



**Recommendations to the Ad Hoc Police Practices Review Commission
Submitted by the American Civil Liberties Union of Virginia
August 12, 2015**

Section I – Introduction

We commend the County of Fairfax Board of Supervisors for establishing the Ad Hoc Police Practices Review Commission (Commission) to review the Fairfax County Police Department’s (FCPD) policies and practices and “recommend changes, consistent with Virginia law, that the Commission feels would help Fairfax County to achieve its goal of maintaining a safe community, ensuring a culture of public trust and making sure [its] policies provide for the fair and timely resolution of Police-involved incidents.”¹ This is an important step in restoring civilian authority and oversight over policing in the County, a step that is also essential to restoring public trust in the FCPD. Realizing these recommendations will help enable the FCPD to become a national model for constitutional policing.

Constitutional policing and respect for the sanctity of human life should be in the DNA of all law enforcement personnel. These concepts and values should provide the foundation for all recommendations made by the Commission and should guide all policies and procedures adopted by the FCPD and the Fairfax Board of Supervisors.

Section II – Enhancing police-community relations

A. Policing in a Democratic Society

As the Police Executive Research Forum (PERF) highlights in its review of the FCPD, the most important concepts in policing are the concepts and values of policing in a democratic society.² Law enforcement are the guardians of the U.S. Constitution, thus the Commission should accept the PERF recommendation that the FCPD shift its recruit training schedule to ensure that new recruits focus on the most important issues first, including the mission and role of police in protecting constitutional rights, ensuring the sanctity of human life, prioritizing de-escalation, and mandating a duty to intervene if another officer uses excessive force.³ As PERF stated, by shifting recruits’ initial focus from firearms skills and emergency vehicle operations to the concepts and values of policing in a democratic society, the FCPD will “send an important message to new recruits about the department’s priorities, about the nature of the profession, and about what is expected of them.”⁴ This recommendation is covered under PERF Recommendation #50.

By making the sanctity of human life a foundation of its policies and training, the FCPD will better ensure that its personnel respect and protect all lives. As PERF stated, “[o]ften, police must respond to situations in which it is difficult to differentiate between a person who needs mental health care and a criminal offender who poses a serious threat. ... [B]y calling for a reverence for the sanctity of

¹ County of Fairfax Board of Supervisors, Board Matter: Establishment of the Ad Hoc Police Practices Review Commission, Mar. 3, 2015, *available at* <http://www.fairfaxcounty.gov/chairman/pdf/board-matter-march3.pdf>.

² Police Executive Research Forum, Use-of-Force Police and Practice Review of the Fairfax County Police Department, p. 4, June 2015, *available at* <http://www.fairfaxcounty.gov/policecommission/materials/fairfax-county-police-dept-final-report-june19.pdf>.

³ *Id.* at 4-5.

⁴ *Id.* at 5.

human life, effective use-of-force policies and training are intended to ensure that officers can protect the public and also protect themselves.”⁵

The PERF report also includes recommendations to ensure better compliance with its recommended police model. Recommendations #49 and #51 would provide substantial scenario-based training in the use-of-force and strategies for reducing the use-of-force,⁶ and would require additional training on an annual basis.⁷ These recommendations would better ensure that recruits have scenario-based training to address issues including legal and constitutional issues surrounding the use-of-force, options for disarming a person or making an arrest, crisis intervention training so that the recruit can effectively respond to individuals with mental illness or other developmental disability, and de-escalation strategies. In addition, Recommendation #71 would ensure that all FCPD personnel understand the concepts and values of policing in a democratic society.⁸

The need for this training and shift in mindset is urgent. Just last month, Alex Horton, a member of the Defense Council at the Truman National Security Project and former U.S. Army infantryman who served in Iraq, was awoken in his Alexandria apartment by three FCPD officers who raided his apartment and leveled their service pistols at his head.⁹ Mr. Horton’s neighbor, who was not aware that Mr. Horton had moved temporarily into a neighboring model unit in their apartment building because of repairs being done in Mr. Horton’s apartment, contacted the FCPD because he mistakenly thought Mr. Horton was a “squatter.”¹⁰ Instead of checking with the building security or management, or contacting Mr. Horton in a less reckless manner, FCPD officers raided the apartment.¹¹ As Mr. Horton wrote in the Washington Post, when he questioned the FCPD officers’ decision to raid his apartment with service pistols drawn and pointed at him, the FCPD shift commander’s response was that officers do not generally investigate beforehand because it could delay the officers’ ability to apprehend the suspect.¹² A law enforcement culture that “encourages police officers to engage their weapons before gathering information promotes the mind-set that nothing, including citizen safety, is more important than officers’ personal security. That approach has caused public trust in law enforcement to deteriorate.”¹³

Finally, the Commission should recommend that the FCPD implement department-level training on implicit bias to identify and correct racial bias. This training is essential to ensure that the FCPD respects the right all individuals within its jurisdiction to equal protection under the law.

