



# **POLICING BODY CAMERAS**

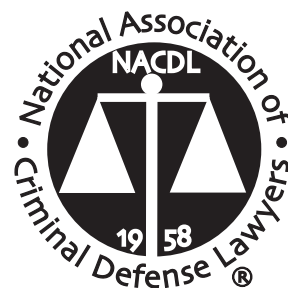
**Policies and Procedures to Safeguard the Rights of the Accused**

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**REPORTER**

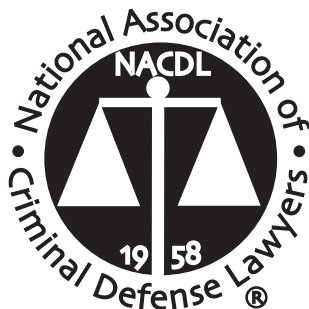


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# **POLICING BODY CAMERAS**

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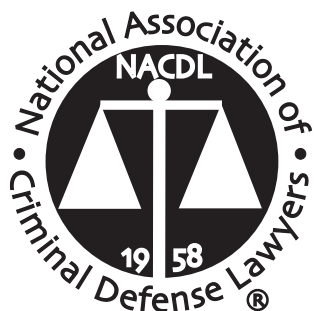


# About the National Association of Criminal Defense Lawyers and the Foundation for Criminal Justice

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with a crime or wrongdoing. NACDL's core mission is to: *Ensure justice and due process for persons accused of crime ... Foster the integrity, independence and expertise of the criminal defense profession ... Promote the proper and fair administration of criminal justice.*

Founded in 1958, NACDL has a rich history of promoting education and reform through steadfast support of America's criminal defense bar, *amicus curiae* advocacy, and myriad projects designed to safeguard due process rights and promote a rational and humane criminal justice system. NACDL's many thousands of direct members — and 90 state, local and international affiliate organizations totalling up to 40,000 members — include private criminal defense lawyers, public defenders, active U.S. military defense counsel, and law professors committed to preserving fairness in America's criminal justice system. Representing thousands of criminal defense attorneys who know firsthand the inadequacies of the current system, NACDL is recognized domestically and internationally for its expertise on criminal justice policies and best practices.

The Foundation for Criminal Justice (FCJ) is a 501(c)(3) charitable non-profit organized to preserve and promote the core values of America's criminal justice system guaranteed by the Constitution — among them access to effective counsel, due process, freedom from unreasonable search and seizure, and fair sentencing. The FCJ supports NACDL's charitable efforts to improve America's public defense system, and other efforts to preserve core criminal justice values through resources, education, training, and advocacy tools for the public and the nation's criminal defense bar.



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NACDL extends its deep appreciation to the members of the Body Camera Task Force who dedicated their time and effort to studying the issues and working through the recommendations in order to ensure the strongest protection for the rights of the accused in criminal cases: Co-chairs Steven R. Morrison and Barry J. Pollack; Anna M. Durbin, Kobie Flowers, Rick Jones, Elizabeth Kelley, Michael J. Nichols, Barry G. Porter, and Martin A. Sabelli.

The work of the Task Force would not have been possible without the insightful contributions of our esteemed witnesses, identified throughout the report and in Appendix A. Sincerest gratitude goes to the following individuals, who worked behind the scenes to make the task force and report possible: At NACDL Barry J. Pollack, President, NACDL and Task Force Co-chair; E.G. "Gerry" Morris, Immediate Past President, NACDL; Theodore Simon, former NACDL president; Norman L. Reimer, Executive Director; Jumana Musa, Sr. Privacy and National Security Counsel; and Lisa Schrade, National Affairs Assistant.



## Foreword

Criminal defense lawyers have long known that while most police do their best under difficult circumstances, the use of excessive force by police occurs with greater frequency than was publicly acknowledged, and the excessive use of force is deployed disproportionately against African Americans and other minority communities. Within the past few years, a spate of police shootings captured on video fostered national debate and propelled a movement to deploy body worn video cameras as required police equipment.

Fifty years ago, instant video replay made its national debut. For many years, it allowed fans at home to assess whether or not an official acting in real time made the right call. Now, in nearly every professional sport, video replay has become part of the game itself. Leagues realize that officials will gain a more accurate sense of what transpired if they are able to review the video before attempting to make a final determination. That does not mean that the official will always get it right. Frequently, video is taken from a particular angle that provides a skewed view of the actual events. But, the leagues recognize the additional information the video offers will overall lead to better decision making.

In our courtrooms, as juries try to determine what happened in real time, often in situations where the participants and various eyewitnesses have very different perceptions of the events, having additional evidence available to them, even if far from perfect evidence, is likely overall to lead to better decision making. Yet, body worn cameras are nothing close to a panacea for what ails police-community relations. Police must be better trained to de-escalate situations, understand explicit and implicit bias, and employ force only as a last resort and only to the extent truly necessary. Without such training, people will continue to be shot and killed on our streets needlessly. Further, not only do body worn cameras not solve all problems, they also introduce new ones. In particular, they can be costly, potentially taking resources away from other reform measures such as better training, and present significant privacy concerns.

Typically, criminal justice reforms emanate from law enforcement, often implemented in the passion of some sensationalized case, and rarely with input from the defense bar. As the body camera movement gained momentum, NACDL resolved to study the issue. It established a Task Force to consider the widespread deployment of body worn cameras, and to assess how best to employ them considering the implications for the rights of the general public, criminally accused persons, the defense function, and the integrity of the criminal justice system. This report is the product of more than two years of intensive study with input from a broad range of stakeholders in the criminal justice system. NACDL offers this report to the criminal justice community and the public at large, confident it provides thoughtful analysis and a much-needed perspective.



**Barry J. Pollack**



**Steven R. Morrison**

**Co-Chairs, NACDL's Body Camera Task Force**



## Executive Summary

To contribute to the important national debate about body cameras, and in response to “the furor over recent cases in which unarmed black men were killed by law enforcement,” National Association of Criminal Defense Lawyers (NACDL) then-President Theodore Simon established a working group in December 2014 and, in July 2015, the NACDL Board of Directors adopted a set of principles on body camera policies to direct future work of this Body Camera Task Force.

Over the months of drafting and discussing this report, many more men and women of color and other civilians have been shot by police under circumstances that raise serious concerns and leave many unanswered questions. At times, multiple shootings have grabbed headlines in different cities in the same week. NACDL’s concern is not limited to those killed and their families, but also extends to the communities torn apart by the distrust that such shootings often bring or exacerbate and to the rights of police officers involved, some of whom may be criminally charged.

The core mission of NACDL is to: “Ensure justice and due process for persons accused of crime . . . Foster the integrity, independence and expertise of the criminal defense profession . . . Promote the proper and fair administration of criminal justice.” The use of body cameras will not eliminate unnecessary shootings of civilians, but NACDL believes the documentation of police-citizen encounters has already had, or over time will have, a salutary effect on policing and the criminal justice system, by ensuring a more full and fair record of these encounters.

NACDL cautiously endorses the continued and wider use of body cameras implemented with the protections outlined in this report. The use of body cameras under the carefully-crafted policies outlined below offers the potential to ensure both police accountability and the creation and maintenance of a fuller evidentiary record, which is essential to further the search for truth in investigations and trials.

Body cameras are not by any means a complete solution to what ails the criminal justice system, and their increased implementation should in no way supplant other important initiatives. NACDL may revisit its endorsement of the use of body cameras and the principles essential to their use as new issues or concerns arise.

### **1. Clear and strictly enforced policies must establish when body cameras will be recording so that the decision of when to record is not left to the discretion of individual police officers.**

If the individual police officer wearing a body camera has discretion over the camera — when to turn it on, when to turn it off, what to film, and so forth — the camera becomes vulnerable to manipulation that may serve the officer instead of serving the public interest.

Achieving the goals of the protection of the rights of the criminally accused and police accountability requires that body cameras be running continuously and clear policies and advisements be crafted to ensure that individual police officers are not able to decide when and what will be recorded. Sometimes the video will be harmful to those accused of a crime. Nevertheless, as two different public defenders told the Task Force, clients almost always prefer video of an incident over the word of the officer standing alone, believing their word is not going to hold up against the police.





Evidence thus far has shown that many officers do not comply with activation policies, and there is a suspicious frequency of cameras malfunctioning, regardless of whether police officers get to decide when to record. Allowing officer discretion will only increase the ability of individual officers to skew when recordings occur to the perceived benefit of the officer. In Albuquerque, Denver, and other cities, officer compliance with body camera recording is as low as 30%.

Recording every public encounter between police and citizens offers the best chance of achieving the goals of police accountability and protection of the rights of the criminally accused. As detailed in this report, clear and well-known policies limiting access to the video can mitigate the intrusion on privacy caused by the recording and can address most of the concerns with potential misuse of the resulting footage.

In public areas, ensuring preservation of evidence and accountability counsels in favor of continuously recording citizen encounters even if a request is made to stop recording. Private homes, on the other hand, are an area entitled to greater privacy, and officers should request consent before recording.

Discretion in deciding when a camera should be turned off during non-public interactions must rest with the person interacting with the police — not the officer. When individuals ask that the camera be turned off in a private home, the request should be made on camera and include a standard, carefully crafted advisement from the officer in response.

The continuous recording by body cameras is essential to increased transparency, accountability, and evidentiary documentation, but NACDL readily acknowledges concerns that these cameras are not watching police, but are instead pointed at “the community being policed,” which raises the potential for their use as “tool[s] of high-tech racial profiling.” NACDL also acknowledges that body cameras should not supplant other methods of ensuring police accountability. Individuals must also be free to videotape the police, whether occasionally when they see something that seems awry or in a more organized way.

Policies requiring recording become meaningless without consistent compliance. Policies must include potent remedies for violations, including disciplinary action against the officer and exclusion of evidence found as a result of certain violations.

## **2. Video must be stored for a sufficient time to allow the accused to obtain evidence that is exculpatory or may lead to the discovery of exculpatory evidence.**

All body camera footage is not equal, and certain types of footage must be preserved longer than other types. Flagging footage for longer retention should occur automatically for any incident:

- ❖ involving a use of force;
- ❖ that leads to detention or arrest;
- ❖ that remains open or under investigation; or
- ❖ concerning which either a formal or informal complaint has been registered.



Moreover, the subject of any recording may flag a recording, even if not filing a complaint, and third parties should also be able to flag an incident whenever an individual has some good faith basis to believe police misconduct occurred. In addition, defendants and defense counsel must be permitted to flag for extended preservation any footage believed in good faith to be relevant to any criminal case. This may include footage supportive of an alibi or suggestive that someone else committed a charged offense.

Flagged videos, including videos of use of force incidents, must be kept for the duration of the case to which it pertains and a reasonable period of time after that to ensure that all post-conviction remedies have been exhausted.

### **3. Arrested individuals and their attorneys must be given prompt access to all body camera video pertaining to a case.**

It is imperative that video is provided to defense counsel as soon as technically feasible, ideally within a day or two of arrest. Simply providing defense counsel an opportunity to view the footage is not sufficient; defense counsel must be provided a copy of the footage.

