

WRITTEN TESTIMONY OF DARIUS CHARNEY
CENTER FOR CONSTITUTIONAL RIGHTS
TO THE PRESIDENT'S TASK FORCE ON 21st CENTURY POLICING
LISTENING SESSION ON POLICY AND OVERSIGHT
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I would like to thank the President's Task Force on 21st Century Policing for inviting me to testify on behalf of the Center for Constitutional Rights (CCR) on this important panel on civilian oversight of police. This session comes at a critical moment and during an intense and important national debate on police accountability and racial justice.

Founded in 1966 by attorneys who represented civil rights movements in the South, CCR is a non-profit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the U.S. Constitution and the Universal Declaration of Human Rights and committed to the creative use of law as a positive force for social change. For almost two decades, through litigation, legislative advocacy, research, and social movement support, CCR has challenged and sought to reform abusive and discriminatory policing policies and practices in New York City and across the country. Among our recent efforts are *Floyd v. City of New York*, a federal class action lawsuit successfully challenging the constitutionality of the New York City Police Department's (NYPD) stop, question and frisk practices, and our legal support work on behalf of grassroots police accountability activists and organizations in Ferguson, Missouri. CCR is also a founding member of Communities United for Police Reform (CPR), a coalition of more than 60 grassroots, legal, policy and academic research organizations who in 2013 won passage of the landmark Community Safety Act in the New York City Council, which created an Inspector General for the NYPD and established one of the most expansive biased policing bans in the country.

It is CCR's firm belief that the goal of an effective system of civilian oversight must be to maximize the transparency, accountability, and legitimacy of law enforcement agencies to the communities they police. With this goal in mind, CCR offers the following six recommendations for improving civilian oversight of police departments in the United States.

I. Independent Civilian Complaint Investigative Bodies Must Be Sufficiently Funded and Have Prosecutorial Power

While many jurisdictions around the country currently have governmental agencies independent of the local police department to investigate civilian complaints of police officer misconduct, none of these agencies have the power to actually discipline those officers who the agencies' investigations have found have committed misconduct. In virtually all jurisdictions, the power to impose disciplinary penalties on offending officers rests solely with the commissioner or chief of the police department,ⁱ as does the decision whether or not to even prosecute the officers through existing administrative disciplinary hearing processes. Moreover, in the few jurisdictions where the independent investigative bodies have been granted the power to administratively prosecute disciplinary charges against officers against whom they have sustained civilian complaints, that power is restricted to certain categories of misconduct cases and, in New York City, can even in certain cases be removed from the

investigative body altogether by the police commissioner.ⁱⁱ

This lack of independent disciplinary authority has in turn resulted in repeated failures by police departments to hold officers who have violated civilians' rights accountable in any meaningful way. For example, in New York City, a recent report by the NYPD's Inspector General found that in all substantiated civilian complaints against NYPD officers for improper chokeholds between 2009 and 2013 that were referred to NYPD for formal disciplinary charges against the offending officers, the NYPD either refused to administratively prosecute charges and/or rejected the recommended disciplinary penalty offered by the independent complaint investigative body, the Civilian Complaint Review Board (CCRB).ⁱⁱⁱ In addition, in the *Floyd* stop-and-frisk litigation, the United States District Court for the Southern District of New York found that the NYPD's disciplinary prosecution arm, the Department Advocate's Office (DAO), has repeatedly failed to pursue disciplinary charges against officers against whom the CCRB had sustained misconduct allegations, rejecting CCRB investigators' factual findings and instead conducting its own *de novo* review of the complaint allegations in which it routinely disregarded the civilian complainant's account of the incident in question which the CCRB investigator had found to be credible.^{iv}

These failures have in turn seriously undermined the legitimacy of existing civilian complaint and police officer disciplinary processes. While state and municipal labor and civil service laws often make it extremely difficult to transfer final disciplinary authority out of the hands of the chief or commissioner of a local police department, CCR believes giving administrative disciplinary prosecutorial power to the independent body that investigates civilian misconduct complaints is a legally and politically viable reform.^v Accordingly, we recommend that the Department of Justice, through its COPS or other funding streams, provide funding and technical assistance to state and local jurisdictions to develop disciplinary prosecutorial offices within existing independent civilian complaint investigative agencies. We believe that the Administrative Prosecution Unit of New York City's Civilian Complaint Review Board, as well as San Francisco's Office of Citizen Complaints, provide useful models.

II. Increase Transparency of Police Department Dispositions of Disciplinary Cases

The lack of public confidence in existing civilian complaint and officer disciplinary processes is worsened by the fact that, in so many jurisdictions, the police department's internal disciplinary process lacks transparency. Thus, in most cities, once the independent complaint investigative body has referred a sustained civilian complaint to the police department for disciplinary action, there is no way, short of filing a formal open records law request, for the complainant, much less the general public, to learn what if any disciplinary action was taken against the offending officer or the reasons for the police department's disciplinary disposition.

