

**Preliminary Observations and Recommendations
Following Benchmarking Against Best Practices
Use of Force Subcommittee
Ad Hoc Police Practices Review Commission
July 22, 2015**

CHIP MONCURE

- 1. All but one of the 71 recommendations from the *Final Report on Use-of-Force Policy and Practice Review of the Fairfax County Police Department* by the Police Executive Research Forum (PERF) should be adopted and implemented as soon as corresponding language can be drafted in the form of General Orders and accompanying SOP'S.**
- 2. PERF Recommendation #54 to discontinue use of the Precision Immobilization Technique, or "PIT" maneuver, should be evaluated by the Chief of Police and his staff to determine viability.**

The reasoning for inclusion of all of these recommendations under the auspices of "Use of Force" is simple because these recommendations reflect on "Use of Force" directly or indirectly. All of the recommendations are related to the people served with a clear understanding of the sanctity of life, whether specifically stated or not.

It is perfectly clear that the issues that have arisen did not happen overnight, nor did the police agency get to this juncture without some reasoning. The current Chief has openly and publicly stated a need for change, review and remodeling. The Chief engaging the "PERF" report is a proactive step to avoid reading a DOJ report on Fairfax.

Change is necessary, but as humans we tend to resist it because of our established comfort zones. This can be accomplished through good leadership, proper training and measured execution of task. Training is the key to establishing a progressive mindset and changing existing views. Whether it is adding body cameras or changing recruit training schedules from skills first to academics followed by skills. The goal is always the same, preservation of life through service and ultimately protection of citizens and officers.

Until such time that personnel are no longer recruited from the human race, there will always be the possibility of error and the goal of review is to try and reduce the errors. A way to help insure that objectives are met and goals are achieved is the implementation of an independent auditor or inspector general for public safety. This allows for a fulltime salaried professional to examine the implementation of reforms and changes necessary to complete the required tasks allowing, for inclusion and transparency while meeting the overall goal.

RANDY K. SAYLES

DIVERSITY

- 1. Fairfax County must drive for greater diversity in its police force by strengthening its recruitment/hiring program. Increasing the number of highly capable police officers reflective of the diversity of our community will promote mutual respect and trust of between the FCPD and the residents it serves and will reduce the potential for race and cultural differences to be factors in inappropriate use of force in the conduct of a Fairfax police officer's responsibilities.**

I agree with DOJ's recommendation to the Ferguson Police that enhanced diversity with African American Officers, especially in communities with high percentages of African Americans, is necessary for overall sound, just policing. I also believe Diversity is indirectly relevant to our well documented use of force (UOF) discussions to date, of the Fairfax County Police; which I won't regurgitate and also for reasons I've alluded to during those discussions without stating specifically. I will state those reasons during this briefing in further support of my recommendations for the Subcommittee's consideration.

As an African American, retired law enforcement officer, I can attest that pressures to be accepted by your police officer colleagues, and others, at a police department or agency can be overwhelming; potentially leading to unjust policing and unwarranted uses of force. Although, recruitment and hiring of minorities alone is not a panacea to abuses, to include UOF, it is my life long experiences as an African American, living in economically depressed environments (ghettos); as well as middle, upper class and affluent environments, believe that it is critically important to ensure that the Fair Fairfax County Police Department (FCPDD) have officers with integrity and intestinal fortitude to do the right thing; regardless of internal police challenges or those encountered when interacting with citizens.

Based on my personal experiences the past eight (8) years with the FCPD with harassing traffic stops; issuing of tickets, warnings and abusive language not resolved when attempting to do so informally or subsequent to favorable adjudication by County Traffic Court proceeding, I'm of the opinion that FCPD, at least in the Sully District, need to have more African American Officers; who possibly will give the same considerations to African American, as I observed by White Officers giving to White drivers for the same offenses in the same general areas as me. In all but one of my interactions with FCPD, I was acting officially on behalf of the Fairfax County Clean Streets Program and saw no need to identify myself as a former law enforcement officer.

What is the nexus to Use of Force? In my many experiences working with police officers nationally and internationally, I've seen similar interactions, and others that I have referenced escalate into confrontations, resulting in potential uses of force, which could have easily been avoided. Fortunately, in my interactions, I displayed empathy and exercised restraint, in spite of disrespectful tone and attempts to, consciously or unconsciously, marginalize me.

This is a NO, NO by police officers when interacting with citizens; especially African Americans who have been the brunt of this type of policing historically and viewed treatment by many, overall from the "system" in general.

TRAINING

- 2. The Training Academy, or FCPD Command, should direct that a review be undertaken of FCPD hiring and promotional practices that is inclusive of all available and pertinent data regarding Field Training Instructors and the Academy Training Staff; their selection, training, evaluations, comments and recommendations for tenures in positions up to five (5) years by the appropriate Captain, or Deputy Chief, beyond that by any outside agency certifications.**
- 3. FCPD should provide mandatory, recurring training to post-probation officers within two (2) years of ending probation to enhance, ensure training taught in the Academy is properly balanced with realities "in the field".**

As it is more likely probationary officers are being told that handling realities in the field are, may be, contrary to that acknowledged or known by training staff personnel on June 3.

I agree with DOJ's recommendation of initial and recurring training for the Ferguson PD and believe that the same is needed for the FCPD; as an indirect nexus to UOF for several reasons; many already well documented and discussed to date in our Subcommittee, as well as my personal experiences, stated regarding diversity.

Additionally, I'm concerned with several responses (which suggested laxity in determining suitability of Field Training Instructors (FTIs)) received from FCPD Training Academy staff on June 3, 2015, when responding to Subcommittee questioning of the selection process of FTIs; training of probationary officers; as well as officers with more than two (2) years tenure. The officers involved in my encounters fell within the categories stated.

SUPERVISION

- 4. FCPD should provide all data, where legally permissible (they don't necessarily have to release names of officers or victims until cases are concluded), for all uses of force, to include deadly and serious injuries, or any others per FCPD policy description; specifically for determining actions taken, not taken, to include opportunities for training, by supervisors, Commanders up to and including the Chief of Police, on the scene or not.**

I agree with DOJ when highlighting poor supervision, and/or lack of by the FPD, as a major issue and I believe the same exists as a potential indirect nexus to Use of Force by the FCPD, as seen in Ferguson. Again, I base my comments on our Subcommittee discussion to date, and my personal interactions with the FCPD stated regarding Diversity and Training. I believe the FCPD need to ensure appropriate initial and follow-up supervision occurs at all levels of interactions with the public.

I found it concerning when reviewing past Subcommittee discussions, to include rebuttals by Sal Culosi, regarding the report on his son, Dr Culosi, forwarded for Subcommittee review and subsequent to my submission of the Ferguson report, that the officer received discipline; however, there was no discussion, discipline for Supervisors, to include Command Official(s), in the report approving the operation that resulted in deadly Use of Force.

The [Police Executive Research Forum](#) (PERF) report, while not specific, appears to have indirectly come to the conclusion that the FCPD doesn't provide adequate supervision overall; which is what DOJ cited as a deficiency with the FPD.

Therefore, I'm concerned that non-law enforcement citizens will unnecessarily engage with the FCPD, as I did when not identifying myself as a former law enforcement officer, in prolonged and unsuccessful attempts to meaningfully interact with officials, to include Chief Roessler, in useless back and forth dialogue via email, phone, even after purportedly receiving an introduction from County Executive Bulova to meet with Chief Roessler (although, it should be noted that Ms. Bulova was not specifically told in great detail my reason to meet with Chief Roessler).

As a retired law enforcement Officer encountering such resistance, double talk, slow responses, non-action causes me to question whether FCPD supervisors, and higher, are executing their responsibilities reflective of FCPD policies; to include UOF and the ultimate well being and dignity of citizens. If not, as in my examples, then failure to engage forthrightly and appropriately has historically led to a culture within police departments contributing to an indirect nexus to Uses of Force, as seen in Ferguson.

ACCOUNTABILITY

- 5. FCPD should submit randomly selected complaints, at all levels of use of force and non-uses of force, for independent review and evaluation of appropriate accountability, discipline issued, formal or informal, of involved officers and others.**

I agree with DOJ's highlighting failures by FPD supervisors, up to and including the Police Chief, to not only review, but to hold officers in use of force situations culpable for their actions. Based on well documented discussions, to date, by other use of force Subcommittee members, as well as my own personal experiences stated, accountability and non-accountability must apply at all levels of interactions with the FCPD. Lack luster or non-accountability by Supervisors can be viewed in tandem with that stated of supervision and thus become an indirect or direct nexus to uses of force "in the field."

COMMUNITY STAKEHOLDERS

6. FCPD should assess the effectiveness of its engagement with citizen advisory committees how citizens can better understand, monitor and engage in those interactions, including a review of all pertinent data, agendas, and minutes from civilian committees, formally or informally interacting with the FCPD.

I agree with DOJ's recommendation to the FPD regarding the overall importance of community stakeholders with their myriad of policing issues and also believe there is an indirect nexus, importance to the FCPD in minimizing uses of force based on discussions, to date, of this Subcommittee.

I also didn't see where Mr. Wexler and his PERF team made any attempt to hear from citizens, and if they did, believe that citizens' comments will support the importance of stakeholders, as stated, regarding minimizing the uses of force.

Chief Roessler, during the UOF Subcommittee meeting on July 1, alluded to an alliance with the "Public Safety Committee" when stating that he wanted the "Public Safety Committee to challenge us" (FCPD). It's my un-confirmed understanding that this committee hasn't met in four (4) years.

ECW's (TASERS)

- 7. FCPD should provide enhanced training and issue ECW's (Tasers) immediately to all police officers; regardless of rank or assignment.**
- 8. FCPD should mandate all uniform patrol officers, regardless of rank, carry a Taser, in addition to sidearms.**
- 9. FCPD should mandate all detectives and plainclothes officers, regardless of rank, carry Tasers in vehicles when on duty;**

I agree with DOJ's recommendation to the FPD that Officers should be required to view ECWs as one tool among many, and "a weapon of need, not a tool of convenience"; while NOT depending on ECWs, or any type of force, "at the expense of diminishing the fundamental skills of communicating with subjects and de escalating tense encounters." Although DOJ didn't state mandatory carry, I believe that there has been sufficient use of force Subcommittee discussion, to date, justifying mandatory use of this

less lethal deadly weapon by the FCPD along with side arms. The single reason stated by FCPD Academy training staff on June 3, 2015 of no room on the Sam Brown belt is not accepted as valid and should be countered with making room to carry tasers. Therefore, I recommend for consideration by the Subcommittee that:

RESIDENCY

10. FCPD police officers should be required to live within the boundaries of Fairfax County.

Police officers living in a community will more likely be inherently more disposed to policing justly; then if having an ability to police without thinking or in accordance to policies and then retiring to a community where it is less likely they will face the consequences of their actions; if unjust.

DOJ Investigators didn't state a residency requirement for FPD. Never the less, I believe the requirement appropriate for FCPD overall and specifically beneficial to mitigation against unnecessary use of force.

