

THE **CONSTITUTION PROJECT**



Safeguarding Liberty, Justice & the Rule of Law

**THE USE OF BODY-WORN CAMERAS
BY LAW ENFORCEMENT**

TESTIMONY OF

THE CONSTITUTION PROJECT

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BEFORE THE

THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING

LISTENING SESSION ON TECHNOLOGY AND SOCIAL MEDIA

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I. Introduction

My name is Madhuri (Madhu) Grewal and I am Policy Counsel for The Constitution Project (“TCP”). On behalf of TCP, I am grateful for the opportunity to address the President’s Task Force on 21st Century Policing (“Task Force”) regarding the use of body-worn cameras by law enforcement. In light of the tragic deaths of Michael Brown, Eric Garner, and too many others like them – the effects of which have rippled across the country – the nation is paying special attention to our criminal justice system and the relationship of communities with law enforcement. There is an urgent need for the practical, bipartisan approach to reform that TCP has promoted for nearly two decades.

TCP was founded in 1997 as a nonpartisan organization that promotes and defends constitutional safeguards. Our work includes reforming the nation’s broken criminal justice system, strengthening access to justice, protecting civil liberties, and ensuring government transparency and accountability. TCP undertakes original research; develops policy recommendations; issues reports, statements, and policy briefs; files *amicus* briefs; testifies before Congress; and holds regular briefings with legislative staff and policymakers.

We are also well-known for bringing together legal and policy experts from across the political spectrum to promote consensus-based solutions to pressing issues. TCP’s policy recommendations and in-depth reports are guided by several bipartisan and diverse committees¹ that come together to push for practical reforms that will ensure adherence to constitutional safeguards. Recently, TCP convened a Committee on Policing Reforms² (“Committee”), which has submitted two policy briefs³ and recommendations in the last few weeks to this Task Force. The first is a background paper and guidelines for the [use of body-worn cameras](#). The second is a policy brief regarding the constitutional implications of the [use of military equipment and tactics](#) by law enforcement. The Task Force is also encouraged to review our earlier report: [Guidelines for Public Video Surveillance: A Guide to Protecting Communities and Preserving Civil Liberties](#).⁴ I have copies of both policy briefs and the video surveillance report with me, although my testimony today on behalf of The Constitution Project will focus solely on the use of body-worn cameras by law enforcement, given the subject of today’s hearing.

The implementation of body-worn cameras has gained increased attention and use among law enforcement professionals, who use them for functions such as obtaining evidence, promoting officer safety, and improving law enforcement community relations, and accountability. Indeed, police departments are increasingly using body-worn cameras. The availability of this new technology presents unique and novel issues, including: (1) whether to record; and (2) if so, when and how to record. On the first question, individual police departments can best weigh the benefits and costs of implementing police body-worn cameras given their local law enforcement needs, resources, and objectives. TCP’s research and analysis has focused on the second question. As more and more police departments consider implementing body-worn camera programs, it is clear the legal and policy issues presented by the use of such technology must be assessed.

Over the next month, the TCP Committee on Policing Reforms will further refine its views and publish two official reports on the use of military equipment and tactics and on the use of body-worn cameras, both of which will be available on The Constitution Project’s website. Additionally, as more stakeholders weigh in, more agencies adopt this technology, and more empirical research is conducted, new questions are bound to arise which may require further evaluation of the use of body-worn cameras by law enforcement. TCP and its Committee on Policing Reforms will continue to engage with the Administration, the Department of Justice, and policymakers to discuss the recommendations in our policy briefs. We remain committed to developing and advancing proposals that: (1) protect constitutional values such as

Fourth Amendment and equal protection rights; (2) build trust and legitimacy between law enforcement and the communities they serve; (3) promote transparency and accountability; and (4) protect civil liberties and privacy rights.