B. Civilian Review Board

The Commission should recommend that the Board of Supervisors establish an independent civilian review board (board). The Board of Supervisors should empower the board to hear complaints involving alleged: (1) excessive and/or improper use of force; (2) abuses of power, including stop-and-frisks and/or unlawful searches or seizures; and (3) unprofessional behavior, including foul language and/or discriminatory statements.

⁵ *Id.* at 9.

⁶ *Id.* at 63.

⁷ *Id.* at 64.

⁸ *Id.* at 85.

⁹ Alex Horton, *In Iraq, I raided insurgents. In Virginia, the police raided me.*, Wash. Post, July 24, 2015, available at https://www.washingtonpost.com/opinions/in-iraq-i-raided-insurgents-in-virginia-the-police-raided-me/2015/07/24/2e114e54-2b02-11e5-bd33-395c05608059_story.html.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

The Commission should recommend that the board be comprised of civilian representatives that reflect the racial, ethnic, and religious diversity of Fairfax County, ensure representation from the Lesbian, Gay, Bisexual, Transgender community, and equal representation of men and women. The Board of Supervisors should appoint the civilian representatives. The civilian representatives should live or work in Fairfax County and should have a legal, law enforcement, human resources, or civil rights background. In addition, the number of civilian representatives with a law enforcement background should comprise a minority of the board's civilian membership. No civilian representative should be an employee of the FCPD or have been an employee of the FCPD for seven years prior to their appointment to the board.

The Commission should recommend that the Board of Supervisors approve funds to staff the board professionally, including funds to maintain board investigators, attorneys, community liaisons, and the administrative staff necessary to ensure the effective day-to-day operation of the board. In addition to maintaining the board's day-to-day operations, the professional staff would investigate and make recommendations regarding all complaints filed with the board.

The Commission should recommend that the Board of Supervisors provide the board with both investigatory and discipline authority. The investigatory authority should include the power to subpoena witnesses and documents, including documents relating to internal FCPD policies and standards.¹⁴ The board's disciplinary authority should include the power to recommend a disciplinary action taken from a range of options developed in collaboration with FCPD leadership, representatives of rank and file officers, and other stakeholders. The board's recommended discipline should follow the discipline guidelines, which should include consideration of the officer's past disciplinary record, and should not be subject to amendment by the FCPD unless a clear error in the board's investigation is discovered. In addition to the power to investigate and recommend the discipline of individual FCPD officers, the board should also have the authority to investigate and make public recommendations regarding FCPD policies and practices.

The Commission should also recommend that the board ensure the due process rights of FCPD personnel, including the right to counsel during all stages of the investigation and discipline stages, if any, for any officer under investigation by the board. In addition, prior to a decision by the board to recommend discipline, the accused officer should have the right to a hearing that includes the opportunity to present and challenge evidence surrounding and offer defenses to the alleged action. And, if discipline is recommended, the officer should have the right to appeal as established under Virginia law.¹⁵

The establishment of a civilian review board with investigatory and discipline authority can be an effective tool for enhancing trust between the FCPD and Fairfax residents. It does so by making the FCPD more transparent and accountable to the people.

C. Police Body Worn Cameras (Body Cams)

Body cams are small cameras worn by officers that record audio and video of the officer's interaction with the public. **If** proper policies and procedures are in place for their use, body cams can be a win-win. They can both protect the public from police misconduct and protect the police from false allegations of abuse.

¹⁴ Under Va. Code §15.2-403, the Board of Supervisors "may inquire into the official conduct of any office or officer, whether elective or appointive, of the county. ... For these purposes it may subpoena witnesses, administer oaths, and require the production of books, papers and other evidence." Because the Board of Supervisors has this authority, it may provide that power to a civilian review board established by county ordinance and acting within the authority granted by that ordinance.

¹⁵ Title 9.1, Chapter 5.

The Commission should recommend that the Board of Supervisors fund body cams for use by all sworn law enforcement officers with arrest powers, except undercover officers. The funds should be considered a base budget public safety expenditure and should not come from proceeds from asset forfeitures.

The Commission should also recommend that the Board of Supervisors adopt a policy governing the use of body cams before authorizing their purchase or deployment. The public should have many opportunities to comment on a proposed policy before it is final, and comment on the proposed policy should be solicited from community and civil rights groups early in the policy development process.