Reviewing this footage can be time-consuming, and an early start is imperative to preparing for preliminary hearings and important to investigating the case for potential suppression issues and defenses.

### **4. Policies must be crafted and equipment must be designed to minimize concerns with the misinterpretation of video.**

Body camera footage, like any video, is not an objective record of events. Unlike dash cams, which often capture both officers and citizens and a wide field of view, body cameras provide a limited view from the officer's perspective. To present a more accurate perspective of an encounter, only body cameras with a wide field of view should be used. Cameras must also include a buffer of at least thirty seconds to ensure a more complete account of an event.

The placement of the body camera can also result in a distorted reality. Most body cameras in the United States are mounted on an officer's chest, unlike the head-mounted cameras in some other countries. Viewing an event from a perspective several inches lower than the officer's sightline can make a suspect seem larger and more intimidating, particularly when the suspect is physically close to the officer. Moreover, because cameras are mounted on clothing, simple movements will appear exaggerated. Body cameras mounted on hats, glasses, or helmets will generally present a more accurate view of events.

In addition, although a body camera generally captures the officer's voice, it does not show if an officer has his or her hand on a gun or is making a menacing gesture while talking in an otherwise calm and reasonable voice. Similarly, body cameras do not show whether an individual being arrested is tensing his or her arm. Body camera footage alone must be viewed cautiously; it presents only the officer's perspective, which is not only limited, but also prone to manipulation. Even video footage thought to be unambiguous may be susceptible to multiple interpretations depending on the "cultural outlook" of the individual viewing the tape.



## 5. Police officers should not access body camera video before preparing their initial reports.

Officers, like other eyewitnesses, should generally not be permitted to view body camera footage before giving a statement about, or preparing a report of, an incident. Academic research shows that watching the video can “essentially erase and record over” an officer’s memory. Allowing police — but not suspects or witnesses — to view body camera footage before providing their account of an incident unfairly bolsters the officers’ account, and thus credibility, by allowing officers to recall more details seemingly more accurately than others and to conform their recollections (consciously or subconsciously) to those seemingly supported by the video. Rather, only after an initial report is prepared, and with careful monitoring and documentation, officers may be permitted to view footage and prepare an addendum to their report.

## 6. Policies must prohibit the use of any biometric technologies in conjunction with body cameras.

The Fourth Amendment protects citizens against unreasonable searches, which are those in which the government violates a subjective expectation of privacy that society recognizes as reasonable. Although a citizen may not have a general expectation of privacy when he or she is in the public square, many would question the reasonableness of constant recording that could not only collect massive amounts of biometric information, but also compile and later search those videos using biometric means. Using body cameras as dragnet surveillance tools of individuals, most of whom are suspected of no crime, raises serious privacy concerns and implicates the constitutional rights of individuals whose biometric data is collected and searched. In addition, individuals who live in highly-policed neighborhoods, who are often poor and predominantly people of color, are more likely to be put in such databases. Short retention periods for unflagged video may reduce privacy concerns only if biometric data is never collected and never added to government databases.

## 7. Video must not be later viewed to search for additional crimes or take other punitive action against an individual.

The Fourth Amendment has long protected individuals’ expectation of privacy against overzealous police action. Although video may document a crime scene, repeated views and technologically enhanced scrutiny should not be permitted to investigate additional potential crimes or exact punitive consequences after a police encounter has concluded. However, in the absence of a judicially-approved warrant particularly describing the place or item to be searched and specifically authorizing technological enhancements, officers should not be permitted to review video of their entry into a home to search for, with enhanced lighting and the ability to slow and replay segments of video, evidence of contraband, for example. Nor should an officer without a warrant be able to comb through video collected for other purposes to engage in a fishing expedition hoping to discover evidence of criminal activity.

## 8. Adequate resources must be available to ensure ongoing officer training on body camera use.

Training police officers on the proper use and protocols is critical to operation of a body camera program that adheres to policies, collects and preserves evidence when required, and protects the rights of the accused. Officers must also understand the consequences of not using their body cameras when required, which is discussed as part of Principle 1 above. Unfortunately, as one former police chief told the Task Force,



the high cost of the equipment and data storage sometimes leaves jurisdictions in a cash-strapped position in which training is not funded or not funded at a sufficient level.

Training should not only be offered regularly, it should specifically address the reality that body cameras alter interactions with the public generally and especially with vulnerable populations, such as individuals with mental disabilities, who represent more than half the people in the nation's jails and prisons.

### **9. Sufficient resources must be available to ensure that counsel are appropriately trained and that appointed counsel have adequate time and access to experts necessary to render effective assistance of counsel.**

NACDL acknowledges the significant cost of body cameras, which is largely borne by local governments, although some DOJ funding or state funding may be available. The efficacy of spending millions of dollars for body cameras is far from settled. If a decision is made to purchase body cameras, however, funding must also be made available for training officers on their proper use. That funding should not be on the backs of the criminally accused, which will exact a heavier price on the low-income communities most often targeted by police activity.

Body camera programs entail a number of obvious and less obvious costs. They include the purchase of the physical equipment and its upkeep, training, data storage, the dedication of lawyer time to review and examine footage, and the possibility of requiring a forensic expert. These costs will affect police departments, prosecutors' offices, private criminal defense attorneys, and, perhaps most severely, public defenders. Any body camera program must account for all of its upfront costs, as well as the resources necessary to maintain an effective program.

Prosecutors and defense counsel not only take a significant amount of time reviewing camera footage for their cases, they may also require the assistance of forensic experts. These lawyers, and public defenders in particular, may have inadequate resources to properly review this evidence.

### **10. An independent, non-police agency must retain and control access to body camera footage.**

In light of the many concerns discussed above, an Independent Monitoring Board should be appointed to control access to all body camera footage. Because for many people much of the impetus for use of body cameras is an ongoing distrust of police, allowing police to control when cameras are used and access and store video at their discretion exacerbates rather than resolves the concern. Ironically, the very organizations meant to be held accountable are able to prevent these videos from being created in the first instance or shared after the fact.

The information collected — like all other forms of evidence — does not belong to any particular party in litigation, including the police. Thus, jurisdictions should create independent boards of civilians, not police, to retain and release that information. Federal government grants should not fund programs that do not follow these guidelines or, at a minimum, should offer funding to a few jurisdictions who agree to create such a system that relies on the use of an independent, non-police monitoring agency.



An independent monitor obviates many of the issues discussed above. An entity other than police retaining and controlling access to video will greatly reduce accusations of tampering or deletion, intentional or inadvertent, by police and the need for courts to have hearings and craft remedies.

In short, an independent monitor can thoughtfully mitigate the privacy concerns created by widespread collection of body camera footage while best ensuring police accountability.

## Conclusion

Body cameras were introduced long before policies for their use were fully developed. As with any police technology, the devil is in the details. With the right policies in place, body cameras can be an important tool for accountability and can have great evidentiary value. Police-civilian interactions will no longer be a matter of the accused's word against that of the police officer. NACDL will work to ensure that body cameras are used in ways that preserve the constitutional rights of the accused in criminal cases.



## NACDL Body Camera Principles

- 1. Clear and strictly enforced policies must establish when body cameras will be recording so that the decision of when to record is not left to the discretion of individual police officers.**
- 2. Video must be stored for a sufficient time to allow the accused to obtain evidence that is exculpatory or may lead to the discovery of exculpatory evidence.**
- 3. Arrested individuals and their attorneys must be given prompt access to all body camera video pertaining to a case.**
- 4. Policies must be crafted and equipment must be designed to minimize concerns with the misinterpretation of video.**
- 5. Police officers should not access body camera video before preparing their initial reports.**
- 6. Policies must prohibit the use of any biometric technologies in conjunction with body cameras.**
- 7. Video must not be later viewed to search for additional crimes or take other punitive action against an individual.**
- 8. Adequate resources must be available to ensure ongoing officer training on body camera use.**
- 9. Sufficient resources must be available to ensure that counsel are appropriately trained and that appointed counsel have adequate time and access to experts necessary to render effective assistance of counsel.**
- 10. An independent, non-police agency must retain and control access to body camera footage.**



# Introduction/Scope of Report

To contribute to the important national debate about body cameras and in response to “the furor over recent cases in which unarmed black men were killed by law enforcement,” National Association of Criminal Defense Lawyers (NACDL) then President Theodore Simon established a working group in December 2014<sup>1</sup> and, in July 2015, the NACDL Board of Directors adopted an interim set of principles on body camera policies that could direct future work of this Body Camera Task Force (Task Force).<sup>2</sup>



**NACDL’s concern is not limited to those killed and their families, but also extends to the communities torn apart by the distrust that such shootings often bring or exacerbate and the rights of police officers involved, some of whom may be criminally charged.**

Over the months of drafting and discussing this report, many more men and women of color and other civilians have been shot by police under circumstances that raise serious concerns and leave many unanswered questions. At times, multiple shootings have grabbed headlines in different cities in the same week.<sup>3</sup> NACDL’s concern is not limited to those killed and their families, but also extends to the communities torn apart by the distrust that such shootings often bring or exacerbate and the rights of police officers involved, some of whom may be criminally charged.

The core mission of NACDL is to: “Ensure justice and due process for persons accused of crime . . . Foster the integrity, independence and expertise of the criminal defense profession . . . Promote the proper and fair administration of criminal justice.”<sup>4</sup> The use of body cameras will not eliminate unnecessary shootings of civilians, but NACDL believes the documentation of police-citizen encounters has already had, or over time will have, a salutary effect on policing and the criminal justice system, by ensuring a more full and fair record of these encounters.<sup>5</sup>

## NACDL’s Review

A wide array of organizations has endorsed use of police body cameras. Focusing on law enforcement, Attorney General Loretta Lynch has said that body camera programs give police officers “the tools, support, and training they need to tackle the 21st century challenges we face while holding tremendous promise for enhancing transparency, promoting accountability, and advancing public safety for law enforcement officers and the communities they serve.”<sup>6</sup> A coalition of civil rights, privacy, and media rights groups have explained that body cameras may “help provide transparency into law enforcement practices, by providing first-hand evidence of public interactions,” while expressing concerns for misuse and abuse.<sup>7</sup> The Task Force carefully considered the concerns of the privacy of the accused, the public,<sup>8</sup> police officers,<sup>9</sup> and crime victims.<sup>10</sup>

Studies on the effectiveness of body cameras are relatively few and arguably inconclusive. Proponents claim that if officers know they are being recorded, they will reconsider engaging in abusive behavior. In Rialto, California, researchers found a 60 percent reduction in officer use of force when body cameras were employed, and an 88 percent reduction of citizen complaints against officers.<sup>11</sup> But the study did not control for the recent changes of a new police chief and new training protocols.<sup>12</sup> The Rialto study’s findings were not replicated in a study of camera use by the Albuquerque police.<sup>13</sup>

**POLICING BODY CAMERAS: Policies and Procedures to Safeguard the Rights of the Accused**



More recently, a study by researchers from Temple University offered the troubling conclusion that “the use of wearable body cameras is associated with an increase in the shooting deaths of civilians,” purportedly because the cameras “can help the police justify shooting deaths of armed suspects.”<sup>14</sup> The study merely correlated existing numerical data and was not a controlled study; it was quickly criticized by a leading body camera researcher for relying on 2013 Bureau of Justice Statistics data, which he believed were too old to incorporate in analyzing police killings during 2015.<sup>15</sup> The effectiveness of body cameras, like any important policy issue, warrants rigorous and continuing study and review.<sup>16</sup>



**The effectiveness of body cameras, like any important policy issue, warrants rigorous and continuing study and review. . . . The Task Force reviewed hundreds of pages of policy reports, articles, legislation, and department policies, and heard from sixteen witnesses representing a wide variety of perspectives[.]**

In addition to these studies, the Task Force reviewed hundreds of pages of policy reports, articles, legislation, and department policies, and heard from sixteen witnesses representing a wide variety of perspectives, as listed in Appendix A. This report, which is the product of that Task Force’s work, was discussed at length by the NACDL Board at its August 2016 annual meeting. While dissenting views were thoughtfully and cogently presented and carefully considered, the Board, over these dissenting opinions, adopted as NACDL policy the views expressed in this report. This report adds a critical voice that has not previously been part of the discussion: the criminal defense bar committed to protecting the rights of the accused.