INDEPENDENT OVERSIGHT

11. The BOS should establish an FCPD independent civilian oversight committee.

12. To ensure that the civilian oversight committee has sufficient influence and authority for meaningful interaction with the FCPD, its composition should include:

- **Citizens of a recognized advocacy body; such as the NAACP, Urban League or similar group;**
- **Independent citizen(s) residing legally in Fairfax County;**
- **A FCPD police officer;**
- **A law enforcement official, current or retired, from a recognized agency; such as FBI, State Police, etc.;**
- **A member of the Fairfax County Board of Supervisors or a designated;**
- **Any other person deemed to be beneficial for independent, fair and sensible oversight to the benefit of citizens, FCPD and Fairfax County Government.**

DOJ Investigators recommended independent oversight of the FPD based on substandard policing negatively impacting the city of Ferguson, especially African American citizens, done in collusion with other City Departments.

FCPD does not meet the dismal standard of FPD for independent oversight; however, I believe FCPD warrants independent oversight by a Board consisting of citizens for the following reasons:

- (a) Discussions to date by this Subcommittee of FCPD uses of deadly and non-deadly force;
- (b) Chief Roessler's statement that he welcomed the "Public Safety Committee" to challenge the FCPD;
- (c) Citizens, who believe that they have been wronged, should have informal and formal options to voice their concerns or complaints of alleged unprofessional, unwarranted Police behavior versus via court action; as other Subcommittee members and I endured.

There is, however, FCPD data and personal experiences of Use of Force Subcommittee members that warrant serious consideration for establishment of an independent oversight committee to ensure every aspect of police operations is responsive to citizens' safety, well-being and respect.

DOJ INVESTIGATION FAIRFAX COUNTY POLICE (No Specific Recommendation)

DOJ Investigators conducted investigation of the FPD based on discriminatory actions identified as deeply entrenched with practices, priorities that were incompatible with lawful and effective policing thus damaging community trust.

Adrian Steel, member of the use of force Subcommittee, has made written recommendation, June 5, 2015, that there is no need for a DOJ investigation of the FCPD. I disagree with this definitive position, at this point and recommend waiting for additional review, discussion of forthcoming data, discussion regarding FCPD operations before a final decision is made.

SAL CULOSI

- 1. When a weapon is taken from a holster in the presence of a suspect, this is a reportable action. The unholstered firearm will be maintained in a "ready gun" position which is defined as pointing the weapon so the officer can see the suspect's hands and waist. The officer will announce "Police, don't move" after attaining the "ready gun" position and if feasible prior to using deadly force. The pointing of a firearm in response to the actions of a subject to establish control and gain compliance will be consistent with the "ready gun" position and shall be considered non-deadly use of force if the weapon it is not aimed at center of mass, which is normally the chest.**

FCPD's current policy is as follows:

"If feasible, when using a firearm for the purpose of deadly force, officers shall give the verbal warning, 'Police, don't move!' prior to using deadly force. The pointing of a firearm in response to the actions of a subject to establish control and gain compliance shall be considered non-deadly use of force." [Page 3 of General Order 540.1(2)]

Reasons for recommendation:

- (a) The consensus of the Use of Force Subcommittee obtained from a review of several studies and reports is that drawing a weapon on someone should be reported
- (b) The "Ready Gun" position is not now defined in the GO 540.1 and should be defined as LtCol Ryan defined it in his answer to questions related to ready gun
- (c) Safety of the officer demands that he announce his presence only after the officer is at "Ready Gun" because he should not give the suspect any advance notice of his presence until the officer is more prepared to react than the person being confronted
- (d) The current policy can be interpreted to mean that pointing a weapon at center of mass or at a suspects head is considered non-deadly force. The resolution of the gravity of pointing a weapon at center of mass should not be addressed in a general order when this issue is not globally resolved. The proposed change indicates that a weapon not pointed at center of mass is considered non-deadly force and is appropriately silent about the gravity of pointing at center of mass, which would normally occur when an officer's life is threatened

2. FCPD should modify the Warrant Risk Assessment Matrix per Figure 1.

Note: Warrant Risk Assessment Matrix for use of SWAT is not currently a part of any general order

The prior version leaves open the possibility of using SWAT against any person if the warrant involves any vice case and does not include the other high risk factors presented in the matrix. The proposed changes have already been incorporated by FCPD following discussions with Major Moyer regarding the appropriateness of the prior version.

MIKE SHUMAKER

1. The Fairfax Co. Board of Supervisors (BOS) should immediately initiate a search for a new Chief of Police

Since 2013, Chief Roessler's actions and inactions have become a distraction. The Ad Hoc Commission and PERF's June 2015 *Use-of-Force Policy and Practice Review of the Fairfax County Police Department* are a result of actions during his tenure.

(1) PERF made 71 substantive recommendations; undoubtedly more could have been made but were limited by the scope of the contract.

(2) The citizens of Fairfax and the FCPD deserve a chief who brings accountability to police and holds officers who act out of line accountable for their actions.

(3) At the July 1, 2015, UOF Subcommittee, Chief Roessler unequivocally said he supported 70 of 71 PERF recommendations. Yet, when pressed by one subcommittee member it became clear that he has acted to stop teaching choke holds but crucially will not prohibit use of choke holds by FCPD per "Recommendation #48: Prohibit "Choke" Holds in Policy"; his action doesn't fully implement PERF's recommendation. The chief simply refuses to understand that "prohibit" means training and in practice.

(4) At that same meeting, the Chief declared he had been the subject of 26 complaints early in his career with FCPD.

(5) He also told the UOF subcommittee he had reversed or lessened discipline for officers in UOF cases because their supervisors were not being held accountable. However, he is in the unique position to hold those supervisors accountable making his actions toward the officers and supervisors inexplicable. Chief Roessler is sending the wrong message on the culture of UOF within FCPD. That he made chief after 26 complaints and reversed or lessened discipline for officers in UOF cases has created an unhealthy pro-UOF culture in FCPD that PERF's 71 recommendations only begin to address.

(6) Chief Roessler told the UOF subcommittee that availability of Tasers is limitation despite assuring the subcommittee that (a) money is not an issue and (b) Lt. Col. Ryan having told the UOF subcommittee previously there is zero shortage of Tasers in FCPD and (c) Ryan reiterated his previous statement on July 1.

(7) While vowing support of transparency, Chief Roessler stonewalled the UOF subcommittee on requests for documents and data. (a) He repeatedly failed to produce documents sought by the UOF subcommittee or provided them only after long, unexplained delays. (b) Often the information FCPD provided made no sense, generated additional questions, or contradicted other answers. (c) Some documents were delivered one or two days before a UOF subcommittee meeting which didn't allow time for careful review and consideration of their contents. This violated the policy of the UOF subcommittee chairman prohibiting last minute data dumps.

Figure 1. Recommended Modified Warrant Risk Assessment Matrix

WARRANT RISK ASSESSMENT MATRIX
FAIRFAX COUNTY POLICE DEPARTMENT

This Warrant Risk Assessment Matrix shall be completed for all search warrants. It is intended to serve as a guide in determining resources necessary to minimize the risk of the Search Warrant service and to provoke consideration of issues relating to the safety of officers and the community. The Tactical Analysis Worksheet shall be completed for all Search Warrants where SOD consultation is required, or where completion is mandated by a supervisor/commander. Cases involving OCN matters should be de-conflicted with an OCN Commander. A commander may waive SOD consultation if the search location has been secured and threat factors mitigated.

If any **ONE (1)** of the risk factors in this section is present, the SOD Commander/Assistant Commander **MUST** be consulted **PRIOR** to the attempted service of the warrant. **CHECK ALL THAT APPLY.**

- If the warrant involves any felony drug case, the OCN Commander must be contacted prior to any attempted service. If an OCN warrant, the OCN Commander or designee will evaluate the warrant service.
- Any subject believed to be present at the warrant location who has a previous arrest for using a firearm during the commission of a crime, or is known to illegally carry a firearm, or has a history of violent crime involving weapons, or any offense involving an explosive device, or threats to use fire as a weapon.
- Any subject believed to be present at the warrant location who has confirmed access to body armor, armor defeating ammunition, or full auto weapon systems.
- Any subject believed to be present at the warrant location who has outstanding warrants or probable cause for arrest for Homicide, any Violent Sexual Offense involving a weapon, Armed Robbery or Abduction while armed.
- Any subject believed to be present at the warrant location who has made verified threats to harm law enforcement, including threats of suicide by cop.
- Any subject believed to be present at the warrant location with known ties to terrorism or violent extremism.
- The warrant location has armed counter surveillance, booby traps, or clandestine labs.
- The warrant location is fortified or entry requires special breaching tools.

If **TWO (2)** or more of the following risk factors in this section are present, the SOD Commander/Assistant Commander **MUST** be consulted **PRIOR** to the attempted service of the warrant. **CHECK ALL THAT APPLY.**

- There is intelligence of firearms at the warrant location (CCW, I/LEADS, Officer Intel, etc.): _____
- Any subject believed to be present at the warrant location who has a history of assaulting public safety personnel, resisting arrest, or are known police fighters: _____
- Any subject believed to be present at the warrant location who has criminal gang affiliations: _____
- Subject of warrant is a drug user or alcohol abuser or mentally unstable: _____
- Subject of the warrant has formal weapons/tactics training: _____
- Subject of the warrant is on Probation or Parole: _____
- The structure is large/multi-leveled and beyond the capability of the requesting unit to secure: _____
- Multiple subjects on site who will be arrested for felonies: _____
- Counter surveillance or monitoring devices are utilized (lookouts, cameras, etc.): _____
- Intelligence that vicious animals (guard dogs) are utilized to secure the site: _____

The consulted SOD commander shall either defer to the commander requesting the warrant service based on their assessment of the situation/facts/capabilities of the requesting unit or authorize SWAT based on analysis.

- SOD consult not required - R&D at third party compliant site, evidence in police custody, DNA confined party, etc.

Matrix Completed by: _____ EIN: _____ Division/Squad: _____ Date: _____

Case #: _____ Crime/Event Type: _____

Evidence Sought: _____

Approving Supervisor: _____ EIN: _____ Approving Commander: _____ EIN: _____

SOD Commander Consulted: YES NO SOD Commander: _____ EIN: _____

If consulted, SOD Commander Determination: SOD Other Entity Unit Assigned: _____

DISTRIBUTION: (1) Send a paper copy to SOD.

(8) Analysis of the May 15, 2015, memo from 2Lt. David White to Lt. Col. Ryan, SUBJECT: 14-INSP-031, REF: Officer Involved Shooting Statistics (Fatal versus Non-Fatal) and Release of Officer Involved Shooting Information <http://www.fairfaxcounty.gov/policecommission/subcommittees/materials/col-ryan-memo.pdf> reveals four PDs baslined against FCPD had (a) less total officer-involved shootings/officer and (b) crucially less fatal officer-involved shootings/officer than FCPD: Virginia Beach, VA; Montgomery Co, MD (which is nearly a mirror image of Fairfax Co. in demographics and the size of its PD; Charlotte, NC; and Raleigh, NC. Newport News, VA had less fatal officer-involved shootings/officer than FCPD.