We therefore believe it is essential for all state and local law enforcement agencies to regularly provide data to the public on the disciplinary dispositions of all sustained civilian misconduct complaints against police officers. Such data, which can be provided in a way that protects police officer anonymity and privacy rights, will not only increase the transparency of police departments' disciplinary processes, but will allow systemic problems in those processes to be more easily identified and addressed. A model for this kind of data disclosure is the

quarterly discipline reports released by the Los Angeles Police Department.^{vi} In addition, we believe that a police department's final disciplinary disposition of a sustained civilian complaint, including the penalty imposed and the reasons for the decision, should be provided in writing to the civilian complainant. The police officer disciplinary procedures for the Washington, DC Metropolitan Police Department provide a good model for this kind of information disclosure.^{vii}

Accordingly, CCR recommends that the DOJ develop guidelines and/or regulations requiring state and law enforcement agencies receiving federal funding to adopt the aforementioned procedures for public disclosure of information concerning departmental dispositions of officer disciplinary proceedings.

III. Creation of Independent Police Auditor/Inspector General Offices to Study and Recommend Reforms to Local Police Department Policies and Practices

Another limitation of most independent civilian complaint investigative bodies is that they are designed and equipped to investigate and address only individual cases of officer misconduct, but not problematic departmental policies and practices which may be contributing to officer misconduct. Thus, several jurisdictions have over the past two decades established, through municipal legislation or executive order, permanent governmental agencies, independent of the local police department, which are tasked with and empowered to study, report on and recommend reforms to various police department policies and procedures, including policies and procedures for investigation and disposition of civilian complaints. These agencies, often referred to as "Police Auditors", "Police Monitors" or "Inspector Generals," are normally granted extensive access to documents, data, and personnel within the subject police department and report their findings and recommendations to the police department and local government leadership, as well as to the general public.^{viii} Cities with active and well-funded Auditor/Monitor/Inspector General offices include Los Angeles, Portland, San Jose, CA, New Orleans and New York City.^{ix}

An obvious limitation of the police auditor/inspector general model is that such agencies can only recommend, but not require, a police department to reform its problematic policies and practices.^x However, when combined with other civilian oversight models, including the one discussed in Point IV below, the police auditor/inspector general model can provide a powerful accountability tool to local government officials and community members who are committed to meaningful police reform. Thus, CCR recommends that the DOJ, through its COPS or other funding streams, provide funding and technical assistance to jurisdictions around the country to establish independent police auditor/inspector general offices. We believe that the existing agencies in Los Angeles, Portland, New Orleans, San Jose, and New York can serve as models.

IV. Conduct Research on Civilian Governance of Municipal Police Departments

Currently, there are a handful of jurisdictions across the country, including Los Angeles, San Francisco, and Milwaukee, whose police departments are actually governed by a board or commission of civilians, chosen by the local mayor and/or city council. These boards and commissions essentially function like a public school board or corporate board of directors, setting policy departmental policies, and even having a say in the hiring and firing of the police

chief or commissioner, who him or herself remains in charge of the day-to-day departmental operations, and in the discipline of officers who have committed misconduct.^{xi} Placing such policy-making authority in the hands of a civilian board that holds regular public hearings has the obvious benefit of increasing the public's access to the policy-makers of police departments, which historically have remained among the most closed-off and secretive governmental institutions in the United States. Moreover, as evidenced by the individuals who have served on the governing boards and commissions in San Francisco and Los Angeles, this model of police department governance allows for the inclusion of a diversity of perspectives beyond those of just law enforcement executives in police policy decision making. Such public access and diversity of perspectives is critical for policing in a democratic society.

On the other hand, because oversight of the day-to-day operations of police departments remain under this model in the hands of the police chief or commissioner, the ability of civilian board or commission members, all of whom work only part time, to truly impact everyday police behavior on the streets will be limited unless they are able to keep close tabs on the implementation of departmental policies and procedures. Thus, CCR believes that for a civilian board/commission police department governance model to work, it must be combined with the police auditor/inspector general model discussed in Point III above. This two-pronged oversight approach is currently employed in the Los Angeles Police Department, where the Inspector General reports to and works on behalf of the Board of Police Commissioners.^{xii}

Accordingly, CCR recommends that the Department of Justice COPS Office conduct a study of a sample of jurisdictions of varying sizes, geographic locations, and demographics whose police departments are and are not under civilian governance to (a) determine if those departments under civilian governance tend to have better police community relations than those departments that are not, and (b) identify those aspects of successful civilian governance structures that are most likely to improve police community relations. We believe that such research could shed important light on the question of whether civilian governance is a promising reform idea for American policing.