# Recommendations

NACDL cautiously endorses the continued and wider use of body cameras implemented with the protections outlined in this report. With these protections, body cameras offer enormous potential to better document encounters between police officers and citizens while mitigating competing concerns about their potential for misuse or abuse.

The use of body cameras under the carefully crafted policies outlined below offers the potential to ensure both police accountability and to create and maintain a fuller evidentiary record, which is essential to further the search for truth in investigations and trials. The experience of defense lawyers with video evidence, whether it be dashboard cameras or recorded statements to police, has been largely positive. As with these other forms of police-generated video, some video footage is better than none and more footage is better than less. When a camera is able to better reveal the “truth” of a police-citizen encounter, the important goals of obtaining and maintaining evidence relevant to criminal investigations and trials, transparency, accountability, and public safety are advanced.



**Body cameras are not by any means a complete solution to what ails the criminal justice system, and their increased implementation should in no way supplant other important initiatives.**

Body cameras are not by any means a complete solution to what ails the criminal justice system, and their increased implementation should in no way supplant other important initiatives. NACDL may revisit its endorsement of the use of body cameras and the principles essential to their use as new issues or concerns arise.

NACDL acknowledges that any municipality adopting a body camera policy or state legislature setting broader policy will need to weigh the competing considerations and the interests of many groups expressing views on the merits of body cameras. Different municipalities that have adopted the use of body cameras have not provided uniform protections against their misuse.<sup>17</sup>

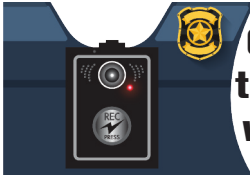
The perspective and concerns of the criminal defense bar advocating for the rights of the criminally accused must be a critical part of the discussion about whether and how to use body cameras. This report offers principles essential to maximizing the likelihood that the use of body cameras will result in a net benefit in furthering the important goals of increased police accountability and protection of the rights of the criminally accused. Policies on using body cameras should incorporate each of these ten principles.

## **1. Clear and strictly enforced policies must establish when body cameras will be recording so that the decision of when to record is not left to the discretion of individual police officers.**

If the individual police officer wearing a body camera has discretion over the camera — when to turn it on, when to turn it off, what to film, and so forth — the camera becomes vulnerable to manipulation that may serve the officer instead of serving the public interest.

**POLICING BODY CAMERAS: Policies and Procedures to Safeguard the Rights of the Accused**





**Clients almost always prefer video of an incident over the word of the officer standing alone, believing their word is not going to hold up against the police.**

Achieving the goals of the protection of the rights of the criminally accused and police accountability requires that body cameras be running continuously and clear policies and advisements be crafted to ensure that individual police officers are not able to decide when and what will be recorded.<sup>18</sup> Sometimes the video will be harmful to those accused of a crime. Nevertheless, as two different public defenders (one in a jurisdiction that has long used body cameras and one in a jurisdiction that does not use them) told the Task Force, clients almost always prefer video of an incident over the word of the officer standing alone, believing their word is not going to hold up against the police.<sup>19</sup>

The public interest is served by having more evidence about what occurred during police-citizen encounters, not less. Similar to DNA evidence, which concerned some defense lawyers initially because it could hurt criminal defendants, body cameras may also serve as a powerful tool for possible exoneration. Body camera footage may also be crucial to a suppression motion, where it “would have been much harder” to establish a non-consensual encounter without it.<sup>20</sup> Moreover, when NACDL members represent any individual, including police officers who are the subject of false allegations that they behaved criminally, evidence properly collected by body cameras may be crucial to the search for the truth.

As explained below, because of the difficult and nuanced situations posed to officers, unambiguous policies that eliminate individual officer discretion should be crafted to maximize the protection of the rights of suspects and potential suspects.



**Allowing officer discretion will only increase the ability of individual officers to skew when recordings occur to the perceived benefit of the officer.**

### **A. Poor records of compliance**

Many officers do not comply with activation policies, and there is a suspicious frequency of cameras malfunctioning, regardless of whether police officers get to decide when to record. Allowing officer discretion will only increase the ability of individual officers to skew when recordings occur to the perceived benefit of the officer. Allowing individual discretion also makes it harder to detect whether a failure to record is the result of a decision made in good faith. Finally, allowing such discretion can result in valuable evidence being lost, even when the discretionary decision not to record was made in good faith.

In Albuquerque, Denver, and other cities, officer compliance with body camera recording is as low as 30%.<sup>21</sup> Although officers in Albuquerque were given no discretion as to when to record, officers repeatedly turned off their body cameras prior to incidents in 2012.<sup>22</sup> An independent monitor investigating the New Orleans Police Department’s use of body cameras in 2010 expressed suspicion regarding how frequently body cameras malfunctioned and failed to record during crucial moments.<sup>23</sup> The independent monitor reviewed 145 use-of-force reports logged by the investigation team and found documentation of footage of only 49 use-of-force incidents, signaling a significant failure to record.<sup>24</sup>

Noncompliance by police with a policy, sometimes imposed in the face of strong opposition from officers, is not surprising, as earlier attempts to equip officers with microphones, dash cameras, and body cameras were met by rampant defiance.<sup>25</sup> Sometimes the failure to record is willful; other times it may simply be a reality of the difficult job of officers. As a former police chief told the Task Force, when officers are in a stressful or shooting situation, they “will not have the mental acuity to turn it on . . . they are in life preservation mode.”<sup>26</sup>

NACDL acknowledges the concerns of continuous recording that have been expressed by police officers, privacy advocates, and others. These include citizens’ privacy and the potential harm to confidential informants, victims, witnesses, minors, or those merely having an “informal, non-law enforcement interactions with members of the community;” not to mention the potential chilling effect that body cameras might have on the willingness of citizens to speak with police.<sup>27</sup> Recording every public encounter between police and citizens offers the best chance of achieving the goals of police accountability and protection of the rights of the criminally accused. As detailed later in this report, clear and well-known policies limiting access to the video can mitigate the intrusion on privacy caused by the recording and can address most of the concerns with potential misuse of the resulting footage.

## B. The need to eliminate discretion

Although many department policies provide for recording specific types of encounters, the language chosen often allows exceptions to swallow the general rule requiring recording. For example, in Illinois, police are required to turn off the camera when a victim, witness of a crime, or community member asks for the camera to be turned off as well as when a police officer is interacting with a confidential informant.<sup>28</sup> But the camera need not stop recording if exigent circumstances exist or otherwise doing so would be “impracticable or impossible.”<sup>29</sup> Moreover, police officers are given the discretion to continue recording in all of these circumstances if they believe the victim, witness, or confidential informant has committed a crime or is in the process of doing so.<sup>30</sup>

Allowing officers discretion to decide when and what to record leads to officers making comments like “we are live” while looking at each other or stating they need to have an “administrative conversation” before turning off the camera.<sup>31</sup> Achieving the important goals of police accountability as well as evidence collection and preservation will be difficult, if not impossible, if officers are permitted to choose when to record. Indeed, granting officers discretion to deactivate cameras when they deem appropriate led to a reduction in recording by as much as 42 percent.<sup>32</sup>



**Recording in the midst of an encounter provides an incomplete, if not distorted version of events, by omitting the circumstances that led up to the escalation.**

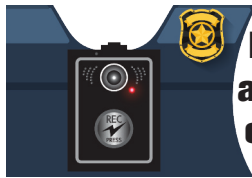
Moreover, a recent study showed that the use of force increases significantly when police have discretion to announce mid-encounter that they are turning on video.<sup>33</sup> Recording in the midst of an encounter provides an incomplete, if not distorted version of events, by omitting the circumstances that led up to the escalation. Moreover, if an “officer suddenly says ‘I’m turning on this camera to record this,’ that could be considered an escalation,” which is wholly avoidable if the camera is running from the outset.<sup>34</sup>



### C. In public areas, recording must be continuous, but in private homes officers should request consent

NACDL largely agrees with the initial recommendations of the American Civil Liberties Union (“ACLU”) regarding recording. Specifically, body cameras should generally be limited to uniformed police officers, which will ensure people know that the encounter will be recorded.<sup>35</sup> Non-uniformed officers involved in SWAT raids or in other planned enforcement actions or uses of force should also be equipped with cameras.<sup>36</sup>

A simple, non-verbal form of notice of recording should also be provided.<sup>37</sup> For example, officers could wear an easily visible pin or sticker stating something to the effect of “lapel camera in operation.”<sup>38</sup> Cameras could also have blinking red lights when they record, which is standard on most cameras.<sup>39</sup>



#### **In public areas, ensuring preservation of evidence and accountability counsels in favor of continuously recording citizen encounters even if a request is made to stop recording.**

In public areas, ensuring preservation of evidence and accountability counsels in favor of continuously recording citizen encounters even if a request is made to stop recording. Fourth Amendment jurisprudence does not recognize an expectation of privacy in the public square, and many public areas are already the subject of video surveillance. Police-citizen encounters should not be the one thing that goes unrecorded. As discussed elsewhere in the report, the increased privacy intrusion of recording such encounters can be mitigated through strict policies regarding the retention of data collected and strictly limiting the access to that data.

Private homes, on the other hand, are an area entitled to greater privacy, and officers should request consent before recording. Absent exigency, police need a warrant or consent to enter the home. But important evidence, including statements of witnesses that will be used against defendants and the seizure of evidence that is claimed to be in plain view, are often gathered in the home.<sup>40</sup> On the other hand, evidence favorable to defendants may also be found in a home, and its preservation on video may be essential to mounting an effective defense.