(9) Chief Roessler's "50 Means 50" weeklong anti-speeding initiative on the Fairfax County Parkway contradicts Recommendation 2.9 of *Final Report of the President's Task Force on 21st Century Policing* of May 2015: "Law enforcement agencies and municipalities should refrain from practices requiring officers to issue a predetermined number of tickets, citations, arrests, or summonses." Ironically, FCPD cars speed and run red lights when not responding to a call. This is contrary to Pillar One of *Final Report of the President's Task Force on 21st Century Policing* of May 2015: The public confers legitimacy only on those whom they believe are acting in procedurally just ways.

(10) FCPD engaged in a high stakes gambling raid in Great Falls in January 2015 using SWAT that was reminiscent of the raid that resulted in an officer killing Dr. Sal Culosi and cost our County \$2M in a settlement. Had one of the 2015 gamblers been shot our County could have lost a few more million dollars.

(11) While Chief Roessler boasted of the arrest of two officers in mid-2015 for pornography and stealing gasoline, the officer-involved shooting death of John Geer is no closer to resolution. The County already paid \$2.9M to Geer's survivors.

(12) The FCPD's investigation of the Taser induced death of a woman of color in the County jail resulted in no recommendations. A Washington Post editorial of July 19, 2015, deplored the investigation and the role of the chief. The Post mentioned Chief Roessler 10 times in its editorial; none was positive: "Police Chief Edwin C. Roessler Jr. stared into a camera and delivered a bland recapfor nine full minutes, Mr. Roessler... managed to reveal absolutely nothing. Mr. Roessler did so while at the same time impugning Ms. McKenna, who was mentally ill, as a "combative" woman who refused commands and resisted removal from her cell. As if her death were her own fault. Mr. Roessler was content to characterize her conduct but had virtually nothing to say about the conduct of the six jail guards.... Mr. Roessler acknowledged that a video, shot by jail personnel, exists of the struggle between the guards and Ms. McKenna. But he offered no rationale for why the police have not released it. Mr. Roessler's presentation, a rehash of information reported by this newspaper and other news outlets months ago, was little more than an exercise in obfuscation. Mr. Roessler said the police were committed to candor — and, at the conclusion of the police investigation, delivered nothing of the kind." http://www.washingtonpost.com/opinions/nine-minutes-of-obfuscation/2015/07/19/7f470e4c-2cb7-11e5-a250-42bd812efc09_story.html

- 2. The Fairfax Co. Board of Supervisors (BOS) should establish an Office of the Independent Police Auditor that reports directly to the BOS: (1) to provide independent oversight of and instill confidence in the complaint process through objective review of police misconduct investigations; (2) to conduct outreach to the Fairfax Co. community; (3) to propose thoughtful policy recommendations to the FCPD; and (4) to strengthen the relationship between the FCPD and the community it serves. The Independent Police Auditor shall, at all times, be totally independent such that requests for further investigations, recommendations, and reports shall reflect the views of the Independent Police Auditor alone. No person shall attempt to undermine the independence of the Police Auditor in the performance of her/his duties and responsibilities.**

See pp. 3-4 of [2014 IPA Year End Report](#) by the Office of the Independent Police Auditor City of San José, CA, at <http://www.sanjoseca.gov/DocumentCenter/View/42029> .

Per an email from Shivaun Nurre (Interim Independent Police Auditor City of San José) to Michael Shumaker (UOF Subcommittee member) of July 8, 2015, "I can assure you that the IPA staff firmly believe that...the auditor model is a good form of police oversight. But we are biased on this point. You may want to read this 2005 report on the various forms of oversight. Although the report is a bit dated, it provides a good overview of the various models."

<http://nacole.org/wp-content/uploads/Review-of-National-Police-Oversight-Models-Feb.-2005.pdf>

This recommendation is consistent with Pillar Two ("external and independent investigations and prosecutions of officer-involved shootings and other use of force situations and in-custody deaths") of *Final Report of the President's Task Force on 21st Century Policing* of May 2015.

The BOS should consider hiring Judge LaDoris H. Cordell (Ret.), retired Independent Police Auditor City of San José or Ms. Nurre, Interim Independent Police Auditor City of San José as a consultant. Judge Cordell is that city's third IPA. She was Northern California's first African American female judge. <http://www.sanjoseinside.com/2015/03/18/ladonis-cordell-to-step-down-as-independent-police-auditor/>

Jonathan Siegel, a former member of the Police Oversight Commissioners in Albuquerque said, "A good police department needs accountability. It doesn't diminish the police, it expresses how ready they are to be examined."

3. The Chief of FCPD shall disestablish the FCPD's SWAT.

Fairfax Co. faces a \$100M budget shortfall in 2016 and FCPS a similar funding gap. According to FCPD the Special Weapons & Tactics (SWAT) team "is typically used for the following situations:

- a. Search Warrants/Arrest Warrants
- b. VIP protection
- c. Barricades
- d. Armed Robbery Stakeouts
- e. Active shooter case"

(a) Use of SWAT for ~35 search warrants/year out of ~41-43 SWAT calls/year is an insufficient reason for the taxpayers to bear the cost of 27 SWAT-related officers: 12 full time SWAT officers *plus* a supplemental team of 15 equally trained officers to backup SWAT. (b) SWAT has never been called for an active shooter. Cmdr. Moyer provided the preceding data at the May 20, 2015, UOF subcommittee meeting. (c) SWAT has been used in non-violent crimes such as gambling. However, in 2006 a member of FCPD SWAT killed Dr. Sal Culosi. Contrary to the FCPD answer to question #12 (Which individual cases prompted SWAT to create the Threat Assessment Form and how each case would have scored had the form existed at the time?) furnished in Answers to Subcommittee Questions Set #6 07/10/15 in January 2015, FCPD SWAT arrested gamblers in Great Falls. The Answer to #12 concludes: "The best the Department can provide is a statement that based on the information we have at this time, high risk tactics would not have been authorized based on today's threat assessment form." The 2015 Great Falls gambling raid demonstrates that is false.

(d) According to the FBI's Crisis Negotiation website 80% of barricade situations are resolved peacefully through patient negotiations: "In fact, most barricades and hostage situations in the U.S. are resolved through negotiations or a combination of negotiation and tactical force. Less than one in five incidents are resolved strictly through tactical means, [head of the negotiation unit, Special Agent John] Flood

said. Indeed, the unit's Latin motto is 'Pax per Conloquium,' which means 'resolution through dialogue.'" https://www.fbi.gov/news/stories/2007/april/negotiation_041307

(e) The Chief of FCPD rushed into effect General Order 520.3 for HOSTAGE / BARRICADED PERSON dated July 1, 2015, without consulting the UOF subcommittee and despite concerns that subcommittee had voiced about the previous barricade policy. One might conclude the Chief of FCPD did so to create the impression he is addressing a Recommendation #62 in PERF's June 2015 *Use-of-Force Policy and Practice Review of the Fairfax County Police Department*, i.e., "Policy on hostage/barricaded person situations also should be expanded to include definitions of legal authority, the command post, immediate action team, staging area, and other key terms. Given the critical role played by the first on scene supervisor at hostage/barricades person incidents, a new section on this supervisor's responsibilities should be added to the policy." However, GO 520.3 failed to address the responsibilities of the first on-scene supervisor at hostage/barricades person incidents. It also defines barricade so broadly that anywhere in out County constitutes a barricade, e.g., "open field, or other location," which could well violate 4th Amendment rights. GO 520.3 glaring fails to address citizens who barricade themselves when faced with an active shooter. The Dept. of Homeland Security collaborated with FCPD on Active Shooter How to Respond that states that when faced with an active shooter people should evacuate (p. 3) but if they can't per p. 9 they should "Lock and barricade doors." How the arriving FCPD will deal with those citizens who've followed protocol and barricaded themselves is a disaster waiting to happen. How will the FCPD differentiate between barricaded citizens and a barricaded active shooter?

(f) SWAT support to VIPs is insufficient justification to burden taxpayers with retaining it and risk an officer-involved shooting. VIPs have their own security detail, e.g., the President has Secret Service protection.

4. The Chief of FCPD shall increase FCPD's transparency with respect to use-of-force. All FOIA requests involving UOF shall be approved, partially approved, or disapproved by a citizen-police oversight board. The Board of Supervisors (BOS) should be a final appeal option for those requesting information involving UOF from FCPD. If this requires action by the General Assembly, the BOS should make it a priority in its annual input to the county delegation to the General Assembly.

Consistent with Recommendation 1.3 and Action Items 1.3.1 and 1.3.2 of *Final Report of the President's Task Force on 21st Century Policing* of May 2015.

Currently, the Chief of FCPD can withhold documents from the public without any independent oversight. The current VFOIA system gives the Chief of Police the final say. Public requests for use of force (UOF) information are no different than security classification challenges. The Chief withholds information based on VFOIA, but the outcome is less open to challenge than the Federal Gov't for over classifying information or designating it sensitive, but unclassified. Federal Gov't information whose unauthorized release could harm national security is subject to classification; that makes sense. The withholding of FCPD information does not entail such risk. The current system used by FCPD is the antithesis of transparency. Rules established by the National Archives allow those challenging over classification by the Federal Gov't to appeal and ultimately seek independent outside review. Highlights from the National Archives website for Classification

Challenges <http://www.archives.gov/declassification/iscap/classification-challenges.html> follow: Section 1.8 of Executive Order 13526, "Classified National Security Information" provides for classification challenges by an authorized holder who believes that the classification status of certain information is improper.... The Order provides this provision to encourage authorized holders to challenge classification levels in order to promote proper and thoughtful classification actions. [Per EO

13526 those “who, in good faith, believe that its classification status is improper are encouraged and expected to challenge the classification status.”

Agency Level Process for Classification Challenges

The Executive Order requires each agency to establish a process for tracking and handling challenges. These procedures are unique to each individual agency, however they must adhere to the provisions of the Order and the Implementing Directive [from the Nat’l Archives].

- Agencies must consider classification challenges separately from FOIA requests.
- Agencies must provide an initial written response to a challenge within 60 days.
- An authorized holder must complete the process at the agency level before presenting a challenge to the ISCAP. However, failure by an agency to adhere to the above listed timeframes allows an authorized holder to come directly to the ISCAP [Interagency Security Classification Appeals Panel].

ISCAP Level Process for Classification Challenges

After fulfilling all steps within the agency level process, the appellant can then appeal the denial of their classification challenge to the ISCAP.