The policy adopted by the Board of Supervisors for implementation by the FCPD must address at least the following issues:¹⁶

- A. Police wearing body cams must be required to inform people with whom they are interacting that they are being recorded, especially when entering a home, office, or other private space. Residents should be able to request that the body cam be turned off when police enter their home, unless it is an emergency or the officer has a warrant.
- B. The policy must specify the circumstances when the body cams are to be turned on and off, and officers must not have individual discretion to turn them on and off at will.
- C. The policy must be clear about what happens to the video from the body cams, where it is stored, how long it is stored, and who has access to it (including ensuring consent from the individual(s) filmed before the content is made public with their image intact).
- D. The policy should require that videos be tagged before they are stored indicating whether the video is relevant to a criminal investigation or a possible personnel action, either of which tags might trigger a discretionary exception to disclosure under FOIA. The policy should provide that videos not tagged will be deleted from the public record as soon as possible.
- E. FCPD supervising officers and designated individuals outside the department (perhaps from the civilian review board staff or membership) should review the videos on an ongoing basis to determine whether the videos provide information that suggests that FCPD personnel are acting inappropriately or exhibiting bias. Action should be taken to address issues where they are identified, subject to proper procedural protections for the officers involved.

With these policies in place, police body cams can help build trust between the FCPD and the community, protect the FCPD from liability, and provide the public with a tool to assure accountability.

D. War on Drugs

After more than 40 years of the War on Drugs, we know one thing for sure – imposing harsh punishments has not solved the problem but has cost the taxpayers of the Commonwealth millions of dollars. In 2010, the Commonwealth spent almost \$70 million enforcing the marijuana

¹⁶ For a more comprehensive discussion of what the policy should include, see Jay Stanley, *Police Body-Mounted Cameras: With Right Policies in Place, a Win For All* (Version 2.0), American Civil Liberties Union, March 2015, available at https://www.aclu.org/sites/default/files/assets/police_body-mounted_cameras-v2.pdf.

possession prohibition alone.¹⁷ The failure of the War on Drugs is acknowledged by Virginia police chiefs from localities as diverse as Virginia Beach and Galax.¹⁸

The War on Drugs has also disproportionately harmed communities of color. Fairfax County is no exception. For example, while African Americans and whites use marijuana at roughly the same rate, African Americans in Fairfax County were 3.1 times more likely to be arrested for marijuana possession in 2010.¹⁹ And, the impact of this disparity is aggravated by the fact that the total number of marijuana possession arrests in Fairfax County have increased dramatically. As the *Washington Post* reported last year, arrests for possession in Fairfax County more than doubled between 2000 and 2013 – from 1,442 to 2,918.²⁰

In addition to the financial cost and disproportionate impact on communities of color, the FCPD's own Risk Assessment Statistical Summary makes clear that the War on Drugs is the central reason for unnecessarily risky interactions between police and the public.²¹ In 2014, four out of five – 34 out of 43 – events involving the Fairfax County Police Department in which “advanced tactics”²² were recommended were narcotics related. For comparison's sake, the next highest type of event was burglary, for which advanced tactics were recommended four times. According to the FCPD, officers recommended advanced tactics 8 ½ times more for narcotics-related situations than they were for home invasions. FCPD officers recommended advanced tactics for robberies just twice in 2014, making it 17 times more likely that advanced tactics would be deployed for narcotics-related events than for robberies.²³

Drug use is fundamentally a public health issue and must be dealt with as such. Drug policies must be evidence-based and incorporate prevention, treatment, and public safety elements.

To begin the process of reining in the failed War on Drugs, the Commission should recommend to the Board of Supervisors that it establish a policy for the FCPD deprioritizing enforcement of

¹⁷ Ezekiel Edwards, Will Bunting, & Lynda Garcia, *The War on Marijuana in Black and White*, American Civil Liberties Union, p. 181, June 2013, available at

https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rel1.pdf.

¹⁸ Editorial, *The War on Drugs is a Failure*, RICHMOND TIMES-DISPATCH, May 16, 2015, available at http://www.richmond.com/opinion/our-opinion/article_0b6b8faa-7a4a-50ac-853a-e9be767d2be3.html.

¹⁹ Ezekiel Edwards, Will Bunting, & Lynda Garcia, *The War on Marijuana in Black and White*, American Civil Liberties Union, p. 21 & 181, June 2013, available at

https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rel1.pdf.