Nevertheless, officers must be cognizant that some individuals will not want the inside of their homes recorded. Unless the officer’s visit to the home requires examination of the inside of the home (for investigation or aid of a person inside, for example), the officer should ask the homeowner if he or she would prefer to speak outside. Otherwise, in the absence of a demonstrable exigency that makes an advisement impossible, officers should expressly advise individuals that they are being recorded and may ask for the camera to be turned off in the home. As explained below, this advisement and interaction before entering the home must be recorded.

### D. Requests not to record must be documented and retained

Discretion in deciding when a camera should be turned off during non-public interactions must rest with the person interacting with the police — not the officer. When individuals ask that the camera be turned off in a private home, the request should be made on camera and include a standard, carefully crafted advisement from the officer in response.



If a statement is not recorded, a clear advisement from police is necessary to ensure this decision is one made knowingly and voluntarily. Officers should not be permitted to pick and choose which encounters or parts of encounters will be taped by encouraging or discouraging consent based on the perceived benefits of video. Any colloquy regarding a request to stop taping must be taped and preserved.<sup>41</sup>

### **E. The use of police body cameras should in no way limit the rights of citizens to videotape police**

The continuous recording by body cameras is essential to increased transparency, accountability, and evidentiary documentation, but NACDL readily acknowledges concerns that these cameras are not watching police, but are instead pointed at “the community being policed,” which raises the potential for their use as “tool[s] of high-tech racial profiling.”<sup>42</sup> A number of the recommendations in this report are designed to lessen this concern.



**NACDL readily acknowledges concerns that these cameras are not watching police, but are instead pointed at “the community being policed,” which raises the potential for their use as “tool[s] of high-tech racial profiling.”**

Further, police body cameras are not the only devices capable of recording police-citizen encounters. Individuals must also be free to videotape the police, whether occasionally when they see something that seems awry or in a more organized way sometimes known as “copwatching,” through which “groups of local residents . . . wear uniforms, carry visible recording devices, patrol neighborhoods, and film police-citizen interactions in an effort to hold police departments accountable to the populations they police.”<sup>43</sup> Unapologetically adversarial in nature, copwatchers “point their cameras at officers, ask them questions about the officers’ practices and policies, and critique those practices and policies on social media and in court.”<sup>44</sup>

### **F. Consequences for violation of recording rules**

Policies requiring recording become meaningless without consistent compliance.<sup>45</sup> Policies must include potent remedies for violations, including disciplinary action against the officer and exclusion of evidence found as a result of certain violations.



**If departments allow officers to flout or disregard rules, the integrity of evidence and public trust of the department is undermined.**

#### *Officer Discipline*

Officers must face true disciplinary sanctions when they intentionally or recklessly fail to follow body camera program procedures. If departments allow officers to flout or disregard rules, the integrity of evidence and public trust of the department is undermined. The sanctions must be graduated based on the intentionality of the conduct and mindful of prior violations. Minor or first time violations may warrant



reprimands or leave without pay. But willful or repeated violations should result in severe sanctions that include termination.

### *Limits on Admissibility of Evidence*

Although officer discipline is an important sanction for the failure to record or preserve video, courts can and should consider suppression of evidence to make defendants whole and ensure the important goals of body cameras are achieved. Most states addressing claims of lost or destroyed evidence follow *Arizona v. Youngblood*, 488 U.S. 51 (1988), which requires a showing of “bad faith” on the part of the police — “an almost impossible bar for criminal defendants.”<sup>46</sup> Courts, however, could properly find that failing to record or allowing footage to be destroyed in violation of an unambiguous recording and retention policy amounts to bad faith.<sup>47</sup>



**In order to ensure a fair trial, judges should, at a minimum, grant an adverse-inference jury instruction whenever there has been spoliation of body camera evidence.**

Beyond the *Youngblood* framework, jurisdictions should consider adopting statutes or courts rules to ensure the integrity of the fact-finding process when police do not follow established body camera policies. For example, if police fail to record in violation of an unambiguous policy that required recording, the officer could be prohibited from testifying about the observations that were not recorded.<sup>48</sup> Similarly, in cases that require consent by the suspect, police failure to document that consent by a recording should invalidate the consent and result in suppression of the statement.<sup>49</sup> In order to ensure a fair trial, judges should, at a minimum, grant an adverse-inference jury instruction whenever there has been spoliation of body camera evidence.<sup>50</sup>

Whenever there is a claim that the equipment malfunctioned, defense counsel must have access to cameras to allow for forensic analysis of claims of equipment malfunctioning, especially repeated ones from the same officer. Moreover, similar to radar or alcohol testing devices, body camera equipment should be regularly tested and certified to ensure its proper functioning. Mandatory reporting and documentation of equipment malfunctions should be required for all body camera programs.

Finally, as a practical matter, as body camera footage becomes more prevalent, jurors may expect it in every case and discount “other types of evidence, such as statements from police officers or other eyewitnesses” unaccompanied by video.<sup>51</sup> Defense lawyers must be mindful of this in selecting jurors and arguing cases to juries in cases without video.

## **2. Video must be stored for a sufficient time to allow the accused to obtain evidence that is exculpatory or may lead to the discovery of exculpatory evidence.**

All body camera footage is not equal, and certain types of footage must be preserved longer than other types. Flagging footage for longer retention should occur automatically for any incident:

- ❖ involving a use of force;
- ❖ that leads to detention or arrest;



- ❖ that remains open or under investigation; or
- ❖ concerning which either a formal or informal complaint has been registered.<sup>52</sup>

Moreover, the subject of any recording may flag a recording, even if not filing a complaint, and third parties should also be able to flag an incident whenever an individual has some good faith basis to believe police misconduct occurred.<sup>53</sup> In addition, defendants and defense counsel must be permitted to flag for extended preservation any footage believed in good faith to be relevant to any criminal case. This may include footage supportive of an alibi or suggestive that someone else committed a charged offense.



**Flagged videos, including videos of use-of-force incidents, must be kept for the duration of the case to which it pertains and a reasonable period of time after that to ensure that all post-conviction remedies have been exhausted.**

Flagged videos, including videos of use-of-force incidents, must be kept for the duration of the case to which it pertains and a reasonable period of time after that to ensure that all post-conviction remedies have been exhausted.<sup>54</sup>

Policies must include clear provisions regarding storage of various types of data. Footage that serves no evidentiary or officer accountability purpose should be deleted in relatively short order.<sup>55</sup> The ACLU provides a useful framework in which footage that is flagged is retained for a longer period than unflagged video, which could be deleted within a relatively short period of time, such as 90 days.<sup>56</sup> As a practical matter, most complaints against police are filed within two weeks.<sup>57</sup> Although the statute of limitations for filing a civil suit may be longer in some jurisdictions, policies should strike a fair balance between the concerns presented by the long-term retention of unflagged data and giving interested parties sufficient time to flag footage. Continuous deletion mitigates concerns for privacy, the risk of improper use of video for improper further investigation and/or biometric screening, each discussed below, and the cost of storage of exceedingly large amounts of data.<sup>58</sup>

In short, retention policies must be crafted to ensure preservation of evidence, police accountability, and protection of the rights of the criminally accused by establishing longer periods for flagged video. Moreover, as discussed in Principle 7, technological controls must strictly limit access to footage and establish digital fingerprints to document any access.

### **3. Arrested individuals and their attorneys must be given prompt access to all body camera video pertaining to a case.**

It is imperative that video is provided to defense counsel as soon as technically feasible, ideally within a day or two of arrest. Simply providing defense counsel an opportunity to view the footage is not sufficient; defense counsel must be provided a copy of the footage.<sup>59</sup>

Reviewing this footage can be time-consuming, and an early start is imperative to prepare for preliminary hearings and important to investigating the case for potential suppression issues and defenses. Realizing early on what body camera video is available is crucial to determine whether other footage (e.g., closed circuit television (CCTV), private businesses, etc.) may exist in order to request it before it is deleted, which





often occurs in less than a month. Early receipt of video may also be important in identifying what, if any, experts need to be consulted in the case.<sup>60</sup>

#### **4. Policies must be crafted and equipment must be designed to minimize concerns with the misinterpretation of video.**

Body camera footage, like any video, is not an objective record of events. Unlike dash cams, which capture both officers and citizens and a wide field of view, body cameras provide a limited view from the officer's perspective.

Even with body cameras rolling at all times, though, the picture may not capture either “what happened outside the camera’s view or the causation for actions shown . . . depend[ing] on ‘the camera’s perspective (angles) and breadth of view (wide shots and focus).”<sup>61</sup>

##### **A. Equipment design**

Like an instant replay video of a sporting event, body cameras also have a limited perspective on any given incident. Thus, although body cameras may provide a valuable account of an incident, the view is not always a comprehensive or reliable one. A single camera is fixed on one part of an officer's body and does not provide additional views or context.

To present a more accurate perspective of an encounter, only body cameras with a wide field of view should be used. But body cameras are marketed to police departments — not citizens. Thus, it is troubling that some cameras are specifically being marketed because of their narrow field of view — which could be decreased from 165 degrees to as little as 50 or 60 degrees.<sup>62</sup> Presenting an accurate picture of what the officer saw is desirable; presenting a distortedly narrow one is not.

The placement of the body camera can add to the distortion. Most body cameras in the United States are mounted on an officer's chest, unlike the head-mounted cameras in some other countries.<sup>63</sup> Viewing an event from a perspective several inches lower than the officer's sightline can make a suspect seem larger and more intimidating, particularly when the suspect is physically close to the officer.<sup>64</sup> Moreover, because cameras are mounted on clothing, simple movements will appear exaggerated. Body cameras mounted on hats, glasses, or helmets will generally present a more accurate view of events.

Finally, cameras must include a buffer of at least thirty seconds to ensure a more complete account of an event. Although cameras should be continuously recording in the public as explained in Principle 1, when an officer turns on a camera it is essential to know what occurred immediately before the event that led the officer to activate the camera. This technology is readily available, and any jurisdiction using body cameras should only purchase cameras with a buffer of at least thirty seconds.

##### **B. Understanding the incomplete picture and importance of perspective**

Moreover, although a body camera generally captures the officer's voice, it does not show if an officer has his or her hand on a gun or is making a menacing gesture while talking in an otherwise calm and reasonable voice. Similarly, body cameras do not show whether an individual being arrested is tensing his or her arm. The camera will record an officer's narrative, and officers have been trained to narrate events when they are





being recorded.<sup>65</sup> Thus, yelling at a suspect to “stop resisting” presents powerful, and powerfully misleading, evidence if an individual is not tensing his arm or taking any other action.