Notification

Article VIII section H of the ISCAP bylaws state that: "The Executive Secretary shall promptly notify in writing the appellant, the agency head, and the designated senior agency official of the ISCAP decision." Article VII section E of the ISCAP bylaws indicates that agencies have 60 days from receipt of this letter to petition the President through the President for National Security Affairs to overrule the decision of the ISCAP. If no agency appeal is lodged within the 60-day period or if the President affirms the ISCAP decision, in the event of an appeal, the decision is final.

https://www.fas.org/sgp/othergov/intel/capco_reg_v5-1.pdf discusses Law Enforcement Sensitive information:

Definition: LAW ENFORCEMENT SENSITIVE (LES) information is *unclassified information* originated by agencies with law enforcement missions *that may be used in criminal prosecution and requires protection against unauthorized disclosure to protect sources and methods, investigative activity, evidence, or the integrity of pretrial investigative reports*. Any law enforcement agency employee or contractor in the course of performing assigned duties may designate information as LES if authorized to do so pursuant to department specific policy and directives. [Emphasis added] Importantly, if the FCPD applies LES it can release it.

5. The BOS should require that all UOF incidents undergo an administrative investigation.

In answering a UOF subcommittee question about why the yearly totals of discipline cases was so small out of the total number of UOF cases Lt. Col. Ryan wrote: “The vast majority of UOF incidents involve unambiguous officer compliance with these orders and hence not subject to administrative review.” Non-fatal UOF incidents should be reviewed (1) because they may highlight an officer whose behavior deserves intervention and (2) is in keeping with the FCPD’s acceptance of the 2015 Use-of-Force Policy and Practice Review of the Fairfax County Police Department by PERF that called for the FCPD to adopt a policy stating that a respect for the sanctity of human life must be a guiding principle for the department’s use-of force policies, procedures, and training.

6. The Chief of FCPD shall immediately establish policies that include provisions for the collection of demographic data on all parties involved in officer-involved shootings, other use of force situations, in-custody deaths, and all detentions (stops, frisks, searches, summons, and arrests). Annual UOF statistics shall include the following for each incident:
 - (a) Ethnicity
 - (b) Mental illness history
 - (c) Was person armed? (no or how armed)
 - (d) Police weapons used
 - (e) Prior criminal record
 - (f) CIT at scene?
 - (g) Cause of death/injury
 - (h) Within FCPD policy?

See p. 44 of 2014 IPA Year End Report by the Office of the Independent Police Auditor City of San José, CA, at <http://www.sanjoseca.gov/DocumentCenter/View/42029>

See also Pillar Two and Action Item 2.6 of *Final Report of the President's Task Force on 21st Century Policing* of May 2015.

7. The BOS should baseline the FCPD UOF policies on those of: Charlotte and Raleigh, NC; Virginia Beach and Newport News; and Montgomery Co., MD.

Analysis of the May 15, 2015, memo from 2Lt. David White to Lt. Col. Ryan, SUBJECT: 14-INSP-031, REF: Officer Involved Shooting Statistics (Fatal versus Non-Fatal) and Release of Officer Involved Shooting Information <http://www.fairfaxcounty.gov/policecommission/subcommittees/materials/col-ryan-memo.pdf> reveals those PDs had less total officer-involved shootings/officer (except Newport News) and crucially less fatal officer-involved shootings/officer than FCPD. Total officer-involved shootings/officer and fatal officer-involved shootings/officer mirror the approach of the Dept. of Justice/Bureau of Justice Statistics in its Special Report, June 2006, NCJ 210296, p. 3, in the box captioned "Complaints about police use of force in England and Wales." <http://www.bjs.gov/content/pub/pdf/ccpuf.pdf>

8. The Chief shall develop and implement a policy for officers experiencing stress in their private life.

Question #67 asked: "Can FCPD post its policies regarding officers going out on or staying on patrol who are experiencing stress in their domestic life that could impact their performance on patrol?" In answering, Lt. Col. Ryan wrote: "The FCPD does not have a policy reference officers experiencing stress in their private life."

9. Reword General Order 540.1, as follows:

II. POLICY

It is the policy of the Police Department that **a police officer will never employ unnecessary force or violence and will use only such forces in discharge of duty as is reasonable in all circumstances. The use of force shall be used only after discussion, negotiation and persuasion have been found to be inappropriate or ineffective. While the use of force is occasionally unavoidable, every police officer will refrain from unnecessary infliction of pain or suffering and will never engage in cruel, degrading or inhuman treatment of any person.** ~~force is used only to the extent reasonably necessary to defend~~

~~oneself or another, to control a person during an investigative detention or mental detention, and to effect arrest. In all situations, medical assistance shall be provided to any person who is obviously injured, alleges an injury, or requests medical assistance."~~

Incorporate the Law Enforcement Code of Conduct of Sheriff David Clarke, Jr., of Milwaukee Co, WI. In 2002, Clarke was appointed to a vacancy by Gov. McCallum and later elected that same year to his first four-year term. He was re-elected in November 2006, 2010, and 2014, and is currently serving his fourth full term. He went on to earn a degree in Criminal Justice Management from Concordia University Wisconsin, graduating summa cum laude. In 2003, Concordia University named him Wisconsin Alumnus of the Year. His postgraduate work includes graduating from the FBI National Academy and the National Executive Institute in Quantico, Virginia; completing the Program for Senior Executives in State and Local Government at Harvard University's John F. Kennedy School of Government; Driving Government Performance: Leadership Strategies that Produce Results at Harvard University's John F. Kennedy School of Government; and studying with Police Chief William Bratton and L.A. County Sheriff Lee Baca. In 2013, Clarke earned a Masters Degree in Homeland Security at the Naval Postgraduate School and was honored with the Sheriff of the Year Award by the Constitutional Sheriffs and Peace Officers Association. The official statement credited Clarke with, "Demonstrating true leadership and courage...staying true to his oath, true to his badge, and true to the people he has promised to serve and protect."

10. Revise IAB Administrative Investigation column in General Order 540.1, Use of Force, Section V., "Use of Force Reporting by Type of Force Employed and Injury/Treatment" to replace "No" with "Yes" in all rows except Vehicle Incident No Contact and Destruction of Non-Domestic Animal.

Per the current table, an IAB Administrative Investigation is only required by policy for Deadly Force and Less-Lethal. An IAB Administrative Investigation of other types of UOF may detect a pattern of abuse of UOF or progression to increasingly harsh UOF and warn of a tendency toward use of Deadly Force and Less-Lethal.

11. The Fairfax Co. BOS should mandate that FCPD adopt a motto such as "Service that all might live."

It is noteworthy that the FCPD lacks a motto. A worthy motto would draw inspiration from the motto of the FBI negotiation team, *Pax per Conloquium*. It should also address Recommendation #4 Add a "Sanctity of Life" Statement to Department Policy in the PERF's June 2015 *Use-of-Force Policy and Practice Review of the Fairfax County Police Department*. Such a motto would reinforce the "sanctity of life" philosophy advocated in the *Final Report of the President's Task Force on 21st Century Policing* of May 2015.

12. The Chief of FCPD shall require all members of FCPD to comply with the letter and spirit of laws that apply to the public; the FCPD cannot view itself as above the law when it comes to UOF nor can it risk being perceived as holding such views.

Pillar One of *Final Report of the President's Task Force on 21st Century Policing* of May 2015: "The public confers legitimacy only on those whom they believe are acting in procedurally just ways."

13. The BOS should require FCPD to embrace a guardian mindset to build public trust and legitimacy. Toward that end, FCPD should adopt procedural justice as the guiding principle for internal and external policies and practices to guide their interactions with the citizens they serve.

Recommendation 1.1 and 1.4 and Action Items 1.4.1 and 1.4.2 of *Final Report of the President's Task Force on 21st Century Policing* of May 2015.

- 14. The Chief of FCPD shall acknowledge the role of policing in past and present injustice and discrimination and how it is a hurdle to the promotion of community trust.**

Recommendation 1.2 of *Final Report of the President's Task Force on 21st Century Policing* of May 2015.

- 15. The Chief of FCPD shall proactively promote public trust by initiating positive non-enforcement activities to engage communities that typically have high rates of investigative and enforcement involvement with government agencies.**

Recommendation 1.5 and Action Items 1.5.1 of *Final Report of the President's Task Force on 21st Century Policing* of May 2015.

- 16. The BOS should require mandatory residency in Fairfax County for all FCPD officers. Residency in the City of Fairfax or the City of Falls Church does not count.**

Action Item 1.5.2 of *Final Report of the President's Task Force on 21st Century Policing* of May 2015.

- 17. The Chief of FCPD shall modify General Order 540.1 to make clear that any UOF against children, elderly persons, pregnant women, and people with physical and mental disabilities is a last resort**

Action Item 1.5.4 of *Final Report of the President's Task Force on 21st Century Policing* of May 2015.
General Order 540.1 only addresses children, elderly persons, and pregnant women with respect to CEW and PepperBall.

- 18. The Chief of FCPD shall consider the potential damage to public trust when implementing crime fighting strategies.**

Recommendation 1.6 and Action Item 1.6.1 of *Final Report of the President's Task Force on 21st Century Policing* of May 2015.

- 19. The Chief of FCPD shall track the level of trust in police by their communities just as the FCPD measures changes in crime. Annual community surveys, ideally standardized across jurisdictions and with accepted sampling protocols, can measure how policing in that community affects public trust.**

Recommendation 1.7 of *Final Report of the President's Task Force on 21st Century Policing* of May 2015.

- 20. The Chief of FCPD shall create a diverse workforce**

Recommendation 1.8 of *Final Report of the President's Task Force on 21st Century Policing* of May 2015.

- 21. The Chief of FCPD shall have clear and comprehensive policies and provide continual training on the use of force (including training on the importance of de-escalation), mass demonstrations (including the appropriate use of equipment), consent before searches, gender identification, racial profiling, and performance measures**

Pillar Two, Recommendation 2.2 and 2.7, and Action Items 2.2.1 and 2.7.1 of *Final Report of the President's Task Force on 21st Century Policing* of May 2015.

22. The Chief of FCPD shall amend General Order 540.1 to:

- (1) clearly state an unambiguous "sanctity of life" philosophy must be in the forefront of every officer's mind.**
- (2) replace "reasonable" with "objectively reasonable" throughout.**
- (3) modify the definition of reasonable to include: a particular use of force is based on the totality of circumstances known by the officer at the time of the use of force and weighs the actions of the officer against the rights of the subject, as well as the safety of all involved or in jeopardy of actions taken in light of the circumstances surrounding the event. Reasonableness will be judged from the perspective of a reasonable officer/agent on the scene, rather than with the 20/20 vision of hindsight.**
- (4) GO 540.1 should incorporate the text regarding "Objectively Reasonable and the Totality of Circumstances" in I.B.1-3 (p. 2) in *the Use of Force Policy, Guidelines and Procedures Handbook, Office of Training Development, HB 4500-01C* of the U.S. Customs and Border Protection.**

Pillar Two of *Final Report of the President's Task Force on 21st Century Policing* of May 2015.

23. For all General Orders (GOs), SOPs, and memoranda, the Chief of FCPD shall:

- (1) seek public comment on them, especially where they touch upon use of force,**
- (2) create a process for gathering lessons learned from within the FCPD and the public on implementation of them, and**
- (3) schedule annual reviews of them considering new technology, research, and lessons learned here and nationwide.**

Pillar Two of *Final Report of the President's Task Force on 21st Century Policing* of May 2015.