²⁰ Marc Fisher, *Even as marijuana gains ground, some tightly enforce laws*, WASH. POST, June 21, 2014, available at http://www.washingtonpost.com/politics/even-as-marijuana-gains-ground-some-tightly-enforce-laws/2014/06/21/2d0f8230-d21d-11e3-9e25-188ebe1fa93b_story.html.

²¹ Fairfax County Police Department Risk Assessment Statistical Summary (March 12, 2015), <http://www.fairfaxcounty.gov/policecommission/materials/statistical-summary-risk-assessments.pdf>.

²² Advanced tactics are defined in Policy 601 as follows: “Tactics that should be considered when executing a high risk or mental detention.” Such tactics include “dynamic building entry,” “forced breaching of doors,” “pre-planned deployment of chemical agents or diversionary devices,” “tactical vehicle intercepts,” and “unique tactical deployments requiring specialized training or equipment such as rifle bunkers, armored vehicle, or scoped rifles.” Felony traffic stops or ruses – having a person exit a residence under ruse his vehicle was involved in an accident to execute an arrest – are not considered advanced tactics.

²³ Fairfax County Police Department Risk Assessment Statistical Summary (March 12, 2015), <http://www.fairfaxcounty.gov/policecommission/materials/statistical-summary-risk-assessments.pdf>.

marijuana possession laws.²⁴ In addition, the Commission should recommend that the Board of Supervisors include support for legislation to decriminalize marijuana possession on its list of priority legislation submitted for consideration by the Virginia General Assembly. As discussed above, arrests for marijuana possession are expensive. At taxpayers' expense, these arrests involve law enforcement, a judge, a clerk, deputies, and prosecutors, and disproportionately impact African Americans and other persons of color who live in the County. In addition, while the data from states that have decriminalized or legalized marijuana do not establish causation between legalization or decriminalization and increased public safety benefits, opponents' claims that marijuana reform leads to increased use by youth, public safety harms, and increased traffic fatalities are not supported by the evidence.²⁵

E. Data Collection

Policy 401.1 says nothing about the department's collection or release of "information about stops, summonses, arrests, reported crime, and other law enforcement data aggregated by demographics." As the Interim Report of the President's Task Force on Policing in the 21st Century

²⁴ As Fairfax Public Defender Todd Petit told the Washington Post, FCPD's enforcement of marijuana possession laws has become more aggressive. "The last few years, we've seen lots of small undercover marijuana buys. They'll go to a 7-Eleven and ask someone to buy \$24 worth of marijuana, which is something I used to see them do only for maybe 20 to 40 rocks of crack cocaine." Marc Fisher, *Even as marijuana gains ground, some tightly enforce laws*, WASH. POST, June 21, 2014, available at http://www.washingtonpost.com/politics/even-as-marijuana-gains-ground-some-tightly-enforce-laws/2014/06/21/2d0f8230-d21d-11e3-9e25-188ebe1fa93b_story.html.

²⁵ Regarding youth use, a new report from the Center on Juvenile and Criminal Justice found that in California, where full marijuana decriminalization went into effect on Jan. 1, 2011, "marijuana decriminalization in California has not resulted in harmful consequences for teenagers, such as increased crime, drug overdose, driving under the influence, or school dropout. In fact, California teenagers showed improvements in all risk areas after reform." See Christopher Ingraham, *After California decriminalized marijuana, teen arrest, overdose and dropout rates fell*, WASH. POST, Oct. 15, 2014, available at <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/10/15/after-california-decriminalized-weed-teen-arrest-overdose-and-dropout-rates-fell/>. In addition, since voters approved marijuana legalization in Washington State, "youth use has remained stable. Between 2012 and 2014 usage rates for 8th and 10th graders decreased slightly and similar rates for 12th and 6th graders remained unchanged." See Drug Policy Alliance, Status Report: Marijuana Legalization in Washington After 1 Year of Retail Sales and 2.5 Years of Legal Possession, July 2015, available at <http://www.drugpolicy.org/resource/marijuana-legalization-washington-after-1-year-retail-sales-and-25-years-legal-possession>. Regarding increased crime, in Denver violent crime decreased by 2.2% in the first 11 months of 2014, burglaries decreased by 9.5%, and overall property crime decreased by 8.9%. See Drug Policy Alliance, Status Report: Marijuana Legalization in Colorado After One Year of Retail Sales and Two Years of Decriminalization, available at http://www.drugpolicy.org/sites/default/files/Colorado_Marijuana_Legalization_One_Year_Status_Report.pdf. In Washington State, between 2011 and 2014 violent crime declined by 10%, burglaries declined by 6%, and the property crime rates remained steady statewide. See Drug Policy Alliance, Status Report: Marijuana Legalization in Washington After 1 Year of Retail Sales and 2.5 Years of Legal Possession, July 2015, available at <http://www.drugpolicy.org/resource/marijuana-legalization-washington-after-1-year-retail-sales-and-25-years-legal-possession>. Regarding increased traffic fatalities, during the first 11 months of 2014, Colorado had a 3% decline in the number of traffic fatalities when compared to the first 11 months of 2013. Drug Policy Alliance, Status Report: Marijuana Legalization in Colorado After One Year of Retail Sales and Two Years of Decriminalization, available at http://www.drugpolicy.org/sites/default/files/Colorado_Marijuana_Legalization_One_Year_Status_Report.pdf. In Washington State, number of traffic fatalities declined after the first year of marijuana legalization. And, while data are not yet available for 2014, "preliminary figures for 2014 show that the number of traffic fatalities has remained stable for the entire country, including the region containing Washington." See Drug Policy Alliance, Status Report: Marijuana Legalization in Washington After 1 Year of Retail Sales and 2.5 Years of Legal Possession, July 2015, available at <http://www.drugpolicy.org/resource/marijuana-legalization-washington-after-1-year-retail-sales-and-25-years-legal-possession>.