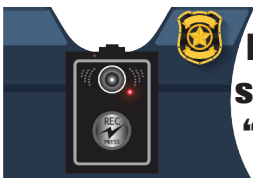
### **The way one perceives body camera footage is shaped by what one believes of law enforcement.**

Law professor and former police officer Seth Stoughton created an interactive test available online through the *New York Times* that demonstrates that the way one perceives body camera footage is shaped by what one believes of law enforcement.<sup>66</sup> Professor Stoughton explains the phenomenon of “camera perspective bias,” the idea that body camera footage, which allows us to view incidents through the officer’s perspective, tends to cause us to interpret the video in the officer’s favor.<sup>67</sup> This kind of interpretation favoring the officer is even more likely from someone cognitively biased in favor of the police.<sup>68</sup>

The importance of vantage point is similarly highlighted by studies of mock juries shown a first-person interrogation tape without the officer on screen who are “significantly less likely to find an interrogation coercive, and more likely to believe in the truth and accuracy of the confession,” than are jurors who are shown the identical interrogation but from a wider angle that includes the officer.<sup>69</sup> This sort of distortion is especially concerning given that body camera footage will always be filmed from the perspective of the officer, making it easier for a jury to credit this perspective.<sup>70</sup>

In addition, two people can interpret the same video in different ways. The conflicting opinions of justices of the Supreme Court in *Scott v. Harris*,<sup>75</sup> a case that included video of a high speed chase that left a motorist paralyzed, highlight this concern. Video was crucial to the case. As one scholar noted, “[T]o eight out of nine justices, the video was a transparent — clear — window onto truth.”<sup>76</sup> After noting that Justice Stevens’ dissent suggests the majority was “misrepresenting” the contents of the video, Justice Scalia concludes that he and the majority “are happy to allow the videotape to speak for itself,” referring all interested members of the public to a link on the Supreme Court’s website.<sup>77</sup>

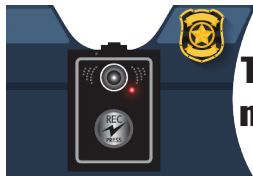
**The assumption that body camera footage is objective is disproved by the case of Derrick Price in Florida, a victim of police brutality.<sup>71</sup> The incident with Mr. Price was caught on both police body camera footage and video surveillance from a building. The discrepancies in the footage illustrate the subjectivity of police body camera footage.<sup>72</sup> The wide view of the video surveillance shows that while Mr. Price was running from the police, he surrendered and lay on the ground with his hands up many seconds before officers stopped their car, got out, and beat and arrested him.<sup>73</sup> The body camera was turned on late and showed only a scuffle that seems to show Mr. Price resisting arrest and officers yelling “stop resisting.” The video surveillance unmistakably showed Mr. Price was not resisting but was being beaten up by the officers.<sup>74</sup> Mr. Price’s case illustrates the need for skepticism in viewing body camera footage alone; it presents only the officer’s perspective, which is not only limited, but also prone to manipulation.**



### **Even video footage thought to be unambiguous may be susceptible to multiple interpretations depending on the “cultural outlook[]” of the individual viewing the tape.**

Finally, even video footage thought to be unambiguous may be susceptible to multiple interpretations depending on the “cultural outlook[]” of the individual viewing the tape, as shown by an empirical study conducted by Professor Dan Kahan.<sup>78</sup> These sorts of implicit biases may subtly affect how viewers process — in their living room or in the courtroom — the story told by body-camera footage.<sup>79</sup> This phenomenon may also allow for the unconscious incorporation of implicit biases when determining whether an officer’s actions were “reasonable” under the circumstances for purposes of an indictment or conviction.<sup>80</sup>

As explained in Principle 9 below, training for criminal defense lawyers and the availability of expert witnesses are essential to ensure fairness to the accused when a case includes body camera footage.



**The “public has more faith in the process if the officer does not watch the video” before drafting the report[.]**

## **5. Police officers should not access body camera video before preparing initial reports.**

Officers, like other eyewitnesses, should generally not be permitted to view body camera footage before giving a statement about, or preparing a report of, an incident. Only after an initial report is prepared, and with careful monitoring and documentation, may officers be permitted to view footage and prepare an addendum to their report.

Some police chiefs have argued that preventing officers from viewing body camera footage is akin to trying to catch officers in a lie.<sup>81</sup> Others whose departments have used body cameras believe that showing officers video is unnecessary and undermines the purpose of the body cameras. Specifically, as one of the chiefs explained, he “wants to know what an officer recalls from an incident, not what the video recorded.”<sup>82</sup> What officers recall untainted by the video reflects their “state of mind.”<sup>83</sup> Moreover, transparency is essential and the “public has more faith in the process if the officer does not watch the video” before drafting the report.<sup>84</sup>

Science supports prohibiting, or at least carefully restricting, officer access:

If the purpose of any investigation is to get the most complete, accurate information possible, then it could be argued that the officer should view the footage, probably multiple times, prior to being questioned and prior to testifying. Human memory is notoriously flawed, but we can consider recorded footage to be “ground truth.” So according to this argument, bolstering the officer’s account by having him view the recorded footage effectively serves to enhance the accuracy of the officer’s report. And it does. The problem is that in so doing, two independent lines of evidence — the officer’s eyewitness memory and the recorded footage — are no longer two independent lines of evidence. That is, the eyewitness memory of the officer has been tainted by viewing the recorded footage. If in the prosecution of the case the officer is to serve as an eyewitness, and his memory is to be preserved untainted, then it is critical that the officer not view the footage . . . If it is important to know exactly what happened, then viewing the video footage will always be more accurate than the account of an officer, in which case the officer does not need to see the footage. If it is important to know an officer’s perception of an event, then it is important to preserve his memory untainted by viewing the video footage. In neither case is viewing the video footage recommended.<sup>85</sup>



Initially, the Police Executive Research Forum (PERF), an organization that has written one of the most comprehensive reports on body cameras, favored allowing officer access. However, the organization has since changed its position, citing “academic research showing that video can ‘essentially erase and record over’ an officer’s memory.”<sup>86</sup> “If [police] are going to review the video, other [eyewitnesses] should be allowed to see it, too,” the executive director explained.<sup>87</sup> Taking the officer’s statement before he or she is allowed to watch the video also helps law enforcement agencies build trust with the communities they police.

Although equal treatment of police with other witnesses and suspects may not always be possible, a vast, unnecessary disparity should not be tolerated. Allowing police — but not suspects or witnesses — to view body camera footage before providing their account of an incident unfairly bolsters the officers’ account, and thus credibility, by allowing officers to recall more details seemingly more accurately than others and to conform their recollections (consciously or subconsciously) to those seemingly supported by the video.

## 6. Policies must prohibit the use of any biometric technologies in conjunction with body cameras.



**Using body cameras as dragnet surveillance tools of individuals, most of whom are suspected of no crime, raises serious privacy concerns and implicates the constitutional rights of individuals whose biometric data is collected and searched.**

The Fourth Amendment protects citizens against unreasonable searches, which are those in which the government violates a subjective expectation of privacy that society recognizes as reasonable.<sup>88</sup> Although a citizen may not have a general expectation of privacy when he or she is in the public square, many would question the reasonableness of constant recording that could not only collect massive amounts of biometric information, but also enable compilation and later searches of those videos using biometric means.<sup>89</sup> Using body cameras as dragnet surveillance tools of individuals, most of whom are suspected of no crime, raises serious privacy concerns and implicates the constitutional rights of individuals whose biometric data is collected and searched.

The potential use of data collected by body cameras in conjunction with facial recognition, voice recognition, iris scan technology or other tools<sup>90</sup> that could feed biometric databases such as the FBI’s Next Generation Identification (NGI) database is staggering.<sup>91</sup> The immense existing privacy concerns are likely to be exacerbated in the near future as vendors highlight and market the capacity to incorporate facial recognition technology into their cameras.<sup>92</sup> Even if the government can already “connect the dots” from massive amounts of data,<sup>93</sup> body cameras enhanced with biometric capabilities would add personal, street-level data to this ocean.



**Individuals who live in highly-policed neighborhoods, who are often poor and predominantly people of color, are more likely to be put in such databases.**

Federal privacy laws currently do not offer protection from government biometric data collection.<sup>94</sup> Moreover, officer-mounted cameras, paired with facial recognition, could go far beyond the current crop of



automated license readers, constantly reading thousands of faces (license plates) and interpreting identity (plate number), if this information could be fed into and screened against national and local crime databases in real-time.<sup>95</sup> Individuals who live in highly-policed neighborhoods, who are often poor and predominantly people of color, are more likely to be put in such databases.

Many members of the community may be less likely to speak with (or even cross paths of) police if they knew their face would be compared to any number of databases anytime they see an officer.<sup>96</sup> At least one state, Oregon, has banned the use of facial recognition technology with body cameras.<sup>97</sup> At the municipal level, only a few cities place some restrictions and no jurisdiction sharply limits the use of facial recognition to identify recorded individuals,<sup>98</sup> which is essential to maintain community relations and dampen fears about the surveillance potential that cameras could bring.

Short retention periods of unflagged video may reduce privacy concerns only if biometric data is never collected and never added to these databases. Thus, as discussed in Principle 7, flagged data should be used only for its original purpose of preserving evidence and increasing transparency and accountability.

## **7. Video must not be later viewed to search for additional crimes or take other punitive action against an individual.**

As discussed above, body camera footage offers great potential for preservation of evidence and police accountability, but with real risks of abuse and surveillance. The Fourth Amendment has long protected individuals' expectation of privacy against overzealous police action. Although video may document a crime scene, repeated views and technologically-enhanced scrutiny should not be permitted to investigate additional potential crimes or exact punitive consequences after a police encounter has concluded.



**Nor should an officer without a warrant be able to comb through video collected for other purposes to engage in a fishing expedition hoping to discover evidence of criminal activity.**

For example, an officer who with the naked eye sees contraband in plain view in a residence is entitled to seize it or seek a warrant.<sup>99</sup> However, in the absence of a judicially-approved warrant particularly describing the place or item to be searched and specifically authorizing technological enhancements, officers should not be permitted to review video of their entry into a home to search for, with enhanced lighting and the ability to slow and replay segments of video, evidence of contraband. Nor should an officer without a warrant be able to comb through video collected for other purposes to engage in a fishing expedition hoping to discover evidence of criminal activity.

## **8. Adequate resources must be available to ensure ongoing officer training on body camera use.**

As law enforcement agencies begin to work with body cameras, training the officers on proper use and protocols is critical to operation of a body camera program that adheres to policies, collects and preserves evidence when required, and protects the rights of the accused. Officers must also understand the consequences of not using their body cameras when required, which is discussed as part of Principle 1 above.

Unfortunately, as one former police chief told the Task Force, the high cost of the equipment and data storage sometimes leaves jurisdictions in a cash-strapped position in which training is not funded or not funded at a sufficient level.<sup>100</sup>

Moreover, training should ensure that police departments not only abide by the letter of the law, but also that they interact with the public with professionalism and sensitivity. Training should address that body cameras alter that interaction with the public generally and especially with respect to vulnerable populations, such as individuals with mental disabilities, who represent more than half the people in the nation's jails and prisons.<sup>101</sup> Training could include ways to de-escalate encounters with persons with mental disabilities, as taught in Crisis Intervention Trainings (CIT) implemented by many departments throughout the country.

