occupants, and that mere desk charges would not be issued. This was contrary to Abiuso's earlier assurances.

When a desk appearance ticket is issued, the defendant is charged with a misdemeanor, fingerprinted, and processed at the nearest precinct, and then released and permitted to appear in court on a later date for arraignment. In contrast, on either a felony or misdemeanor charge, a defendant can be taken to central booking in Lower Manhattan for processing, where he is housed with the general population of persons arrested that day, and often spends a night in jail. While we have not received definitive evidence, it appears that the students were in fact jailed overnight and not simply issued desk appearance tickets.

12. Search of the Building

While surveying the scene inside the Building, Sikorski observed that, in addition to food and sleeping bags, there were pry bars, bolt-cutters, paint, masking and duct tape, kryptonite locks, and hundreds of feet of security cable and nylon ropes. The Occupants had

used the rope and cable to block the entrances to the Building and to obstruct the stairwells inside.¹²

Police declared the Building a crime scene and searched it for approximately 90 minutes following the arrests before deeming it safe from hazards and free of additional intruders. Police took photographs of some of the damage inside the Building, which included damage to a cash register, which bore pry marks suggesting that someone had attempted to pry it open. In addition to the cash register, the locks on a security gate had been broken along with several signs which were ultimately replaced by the School. Furthermore, the Occupants had opened food containers rendering them unfit for sale.

The Executive Staff estimates that the above, in combination with the loss of business at the cafeteria due to the occupation, the replacement of Rodriguez's radio, and overtime payments to cleaning staff who later attended to the Building, amounted to over \$12,000 in expenses to the University. As of the writing of this report, we have received and reviewed invoices that confirm replacement of the radio and repairs to the locks and doors.

13. Administrative Action against the Students

The School issued immediate interim suspension letters to the New School

¹² We have sought information from the D.A.'s office as well as the NYPD to confirm the evidence seized after the Occupation and have received no information.

students involved in the Occupation. While the Demonstration Guidelines refer to hearings and other forms of due process prior to imposition of discipline for violation of the Guidelines, it also references the University's disciplinary procedures, which provide in pertinent part: "The President of the university, or a university officer authorized by the president, may impose upon a student an immediate emergency suspension when in the judgment of the president, such action appears necessary for reasons relating to . . . the safety and well-being of members of the university community, or to prevent damage or theft of university property." (Art. II, Sec. B(1).)

The disciplinary review process has been placed on hold pending the conclusion of the criminal proceedings against the students. At some point in mid-April, the suspensions were modified so that the students could attend classes, but not school social events.

All of David Benzaquen's administrative disciplinary charges were dropped when it was learned that he was never inside of the Building.

D. Remaining Committee Questions

1. Reasons for Extent of Police Presence

Committee members have questioned why the NYPD responded to the Occupation with such a large number of personnel and high-ranking commanding officers.

Police presence consistently expanded as the day progressed. High ranking

commanders of the NYPD arrived at the scene, including the Chief of Patrol, the Chief of the Department, as well as the Manhattan South Commander, James Tuller. A helicopter unit hovered over the Building, and emergency service unit personnel and commanders as well as a hostage negotiation team were present. Sikorski noted that he saw Hazmat, Intel, and Weapons of Mass Destruction units on the scene.

The large number of officers responding to the scene appears to have resulted from the decision to remove the Occupants of the Building and effect arrests. Once deputy commander Chan was informed by Sikorski that the University would act as complainant, he began making calls to increase the level of police presence.

A security witness stated that for much of the morning, police were holding tactical or “tack meetings” in which they coordinated their plan of entry into the Building. Sikorski and facilities manager Gene Evans were consulted in these meetings. Police officials informed Sikorski that they felt they had the situation contained, and that they therefore wanted to take additional time to adequately plan and staff their entry into the Building in order to ensure the safety of the Occupants and the officers and to prepare for a variety of circumstances. Sikorski explained that he did not hear mention of the possibility of terrorism throughout the day, but also qualified this statement by indicating that no one knew what to expect from the incident, and that the possibility of a violent act was in the back of everyone’s minds.

Later in the day, police also summoned helicopter surveillance to get an aerial view of the Building. Sikorski believed this was in order to determine whether there were any routes of escape from the roof of the Building. At some point in the day, police also made their way onto the roof of the Building by climbing on to it from an adjacent rooftop.