describes, the legitimacy of a law enforcement agency depends on the trust of the communities in which it operates.²⁶ Whether the department's policies mention it or not, the disparate treatment of communities of color is an issue for police departments nationwide, and FCPD is no exception.

To ensure that the FCPD is not engaged in racially biased policing, the Commission should recommend that the Board of Supervisors adopt a policy requiring the FCPD collect, analyze, and publish an annual statistical report covering all FCPD stops, frisks, citations, arrests, and use-of-force incidents. This data should include the actual or perceived race, gender, and ethnicity of the individual(s) stopped, frisked, cited, arrested, and/or subjected to force. It should also include the race and gender of the FCPD personnel conducting the stop, frisk, citation, arrest, and/or use-of-force and whether the interaction was FCPD or resident initiated. Finally, for each stop and/or frisk, the data should include the outcome of the incident.

Collection of this data is essential to enable the Board of Supervisors and the FCPD leadership to determine whether FCPD personnel are acting in a way that is consistent with the principles of policing in a democracy or in a way that fuels mistrust between FCPD and communities of color. Collecting this data will also allow the public and media to determine whether complaints about racially biased policing have any merit. As PERF stated in its review of the FCPD, "[i]n today's policing environment—with community members paying close attention to police practices, and posting video recordings of police officers on social media networks that transmit information and images instantaneously—it is critical that police departments be as open, transparent, and informative as possible about police operations and practices."²⁷

The recommendation outlined above is a substantial change to the PERF Recommendation #70, which only recommended that FCPD publish annual use-of-force statistical information without consideration of other FCPD/resident interactions or the actual or perceived race, gender, or ethnicity of the individual(s) involved.²⁸ On its own, this recommendation would fail to provide FCPD leadership or the media and public with a meaningful understanding of FCPD/resident interactions.

F. Use of SWAT

When first created in the late 1960s, SWAT teams were developed to address imminent, violent situations that regular law enforcement officers were untrained for, such as hostage and active shooter situations. Over the last 50 years, the mission of SWAT teams has shifted dramatically. Between 2011 and 2012, 79 percent of SWAT deployments were for the purpose of executing a search warrant while only 7 percent were for imminent, violent situations.²⁹

In addition to the shift in the mission of SWAT teams, there is almost no civilian oversight over SWAT team actions at either the state or local level in Virginia. That is, there is no civilian body authorizing this escalation in tactics or asking whether this is how the community wants or expects to be policed. This is true despite documented instances of excessive force by SWAT teams,

²⁶ President's Task Force on 21st Century Policing, Interim Report of the President's Task Force on 21st Century Policing, Office of Community Oriented Policing Services 9-10 (Mar. 4, 2015), available at http://www.cops.usdoj.gov/pdf/taskforce/Interim_TF_Report.pdf.

²⁷ Police Executive Research Forum, Use-of-Force Police and Practice Review of the Fairfax County Police Department, p. 83, June 2015, available at <http://www.fairfaxcounty.gov/policecommission/materials/fairfax-county-police-dept-final-report-june19.pdf>.