## **9. Sufficient resources must be available to ensure that counsel are appropriately trained and that appointed counsel have adequate time and access to experts necessary to render effective assistance of counsel.**

NACDL acknowledges the significant cost of body cameras, which is largely borne by local governments, although some DOJ funding or state funding may be available.<sup>102</sup> As noted above, the efficacy of spending millions of dollars for body cameras is far from settled. If a decision is made to purchase body cameras, however, funding must also be made available for training officers on their proper use. That funding should not be on the backs of the criminally accused, which will exact a heavier price on the low-income communities most often targeted by police activity.<sup>103</sup> Moreover, adoption of body cameras must not incentivize profit-driven policing through reliance on monies seized<sup>104</sup> and increased fines.<sup>105</sup> Funding proposals can instead acknowledge the offset of costs from significant savings in litigation.<sup>106</sup>

As noted throughout this report, body camera programs entail a number of obvious and less obvious costs. They include the purchase of the physical equipment and its upkeep, training, data storage, the dedication of lawyer time to review and examine footage, and the possibility of requiring a forensic expert. These costs will affect police departments, prosecutors' offices, private criminal defense attorneys, and, perhaps most severely, public defenders. Any body camera program must account for all of its upfront costs, as well as the resources necessary to maintain an effective program.



**Courts and legislatures must . . . take steps to ensure that all lawyers have the opportunity to adequately review, examine, and scrutinize body camera footage[.]**

Prosecutors and defense counsel not only take a significant amount of time reviewing camera footage for their cases, they may also require the assistance of forensic experts. These lawyers, and public defenders in particular, may have inadequate resources to properly review this evidence. Courts and legislatures must be cognizant of these resource limitations and take steps to ensure that all lawyers have the opportunity to adequately review, examine, and scrutinize body camera footage, as well as investigate leads obtained from that footage, all of which is essential to providing effective assistance of counsel to those accused of crimes.<sup>107</sup>

As body cameras are introduced into a jurisdiction, early and comprehensive training of both the private and public defense bar is imperative. NACDL is committed to assisting in this training by helping to develop a cadre of experienced lawyers available for in-person and web-based training. Training on a variety of topics is essential for lawyers to harness the full potential of body cameras by understanding the technology and



what to do when it fails, methods and strategies for redaction or use of still photos, use of experts, and jury selection strategies, to name a few.

Criminal defense lawyers representing persons with mental disabilities should be aware of the existence of body camera footage and take steps to ensure this footage protects rather than diminishes their clients' constitutional rights. Many people, including judges, jurors, and prosecutors, either do not understand the behavior of defendants with mental disabilities or are frightened of them. Body cameras may record a person having a psychotic episode or manifesting decompensation due to lack of medication or simply not acting in a neurotypical manner. This footage may be more than embarrassing to the person. Indeed, the footage might also be used against that person at bail hearings, trials, sentencing, probation violation hearings, custody proceedings, or civil commitment proceedings. Evidence needs to be presented or excluded in a responsible way with careful consideration of motions *in limine*, redaction of video, and limiting jury instructions.

## **10. An independent, non-police agency must retain and control access to body camera footage.**

In light of the many concerns discussed above, an independent monitoring board should be appointed to control access to all body camera footage. Because for many people much of the impetus for use of body cameras is an ongoing distrust of police, allowing police to control when cameras are used and access and store video at their discretion exacerbates rather than resolves the concern. Ironically, the very organizations meant to be held accountable are able to prevent these videos from being created in the first instance or shared after the fact.

The information collected — like all other forms of evidence — does not belong to any particular party in litigation, including the police. Thus, jurisdictions should create independent boards of civilians, not police, to retain and release that information. Federal government grants should not fund programs that do not follow these guidelines or, at a minimum, should offer funding to a few jurisdictions who agree to create such a system that relies on the use of an independent, non-police monitoring agency.

Appointment to the monitoring board may vary by jurisdiction. For example, a five-member board could include one board member appointed by the Mayor, one by the Police Chief and law enforcement, one by the City Council, one by the Criminal Defense Bar, and one by a collection of community groups.

The board may then hire individuals to implement the policies set forth by the board. After each individual is cleared by an extensive background check,<sup>108</sup> the board members and individuals appointed will have sole access to the footage and will be responsible for periodically reviewing the footage, responding to requests to view the footage, and making redactions in necessary circumstances.

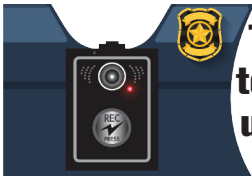
An independent monitor obviates many of the issues discussed above. An entity other than police retaining and controlling access to video will greatly reduce accusations of tampering or deletion, intentional or inadvertent, by police and the need for courts to have hearings and craft remedies.<sup>109</sup>





## A. Implementation

Video footage should be stored in a secure, cloud-based storage system encrypted to prevent access from any outside party. This is technologically feasible. Taser, for example, uses a cloud-based storage system that prohibits access from officers as well as Taser technicians.<sup>110</sup> The device must have safeguards against data manipulation (such as digital fingerprints)<sup>111</sup> throughout the chain of custody of the footage.<sup>112</sup> As set forth in Principles 6 and 7, above, there should be no biometric facial recognition technology of any kind in any body camera device under any circumstance nor should any programs that data-mine video for biometric information be permitted; any such capabilities would run afoul of the fundamental purpose of body cameras.<sup>113</sup>



**There should be no biometric facial recognition technology of any kind in any body camera device under any circumstance[.]**

## B. Access

In criminal proceedings, both the prosecution and defense should have the ability to subpoena the footage and each side should be granted access to the footage at the same time.<sup>114</sup> When footage is distributed outside of the third-party monitor other than to litigants subject to an appropriate protective order, faces and any other identifying characteristics must be blurred<sup>115</sup> and all audio must be muted unless such aspects of the footage are relevant to the purpose of the request.

In short, an independent monitor can thoughtfully mitigate the privacy concerns created by widespread collection of body camera footage while best ensuring police accountability.



## Conclusion

Body cameras were introduced long before policies for their use were fully developed. As with any police technology, the devil is in the details. With the right policies in place, body cameras can be an important tool for accountability and can have great evidentiary value. Police-civilian interactions will no longer be a matter of the accused's word against that of the police officer. NACDL will work to ensure that body cameras are used in ways that preserve the constitutional rights of the accused in criminal cases. ■





# Endnotes

1. Press Release, Nat'l Ass'n of Criminal Def. Lawyers, Nation's Criminal Defense Bar Announces New Initiatives in the Aftermath of Recent Police Killings (Dec. 10, 2014), *available at* <https://www.nacdl.org/NewsReleases.aspx?id=35493>.

2. See Minutes of Annual Meeting of the Board of Directors, July 26, 2015, and Appendix A thereto, adopting the following principles:

1. Black and Latino lives matter. This is the most important reason to support widespread use of body cams.
  - a. Many citizen-police interactions that result in unnecessary use of force must be recorded for protection of the citizens.
  2. Police officers can be protected from false accusations by data preserved from body cams.
  3. Body cams and dash cams are the best available technology at this time to protect the interests of the citizens and the police.
  4. It is critical to have clear rules to protect the integrity of the evidence, privacy, and the fair administration of justice.
    - a. Citizens accused of crimes and police officers accused of misconduct are best protected when there is a complete and accurate record generated from these dash and body cams.
    - b. The cameras should not be turned off or covered arbitrarily at the discretion of the officer. There should be clear rules on when the cameras are turned on and off and rigorous documentation.
    - c. There should be clear rules on how long the data should be preserved, who gets access to the data and when, and when it becomes publicly disclosed, if ever, and who makes the disclosure decision.
    - d. Policies on protecting privacy of citizens and officers and the uses of the data outside of litigated proceedings must be clear and developed.

Then-NACDL President E.G. "Gerry" Morris appointed the following NACDL members to the Task Force: Anna Durbin, Kobie Flowers, Rick Jones, Elizabeth Kelley, Steven Morrison, Michael Nichols, Barry Pollack, Barry Porter, and Martin Sabelli. Professor Joel Schumm served as the reporter for the Task Force. NACDL thanks each of these individuals for their service on the Task Force. The Task Force's report does not represent the views of any of its individual members, but rather the views ultimately adopted by the Task Force.

3. See *The Counted: People Killed by Police in the US*, *available at* <https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database>. *The Washington Post* also updates a website that lists people who "have been shot and killed by police."

<https://www.washingtonpost.com/graphics/national/police-shootings-2016/>

4. About NACDL, *available at* <https://www.nacdl.org/about/mission-and-values/>.

5. In other contexts, NACDL has recognized that video recordings are beneficial because they can preserve evidence that would not otherwise be captured. When urging the Director of the FBI to require electronic recording of interrogations, NACDL emphasized the ways in which an "instant replay" may protect the integrity of the criminal justice system. See Letter from Norman Reimer, Executive Director, to James Comey, Director, Dec. 20, 2013, *available at* [https://www.nacdl.org/Letters/Testimony\\_Recording\\_Interrogations/](https://www.nacdl.org/Letters/Testimony_Recording_Interrogations/) (last visited Aug. 1, 2016). This followed a 2002 NACDL resolution that noted "videotape recording from beginning to end provides the most objective means for evaluating what occurred during an interrogation . . ." Resolution of the Board of Directors of the National Association of Criminal Defense Lawyers Supporting Mandatory Videotaping of Interrogation, May 4, 2002, *available at* <https://www.nacdl.org/About.aspx?id=19765>.

6. Mark Berman, *Justice Dept. Will Spend \$20 Million on Police Body Cameras Nationwide*, WASH. POST, May 1, 2015.



7. *Civil Rights, Privacy, and Media Rights Groups Release Principles for Law Enforcement Body Worn Cameras*, May 15, 2015, available at <http://www.civilrights.org/press/2015/body-camera-principles.html?referrer=>, <http://www.savetheinternet.com/blog/2015/05/20/coalition-says-law-enforcement-must-protect-civil-rights-when-wearing-body-cameras>. Some members of this coalition have endorsed the use of body cameras, some have opposed them, and others have not yet articulated a position.

8. Jay Stanley, *Police Body-Mounted Cameras: With Right Policies in Place, a Win for All*, ACLU, March 2015, available at <https://www.aclu.org/police-body-mounted-cameras-right-policies-place-win-all>.

9. Police Executive Research Forum (PERF) report, *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned*, available at [http://www.policeforum.org/assets/docs/Free\\_Online\\_Documents/Technology/implementing%20a%20body-worn%20camera%20program.pdf](http://www.policeforum.org/assets/docs/Free_Online_Documents/Technology/implementing%20a%20body-worn%20camera%20program.pdf).

10. The Leadership Conference on Civil and Human Rights & Upturn, *Police Body Worn Cameras: A Policy Scorecard*, August 2016, available at <https://www.bwcorecard.org/> (evaluating whether policies protect “categories of vulnerable individuals (e.g., victims of sex crimes) from being recorded without their informed consent”). Although the Task Force also spoke with a domestic violence advocate, it appears that no domestic violence advocacy group has yet prepared a written policy on the use of police body cameras.