II. Background

The use of technology for law enforcement surveillance and observation is not new. In the early 1990s, dashboard cameras emerged as a method for capturing real-time encounters between the police and the public.⁵ Despite early resistance, dashboard cameras gained widespread acceptance as research demonstrated positive effects on officer safety and accountability and a reduction in agency liability.⁶ Closed circuit surveillance systems have also become increasingly popular as both a method of crime prevention and as a tool for criminal investigations (such as in the Boston Marathon bombing).⁷ Moreover, the proliferation of smart phones has dramatically increased citizens' ability to film police officers while performing their duties.⁸ Law enforcement agencies also increasingly recognize the potential for video footage to assist with prosecuting crimes and fostering accountability and professionalism. Indeed, the Department of Justice recently implemented a policy creating a presumption that statements made by individuals in federal custody, following arrest, but prior to their appearance in court, will be electronically recorded.⁹

The technology itself is widely available and relatively easy to use. There are a number of body-worn camera manufacturers, including Panasonic, VIEVU, TASER International, WatchGuard, and Wolfcom Enterprises.¹⁰ The technology includes several components that vary across manufacturers.¹¹ For example, TASER International's AXON system includes a small camera worn by the officer on a shirt lapel, hat, or sunglasses that captures what the officer sees, as well as a device that records the video, a battery pack that lasts typically from 12-14 hours, and an on/off switch for recording.¹² The AXON system comes with a cloud-based data storage service allowing the officer to place the camera in a dock at the end of the shift after which the footage is uploaded to the cloud.¹³ The VIEVU system is a self-contained, pager-sized device that officers wear on their torso, and also includes a docking station for downloading video footage.¹⁴

III. Recommendations

The use of body-worn cameras by law enforcement agencies presents a number of potential benefits as well as risks. Given the limited time I have today, I will focus on our recommendations, rather than discuss the various benefits and risks, which are discussed in greater detail in our background paper submitted to the Task Force, and attached as an appendix to my submission. Before jumping into our recommendations, I want to quickly mention that the role of community input cannot be understated. One of the core functions of body-worn cameras is to improve trust; therefore, input from community members must be sought and considered by policymakers and law enforcement agencies on an on-going basis as policies are developed and implemented.

Written policies

1. Written policies should exist clearly laying out how body-worn cameras are to be used and how the footage is to be maintained.
2. Written policies should describe, at a minimum, when recording is required; how officers should determine recording responsibilities if multiple officers are on the scene; whether or not (and how) officers are to announce that an encounter is being recorded; what events officers should *not* record during an encounter; when supervisors can review footage; selection of technology vendors for purchase and maintenance of cameras, as well as for retention and audits of footage; elements of officer training; data storage and management requirements; video download procedures; video redaction procedures; preparation of video for use in prosecution; maintenance and upkeep of equipment; and how long video is to be retained.

Implementation

1. **Law enforcement considerations:** Before implementing a body camera program, law enforcement agencies should identify the specific objectives behind the program, as well as the anticipated benefits, costs, uses, and privacy impact of body-worn cameras.
2. **Engaging law enforcement personnel:** Body-worn cameras should be introduced by agencies incrementally, starting with pilot programs and soliciting feedback from law enforcement personnel. Incremental implementation will allow for adjustments to department policies that better balance accountability, privacy, transparency, and community relationships as the program develops.
3. **Engaging the community:** The community should be consulted about how their local law enforcement agencies will use body-worn cameras prior to implementation and finalizing department policies as well as on an on-going basis. Policies should be posted online.

When to record

1. **When to begin recording:** Policies should set clear rules regarding the types of interactions that are to be recorded and when that recording must begin. The benefits of body cameras are undermined when recording is discretionary and such policies should be rejected. Recording should begin either (1) during every interaction with the public, or (2) when responding to law enforcement-related calls for service, meaning calls for service, traffic stops, arrests, searches, interrogations, and pursuits. There must be a clear written policy spelling out the requirements and defining what requires activation of the cameras. When in doubt about whether an encounter should be recorded, the default should be to record the encounter.
2. **Notification:** Officers should be required to clearly inform subjects they are being recorded unless doing so would be unsafe or impossible under the circumstances.
3. **Termination of recording:** If recording is limited to law enforcement-related activities, once activated, the camera should remain on until conclusion of the incident, the officer has left the scene, or a supervisor has authorized (on camera) that recording may cease.
4. **Consent:** Officers should be required to obtain consent before recording crime victims. Interviewing crime victims can be especially sensitive (particularly in rape and domestic violence cases). Agencies must have a written policy regarding consent and officer discretion. For instance, agencies may give officers limited discretion to record in these situations or require officers to obtain victim consent to record these sensitive encounters. Citizen requests for cameras to be turned off should themselves be recorded to document – either in writing or by recording – such requests. If the officer denies the request to consent, such a denial should also be recorded.
5. **Mandatory exceptions to recording:** Agencies should prohibit recording of: (1) conversations with confidential informants and undercover officers; (2) places where a heightened expectation of privacy exists, such as restrooms and locker rooms; (3) strip searches.
6. **Consequences for missing footage:** Policies should be written and clear about each officer's obligations to record and store footage and the potential administrative penalties for violating the recording policy.
7. **Documentation:** Officers should document – in writing or on camera – the reasons for not activating or deactivating a camera in situations that otherwise require it to be recorded. To prevent *ex post* explanations, officers should be required to document these reasons contemporaneously.
8. **Other exemptions:** In order to make the use of body-worn cameras as predictable as possible and to protect their legitimacy, additional exemptions should apply.