24. The Chief of FCPD shall make relevant statistics readily available in print and online by district/office, by types of administrative investigations by violation, by violation type, etc. To the maximum extent possible, such reports should be written clearly and in layman's terms easily understood by officers of the FCPD and the taxpayers.

Pillar Two of *Final Report of the President's Task Force on 21st Century Policing* of May 2015.

25. The Chief of FCPD shall collaborate with community members to develop policies and strategies.

Recommendation 2.1 and 5.2, Action Items 3.2.1 and 4.5.3, and Pillar Five of *Final Report of the President's Task Force on 21st Century Policing* of May 2015.

26. The BOS should mandate external and independent criminal investigations in cases of police use of force resulting in death, officer-involved shootings resulting in injury or death, or in-custody deaths.

Action Item 2.2.2 of *Final Report of the President's Task Force on 21st Century Policing* of May 2015.

- 27. The BOS should mandate the use of external and independent prosecutors in cases of police use of force resulting in death, officer-involved shootings resulting in injury or death, or in-custody deaths.**

Action Item 2.2.3 of *Final Report of the President's Task Force on 21st Century Policing* of May 2015.

- 28. The BOS should also require agencies to collect, maintain, and report data to the Federal Government on all officer-involved shootings, whether fatal or nonfatal, as well as any in-custody death.**

Action Item 2.2.4 of *Final Report of the President's Task Force on 21st Century Policing* of May 2015.

- 29. The Chief of FCPD shall adopt policies on use of force that clearly state what types of information will be released, when, and in what situation, to maintain transparency.**

Action Item 2.2.5 of *Final Report of the President's Task Force on 21st Century Policing* of May 2015.

- 30. The Chief of FCPD shall establish a Serious Incident Review Board comprising sworn staff and community members to review cases involving officer involved shootings and other serious incidents**

Action Item 2.2.6 of *Final Report of the President's Task Force on 21st Century Policing* of May 2015.

- 31. The Chief of FCPD shall cease activities requiring officers to issue a predetermined number of tickets, citations, arrests, or summonses, or to initiate investigative contacts with citizens for reasons not directly related to improving public safety, such as generating revenue, e.g., "50 Means 50" and "Click It or Ticket."**

Recommendation 2.9 of *Final Report of the President's Task Force on 21st Century Policing* of May 2015. Such encounters have the potential for disaster for citizens and costs for taxpayers. They could lead to unnecessary UOF. Suppose that in the civil forfeiture case cited here <http://www.washingtontimes.com/news/2015/jun/22/jason-snead-a-dysfunctional-civil-forfeiture-syste/?page=all> the driver (Mandrel Stuart) had struggled with the FCPD officers to retain his \$17,500 which a jury unanimously agreed wasn't subject to seizure. This case began with a traffic stop. If the FCPD have so little crime to occupy its time that it can spend it on speed traps, then the BOS should reduce the number of officers; an officer writing tickets and appearing in court cannot generate enough revenue to justify his salary. If he does see the warning in Recommendation 2.9. At present only about half of the FCPD's 1,390 officers serve on patrol meaning the overhead ratio is 1:1.

- 32. The Chief of FCPD shall implement a policy to seek consent before a search and explain that a person has the right to refuse consent when there is no warrant or probable cause unless exigent circumstances of life and death exist. Furthermore, officers should ideally obtain written acknowledgement that they have sought consent to a search in these circumstances.**

Recommendation 2.10 of *Final Report of the President's Task Force on 21st Century Policing* of May 2015.

- 33. The Chief of FCPD shall adopt policies requiring officers to identify themselves by their full name, rank, and command (as applicable) and provide that information in writing to individuals they have stopped. The UOF subcommittee supports business cards suggested in Action Item 2.11.1, but do not support the police officer detracting from his alertness by writing down this information. In addition, Chief of FCPD shall establish a policy requiring officers to state the reason for the stop and the reason for the search, if one is conducted.**

Recommendation 2.11 of *Final Report of the President's Task Force on 21st Century Policing* of May 2015.

- 34. The Chief of FCPD shall provide the maximum information on UOF cases possible to the public as it becomes available.**

Pillar Three of *Final Report of the President's Task Force on 21st Century Policing* of May 2015.

- 35. The Chief of FCPD shall provide maximize citizen input on law enforcement an UOF and identify community members who can help de-escalate situations where feasible so that UOF becomes unnecessary or kept to the bare minimum.**

Pillar Four of *Final Report of the President's Task Force on 21st Century Policing* of May 2015.

- 36. The Chief of FCPD shall continually evaluate patrol deployment practices to allow sufficient time for patrol officers to participate in problem solving and community engagement activities**

Recommendation Action Item 4.2.2 of *Final Report of the President's Task Force on 21st Century Policing* of May 2015.

- 37. The Chief of FCPD shall ensure the FCPD continually engages in multidisciplinary, community team approaches for planning, implementing, and responding to crisis situations with complex causal factors**

Recommendation 4.3 of *Final Report of the President's Task Force on 21st Century Policing* of May 2015.

- 38. The BOS should encouraged ordinary citizens to evaluate the efficacy of crisis intervention team (CIT) approaches and hold FCPD leaders accountable for outcomes**

Action Items 4.3.3 of *Final Report of the President's Task Force on 21st Century Policing* of May 2015.

- 39. The BOS should support a culture and practice of policing that reflects the values of protection and promotion of the dignity of all, especially the most vulnerable**

Recommendation 4.4 of *Final Report of the President's Task Force on 21st Century Policing* of May 2015.

- 40. The Chief of FCPD shall continually underscore the importance of language used and adopt policies directing officers to speak to individuals with respect. Non-compliance shall be dealt with quickly, via appropriate officer discipline, to include written admonitions to dismissal, and written apology to the citizen(s).**

Recommendation 4.4 and Action Item 4.4.1 of *Final Report of the President's Task Force on 21st Century Policing* of May 2015.

41. The Chief of FCPD shall work with community residents to identify problems and collaborate on implementing solutions that produce meaningful results for the community

Recommendation 4.5 and Action Items 4.5.1 and 4.5.2 of *Final Report of the President's Task Force on 21st Century Policing* of May 2015.

42. The Chief of FCPD shall establish a memoranda of agreement for the placement of School Resource Officers that limit police involvement in student discipline

Action Item 4.6.8 of *Final Report of the President's Task Force on 21st Century Policing* of May 2015.

43. The Board of Supervisors should request a DOJ review of UOF by FCPD from 2006-2015 similar to those DOJ did in Cleveland, Albuquerque, Ferguson, etc.

Action Item 2.2.2 of *Final Report of the President's Task Force on 21st Century Policing* of May 2015. DOJ has expertise and can baseline FCPD against its reviews of police in Ferguson, Cleveland, Albuquerque, etc. The UOF subcommittee doesn't have time to do a thorough review of UOF (DOJ's review of Cleveland took 18 months) and compare with other jurisdictions due to the deadline imposed upon it.

ADRIAN STEEL

PERF REPORT

- 1. The recommendations made in the PERF report should be implemented in full with specific timelines and responsibilities for implementation. The necessary resources for full implementation should be provided, and quarterly reports to the public on progress should be made.**

Chief Roessler has stated that this is the intent of the FCPD and his personal intent. He has said that he will not let budgetary concerns prevent full implementation.

USE OF FORCE COMMITTEE

- 2. The existing FCPD Use of Force Committee should be reconstituted to incorporate not only a review of administrative and tactical issues in each UOF event, but also a review of the substantive decision to employ UOF, the use of de-escalation and alternatives, and compliance with applicable law and FCPD policies and practices. The Committee should receive and consider after action reports (AARs) on each UOF event, identify lessons learned, and make recommendations to the Chief of Police as to any needed changes in policy or practice.**

When the subcommittee removed consideration of the establishment of a Serious Incident Review Board (as recommended by the White House Task Force in Action Item 2.2.6) from the draft scope of work at its May 6 meeting, it was understood that the existing FCPD Use of Force Committee addressed

not only administrative and tactical issues but also substantive issues such as the decision to employ UOF and de-escalation and alternatives that were applied as well as supervisory, training, or policy issues that needed attention. We have now been advised that the existing Committee does not consider such additional issues. We have recommended orally to Chief Roessler that those substantive issues should be considered the Committee, and he seemed to be in agreement. The 2007 report on the Culosi shooting also referred to enhanced responsibilities for the Committee. We have not yet, however, seen the charter for the enhanced Committee. In addition, the Cleveland settlement agreement provides for the establishment of an internal police department Force Review Board. I previously sent the relevant paragraphs (paragraphs 124 -130) from the agreement since they set forth the composition, responsibilities, and activities of the FRB. The language concerning AARs is taken from Michael Shumaker's suggestions. The format for the AARs would need to be determined by the Use of Force Committee and/or other FCPD personnel.

SWAT

- 3. FCPD policies and protocols for the use and documentation of SWAT and other advanced tactics (including threat assessment, supervisory approval, training and post-use review and lessons learned) should be consolidated and clarified. Existing policies and protocols for threat assessment and deployment of SWAT are set forth in various FCPD General Orders and procedure memos. SWAT and other advanced tactics should only be used in situations where there is a high risk of violence, resistance, or injury or harm to the officers involved, the public and/or the subject as reflected in a defined set of "high risk" factors.**

According to the presentation by Commander Moyer at the subcommittee's May 20 meeting, the FCPD currently uses a three step process together with a threat assessment in determining whether to employ SWAT. There is no decision-making flow chart, but the FCPD uses a non-public six page Risk Assessment and Mitigation Form. (The subcommittee was provided with a one page form for public dissemination.) Commander Moyer indicated that the FCPD is considering pulling all of the pertinent policies and guidance on the use of SWAT together into one general order. A draft general order for the use of the Warrant Risk Assessment Matrix and the Tactical Analysis Worksheet has been prepared and provided to the subcommittee, but the draft general order does not collect all SWAT policies and protocols. While the policy of the FCPD appears to now be to use SWAT only in "high risk" situations, it is not certain that there is a definitive formally-approved list the factors to be used in making the determination that a situation presents "high risk" nor does there appear to be guidance as to how to balance the various factors to make the required "high risk" determination. The recent use of SWAT in Great Falls in connection with a gambling situation involving a high stakes poker game in what would appear to be a low risk situation in terms of possible violence or resistance raises a question as to whether the stated policy of using SWAT only in "high risk" situations is fully understood.

BODY AND DASHBOARD CAMERAS

- 4. FCPD officers who interact with the public should employ body and dashboard cameras to record all such interactions. Issues relating to the required operation of the cameras, the retention of and access to the video, privacy interest, and administrative burdens should be addressed in connection with the use of such cameras.**

This recommendation (which was orally confirmed by FCPD personnel at the April 27 Commission meeting) will require decisions as to when the cameras are required to be in operation, the retention of

the video, the public release of and public access to the video, how best to respect individual privacy interests, and the administrative burdens associated with the use of such cameras.