11. Rory Carroll, *California Police Use of Body Cameras Cuts Violence and Complaints*, THE GUARDIAN, Nov. 4, 2013, available at <https://www.theguardian.com/world/2013/nov/04/california-police-body-cameras-cuts-violence-complaints-rialto>.

12. Carlos Miller, *A Study in Contrasts Between Rialto Police and Albuquerque Police in Regards to Body-Mounted Cameras*, PHOTOGRAPHY IS NOT A CRIME available at <http://photographyisnotacrime.com/2014/03/study-contrasts-rialto-police-albuquerque-police-regards-body-mounted-cameras/>.

13. *Id.*

14. Min-Seok Pang & Paul A. Pavlou, *Armed with Technology: The Impact on Fatal Shootings by the Police* 35 (2016), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2808662](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2808662)).

15. Jacob Gershman, *Professor Says Police Bodycam Study Suffers from ‘Fatal Flaw’*, WALL ST. J., Aug. 15, 2016, available at <http://blogs.wsj.com/law/2016/08/15/professor-says-police-bodycam-study-suffers-from-fatal-flaw/>.

16. A recent report summarized additional studies before concluding “there is at least a perceived improvement in police behavior” when body cameras are used, although the research does not resolve the causal issue of whether “cameras lead to improved individual behavior, improved police behavior, or a mixture of both.” THE CONSTITUTION PROJECT, GUIDELINES FOR THE USE OF BODY-WORN CAMERAS BY LAW ENFORCEMENT 12-13 (Dec. 2016), available at <http://www.constitutionproject.org/wp-content/uploads/2016/12/BodyCamerasRptOnline.pdf>.

17. See generally *Police Body Worn Cameras: A Policy Scorecard*, Aug. 2016, available at <https://www.bwcorecard.org/> (evaluating more than 50 department policies in several categories).

18. Serious efforts must be taken to assure body camera footage is not misused, as discussed in Principles 4, 6, and 7 below.

19. Statement of Seth Morris to the Task Force, Feb. 1, 2016; Statement of Kate Finley to the Task Force, Feb. 1, 2016.

20. Rachael Alexander, *Body Cam Videos Affect Outcomes of Criminal Cases*, THE SPOKESMAN-REVIEW, July 7, 2016, available at <http://www.govtech.com/public-safety/Body-Cam-Videos-Affect-Outcomes-of-Criminal-Cases.html> (quoting a public defender in Spokane).

21. Stanley, *supra* note 8, at 4.



22. \$0&\* % , +- \$0 \*+&\$, & '1 , +'! ,1 \*+ \* !&+,!-, ('\$! '1 / '\*& % \*+ (Feb. 2015), available at <https://www.datasociety.net/pubs/dcr/PoliceBodyWornCameras.pdf>; Sarah Lustbader, *The Real Problem With Police Video*, N.Y. TIMES, Dec. 2, 2015, available at [http://www.nytimes.com/2015/12/02/opinion/the-real-problem-with-police-video.html?\\_r=0](http://www.nytimes.com/2015/12/02/opinion/the-real-problem-with-police-video.html?_r=0).
23. %6GI>C #6HK:C (DA>8: D9N 6B:G6H 6C \$DH: +><=ID; I=: ,GJS; '&+! \* J< available at <http://www.npr.org/2014/08/23/342623830/even-police-body-cameras-can-lose-sight-of-the-truth>.
24. Mateescu, Rosenblat & Boyd, *supra* note 22.
25. Statement of Seth Stoughton to the Task Force, June 14, 2016.
26. Statement of Jeffrey Halstead to the Task Force, Feb. 1, 2016.
27. PERF report, *supra* note 9, at 12.
28. Liane C. Dublinski, *Comprehensive Police Officer Body Camera Guidelines in Illinois*, 47 LOY. U. CHI. L.J. 1449, 1458 (2016).
29. *Id.*
30. *Id.*
31. Statement of Seth Morris to the Task Force, Feb. 1, 2016.
32. GUIDELINES FOR THE USE OF BODY-WORN CAMERAS, *supra* note 16, at 27-28 (citing Michael D. White, DOJ Office of Justice Programs, *Police Officer Body-Worn Cameras: Assessing the Evidence* 9 (2014)).
33. :K>C DA9:L:N+IJ9N >C9H,=6I (DA>8: D9N 6B:G6H %6N !C8G:6H: HH6JAIH U !; -H:9 !BEGDE:GAN TECHCRUNCH.COM, May 17, 2016, available at <https://techcrunch.com/2016/05/17/study-finds-that-police-body-cameras-may-increase-assaults-if-used-improperly/>.
34. *Id.* This section focuses on the importance of reducing officer discretion when to record. Officers must retain discretion when to arrest, especially for minor offenses. See generally GUIDELINES FOR THE USE OF BODY-WORN CAMERAS, *supra* note 16, at 25 (discussing concerns that police departments with “strict standards might see an uptick in arrests resulting from implementation of body cameras,” which could disproportionately affect “minority communities subject to a disproportionately large police presence”).
35. Stanley, *supra* note 8, at 5.
36. *Id.*
37. State statutes that require two-party or all-party consent to recording a conversation may need to be amended to account for the use of body cameras. Michael D. White, DOJ Office of Justice Programs, *Police Officer Body-Worn Cameras: Assessing the Evidence* 27 (2014) (explaining how the Seattle Police Department initially determined that body-worn cameras violated state law concerning all-party consent when recording conversations).
38. Stanley, *supra* note 8, at 5.
39. *Id.*
40. This evidence may be helpful to the accused or helpful to the prosecution depending on the specific case. For example, in domestic violence cases the footage regularly documents “firsthand the victim’s injuries, demeanor ... immediate reactions” and “[i]n some cases, officers capture the assault itself.” Karson Kampfe, *Police-Worn Body Cameras: Balancing Privacy and Accountability Through State and Police Department Action*, 76 OHIO ST. L.J. 1153, 1182-83 (2015).
41. As discussed in Principle 2, this type of footage must be “flagged” and retained for a longer period of time.
42. ";;; +IDC: (DA>8: D9N 6B \*JA:H (JH=:9 7N \$- & (!C8AJ9: 68>6A \*:8D<C>I>DC &C\$ -+ ,!% + May 15, 2015, available at <http://www.ibtimes.com/police-body-cam-rules-pushed-aclu-naacp-include-facial-recognition-ban-1924240> (quoting Malkia Cyril, Executive Director of the Center for Media Justice).
43. Jocelyn Simonson, *Copwatching*, 104 CAL. L. REV. 391 (2016).



44. *Id.*

45. Cyrus Farivar, *Oakland Cops Disciplined 24 Times for Failing to Turn on Body-Worn Cameras*, ARS TECHNICA, Dec. 15, 2014, available at <http://arstechnica.com/tech-policy/2014/12/oakland-cops-disciplined-24-times-for-failing-to-turn-on-body-worn-cameras/>.

46. GREG HURLEY, NATIONAL CENTER FOR STATE COURTS (NCSC), BODY-WORN CAMERAS AND THE COURTS, 2016, available at <http://www.ncsc-jurystudies.org/~media/files/pdf/jury/final%20bwc%20report.ashx>.

47. *Id.* (citing *State v. Durnwald*, 837 N.E.2d 1234 (Ohio Ct. App. 2005)).

48. See generally Indiana Evidence Rule 617 (regarding recorded confessions).

49. NCSC report, *supra* note 46, at 10.

50. *Id.* at 10-11. A recent report offers a detailed proposed model jury instruction that would empower juries to draw inferences against a police officer or department if the jurors conclude the failure to record or destruction of a recording was unreasonable or done in bad faith. American Civil Liberties Union Foundation of Massachusetts & University of California, Berkeley School of Law, Samuelson Law, Technology & Public Policy Clinic, No Tape, No Testimony: How Courts Can Ensure the Responsible Use of Body Cameras 13-14 (Nov. 29, 2016), available at <https://aclum.org/uncategorized/no-tape-no-testimony-courts-can-ensure-responsible-use-body-cameras/>.

51. *Considering Police Body Cameras*, 128 HARV. L. REV. 1794, 1803 (2015).

52. Stanley, *supra* note 8, at 6. The ACLU report does not expressly include cases under investigation as a category.

53. *Id.*

54. A consent decree with the Albuquerque Police Department requires the department to retain body camera “evidentiary recordings for at least one year, or, if a case remains in investigation or litigation, until the case is resolved.” *United States v. City of Albuquerque Settlement Agreement* ¶ 220, available at <https://www.justice.gov/sites/default/files/usao-nm/legacy/2015/01/20/DOJ-ABQ%20Settlement%20Agreement%20EXECUTED.pdf>.

55. Video might also be preserved for training purposes, subject to the limitations on use discussed in Principle 7 of this report.

56. See *supra* note 52 and accompanying text, listing use of force, detention or arrest, open investigations, and formal or informal complaints.

57. Statement of Harlan Yu to the Task Force, Feb. 1, 2016. See generally NYC CIVILIAN COMPLAINT REVIEW BOARD, 2012 ANNUAL REPORT 12, available at [http://www.nyc.gov/html/ccrb/downloads/pdf/ccrb\\_annual\\_2012.pdf](http://www.nyc.gov/html/ccrb/downloads/pdf/ccrb_annual_2012.pdf) (“Eighty-three percent of complaints are filed within a week of the incident.”).

58. The Task Force heard from a public defender in Baltimore who noted that CCTV footage was deleted after 28 days, which was often too short of a time period for defenders to make a request for necessary footage. Statement of Kate Finley to the Task Force, Feb. 1, 2016.

59. In some jurisdictions, prompt access is provided to defense counsel through a link that allows counsel to download the video onto their computer, which may also be burned onto a DVD. For example, law enforcement agencies may contract with vendors that provide their criminal justice partners a username and password. Any evidence uploaded and “shared” with them is downloadable. See generally Evidence.com, available at <https://www.axon.io/products/evidence> (“Share: Grant access to people, like prosecutors, or share content with a secure link.”).

60. Statement of Kate Finley to the Task Force, Feb. 1, 2016.

61. *Considering Police Body Cameras*, *supra* note 51, at 1813-14.

62. Statement of Aliya Rahman to the Task Force, Feb. 1, 2016.

63. Statement of Seth Stoughton to the Task Force, June 14, 2016.

64. *Id.*

65. Statement of Seth Stoughton to the Task Force, June 14, 2016.



66. Timothy Williams, James Thomas, Samuel Jacoby & Damien Cave, *Police Body Cameras: What Do You See?*, N.Y. TIMES, Apr. 1, 2016, available at

[http://www.nytimes.com/interactive/2016/04/01/us/10000004278201.app.html?\\_r=2](http://www.nytimes.com/interactive/2016/04/01/us/10000004278201.app.html?_r=2).

67. *Id.*

68. *Id.*

69. Considering Police Body Cameras, *supra* note 51, at 1813 (quoting Jennifer L. Mnookin, *Can a Jury Believe What It Sees?*, N.Y. TIMES, July 14, 2014, available at <http://www.nytimes.com/2014/07/14/opinion/videotaped-confessions-can-be-misleading.html>).