- Recording should never be used to surreptitiously gather information based on First Amendment protected speech, associations, or religion.
- Law enforcement agencies should be aware of the heightened right to privacy in a home and other private spaces; policies should be developed to take reasonable expectations of privacy into account.

How to maintain the data

1. **Flagging videos to be kept:** The following types of footage should be automatically flagged for retention: (1) those involving a use of force; (2) incidents leading to detention or arrest; or (3) where either a formal or informal complaint has been registered.
 - Any subject of a recording should be able to flag the recording for retention, even if not filing a complaint or initiating an investigation.
 - Police department personnel should also be able to flag a recording for retention if they have a basis to believe police misconduct has occurred or have reasonable suspicion that the video contains evidence of a crime.
 - If useful evidence is obtained during an authorized recording, the recording should be retained in the same manner as any other evidence gathered during an investigation.
2. **Chain of custody:** The chain of custody must be clearly preserved and recorded.
 - Policies should clearly describe the responsibility of the officer to turn in and download recorded footage, except for certain clearly-defined incidents – such as officer shootings or use of force – in which case the officer’s supervisor should take physical custody of the camera.
 - Data should be downloaded at the end of each shift. Data should be properly categorized according to type of event captured: if the camera recorded a law enforcement-related event, it should be tagged as “evidentiary”; if not, it should be tagged as “non-event.”
 - Safeguards should be designed to prevent deletion by individual officers.
 - Policies should clearly state where data is to be stored.
3. **Data security:** The method of storage must be safe from data tampering or unauthorized access, both before uploading and prior to downloading. Third party vendors must be carefully vetted.
4. **Auditing:** There must be effective audit systems in place and clear policies on who may access the data and when.
 - An agency’s internal audit unit, not an officer’s direct chain of command, should conduct random review of footage to monitor compliance with the program.
 - Policies should specifically forbid personnel from accessing videos for any other use that those specifically authorized by the policy, such as personal use and/or uploading to social media websites. Policies should contain specific measures for preventing access for personal use (such as built-in audits to accurately trace who has accessed the system).
 - Agencies should collect statistical data concerning camera usage, including when video footage is used in criminal prosecutions and when it is used in internal affairs matters. Agencies should conduct studies evaluating the financial impact of camera programs, including the cost of purchasing equipment, cost savings (including legal fees in defending lawsuits), and complaints against officers.
 - Agencies should conduct periodic reviews to assess the efficacy of their body-worn camera programs.
5. **Deletion:** To protect privacy, videos should be deleted after the elapse of a specified period of time. Policies should clearly state the length of time data is to be retained.
 - Non-evidentiary footage: The retention period of non-evidentiary footage should be measured in weeks, not years. Most existing policies retain such footage between 60-90 days.

- Evidentiary footage: Videos which are part of an investigation should be maintained until the investigation and any ensuing litigation is concluded. In serious felony cases resulting in the conviction and sentence of a number of years or imposition of a death sentence, the footage should be retained indefinitely.

Data Access

Most state open records laws exempt records from disclosure if they are part of an ongoing investigation. But most state records laws were written before the use of body cameras and may not take into consideration the novel privacy issues presented by their use; such laws may need to be amended in jurisdictions where body cameras are used.