V. Protect the Rights of Civilians to Record Police-Civilian Encounters

Another important but underappreciated form of civilian oversight is civilian video recordings of police-civilian encounters. Some of the most infamous and egregious incidents of police brutality in this country over the past two decades, including the beating of Rodney King and the killings of Oscar Grant and Eric Garner, came to light primarily because of video footage taken by civilian bystanders. Even in the age of police officer body worn cameras, video footage recorded by civilians can help produce a more complete and accurate account of police civilian encounters and can act as an important safeguard when officer cameras malfunction or officers manipulate the footage which they record.^{xiii}

Moreover, as the Department of Justice and at least two federal appeals courts have recognized, a private citizen's right to record police-civilian encounters in public places is a fundamental right protected by the First Amendment of the United States Constitution, and police seizure of a civilian's video recording equipment and/or the arrest and criminal prosecution of individuals who record police-civilian encounters "erodes public confidence in

our police departments, decreases the accountability of our governmental officers, and conflicts with the liberties that the Constitution was designed to uphold.”^{xiv} Yet, as CCR’s own legal work on behalf of civilians recording police activity in public has taught us all too well, many police departments around the country continue to violate this fundamental constitutional right.^{xv}

Accordingly, we recommend that the Department of Justice issue guidance or regulations for state and local law enforcement agencies receiving federal funding that require them to adopt policies and procedures protecting the rights of civilians to record police activity in public places and specify that agencies which fail to do so will lose their federal funding.

VI. Incorporate Community Input and Engagement into Court Monitorships

A final civilian oversight model worth mentioning is court monitorships of police departments. Over the past two decades, the Department of Justice Civil Rights Division and several private civil rights plaintiffs have brought lawsuits and investigations involving patterns and practice of civil rights violations by various state and local law enforcement agencies around the country, which have resulted in consent decrees, settlement agreements, memoranda of understanding and court judgments appointing independent monitors to oversee and monitor those agencies’ implementation of court-ordered reforms to their unlawful policing policies and practices. Unlike the other forms of civilian oversight discussed above, these independent monitors, as agents of state and federal courts, have the power to *require* that police departments implement certain policy reforms. However, while court monitors, as a general matter, issue periodic compliance reports to the general public, they monitors do not typically interact directly with or receive input on the development and implementation of policing reforms from the communities impacted by the monitored law enforcement agency’s illegal policing practices.

There are, however, a few court-ordered reform examples that offer some promise for overcoming this limitation in the existing court monitorship oversight model. The Collaborative Reform Procedure used in the *In re Cincinnati Policing* litigation brought by the ACLU of Ohio and Cincinnati Black United Front, which incorporated input on potential reforms to Cincinnati Police Department policies and practices from 8 different community stakeholder groups in Cincinnati, resulted in the landmark Collaborative Agreement in 2002, under which the Cincinnati Police Department was required to implement a strategy of Community Problem Oriented Policing.^{xvi} Similarly, the 2013 remedial order issued by the United States District Court for the Southern District of New York in CCR’s *Floyd* litigation, established a Joint Reform Process which, like the collaborative process in Cincinnati, requires that the court-appointed monitor and facilitator obtain the input of impacted communities into the development of reforms to the NYPD’s unconstitutional stop-and-frisk policies and practices.^{xvii} In addition, the DOJ’s 2012 settlement of its pattern and practice lawsuit against the Seattle Police Department provided for the establishment of a Community Police Commission to review and provide input to the court-appointed monitor on policy reforms to be developed pursuant to the settlement.^{xviii}

Accordingly, CCR recommends that the DOJ include such community input provisions in all of its future consent decrees, settlement agreements, and memoranda of understanding in its police pattern and practice cases brought under 42 U.S.C. § 14141.

ⁱ The very few exceptions include San Francisco, CA, and Milwaukee, Wisconsin, where officer appeals of police commissioner disciplinary decisions and, in San Francisco only, serious misconduct cases in which disciplinary penalties in excess of 10-day suspensions are contemplated are heard and decided by the civilian board or commission that governs the police department. See City and County of San Francisco Police Commission, *Procedural Rules Governing Trial of Disciplinary Cases* § I (adopted April 27, 2011)(hereinafter “S.F. Police Commission Disciplinary Trial Rules”); City of Milwaukee Fire and Police Commission, *About the Fire and Police Commission*, available at <http://city.milwaukee.gov/fpc/About>. Civilian governance of local police departments is discussed further in Point III *infra*.