²⁸ *Id.*

²⁹ Kara Dansky, War Comes Home: The Excessive Militarization of American Policing, American Civil Liberties Union, p. 31, June 2014, available at <https://www.aclu.org/sites/default/files/assets/jus14-warcomeshome-report-web-rel1.pdf>.

including one death that occurred while the FCPD SWAT team executed a gambling warrant in 2006.³⁰

Finally, national data indicates that drug-related SWAT raids disproportionately affect people of color.³¹ Because we lack SWAT data specific to Virginia, we cannot be sure that this national trend has crossed the Virginia border. But other evidence of disparate policing in the enforcement of Virginia's criminal laws make this national finding on SWAT raids very troubling. For example, we know that people of color are arrested and prosecuted for drug crimes at a disproportionate rate in Virginia. As noted above, while African-Americans and whites use marijuana at roughly the same rate, in 2010 African-Americans were 3.1 times more likely to be arrested for marijuana possession in Fairfax County.³²

To ensure that the FCPD SWAT team is deployed in a way that respects the role of the police in a democracy, the Commission should make the following recommendations:

- The Board of Supervisors should adopt a policy that directs the FCPD to limit the use of SWAT to scenarios in which there is a likelihood that the situation for which the SWAT team is being deployed presents an imminent threat to the lives of civilians and/or police personnel. When SWAT deploys for warrant service, the basis for believing such a likelihood exists should have to be established explicitly and approved by a supervisor or other high-ranking official before the deployment.

While the PERF Recommendation #60 provides many of the protections we recommend, it also permits the use of SWAT for “any life-threatening situation that requires skills or resources not typically available or practiced by patrol personnel.”³³ The lack of an immediacy requirement under the PERF recommendation could create confusion regarding when a deployment is justified and increase the risk that SWAT could be deployed in circumstances where its skills and weapons are not necessary. This concern is magnified by the fact that PERF cites “security during special events” as a legitimate circumstance to justify the deployment of SWAT.³⁴

- The policy adopted by the Board and implemented by FCPD should ensure that SWAT deployments follow best practices:
 - Each deployment should be pre-approved by a supervisor or other high-ranking official.
 - Each deployment should be preceded by a written planning process that documents the specific need for the deployment, describes how the operation is to be conducted, and states whether children, pregnant women, and/or elderly people are

³⁰ Radley Balko, Fairfax police stage a SWAT raid on poker players, Washington Post, Jan. 28, 2015 available at <https://www.washingtonpost.com/news/the-watch/wp/2015/01/28/fairfax-police-stage-a-swat-raid-on-poker-players/>.

³¹ Kara Dansky, War Comes Home: The Excessive Militarization of American Policing, American Civil Liberties Union, p. 36-37, June 2014, available at <https://www.aclu.org/sites/default/files/assets/jus14-warcomeshome-report-web-rel1.pdf>.

³² Ezekiel Edwards, Will Bunting, & Lynda Garcia, The War on Marijuana in Black and White, American Civil Liberties Union, p. 21 & 181, June 2013, available at https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rel1.pdf.

³³ Police Executive Research Forum, Use-of-Force Police and Practice Review of the Fairfax County Police Department, p. 75, June 2015, available at <http://www.fairfaxcounty.gov/policecommission/materials/fairfax-county-police-dept-final-report-june19.pdf>.

³⁴ *Id.*

likely to be present (except in emergency scenarios in which engaging in such a process would endanger the lives or well-being of civilians or police personnel).

- All SWAT deployments should include a trained crisis negotiator.
 - SWAT officers should wear body cams during every deployment.
 - All deployments should be proportional to the need; a full deployment consisting of numerous heavily armed officers in an armored personnel carrier (APC) is often excessive.
 - Many scenarios do not necessitate the use of a SWAT team at all, and partial deployments involving the minimal amount of military equipment necessary should be encouraged.
 - For each SWAT deployment, a post-deployment record should be made that documents the following, in a manner that allows for the data to be easily compiled and analyzed. The Commission should consider this recommendation as an amendment to Recommendation #66³⁵:
 - The purpose of the deployment;
 - The specific reason for believing that the situation for which the SWAT team was being deployed presented an imminent threat to the lives or safety of civilians and/or police personnel;
 - Whether forcible entry or a breach was conducted and, if so, the equipment used and for what purpose;
 - Whether a distraction device was used and, if so, what type and for what purpose;
 - Whether an APC was used and, if so, for what purpose;
 - The race, sex, and age of each individual encountered during the deployment, whether as a suspect or bystander;
 - Whether any civilians, officers, or domestic animals sustained any injury or death;
 - A list of any controlled substances, weapons, contraband, or evidence of crime that is found on the premises or any individuals;
 - A brief narrative statement describing any unusual circumstances or important data elements not captured in the list above.
- FCPD should provide training programs for all SWAT teams that do not promote an overly aggressive or “warrior” mentality.
- The Board of Supervisors should take responsibility to ensure that the FCPD is not excessively militarized. It should take responsibility for:

³⁵ *Id.* at 77.