Security personnel have stated that they do not know what caused the highest ranking uniformed members of the NYPD to respond. Two witnesses speculated that because Kerrey is a former United States Senator and he is friends with the Police Commissioner, Raymond Kelly, there was a high level of attention to this potentially volatile situation. Moreover, given the fact that the situation involved a university occupation with an undetermined number of occupants, the police chiefs may have determined that they needed to be there to ensure that appropriate judgments were being made.

We note that Kerrey informed us that later in the morning, he had a call with Commissioner Kelly to assure him that Kerrey was safe. Kerrey did not recall having any other conversation with the NYPD during the day, and left such communications largely to his security personnel.

Without access to information from the NYPD, we cannot reach definitive conclusions as to the reasons for the level of officer response and the presence of so many high-

ranking commanders. We believe, however, that the above-described suggestions as to the causes are plausible and that the NYPD took the Occupation and the need for a successful conclusion very seriously. A group of masked individuals had locked themselves into a multi-level building in New York City and the NYPD was being asked to remove them and effect arrests. Under these circumstances, the NYPD had reason to believe there was a risk of injury to the Occupants and/or the arresting officers and a potential for public recrimination if the operation involving students was mishandled. We have seen no evidence to suggest that any other motivations or causes led to the number of responding officers and commanders.

2. Factual Errors in Describing the Occupation

During the course of the morning on April 10 as well as after the arrest of the Occupants, the Executive Staff issued a number of reports that described what was or had happened, and some of those descriptions contained errors. For example, it was alleged that the Occupants had broken into the Building. Later evidence suggests that they had not broken any locks to get in. It was alleged that 30 persons were in the Building, when in fact the number found inside the Building was 19. There was a report of some occupants escaping through a side door but that report was never verified. One report indicated that students had pepper sprayed themselves to suggest abuse by the NYPD when in fact it was the NYPD who used pepper spray on the students.

As these errors were later pointed out by different students with varying degrees of knowledge of the events, the Executive Staff had to revise the accounts. We have explored the basis for the various statements and have found no reason to believe that the sources of the information sought to mislead. For example, Sikorski, who was present during the arrests, observed that several of the students were wet. At the time of the arrests, one of the police officers in the Building had indicated that there were mace canisters in a trash can in the lobby. The officer called on police Hazmat units to contain the trash can and the area around it, which was dyed red. Accordingly, Sikorski originally assumed that the students had sprayed themselves with mace in order to incriminate the NYPD, and included this in his subsequent report to the Executive Staff. In our interview with him, Benintendo attributed the fact that several of the Occupants were wet to the police's use of pepper spray on 14th Street, which the Occupants then attempted to wash out.

In our experience, it is difficult accurately to reconstruct factual details in such a short period of time. Apparently some members of the Executive Staff cautioned against the effort to describe the events too quickly while others believed it was important to explain what the Executive Staff believed happened. Some of these errors helped to increase suspicions on the part of the faculty and students about the motivations of the Executive Staff.

3. Violation of Guidelines

It is clear that the Occupation constituted a violation of the University's Demonstration Guidelines. The Occupants did not receive a permit to occupy space for a demonstration; they did not provide 24-hours advance notice for a demonstration using University facilities; they occupied the Building outside its normal operating hours; they violated the fire codes of the Building by sealing doors shut; and they violated state laws in their confrontation with Benintendo.

Less clear are the sanctions that would apply to such violations under the Guidelines. While the Guidelines do set forth possible penalties that may be applied, those penalties cover a wide range of possibilities -- warnings and instructions to desist, restitution for damage to University property, probation, restrictions on use of University facilities, suspension for a defined period, expulsion -- and provide no guidance as to which sanction should apply to which type of violation. The Guidelines also provide that the University may "at its discretion, depending on the gravity of the violation, file a criminal or civil complaint with the appropriate public official," but provide no guidance as to when such a filing should be made.