ⁱⁱ See City and County of San Francisco Office of Citizen Complaints, *Complaint Process*, available at <http://sfgov.org/occ/complaint-process>; S.F. Police Commission Disciplinary Trial Rules, *supra* at note i; New York City Civilian Complaint Review Board, Administrative Prosecution Unit, *Second Quarter 2014 Report* at 3, available at <http://www.nyc.gov/html/ccrb/downloads/pdf/APU%20Report%202014%20Q2.pdf>

ⁱⁱⁱ See New York City Department of Investigation, Office of the Inspector General for the NYPD, *Observations on Accountability and Transparency in Ten NYPD Chokehold Cases*, at iii (January 2015). See also WNYC Radio, *Police Punishment: CCRB v. NYPD* (noting that of the 175 substantiated civilian complaints in 2012 in which the CCRB recommended formal disciplinary charges, the NYPD sought charges in only 7 of them), available at <http://project.wnyc.org/ccrb/>

^{iv} *Floyd v. City of New York*, 959 F.Supp.2d 540, 618-19 (S.D.N.Y. 2013)

^v *Lynch v. Giuliani*, 301 A.D.2d 351, 357-58 (N.Y. App. Div. 2003) (holding that granting prosecutorial power to CCRB did not violate New York City or State law)

^{vi} See, e.g., Los Angeles Police Department Internal Affairs Group, *Report on the Administration of Internal Discipline: A Report on Complaints Closed April 2012*, and Los Angeles Police Department, *Discipline Report for Quarter 2, 2012*, both available at <http://assets.lapdonline.org/assets/pdf/QDR%202nd%20Qtr.%202012%20FINAL%20V2.pdf>;

^{vii} See D.C. Code § 5-1112(e).

^{viii} See Samuel Walker, *The New World of Police Accountability*, at 136-42 (2005); Police Assessment Resource Center, *National Guidelines for Police Monitors*, at 15-17 (2008)

^{ix} See Los Angeles City Charter Art. V § 573; *Accomplishments of the Office of the Inspector General of the Los Angeles Police Department*, available at <http://www.oig.lacity.org/#!/oig-accomplishments/c3z8>; San Jose City Charter § 809; San Jose Mun. Ord. § 8.04.010; Portland City Code §§ 3.21.010 *et seq.*; New Orleans City Charter § 9-401; New Orleans City Code Chap. 2 § 2-1121; N.Y City Charter Chapter 34 §803.

^x See Walker, *supra* note viii, at 164.

^{xi} See Los Angeles City Charter Art. V §§ 571, 575; Los Angeles Police Commission, *The Function and Role of the Board of Police Commissioners*, available at http://www.lapdonline.org/police_commission/content_basic_view/900; San Francisco Police Department, *Police Commission*, available at <http://sf-police.org/index.aspx?page=2572>; City of Milwaukee, *About the Fire and Police Commission*, available at <http://city.milwaukee.gov/fpc/About>

^{xii} Los Angeles City Charter, Art. V §§ 571, 573.

^{xiii} See Jim Dwyer, Videos Challenge Accounts of Convention Unrest, *The New York Times*, April 12, 2005, available at <http://www.nytimes.com/2005/04/12/nyregion/12video.html>

^{xiv} See Statement of Interest of the United States in *Garcia v. Montgomery County, Maryland*, 12-CV-3592, Dkt # 15 (D. Md. March 4, 2013); *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011); *ACLU of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012).

^{xv} See, e. g., *Bandele v. City of New York*, 07 Civ. 3339 (S.D.N.Y.); Brief of Amici Curiae Berkeley CopWatch, Communities United Against Police Brutality (Minneapolis), Justice Committee, Portland CopWatch, Milwaukee Police Accountability Coalition and Nodutdol for Korean Community Development, filed in *Glik v. Cunniffe*, *supra* note xiv, available at http://ccrjustice.org/files/CCR%20Amicus%20Brief_0.pdf

^{xvi} See Order Establishing Collaborative Procedure, in *Tyehimba v. City of Cincinnati*, No. C-1-99-317, Dkt # 27 (S.D. Ohio May 3, 2001); Collaborative Agreement in *In Re Cincinnati Policing*, No. C-1-99-3170 (S.D. Ohio. 2002), available at <http://www.cincinnati-oh.gov/police/linkservid/27A205F1-69E9-4446-BC18BD146CB73DF2/showMeta/0/>

^{xvii} *Floyd v. City of New York*, 959 F.Supp.2d 668 (S.D.N.Y. 2013)

^{xviii} Settlement Agreement and Stipulated Order of Resolution in *United States v. City of Seattle*, 12-CV-1282, Dkt # 3-1 § I.B. (W.D. Wash. July 27, 2012); Memorandum of Understanding Between the United States and the City of Seattle, dated July 27, 2012, at § IIIA-C, available at http://www.justice.gov/crt/about/spl/documents/spd_mou_7-27-12.pdf