- Approving use of force policies that include standards and requirements for the deployment of SWAT teams;
- Approving/disapproving all (a) requests for the receipt of weapons and vehicles under the 1033 Program; (b) requests for grant funding from the federal government that will be used to purchase military-style weapons and vehicles; and (c) proposals to purchase military-style weapons and vehicles from vendors;
- Developing a process for addressing civilian complaints regarding SWAT tactics, including a system for submitting complaints, conducting hearings, and providing for individual remedies to a civilian review board or other independent body;
- Making appropriate recommendations for FCPD reforms; and
- Considering, on an annual basis, whether continued maintenance of a SWAT team is appropriate and, if not, to recommending the dissolution of the agency's SWAT team.

G. *Civil Asset Forfeiture*

Under current law, state and local law enforcement agencies can seize assets that have a “substantial connection” to a drug offense, regardless of whether a person is convicted of or even charged with a crime.

Asset forfeiture creates the wrong incentive for law enforcement. If the Commonwealth is able to show that assets seized during an investigation are probably related to a drug offense, it is up to the property owner to prove that he or she had the money or property for a lawful purpose. If not, the law enforcement agency that conducted the investigation may keep up to 90 percent of the assets forfeited. This gives law enforcement agencies a financial incentive to seize as much money and property as possible, even if the Commonwealth will be unable to prove beyond a reasonable doubt that a crime was committed.

Policing should be based on public safety, not supplementing a department's budget. The Commission should recommend that the Board of Supervisors prohibit the FCPD from engaging in civil asset forfeitures unless: i) a person whose assets were seized has been found guilty of a crime; ii) the convicted person is the owner of the property; and iii) the government has proven by clear and convincing evidence that the owner/offender either used the property in the commission of the crime or received the property as a result of the crime.

Section III – Enhancing existing policies, practices, and laws regarding police-involved incidents

Reasserting civilian authority over law enforcement and embracing the concepts and values of policing in a democratic society will enable the FCPD to increase its legitimacy, and, thus, its ability to effectively promote and protect public safety. At the core of ensuring legitimacy is public perception of the FCPD's use-of-force. As PERF stated in its review of FCPD:

“The concept of legitimacy is especially critical when it comes to the use of force. If there is a widely held view in the community, or in certain neighborhoods, that the police use excessive force, the police will be viewed as illegitimate. Conversely, if the police are viewed as using force only as a last resort, then the police are more likely to be viewed as legitimate in the eyes of the community. Because legitimacy

strikes at the heart of the relationship between police and residents, and because how and when police use force influences whether the community views the police as being legitimate, it is critical for agencies to review their use-of-force policies, practices, and training.”³⁶

A. History of recent use-of-force (lethal and non-lethal) incidents involving FCPD and subsequent public release of information

The August 2013 shooting of John Geer and the subsequent \$2.95 million settlement with Mr. Geer’s family rightfully prompted a thorough review of FCPD policies and procedures. But the Commission should acknowledge that some of the biggest departmental failures in that sentinel event flowed from the failure to follow policies already on the books. For example, current policy provides that in the event of an officer-involved shooting, “[t]he scene shall be handled like any other major crime scene and the initial incident commander should ensure at a minimum” that medical attention be provided “for all injured parties.”³⁷ The officers on scene did nothing to assist Mr. Geer for an hour after he was shot in the chest.

Although the civil suit has settled, to date there has been no public admonition by the County that recognizes the failure of the FCPD to follow established protocols. Unless the County makes such an admonition, the public has little reason to trust that the FCPD will follow any new policies and procedures recommended by the Commission and enacted by the County.

Mr. Geer’s case was just one of 77 officer-involved shootings between 2004 and 2013.³⁸ In its analysis of the FCPD, PERF examined 25 officer-involved shootings that occurred between 2006 and 2014.³⁹ Of these cases, PERF found that the cases took approximately 6-20 months to investigate and close,⁴⁰ which is longer than the ballpark best practice of 12 months.

Because “[l]engthy investigations can damage public perceptions of a department, especially if the department seems unresponsive to questions and concerns about the incident by the public or news media[,]”⁴¹ the Commission should recommend that the Board of Supervisors adopt a general policy requiring the FCPD to release the criminal incident information and criminal investigative files⁴² immediately for any case involving an officer-involved shooting.