TASERS (ECWS)

- 5. All FCPD officers in uniformed enforcement units should be required to carry electronic control weapons (ECWs) on their duty belt (or elsewhere on their person if necessary) when on patrol. Supervisory approval should be required for ECW use in excess of three cycles on a subject absent exigent circumstances. Consideration should be given to classifying ECWs as less-lethal weapons rather than non-deadly weapons as recommended by the 2011 Electronic Control Weapons Guidelines.**

This recommendation is based on the fact that ECWs provide a critical tool for use in avoiding escalation of a situation as confirmed by the FCPD training officers in their presentation and the fact that the FCPD has a sufficient number of ECWs to allow patrol officers to have a ECW when on patrol. The Philadelphia DOJ report makes a similar recommendation on required carry as well as on the number of multiple uses (although the limit is mandatory)(Recommendations 8.3 and 9.1). The Cleveland settlement agreement has similar language as well concerning multiple use (Paragraph 62). Current FCPD SOP 06-025 provides in Section IV.D.1 that only one ECW should be used against a subject, but that subsequent cycles may be used to achieve the desired result if reasonably necessary. The 2011 ECW Guidelines recommendation on the classification of ECWs is at page 11 of the Guidelines.

OFFICER FITNESS FOR DUTY

- 6. The FCPD should fully implement the Early Identification System (EIS) it has adopted to objectively detect and monitor problematic patterns of officer misconduct, assist officers who may need attention or treatment, identify officer training needs, and limit or restrict officers' use of weapons when there are concerns as to an officer's fitness for full unrestricted duty.**

The 2013 Internal Audit Office report on IAB recommended that the EIS be fully implemented. The Ferguson DOJ report included a recommendation that an "early intervention system" be adopted (Recommendation 10.b). In addition, concerns have been raised that the officer who shot and killed John Geer had a history of anger management issues (including on the day of the shooting) that may have warranted his not being present at a high risk situation such as occurred.

MEDICAL TREATMENT

- 7. The policy set forth in Section II of FCPD General Order 540.1 (Use of Force) that "[i]n all situations, medical assistance shall be provided to any person who is obviously injured, alleges an injury, or requests medical assistance" should be strictly adhered to by the FCPD, and the General Order should be amended to incorporate a section detailing and implementing the policy.**

In the John Geer shooting, questions were raised as to the reasons why medical assistance was not provided to Mr. Geer until nearly an hour after he had been shot. The UOF General Order sets forth a policy requiring such assistance but does not detail how the policy should be applied or provide guidance and instruction to FCPD officers as to the provision of medical assistance.

TRAINING

- 8. FCPD officer training should emphasize (i) the proper use of “ready gun”; (ii) the required use of de-escalation and alternatives to UOF (including ECW), particularly when dealing with vulnerable individuals; and (iii) the required use of CIT. This training should be both a part of basic officer training and part of continuing in-service training (including re-certification). Scenario and reality-based training should be used to provide officers with opportunities to exercise judgment in UOF and other critical response situations. In addition to evaluation that occurs during recruitment, candidate fitness for service as a police officer should be monitored and evaluated during basic officer training.**

While the three areas mentioned are included in FCPD officer training to an extent (and perhaps adequately for the basic training program), the need for continuing in-service training and re-certification is critical as has been recognized in the DOJ. *See, e.g.*, Philadelphia DOJ report (Recommendations 22-30). There seemed to be a sense among the subcommittee that there should be an emphasis on scenario/reality-based training and that candidate fitness should be monitored and evaluated during the basic training process on more than an anecdotal basis.

VEHICULAR PURSUIT

- 9. General Order 501.1 (Section XI) should be revised to authorize vehicular pursuit regardless of jurisdiction only in the circumstances set forth in Section XII of the General Order – i.e., generally when the person being pursued has committed or intends to commit a felony involving violence or the threat of violence. There should also be a requirement for all FCPD vehicular pursuits that there need be a reasonable expectation that the person being pursued presents a risk of harm or injury to other persons.**

There are repeated reports in the press of incidents where a police department vehicle in a pursuit has caused either the vehicle being pursued or the police vehicle to crash and caused death or serious injury to innocent bystanders. Some jurisdictions rule out vehicular pursuits altogether. At a minimum, they should be limited as set forth in the recommendation.

INDEPENDENT OVERSIGHT OF UOF INCIDENTS

- 10. Fairfax County should establish a framework which provides for the independent oversight of UOF incidents.**

Independent oversight will provide public accountability and confidence, education of both the public and the police, and a positive, ongoing feedback loop that would result in the reduction of both incidents and complaints. The Oversight/Investigation subcommittee is still working out the exact nature of the oversight that it intends to recommend, but it is a critical component of an effective UOF policy that such oversight exist.

MARY KIMM

PERF REPORT

- 1. All recommendations of the PERF report should be embraced by the FCPD and FCPD should be provided the resources needed to implement them.**
- 2. FCPD should be required to provide quarterly progress reports on actions completed and progress anticipated on the remainder against established deadlines.**

ROBUST REPORTING OF DEMOGRAPHICS IN ALL USE-OF-FORCE INCIDENTS

- 3. FCPD should engage in robust reporting on the demographics of the subjects in all use of force incidents, including race, gender, age, whether mental health status was involved and previous involvement with FCPD, and to provide that reporting to the Board of Supervisors and the public annually. Data about the particular use of force should also be captured.**

An example of concise reporting of such data from San Jose report, page 39, with thanks to Michael Schumaker: <http://www.sanjoseca.gov/DocumentCenter/View/42029>

SUPPORT INDEPENDENT OVERSIGHT

- 4. A mechanism for Independent Oversight should be established by the BOS.**

There is a tentative proposal for a two-tiered method including 1) an independent auditor for use-of-force incidents resulting in serious injury or death; and 2) a Citizens Review Board that would handle lesser Use-of-Force incidents and Abuse-of-Power complaints.

This will provide public accountability and confidence, education of both the public and the police, and a positive, ongoing feedback loop that would result in the reduction of both incidents and complaints. While I support the specific proposal for a two-tiered approach, as a committee I think we should support whatever independent oversight proposal emerges from the Investigations and Oversight Committee.

PERIODIC REVIEW

- 5. Fairfax County should establish an Ad Hoc Police Practices Review Commission every five years to review and, as needed, make recommendations concerning FCPD policies and practices on use of force, communications and critical incident response and to review complaints and investigations of alleged FCPD misconduct involving officer involved shootings, in-custody deaths, and any use of force incident in which an individual is killed or seriously injured, taking into consideration the reports of the FCPD, the Independent Auditor, and the Citizen Investigation Review Panel.**

UNHOLSTERING A WEAPON CONSTITUTES REPORTABLE USE-OF-FORCE INCIDENT

- 6. The act of having a law enforcement officer unholster his or her weapon in any setting where it would be observed by civilians should be reported under use-of-force incidents.**

In Fairfax County, we enjoy a remarkable degree of safety. The average resident experiences no violent crime and has little interaction with law enforcement unless it is in reporting theft or burglary, or traffic infractions. As such, the act of having a law enforcement officer unholster his or her weapon in any setting where it would be observed by civilians is a powerful and important act, and I believe it should be reported under use-of-force incidents. This is consistent with the DOJ recommendations for Cleveland.

Anytime an officer unholsters a weapon, it would by definition be in a circumstance where lethal force might be necessary. It would be up to FCPD to develop the reporting mechanism which should not be onerous, but which should provide the ability to answer the questions of a citizen who observed officers with drawn guns, and to respond to possible resident complaints about weapons drawn (but not pointed) in other circumstances.

Here is the Cleveland recommendation:

“Officers will not unholster and display a firearm unless the circumstances create a reasonable belief that lethal force may become necessary. ... If an officer unholsters a firearm during an incident, interaction, or event that would otherwise trigger a reporting or data collection requirement, officers will document that a firearm was unholstered. CDP will annually collect and analyze this data.”

SUPPORT CHANGES IN SWAT, READY-GUN AND THREAT ASSESSMENT

- 7. I support Sal Culosi’s specific recommendations on SWAT and Ready-Gun position. I also support Sal’s recommendation for changing on the risk assessment form in relation to Vice and the SWAT team.**

BODY CAMERAS

- 8. Body cameras should be required and its implementation should be staged over one or two budget cycles to allow for the maturation of the technology, progression of culture of transparency in FCPD and a better budget outlook.**

In particular, I think the technology will change dramatically with increased use in the next few years. Sometimes it’s better not to be an early adopter.

CAVEAT

I think we must note at this stage that, while the FCPD has provided immense amounts of information, much of it very informative and useful, the department has only released exactly what it chooses to. FCPD has not given us much of the information promised and needed.

Scope of work: “Review (not investigate) recent use of force incidents (lethal and non-lethal) involving FCPD as well as review any existing data summarizing all FCPD use of force interactions, officer involved shootings resulting in death or injury, and in-custody deaths from 2005 to 2015.”

At this time, we don’t even have a list of such incidents, and we have been told we will have no access to reports, files or documents.

Quote in response to question about this information: “The Chief of Police will post a synopsis and other information regarding the Department’s officer involved shootings but will not be releasing any case reports, files or documents from the criminal or administrative case.”

On July 19, 2015, having begun our meetings in May and with our first draft of recommendations expected by July 22, we still do not have the information which might reveal issues on which it would be important for our subcommittee to base recommendations.

JODI SCHLESINGER

1. The practice of transfer as a disciplinary action should be stopped.

I am wondering how a transfer for disciplinary actions works. It seems to me that would just be shuffling a problem elsewhere. Why would another station want to take over problems, especially if the problem is concerning UOF?

2. All officers should be trained in use of the CEW.

3. All officers should be required to carry the CEW when on duty. It should never be an option that is left up to the officer. It is important that all officers have a less lethal option.

4. All CEW incidents should be reported and investigated.

5. All use of any weapon should be reported and investigated.

6. All UOF incidents should be documented and reported.

7. An Oversight Committee should be created and should be an independent firm that is not part of the county government. The Oversight Committee should have authority and not be chosen by the Police Department.

8. Officers should be required to carry (personal) insurance that covers use of deadly force. In the event they have several claims and cannot get coverage they would be moved or demoted to an area of the department that does not carry weapons.

9. The narcotics division when serving warrants should have the same risk assessment procedures as SWAT.

I would like to have more discussion with the committee on this subject as I was unaware until last week when in a discussion with Chief Roessler I was told that the general public cannot usually tell the difference between SWAT and the narcotics division. This is because they almost always use deadly force in serving warrants even when there is no high risk situation. I understood him to say there is no risk assessment done for a narcotics warrant served. Even if there is no likelihood of weapons or known weapons and the individual(s) are not known as high risk or dangerous felons. These types of warrants using deadly force are used on a regular basis. This practice should be stopped.

10. Officers having quotas to meet should be forbidden.

11. Information should be easily attainable to the general public.

12. Simple complaints by citizens should be easy to make and without red tape. The process should be easy for all citizens to find and follow.

