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Testimony Regarding the Risks of Police Body-Worn Cameras

Written testimony of the New York Civil Liberties Union given by Johanna E. Miller, Advocacy Director. Submitted to the President's Task Force on 21st Century Policing, Listening Session on Technology and Social Media at the University of Cincinnati Tangeman University Center Great Hall on January 31, 2015.

The New York Civil Liberties Union (“NYCLU”) respectfully submits the following testimony regarding the risks and promises of police body-worn cameras. The NYCLU, the New York State affiliate of the American Civil Liberties Union, is a not-for-profit, nonpartisan organization with eight offices across New York State and 50,000 members and supporters.ⁱ Our mission is to defend and promote the fundamental principles, rights, and values embodied in the Bill of Rights of the U.S. Constitution and the Constitution of the State of New York.

A key component of the NYCLU’s work is to promote transparency and accountability for police departments. In this role, we have advocated for the establishment of civilian complaint and officer discipline mechanisms that are accessible, transparent, and effective in holding police accountable for their actions. We have worked to ensure police department policies and data about police activities are publicly available. We have represented individual clients and experienced firsthand how difficult it is to achieve accountability for officer misconduct, particularly in cases where the only evidence is one person’s word against an officer’s.

We are hopeful that police body-worn cameras (BWCs) are the next step in law enforcement reform, furthering transparency and accountability, and ultimately protecting both officers and the public. It has been suggested that knowing a BWC is in use can actually improve the behavior of police and civilians in street encounters.ⁱⁱ If measurable evidence indicates this effect is real, investment in BWCs could represent enormous progress in improving community-police relations. If they can also be used to achieve meaningful accountability for abuse by police officers, they will be one of the most valuable reform steps we can take.

In 2014, the Department of Justice (DOJ) and Police Executive Research Forum found that 63 of 500 surveyed police departments were either using or testing BWCs, and only one-third of those departments had written policies regarding their use.ⁱⁱⁱ The New York Police Department (NYPD), the largest municipal police force in the country, has recently announced a BWC pilot program; it remains to be seen how NYPD will use the experience of the pilot and what regulations will govern BWCs now and in the future. We are concerned that, in the rush to adopt this new technology, departments and legislators are overlooking important privacy and accountability considerations. We hope the DOJ will use grant programs and best practice guidelines to encourage police departments to adopt sensible and enforceable policies for the use of BWCs. To that end, we have the following recommendations.

1. Fund pilot programs to identify best practices.

Most of the available literature on BWCs originates from the policing sector, which naturally frames the issues through an enforcement lens. This limited literature has become redundant and self-referential, repeatedly citing Rialto, California, or Mesa, Arizona as authoritative sources of “data.” While the lessons from those departments may be of use, we are concerned that they are viewed as reliable qualitative research when in fact they are anecdotal experiences.

Answering the most basic question about BWCs—whether their use has a measurable impact on officer or civilian behavior—requires sophisticated social science research. The findings of such a study would be invaluable in informing decisions about adopting BWC programs, but no literature like that currently exists. Other areas where practical research is needed to inform policy include when and how

to activate the cameras for maximum impact and minimum invasion of privacy, and the most effective training programs for officers.

Because of the lack of authoritative information regarding the effects and best use of BWCs, we recommend the DOJ fund rigorously designed pilot programs to gather reliable empirical information. The results and recommendations from these studies should be published widely, and used to inform policy guidelines and requirements for receiving DOJ grant support.

2. Ensure BWC programs are designed to maximize officer accountability.

In order to have any positive impact on police-community relations, BWC programs must be designed to maximize officer accountability. This can be achieved through creating default rules for operating the camera, consequences for failing to do so, and rules regarding retention and deletion of recordings.

At the most basic level, cameras must be on and recording during all law enforcement encounters (with narrow exceptions for situations where privacy is a paramount concern, as described in section 4). Efforts must be made to minimize opportunities for officer interference with cameras and to ensure footage cannot be manipulated or deleted improperly.