E. Unresolved Questions

The following issues remain largely unresolved. We do not believe that resolution of any of these issues is critical to the conclusions discussed in section IV below:

- The number of individuals involved in the planning and occupation of the Building, what individuals took a lead role, and to what extent non-students were involved,
- The motives and goals of the Occupation,
- The manner of the Occupants' entry into the Building,
- Their conduct once inside,
- The level of coordination, if any, between the Occupants and protesters outside the Building,
- The reason for their decision to open doors to police,
- Prior to April 10, what was the nature and scope of police monitoring of the University,
- What was the exact timing of the upgraded mobilizations and reasons,
- What was the police strategy in managing the scene and seeking a resolution to the Occupation; was it planned or reactive,
- Why did the highest ranking officers of the NYPD arrive on the scene,
- What priority did the police place on a negotiated resolution,
- Why did it take so long for the Hostage Negotiation Team to engage Marshall in its negotiations,
- Did members of the Hostage Negotiation Team intentionally mislead Marshall and the Former Student regarding the charges that would be pressed against the Occupants, and
- What evidence did police recover from the Building.

IV. Conclusion

An important question that bears on the recommendations for the future requires an assessment of why the University arrived at the position in which it found itself on the morning of April 10. We found a surprising level of mistrust and a consequent failure of communication between the Executive Staff and members of the academic community. While better communication may not have prevented the Occupation, it might have enabled the community to arrive at greater agreement on what conduct is deemed unacceptable in a university and how best to respond to such conduct. The conflict between the Executive Staff and the academic community crystallized in the faculty's vote of no-confidence in December 2008. In the ensuing period, despite efforts by individuals from different sectors of the University community, including faculty and the Executive Staff, there appears to have been insufficient dialogue on the important questions confronting the University regarding the scope and limitations of student demonstration or the manner of response by the University where lines are crossed. While it is impossible to predict whether better communication based on greater trust would have prevented a small group whose avowed purpose appears to have been to shut down a building from attempting the Occupation, it might have resulted in a better understanding of Mr. Kerrey's decision or might have persuaded him that a different course of action was available and preferable.

With these observations in mind, we turn to the issues in the Guidelines that the

Committee may wish to consider:

- Whether the Guidelines need to be clarified with respect to the nature of the conduct that will constitute a violation.
- Whether the Guidelines should address separately the University response where non-students are involved in a demonstration on University property.
- Whether the Guidelines should clarify the level of discipline based upon the nature of the violation. Currently, the Guidelines do not identify which violation will result in which disciplinary response. The interaction between the Executive Staff and the students engaged in the February 24 teach-in provides an example of the confusion that can result from a lack of clarity as to consequences. There, students complained that it was inappropriate to threaten them with suspension or arrest for merely holding a teach-in that did not disrupt any school functions. Clarity would provide greater notice in that students might be willing to engage in certain forms of protest but not others depending on the consequences. (On the other hand, efforts to provide overly precise formulas may result in inflexible rules that could lead to unfair results in any given case.)
- Whether the Guidelines should provide greater clarity about the process of decision-making respecting University responses to demonstrations. These factors could include:
 - Who is the ultimate decision-maker and should that person be different depending on the issues raised? For example, as noted above, Mr. Kerrey indicated that were he to revisit his decision on April 10 he would have consulted with a broader group in part because the demonstration ostensibly targeted his policies.
 - Should there be a requirement of consultation and if so with whom and under what circumstances? There may be exigent circumstances where executive decision is required and consultation may not be practicable, but one would expect that to be the unusual circumstance.

- Should the Guidelines provide for a separate set of rules or principles regarding the decision-making process when the NYPD may be called for assistance to address a demonstration or when the University should act as a complainant?
 - Given the loss of control over law enforcement efforts upon deciding that the University should act as a complainant, the Committee may wish to give special consideration to the circumstances under which the Guidelines can authorize such a decision.
- Whether the Guidelines should provide greater clarity on the mechanism for challenging the decisions such as an opportunity for a hearing and appeal. While such processes are referenced in the Guidelines currently, the Guidelines also reference more general disciplinary rules contained in the Code of Conduct. For example, the Guidelines refer to the Code of Conduct and the provision of due process before the imposition of discipline, but the Code itself also permits interim suspensions (as discussed above). The Committee may wish to consider whether, given the unique issues implicated by demonstration activity, all applicable procedures should be contained in one operative set of rules to remove any ambiguities.
- Whether the Guidelines should also specify that demonstrators must be given a warning and, once warned, must obey the decision of the appropriate authority pending the hearing or appeal.