- 13. The practice of paid leave for officers after a deadly UOF incident should be stopped and they should be reassigned to an area where they do not carry a weapon, until the investigation is completed.**
- 14. Internal investigations should be for a finite time. They should not go on for months or years. The results should be made public.**
- 15. The charter of the Ad Hoc Commission on Police Practices should be broadened to include the Sheriff Department's UOF and best practices.**

FPCPD uses the Fairfax County jail to hold those arrested by FPCPD, but it is run by the Sheriff's department. FPCPD claim they have no jurisdiction over treatment of those being held at the jail. This seems to be a horrible practice in general.

BERNARD THOMPSON

BODY WORN CAMERAS (BWC)

- 1. Body Worn Cameras (BWC) should be embraced by the Fairfax County Police Department as a wise and timely means of instilling a strong sense of community trust in the FPCPD and its police officers.**

This matter is discussed in detail in my memorandum to the Use of Force Subcommittee dated July 14, 2015.

A November 2014 study and report by the Police Executive Research Forum (PERF) Report captures the "best practices" of the land and serves as the best guide for assessing the merits of using BWC and fashioning a new policy. However, the June 2015 PERF Report on Use of Force Policy and Practice Review of the Fairfax County Police Department, while mentioning BWC, does **not** make any recommendation regarding the use of the devices (beyond referring to their November 2014 study).

First, it should be clear that none of the source material related to BWC discussed any direct link between BWC and use of force. Rather, one must infer from the various discussions of the cameras that in the use of force cases in the future, the best evidence in many instances will likely be the BWC video feed. Put simply, the BWC has been referred to as the "impartial witness" that is always present when the officer is conducting police activities.

Clearly, then, whenever BWC are in use, whatever the situation the police officer is faced with, the cameras will be rolling, capturing the footage for use in subsequent prosecutions, administrative investigations, any resultant civil litigation, and finally, any training matters that may be derived from the video footage. It bears stating that any such video footage will be available, generally speaking, regardless of the outcome of the police incident, be it favorable or unfavorable to the police department.

The major advantages that management officials can site in recruiting patrol officers in the initial phases to encourage them to begin training and using the BWC should center on: evidence collection, officer safety, improved public relations, and, lastly, the ability for the department to monitor the performance of their officers. By their very nature, the BWC should also permit the county government and the

police department to avoid both frivolous litigation and false complaints against its officers. One additional advantage is the so-called “civilizing effect” that results from the use of a body camera. The statistics seem to clearly show a decrease in use of force encounters, and in the resultant number of complaints by civilians against the local police departments once those departments employ the BWC.

FCPD has taken the initiative and issued a Memorandum in May 2015 establishing a new BWC policy and instigated a pilot program.

2. FCPD should engage and include members of the public in fashioning its new BWC policies and procedures.

Initially, and ideally, the recommendations in favor of employing BWC should emphasize one primary goal: improved interactions between the personnel of the police departments and the public whom those departmental personnel are sworn to serve and protect. Thus, the majority of experts recommend that, from the very inception, the departments should engage and include logical members of the public in some manner in fashioning their new BWC policies and procedures. One primary suggestion in this regard: departments are urged to engage their Public Affairs offices in campaigns to let the public know that they are considering the use of BWC, which creates a sense of transparency by the police department. The publication of their BWC policy online and in local media will serve to get the word out about the impending policy and might even initiate a dialogue between the department and the community members.

3. FCPD should consult from the beginning and frequently with the very patrol officers and others who will ultimately wear the BWC.

Some studies have shown that local police officers may initially show some resistance to the new technology. Accordingly, the line officers be brought into the developmental stages of the new program. This will allow the officers’ to “buy-in” while also “keeping them in the loop” as to the benefits that they stand to derive from the new technology. Thus, union representatives should be consulted, while briefings and pertinent discussions regarding the new technology and development of internal policy simultaneously should occur at roll calls. Some departments have even allowed the patrol officers to assist in the early stages of the policy development.

4. FCPD should early on consult with local lawmakers, relevant policy makers and other stakeholders prior to initiating the new program.

One such group of stakeholders that Police Departments are encouraged to consult with consists of local prosecutorial and County legal staff members to ensure that sufficient guidelines are created to deal with the resultant Freedom of Information Act (FOIA) requests for their video camera footage. Some states have allowed the Police agencies to invoke exemptions to the FOIA requests that may serve to protect police officers, informants, SWAT units and similar personnel footage from release. However, since the BWC includes an evolving technological area, new laws may have to be put into place to deal with future requests that might seek the release of footage of, just as one example, a neighbor’s home that was the subject of an arrest incident. During such an incident, persons in the home may have been in various stages of undress and in compromising settings. All of these issues should be worked out with appropriate legal personnel while contemplating the rollout of the new procedures.

5. **FCPD should engage in a wide-ranging training program not only for all police officers who will wear the BWC, but also supervisory personnel, records and evidence management personnel, training division personnel, Internal Affairs and any other personnel who will be involved with the program, as well as any prosecutorial personnel who will be using the BWC-generated video in their criminal case determinations and prosecutions.**
6. **The new FCPD policies regarding the new BWC program should be clear and unequivocal regarding the use of the cameras by the officers. All restrictions, exceptions and requirements should be clearly provided in writing.**

This will properly set expectations prior to the use of the new equipment. For example, PERF recommends that all departments require that officers record all activities (with some clearly stated exceptions) while conducting all official duties. Likewise, the standard rule is that, when possible and safe to do so, the officer wearing a BWC shall state - while the camera is still running - exactly what the reason is for deactivating the BWC. Thus, in many jurisdictions, departments have set forth a policy that repeated failure to use the BWC while conducting police activities can result in severe penalties, to include termination.

7. **Specific guidelines should be put in place to ensure full compliance with the protocols regarding downloading, storage and retrieval of videos resulting from the BWC. The administrative actions that will result from failure to fully comply with the protocols must be provided to all personnel prior to their initial participation in the program.**

As an example, such topics as when a BWC shall be turned on or off, when the devices should be downloaded, and when an officer (or supervisor) will be allowed access to the videos, all must be firmly stated in writing and followed. The policies should state clearly that an individual's failure to strictly adhere to the precise protocols will likely result in severe penalties.

8. **FCPD should create a system that allows them to periodically evaluate the efficacy and to create statistical data regarding the use of the videos. Such data should also be made available to the public on a periodic basis.**

This will allow a sense of transparency, promote public confidence in the program, and allow the agency to periodically evaluate whether departmental goals are being met with regard to the use of the cameras. One major advantage to such evaluative studies will be the ability to demonstrate how much, a department will save, financially or otherwise, by using the videos.

Agencies should also evaluate whether they are following the best policies and protocols through their internal BWC policies, particularly with regard to whether their anticipated outcomes are being achieved through the use of Cameras. As just one example, the departments should be able to accurately assess whether civilian complaints against police officers are changing, perhaps, because of the use of BWC.

RALPH COOPER

1. **FCPD should develop a strategy to monitor and assess the impact its implementation of the Ad Hoc Commission on Police Practices has on improving the public's trust over time in its execution of its responsibilities. This assessment should begin by establishing a baseline "public trust**

matrix” that portrays the current public attitude and then periodically pulses the public on some established schedule.

One key factor to measure the policies/practices’ effectiveness will be communications. Finally I recommend a section of each remaining address this issue after the meetings topic on how to does these changes will improve public trust (Short, mid and long term)

I guess one of the Ad Hoc Commission's objectives is to address policies and practices to improve Public Trust. I do not see or heard any pathway to achieve this objective during our meetings. Most of the Subcommittee actions have focused on policy and practices, but nothing has been done to link their impact on improving Public Trust.

GEORGE BECERRA

- 1. An operational and implementation plan of a medical treatment policy should be created and placed in a separate detailed section of General Order 540.1. This same recommendation of new plans should flow into CEW (Taser) non-deadly incidents where officers take medical action in an event, after a certain number of CEW deployments are taken against a subject.**

In answering the question of what are the current FCPD’s policies on the provision of medical treatment and other assistance to individuals injured as the result of the use of force, here is the exact verbiage out of General Order 540.1, Use of Force, Section II: “It is the policy of the Police Department that force is used only to the extent reasonably necessary to defend oneself or another, to control a person during an investigative detention or mental detention, and to effect arrest. In all situations, medical assistance shall be provided to any person who is obviously injured, alleges an injury, or requests medical assistance.” For reference, here is the link to General Order 540.1:

<http://www.fairfaxcounty.gov/policecommission/materials/5401-general-order.pdf>

I have not been able to find any other General Order, Command Memo, or SOP with more information in this area of medical treatment as a result of a use of force incident.

JOSEPH SMITH

PERF REPORT

- 1. Adopt all PERF Report recommendations but #5 and #54, while accounting for comments and concerns regarding #s 4, 7, 17, 41 and 47.**

Objection to Re #5: I believe that this recommendation should NOT be adopted. This recommendation calls for the insertion of a “duty to intervene” “statement” into department policy for an officer who observes another officer using force that is “clearly beyond that which is objectively reasonable under the circumstances”. Like my concern about recommendation #4, I have no doubt that others will view this is as harsh if not even worse. My concern here is that the addition of such a “statement” is in fact

the creation of a policy. The problem as I see it is that the term used is not a precise term. This creates a situation where one officer may view the actions of another officer as unreasonable.¹

Furthermore, one need only look at the case law up to and including the recent *San Francisco v Sheehan*² to see that the court continues to say, whether they use the term reasonable or objectively reasonable, that the decision for the use of deadly force turns on the officers perception, albeit objective, of the urgent circumstances in which a decision has to be made in the proverbial split second. While the Court does not specifically mention *Terry v. Ohio*³ (which is a search and seizure case rather than the use of force case), it nonetheless continues the practice that it essentially started in Terry by relying on the ability of the officer to articulate facts.

What this policy would do is to pit one officer against another in an emergency situation. If the conduct of one officer is so egregious that his excessive force is “clear”, that officer has committed a crime which the other officer has a duty to stop. If this is not being taught to FCPD officers in training then there is something seriously lacking in the training not to mention the values and upbringing of the subject officer. I assume that is not the case; if it is the case, then the statement does need to be added.

Objections to #54: This recommendation should NOT be adopted. Notwithstanding the DCJS standard cited by PERF, this has been an effective tool in many jurisdictions including those in Virginia. My knowledge of what the Virginia State Police use is dated but my recollection is they have some similar practice; the Maryland State Police have a similar policy which I believe includes disabling of vehicles even at high speed. Of course, as I assume they are now, officers would have to be trained and certified specifically in the technique. This is a form of potentially deadly force and should be governed accordingly. Nonetheless, a vehicle traveling at a high rate of speed can be a deadly weapon. While the technique should be used sparingly (as PERF notes its infrequent use), it is counterproductive to remove it from possible police use under appropriate circumstances.

Comment on re #4: This recommendation would add a “sanctity of life” statement to department policy. I realize that what I’m about to say may sound terribly harsh to others but it is offered in the context of the realities of a deadly force situation. It is not the wording of the policies that concerns me but the interpretation and implementation thereof.