There must be meaningful consequences when officers fail to record an interaction. In order to counter officers' powerful motivation to not record when they behave improperly, department disciplinary rules should create a presumption against the officer for failing to record an interaction when required to do so (rebuttable through evidence of mechanical malfunction). In court proceedings, a presumption against the officer's version of events could be employed to encourage recording of interactions.^{iv}

Departments must retain footage for the amount of time necessary to ensure it is available as evidence in related criminal and civil cases, complaints against officers, or other accountability proceedings (though it should not be stored indefinitely; this point is discussed in section 5). It is vital that footage not be destroyed or misplaced before it can be used.

We further recommend the Task Force consider how BWCs can support other oversight and accountability mechanisms, by providing access to evidence of coercion, intimidation, verbal abuse, and other officer misconduct in addition to use of force. For example, the NYCLU is supporting legislation in New York City that would require informed permission be obtained and recorded before police officers can search a person based solely on the person's "consent."^v Along with a coalition of community, academic, and legal organizations, we believe this law would limit the number of coercive searches that take place on city streets when people don't know they have the right to refuse, or when officers simply commence a search and the absence of vocal protest takes the place of true consent. A law like this, versions of which are on the books in several states^{vi}, is immensely more practical where consent can be recorded by a BWC, providing objective proof that a person understands his right to refuse a search and is waiving that right.

3. Establish a clear and limited purpose for use of BWCs.

As a threshold matter, departments adopting BWCs must be deliberate and transparent about their purpose. We believe the purpose BWCs are best suited for is recording enforcement- or investigation-related interactions between uniformed or plainclothes police and members of the public. They should not be used, for example, to monitor officers' job performance or to engage in surveillance. They should not be used to coerce witness or victim cooperation or be used against witnesses or victims who recant. If the DOJ makes funding available to departments for the purchase of these devices, we recommend it require a clear statement of purpose for the program, limited to these uses, as well as privacy protections as described below.

Additionally, we recommend independent oversight of any BWC program, just as we recommend independent oversight of police department operations in general. Specifically, an independent body should have access to footage to review how BWCs are being used and paid for, and disciplinary records and training materials to review how the program is administered. It should have responsibility for guarding against "mission creep" in the use of BWCs beyond their stated purpose.

4. Establish privacy protections.

We are acutely aware of the need to balance the promise of emerging technologies in law enforcement with the privacy rights of everyday people. One of our core missions is to push back against ever-encroaching police surveillance, from the massive installation of fixed cameras in public locations to the NYPD's database of innocent people who had been stopped and frisked. We recognize the risk that BWCs could be used to gather surveillance of innocent people, that footage of street stops could be used to create a database of "usual suspects," or that recordings of people in sensitive situations could be

used to coerce cooperation with law enforcement. Privacy protections are essential to making sure BWCs don't turn into a tool for abuse.

Like dashboard cameras in police vehicles, which have been in use for many years, BWCs can provide objective evidence of both officer and civilian misconduct. Unlike dashboard cameras, however, BWCs can record inside a home, hospital room, or other sensitive locations. In addition, while dashboard cameras record mostly traffic stops, BWCs can record nearly any type of interaction, from interviews with crime victims to casual conversation with community members to officers blowing off steam with their colleagues. Their unique, and potentially intrusive, mobility calls for careful consideration of privacy concerns.

Rather than creating rules to navigate the entire landscape of situations where privacy could be an issue, we recommend three mechanisms for BWC use that we believe can greatly reduce the potential for harm. First, BWCs should only be used to record police interactions with the public that have an investigative or law enforcement purpose, not casual interactions or mere observations. This requires that individual officers retain the ability to de-activate the camera at certain times, making it even more important that departments establish effective means of ensuring officers record when they should.