70. Considering Police Body Cameras, *supra* note 51, at 1813-14.

71. Radley Balko, *Police Cameras Are a Tool, It's How We Use This Tool That Matters*, WASH. POST, March 15, 2016, available at <https://www.washingtonpost.com/news/the-watch/wp/2016/03/15/police-cameras-are-a-tool-its-how-we-use-this-tool-that-matters/>.

72. *Id.*

73. *Id.*

74. *Id.*

75. 550 U.S. 372, 378 (2007).

76. Elizabeth G. Porter, *Taking Images Seriously*, 114 COLUM. L. REV. 1687, 1758 (2014).

77. *Scott v. Harris*, 550 U.S. at 378 n.5.

78. Considering Police Body Cameras, *supra* note 51, at 1813 (citing Dan Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 903 (2009)).

79. *Id.*

80. Considering Police Body Cameras, *supra* note 51, at 1813-14.

81. New York City's police commissioner strongly objected to an inspector general's recommendation that police officers be prevented from viewing body camera footage before giving a statement to investigators: "I am not intending to use the cameras to play a game of gotcha with the cops," *Bratton Says Cops Should See Body Camera Footage*, POLITICO NEW YORK, Aug. 4, 2015, available at <http://www.capitalnewyork.com/article/city-hall/2015/08/8573390/bratton-says-cops-should-see-body-camera-footage> (noting "one of the recommendations of the I.G. that we strongly, strongly disagree with and will not support under any circumstance").

82. Richard Gonzales, *California Bill Could Limit Police Access to Body Camera Footage*, NPR MORNING EDITION, May 1, 2015, available at <http://www.npr.org/2015/05/01/403316673/oakland-laws-could-limit-police-access-to-body-camera-footage>.

83. *Id.*

84. *Id.*

85. Kathy Pedzek, *Should Cops Get to Review the Video Before They Report?* THE MARSHALL PROJECT, Aug. 13, 2015, available at <https://www.themarshallproject.org/2015/08/13/should-cops-get-to-review-the-video-before-they-report>.

86. Kimberly Kindy & Julie Tate, *Police Withhold Videos Despite Vows of Transparency*, WASH. POST, Oct. 8, 2015, available at <http://www.washingtonpost.com/sf/national/2015/10/08/police-withhold-videos-despite-vows-of-transparency/>.

87. *Id.*

88. *Katz v. United States*, 389 U.S. 347 (1967).

89. In *United States v. Jones*, 132 S. Ct. 945 (2012), the Supreme Court found the placement of a GPS tracking device unconstitutional under the Fourth Amendment based on the illegal trespass to place the device initially. Justice Sotomayor's concurrence expressed concern that the trespass "approach is ill-suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out



mundane tasks.” *Id.* at 957. Moreover, Justice Alito’s concurrence found the Fourth Amendment implicated by a lengthy period of secretly monitoring movement of an individual’s vehicle. *Id.* at 964.

90. Harlan Yu told the Task Force that technology could be developed to identify individuals by their gait or distinct manner of walking. Statement of Harlan Yu to the Task Force, Feb. 1, 2016.

91. Shakeer Rahman, Op-Ed., *Body Cameras Could Transform Policing — For the Worse*, AL JAZEERA, April 17, 2015 (<http://america.aljazeera.com/opinions/2015/4/body-cameras-could-transform-policing--for-the-worse1.html>) (Mr. Rahman reports that police use body-worn cameras with face recognition software in the United Kingdom, Dubai and Canada to investigate suspects and find missing persons. He states that Google has software for Google Glass that recognizes and identifies faces.) The FBI’s NGI database is replacing Integrated Automated Fingerprint Identification System (IAFIS) and the place where biometric information — including fingerprints, facial recognition databases and iris scans — are kept and cross-referenced. “The NGI system, developed over multiple years, is an incremental replacement of the IAFIS that provides new functionality and improves existing capabilities. . . . This technological upgrade accommodates increased information processing and sharing demands from local, state, tribal, federal, and international agencies. The NGI system offers state-of-the-art biometric identification services and compiles core capabilities that serve as the platform for multimodal functionality.” Next Generation Identification (NGI) available at [https://www.fbi.gov/about-us/cjis/fingerprints\\_biometrics/ngi](https://www.fbi.gov/about-us/cjis/fingerprints_biometrics/ngi).

92. See Guidelines for the Use of Body-Worn Cameras, *supra* note 16, at 17.

93. See K.A. Taipale, *Data Mining and Domestic Security: Connecting the Dots to Make Sense of Data*, 5 COLUM. SCI. & TECH. L. REV. 1, 3 n.3 (2003).

94. Anna Meyers, *Can the U.S. Legal System Adapt to Biometric Technology?*, PRIVACY TECH, Aug. 12, 2016, available at <https://iapp.org/news/a/can-the-u-s-legal-system-can-adapt-to-biometric-technology/> (“Currently there is no federal law and only one state with a law protecting biometric information.”).

95. Bryce Clayton Newell, *Crossing Lenses: Policing’s New Visibility and the Role of ‘Smartphone Journalism’ as a Form of Freedom-Preserving Reciprocal Surveillance*, 2014 U. ILL. J.L. TECH. & POL’Y 59, 90 (explaining that the advancement of technology could allow review of years of stored body-camera footage using facial recognition software to look for “cold” hits); *Considering Police Body Cameras*, *supra* note 51, at 1812.

96. Karson Kampfe, *Police-Worn Body Cameras: Balancing Privacy and Accountability Through State and Police Department Action*, 76 OHIO ST. L.J. 1153, 1173-74 (2015).

97. *Id.* at 1174.

98. *Body Worn Camera Scorecard*, *supra* note 17.

99. See generally *Arizona v. Hicks*, 480 U.S. 321 (1987).

100. Statement of Jeffrey Halstead to the Task Force, Feb. 1, 2016.

101. DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, *MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES*, Sept. 2006, available at <http://www.bjs.gov/content/pub/pdf/mhppji.pdf>.

102. Press Release, DOJ, Justice Department Announces \$20 Million in Funding to Support Body-Worn Camera Pilot Program (May 1, 2015), available at <http://www.justice.gov/opa/pr/justice-department-announces-20-million-funding-support-body-worn-camera-pilot-program>.

103. *Considering Police Body Cameras*, *supra* note 51, at 1809-10.

104. Eric King, *Forth Worth Clipping Cameras to Officers*, NBCDFW.COM, available at <http://www.nbcdfw.com/news/local/Fort-Worth-Clipping-Cameras-to-Its-Officers-219642111.html> (last visited, Apr. 28, 2016).

105. For example, in New Jersey legislators proposed to increase fines for DUIs and sex offenders to pay for body cameras. *Considering Police Body Cameras*, *supra* note 51, at 1810.

106. *New York State Assembly Standing Committees on Codes, the Judiciary, and Governmental Operations* [hereinafter N.Y. State Assembly Committee] (Dec. 8, 2015) (statement of Letitia James, Public Advocate for the City of New York).





107. Others argue that body cameras essentially pay for themselves by reducing the rate of frivolous lawsuits brought against officers and departments. See, e.g., PERF report, *supra* note 9, at 31.

108. Statement of Jeffrey Halstead, Former Fort Worth Police Chief, Taser Consultant, Feb. 1, 2016.

109. For example, media reports recently revealed that the Oakland Police Department, one of the first in the nation to use body cameras, accidentally deleted 25 percent of the footage it had collected over the past several years. Jack Morse, *Oakland Police Say They Accidentally Deleted 25 Percent of Their Body-Cam Archive*, SFIST, Sept. 15, 2016, available at [http://sfist.com/2016/09/15/oakland\\_police\\_accidentally\\_delete.php](http://sfist.com/2016/09/15/oakland_police_accidentally_delete.php).

110. Mitch Mitchell, *Tarrant County Police Race to Join Body Camera Bandwagon*, FORT WORTH STAR-TELEGRAM, Oct. 23, 2015, available at <http://www.star-telegram.com/news/local/community/fort-worth/article41250195.html>.

111. Statement of Jeffrey Halstead, Former Fort Worth Police Chief, Taser Consultant, Feb. 1, 2016.

112. Mateescu, Rosenblat & Boyd, *supra* note 22.

113. Scott Simpson, *Civil Rights, Privacy, and Media Rights Groups Release Principles for Law Enforcement Body Worn Cameras*, THE LEADERSHIP CONFERENCE, May 15, 2015; N.Y. State Assembly Committee (statement of Veronica Bayetti Flores, Steering Community Member, Communities United for Police Reform).

114. N.Y. State Assembly Committee (statement of Alice L. Fontier, Vice President, New York State Association of Criminal Defense Lawyers).

115. N.Y. State Assembly Committee (statement of Johanna E. Miller, Advocacy Director, New York Civil Liberties Union). ■



## Appendix A: Witnesses

Malkia Amala Cyril, Executive Director of the Center for Media Justice (CMJ) and co-founder of the Media Action Grassroots Network, *San Francisco, CA*

Kate Finley, then-Assistant Public Defender, *Montgomery County, MD*

Gretta Gardner, Policy Director, DC Coalition against Domestic Violence, *Washington, DC*

Jeffrey Halstead, former Dallas Police Chief, current consultant for Taser, *Ft. Worth, TX*

Greg Hurley, Knowledge and Information Services Analyst for the National Center for State Courts, *Williamsburg, VA*

Jennifer Lynch, Sr. Staff Attorney, Electronic Frontier Foundation, *San Francisco, CA*

Kenyan McDuffie, Councilman, *Washington, DC*

Seth Morris, then-Deputy Public Defender, *Alameda County, CA*

Aliya Rahman, Technologist and advisor to BLM and other movements, *Brooklyn, NY* and *Washington, DC*

Timothy M. Richardson, Senior Legislative Liaison with the Fraternal Order of Police Steve Young Law Enforcement Legislative Advocacy Center in *Washington, DC*

Jeramie Scott, Electronic Privacy Information Center National Security Counsel, *Washington, DC*

Jonathan Smith, Associate Dean of Experiential and Clinical Programs at University of District Columbia David A. Clarke School of Law, *Washington, DC*

Jay Stanley, Sr. Policy Analyst for the Speech, Privacy and Technology Project at the ACLU *Washington, DC*

Seth Stoughton, Assistant Professor at University of South Carolina School of Law, *Columbia, SC*

Sean Whent, then-Chief, Oakland, California Police Department, *Oakland, CA*

Harlan Yu, Principal, Upturn, author of the Police Body Worn Cameras: A Policy Scorecard, *Washington, DC* ■



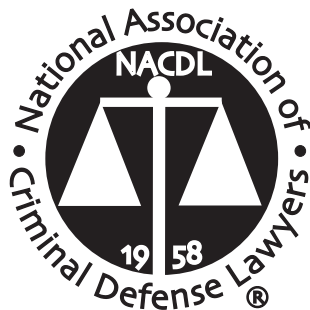






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