Essentially the question may be: whose life are we talking about? Presumably, all life matters and is sacred. The concern I have arises admittedly from a dated incident for which I have only antidotal recollection. In the 1980s, San Diego California implemented a policy the effect of which was to cause officers to hesitate in drawing their weapons; as a result, at least three officers died because they hesitated to pull the trigger. I understand full well what brought about this Commission. The March 3,

¹ I represented an officer in another jurisdiction who was accused of striking a handcuffed prisoner. This took place on the floor of an apartment in a scuffle to subdue the subject who was a convicted escaped felon who prior to his escape earlier that day had assaulted the officer. Another officer, who stood by and did not avail herself of the opportunity to assist my client and a third officer who were struggling to subdue the felon, reported this to Internal Affairs who took the reporting officer's statement every word without additional investigation; my client was terminated. In the subsequent grievance hearing, the internal affairs investigator acknowledged that the reporting officer had also observed that the prisoner was not handcuffed when he was struck. If the subject was not handcuffed, he was not under arrest and the force used by my client was both reasonable and necessary according to both case law and departmental policy. My client was reinstated. I offer this not as a war story but to show that just as abuses can happen to citizens, they can they also happen to officers.

² US SCT Slip Opinion #13-1412, May 18, 2015.

³ 392 U.S. 1(1968)

2015 motion by Chairman Bulova to establish the Ad Hoc Commission spells it out. Clearly, we want no more tragedies; but we also don't want police officers killed as a result of a misinterpretation of policy.

Comment on Re #7: I recommend against part of the wording of this recommendation. Here I repeat refer to part of my comment re recommendation #29 from my report on ECW's which addressed a similar concern. My concern here is that the wording suggested in the *PERF UOF* (see page 42) says that force cannot be used against a person who is exhibiting "minimal" or no resistance. What is "minimal"? A punch? Resistance is resistance and under the law, officers are allowed to use reasonable force necessary to effect the arrest. I would argue that this restriction unnecessarily goes beyond what is allowed under Virginia law.

Concern Re #17: PERF says that FCPD should provide clear policy prohibiting the use of "boilerplate" language. They say what not to do but they don't suggest a remedy in the sense that they do not suggest what type of language will suffice in these reports. Presumably, this is left up to the Chief of FCPD.

Concern on re #41: All officers should be trained and certified in the use of ECW's but all officers should be required to carry and use them. As indicated in the discussion following the presentation on ECW's, some officers do not like them because of the effect on the subjects. This "feeling" is not simply a superfluous way of avoiding use of the ECW. While I am not a credentialed mental health professional, it is well documented that many police officers suffer from what is commonly known as PTSD after involvement in violent incidents, particularly those involving deadly force.⁴ In addition, as Mr. Carruthers noted, there are logistical limitations as to distance associated with the use of the device; as he also pointed, it is not an automatic escalation to a firearm if the ECW is not effective in subduing the subject which I understand that occasionally happens. It is the officer who has to articulate the "objectively reasonable" circumstances in the use of deadly force; it should be up to the officer which degree of force he or she uses. The existence or availability of the ECW or the failure of the officer to use ECW does not necessarily establish additional liability.

Comment on #47: As discussed in my presentation regarding ECW's, there should be a single Use of Force policy. I noted that a nearby jurisdiction has a 14 page single use of force policy covering firearms, ECW's, and the reporting of UOF incidents with very specific instructions as to what information is to be reported. This comment is also applicable to recommendations #19, #44, and #52.

BODY CAMERAS

- 2. FCPD, the Deputy County Executive for Public Safety, or whatever oversight board is established, should be tasked with finding a more cost effective means of processing recordings of the body cameras.**

Body cameras have generally been positively accepted by police departments. While they should be implemented in FCPD, there are questions that have to be answered. First, the cost estimate for retention and processing (redaction) was estimated at \$4 million per year (if I read the presentation

⁴ One of my own nephews was a law enforcement officer in Florida who, with lights and sirens blaring to answer an emergency call, and in full compliance with applicable law and department policy, nonetheless collided with another vehicle and killed the other driver. My nephew was completely exonerated but he never returned to law enforcement after he recuperated from his own injuries.

correctly). While I have no documentation to support my suspicion, I believe that there must be less expensive ways to accomplish this.

3. FCPD, the Deputy County Executive for Public Safety, or whatever oversight board is established, should be tasked with establishing policies and practices that protect citizen privacy.

It is my understanding that in at least Henrico County, the recordings made by body cameras are exempted from release under VFOIA as investigative records. I believe this is correct. I would be very circumspect about what information I gave to the police if I knew it would turn up on You Tube; the fact that my face might be redacted is of little comfort given the access to personal information easily available through the internet not to mention identification by the neighbors.

OVERSIGHT

4. Oversight of the implementation of Commission recommendations should be done either by an established oversight board, an independent auditor, and/or an entity within the FCPD but outside the chain of command of the Chief who would report to an overseer outside the department.

The concern is obviously not simply the implementation of recommendations but as much monitoring to make sure that the recommendations are implemented. Chairwoman Bulova's motion of March 3 indicates that some oversight board has already been established; if so, that presumably should be the locus of the monitoring of implementation. There has also been discussion of an independent auditor answering directly to the Board of Supervisors; such an independent auditor would presumably overcome concerns about implementation. While I mean no *ad hominum* argument, the fact is that changes in FCPD policy have to be approved by the County Executive. With recommendations presumably first going to a Deputy County Executive for Public Safety who is the immediate past Chief of Police, this would not only add another layer of bureaucracy and potential delay but raise the question of why oversight of implementation is left in the hands of the person who was head of FCPD when some of these problems arose.

5. Establish a police legal advisor within the FCPD who would not only advise the department on legal issues but ensure implementation of recommendations and timely implementation of policy changes.

This recommendation overlaps PERF recommendations as to training about legal questions on use of force, the question of "objective reasonableness", and similar issues. It is my understanding is that there is only one Assistant County Attorney (ACA) who has prosecutorial experience and is familiar with police issues from an enforcement and criminal prosecution perspective not simply from one of civil liability. It is my understanding that this ACA is the sole instructor on questions of criminal law at the Criminal Justice Academy. It seems to me more efficient from a police administration/law enforcement perspective to have an in-house legal counsel readily available not only to Command Staff but also the rank-and-file for questions that arise on a day-to-day basis. While such an advisor might not necessarily be accessible in immediate or exigent circumstances, the availability of such a legal advisor on a proactive basis should lead to better investigations and serve as a preventative measure as well.⁵

⁵ In the mid-1970s, with the advance of enhanced enforcement statutes like RICO, as well as the aftermath of the Church Committee on so-called "surreptitious entries" and the enactment of the FISA statute, the FBI field offices found themselves

The responsibilities of this in-house legal advisor could also include immediate oversight of police shootings (only from the position of the department not as counsel to the officers involved) and liaison with the Office of the County Attorney (OCA). The in-house legal advisor could also be charged with responsibility to ensure that policy changes are not only effected but accurately and timely publicized and that the effective dates of new policies are recorded without confusion to document when the changes were made; this responsibility would also include reporting compliance with the Commission recommendations to whatever entity is charged with oversight.

Perhaps the staff position now allotted to the OCA could be transferred to the newly created position in the FCPD; otherwise, the County should absorb the cost of an added lawyer position within the FCPD in addition to the current staff of the OCA.

PUBLIC IMAGE/COMMUNITY POLICING

6. FCPD should enhance community policing.⁶

I recall a remark by police officers whom I knew in the 1960s who said that one of the changes that had a negative impact on the relationship of urban police with the community was air-conditioned police cars. While this was a great relief to officers who had to spend summer days and nights in a hot automobile in already hot temperatures, it cut them off that much more from the community. This separation is exacerbated in a suburban or exurban area like Fairfax. While officers on bicycles help, this alone is not sufficient.

FCPD should, for example, develop at a headquarters level (but working with district commanders) a specific agenda by which to reach community groups, neighborhood associations, and Home Owners Associations (HOA's) to seek out the community attitudes on problems and issues. In particular, FCPD should use this program to address, as much as legally possible in an open forum, allegations of police misconduct and/or questions of use of force. This program should work with, but NOT be under the direction of, the department Public Information Office so that it does not look like a propaganda effort. Certainly the two should work together and should feed information to each other but the community policing effort needs to be separate.

7. The department should proactively work to enhance its "Ride along" program.

Given my observation of the reactions of at least two members of the subcommittee who participated, this allows the public to see what the real life of a police officer is on a day-to-day basis. The community will see that this is not "CSI"; the community will also see that the police officers are human beings and not the rogue beasts sometimes portrayed by the media. This also allows an input from indirectly by the rank-and-file officers were on the street and who, with due deference to Command Staff, are the people that do the dirty work on a day-to-day basis.

faced with more complicated questions that had to have answers quickly particularly in places like New York City. Traditionally, such advice was sought from Assistant United States Attorneys; however, the increasing complexity of the questions was operational questions and an increased need for prompt responses and consistent application of policy. This led the FBI to establish the position of Principle Legal Advisor (PLA) now known as Chief Divisions Counsel using agents who were bar admitted as lawyers. This legal advisor is charged with reviewing all proposed wiretaps, undercover operations, and in most cases planned the arrest scenarios that pose a high risk; the advisor is also responsible for the implementation of mandatory legal instruction for all agents in the particular field division.

⁶ See also Final Report and Recommendations, Communications Subcommittee, p.3 et seq.

8. Strengthen and enhance the use of the Volunteers In Police Service (VIPS) Program to support FCPD's community policing goals, as well as to address policy and program development and implementation challenges.

FCPD maintains a program named Volunteers In Police Service (VIPS) which, as the name implies, uses civilian volunteers to assist in certain functions. My reading of the VIPS program on the department website indicates that the duties to which these volunteers are assigned are what I would characterize as generally mundane.

I have three friends who have participated in this program. One is a former executive level retired FBI agent who had substantial experience in both civil rights investigations and counterterrorism investigations. The other two friends worked in private industry both for "high-tech" firms; while they do not have law enforcement backgrounds, they both have executive level experience and are knowledgeable in computers and financial matters.

It seems to me that individuals such as these (assuming that my friends are an accurate reflection of the membership of VIPS) have backgrounds that would lend themselves to assisting FCPD in policy and program development and implementation on a volunteer basis which, among other things would presumably be at no cost to the department.

For example, FCPD, while generally complemented by PERF, has administrative problems regarding various policies but in particular use-of-force. There appears to be a problem writing clear policy, documenting its implementation and when it is changed. There appears to be a need for somebody else that can draft the policy and set up a system by which its publication and compliance can be tracked.

COST

9. The Commission should assess, through FCPD or independently, the financial cost to taxpayers of the recommendations ultimately proffered by the Commission.

I probably don't have to make this recommendation because I assume that the FCPD Chief will eventually raise the question as he has with the cost estimate for retention and processing of body camera recordings. The latter question is specifically addressed below under Body Cameras. The majority of the PERF recommendations appears to be administrative in nature and presumably can be implemented "in-house" by FCPD. Some of their recommendations are in the nature of conditions precedent and essentially are a cost of doing business.