Second, members of the public must be on notice that they are being recorded, through visual cues or the officer's verbal explanation (with considerations for the visually impaired and people who do not understand English). Third, absent exigent circumstances, such as a police raid or execution of a warrant, people should be able to refuse consent to be recorded. These simple protections could be institutionalized through grant programs run by the DOJ, requiring the adoption of appropriate policy at the local level.

Regarding stored recordings, we recommend the Task Force and DOJ explore technology that would allow blurring or pixelation of faces where a recording is to be used for a purpose other than officer discipline proceedings or a civil or criminal case, for example if requested through open records laws or to be used for training officers. Police departments should endeavor to minimize privacy intrusions while ensuring proper access to government records, including recordings.

Because of the emerging nature of this technology, and the lack of evidence to support best practices, balancing privacy protections with officer accountability is one area where there are no easy answers. We urge this Task Force to recommend further study of privacy concerns, and how they interact with accountability provisions. Specifically, we recommend additional in-depth consultation with privacy and technology experts. Ultimately, it is vital for DOJ to issue guidance in this complicated area.

5. Establish appropriate access and retention rules

The Task Force should be aware of the potential for abuse in the storage and retention of BWC footage. Because of the large volume of digital recordings, BWCs in most cases will be used in conjunction with remote or cloud-based file storage. This necessitates contract language with cloud storage providers that protects against misuse or negligence that results in a privacy violation. Only essential employees at the storage company should have access to footage.

Importantly, departments must have straightforward and responsive mechanisms for people to obtain footage relevant to complaints or legal proceedings they file. This level of access may prove challenging to departments unaccustomed to transparency, so the DOJ has an important role to play in establishing access procedures. Departments should limit the number and type of employees who have access to footage, and for what purposes (for example, if footage is to be used for training, will civilians in the recording be notified or permitted to withhold consent?).

The period of time for which footage is stored may need to change based on the type of information recorded; for example, the statute of limitations in New York for filing a federal civil rights claim is three years. For prosecuting a murder, however, there is no statute of limitations. Footage that records no officer interaction with the public will need to be destroyed quickly, to protect privacy and for practical reasons. This complexity requires departments to develop means of identifying and organizing recordings that capture different types of interactions, a level of data management that most departments are probably ill-equipped to implement. The DOJ should engage with data management professionals, companies providing BWC services and file storage, and government records experts to establish best practices in this area.

6. Conclusion

The growing use of BWCs has the potential to greatly improve accountability of police officers to the communities they serve. Early evidence even indicates a potential self-correcting effect when people know they are being filmed. But the rapid ascension of this technology in law enforcement and reform

circles means there are many complicated issues that are going unaddressed. It is essential that the federal government step in to bring thoughtful discourse, rigorous research, and best practices guidance to the use of BWCs. Without the right policies in place, BWCs will fail to improve police behavior or hold officers accountable, and could themselves become tools of abuse. However, if informed by research and governed by the right policies, BWCs can have a vital positive impact on police-community relations.

Footnotes

i Our recommendations on this issue are not necessarily coextensive with those of the ACLU, though our principles of police accountability, government transparency, and respect for individual privacy are the same.

ii OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, DEPARTMENT OF JUSTICE & POLICE EXECUTIVE RESEARCH FORUM, IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED (2014), at 2 *available at* <http://www.justice.gov/iso/opa/resources/472014912134715246869.pdf>.

iii *Id.* at 6.

iv See JAY STANLEY, AMERICAN CIVIL LIBERTIES UNION, POLICE BODY-MOUNTED CAMERAS: WITH RIGHT POLICIES IN PLACE, A WIN FOR ALL (2013), at 3. *Available at* https://www.aclu.org/files/assets/police_body-mounted_cameras.pdf.

v Int. 0541, N.Y. City Council (2014).

vi Colo Rev. Stat. § 16-3-310 (2010), W. Va. Code § 62-1A-10 (2010), Ark. R. Crim. P. Rule 11.1 (2005)

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