1. **When to disclose footage to the public:**

- Videos should be deleted after the conclusion of investigation/litigation to protect privacy interests.
 - Policies should be in compliance with state open records laws and specifically outline who in the agency is responsible for complying with open records requests; where possible, policies should prescribe liberal disclosure.
 - Redaction should be used in disclosed recordings when feasible.
 - Unredacted or unflagged recordings should not be subject to public disclosure without the consent of the subject of the recording.
2. **Supervisor review:** Written policies should clearly state that supervisors must be allowed to review officer footage, e.g., to investigate a complaint against the officer or a specific incident in which the officer was involved, or to identify videos for training purposes.
 3. **Litigation-related access:** In litigation involving an incident that is recorded, there should be mandatory disclosure of the recording to defendants and/or plaintiffs.
 4. **Filming of law enforcement:** Legislation criminalizing citizen recording of the police should be eliminated.

Training

1. Training should be required for all law enforcement personnel who wear cameras or will have access to video footage, including supervisors, auditors, etc. Training should address all practices included in the agency's policy, an overview of relevant state laws and department policies governing consent, evidence, privacy, public disclosure, procedures for operating the equipment effectively, and scenario-based exercises that replicate situations officers may face in the field.

Ongoing research

1. There remains insufficient empirical research to fully support or refute many of the claims made about police body-worn cameras. Police departments implementing body-worn camera programs should be flexible in the development of their policies and willing to learn from other departments and make adjustments as needed.
2. Further empirical research on the effects of body-worn cameras is vital. Researchers should examine all aspects of the technology, including its perceived civilizing effects, evidentiary benefits, impact on citizen perceptions of law enforcement, and on privacy rights for both citizens and police officers. Research should include citizen surveys to capture perceptions of the technology and its effect on trust in law enforcement.

¹ The list of TCP policy and issue committees is available at: <http://www.constitutionproject.org/about-us/policy-and-issue-committees/>.

² The full list of members serving on the Committee on Policing Reforms is available on The Constitution Project's website: www.constitutionproject.org.

³ The Constitution Project sincerely thanks the law firm of Morgan, Lewis & Bockius LLP and Latham & Watkins LLP, both of which provided a team of pro bono attorneys to guide the Committee on Policing Reforms in crafting its submissions.

⁴ A copy of the video surveillance report is available at <http://www.constitutionproject.org/wp-content/uploads/2012/09/54.pdf>.

⁵ White, Michael D. *Police Officer Body-Worn Cameras: Assessing the Evidence* (Washington, DC: Office of Community Oriented Policing Services, 2014), 11.

⁶ White at 11; Hayes, Jonathan; Ericson, Lars. *A Primer on Body-Worn Cameras for Law Enforcement* (U.S. Dep't of Justice, Office of Justice Programs, National Institute of Justice, 2012), 3.

⁷ White at 12. *See also* Ramirez, Eugene. *A Report on Body Worn Cameras* (Manning & Kass, Ellrod, Ramirez, Trester LLP), 11.

⁸ White at 12.

⁹ *See* Press Release 14-548, Attorney General Holder Announces Significant Policy Shift Concerning Electronic Recording of Statements (May 22, 2014) available at: <http://www.justice.gov/opa/pr/attorney-general-holder-announces-significant-policy-shift-concerning-electronic-recording> (accessed Jan. 14, 2015) (Attorney General Holder stated that the new policy "creates a presumption that statements made by individuals in federal custody, after they have been arrested but before their initial appearance, will be electronically recorded" and "also encourages agents and prosecutors to consider electronic recording in investigative or other circumstances not covered by the presumption").

¹⁰ *See* Hayes at 15 (depicting chart of available body-worn cameras).

¹¹ *See* Ramirez at 10 (depicting one commonly-used body-worn camera).

¹² White at 12. *See also* AXON flex on-officer video, TASER.COM, available at: <http://www.taser.com/products/on-officer-video/axon-flex-on-officer-video> (accessed Jan. 14, 2015).

¹³ White at 12. *See also* AXON flex on-officer video, TASER.COM, available at: <http://www.taser.com/products/on-officer-video/axon-flex-on-officer-video> (accessed Jan. 14, 2015).

¹⁴ White at 12. *See also* VIEVU Products, Choose the VIEVU Camera for you!, VIEVU.COM, available at: <http://www.vievu.com/vievu-products/hardware/> (accessed Jan. 14, 2015).