This recommendation should be coupled with the PERF Recommendation #17, which suggests that the Commission recommend the elimination of “boilerplate” language from use-of-force reports. In doing so, supervisors will have a more accurate understanding of the officer’s version of the event leading up to the use-of-force, and thus a greater likelihood of ensuring transparency and accuracy.⁴³

³⁶ Police Executive Research Forum, *Use-of-Force Police and Practice Review of the Fairfax County Police Department*, p. 21, June 2015, *available at* <http://www.fairfaxcounty.gov/policecommission/materials/fairfax-county-police-dept-final-report-june19.pdf>.

³⁷ Part IV(B) of SOP 12-045.

³⁸ Police Executive Research Forum, *Use-of-Force Police and Practice Review of the Fairfax County Police Department*, p. 25, June 2015, *available at* <http://www.fairfaxcounty.gov/policecommission/materials/fairfax-county-police-dept-final-report-june19.pdf>.

³⁹ *Id.* at 26.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Criminal investigative files are excluded from mandatory disclosure under Virginia’s Freedom of Information Act, but may be disclosed by the custodian. VA. CODE ANN. §2.2-3706(F)(1).

⁴³ Police Executive Research Forum, *Use-of-Force Police and Practice Review of the Fairfax County Police Department*, p. 47, June 2015, *available at*

B. Enhancing FCPD use-of-force training policies

The Commission should recommend that the Board of Supervisors approve any “use of force” policies to be implemented by the FCPD and that any “use of force” policies adopted incorporate the following PERF recommendations:

- Recommendation #4 – Add a “sanctity of life” statement to department policy.⁴⁴ As discussed above, adding this statement will better ensure that FCPD personnel respect and protect all lives.
- Recommendation #5 – Add a “duty to intervene” statement to department policy.⁴⁵ Ensuring legitimacy is a key component to policing in a democratic society. Legitimacy cannot be obtained if the public believes that FCPD personnel who violate laws or policies will not be held accountable. By adding this to department policy and including an accountability mechanism for personnel who fail to follow this requirement, the FCPD will better ensure that all personnel who violate laws or policies are held accountable. By holding bad actors accountable, the FCPD will increase its legitimacy.
- Recommendation #6 – Include de-escalation in FCDP written policy.⁴⁶ As PERF noted, [d]e-escalation strategies help officers prevent situations from developing in which they would need to use additional force.”⁴⁷ This recommendation is about preventing the unnecessary use-of-force.
- Recommendation #7 – Strengthen the definition of “use of force.”⁴⁸ The suggested changes clarify the meaning of this important term.
- Recommendation #9 – Use the term “less lethal,” not “non-lethal.”⁴⁹ Electronic control weapons (ECW), commonly referred to by the trade name Taser, have the potential to cause death, thus by recommending that the FCPD make this terminology change, the Commission may help FCPD personnel understand the serious nature of these weapons.
- Recommendation #10 – Expand the definition of “less-lethal force.”⁵⁰ As PERF notes, the distinction between less-lethal and non-lethal forces rests on a false premise – that some types of force can never cause death.
- Recommendation #12 – Improve the definitions of different types of resistance.⁵¹ By adopting this recommendation, the FCPD will better ensure that its personnel understand that individuals who resist arrest may do so for a variety of reasons, some of which are outside of their control, such as mental illness or hearing impairment. In these situations it is imperative that FCPD personnel have the capacity to effectively assess the situation and design a response that fits the facts on the ground. This recommendation goes hand-in-hand with Recommendation #6, which highlights the importance of using de-escalation strategies to avoid unnecessary use-of-force instances or reduce the level or force needed. Recommendation #12 also highlights the need for FCPD personnel to understand the distinctions between different use-of-force options.⁵² For example, while OC spray (commonly referred to as pepper spray) and electronic control weapons are both less-lethal force options, ECWs carry a much greater likelihood of causing serious injury or death, thus it is imperative that FCPD personnel adjust the level and type of force used depending on

<http://www.fairfaxcounty.gov/policecommission/materials/fairfax-county-police-dept-final-report-june19.pdf>.

⁴⁴ *Id.* at 37.

⁴⁵ *Id.*

⁴⁶ *Id.* at 38.

⁴⁷ *Id.*

⁴⁸ *Id.* at 39-40.

⁴⁹ *Id.* at 41.

⁵⁰ *Id.*

⁵¹ *Id.* at 42.

⁵² *Id.* at 43.

the amount of resistance offered by the individual coupled with the individual's capacity to comprehend what is being asked of them.

- Parts of Recommendation #18 – Revise policy language on less-lethal force.⁵³ This recommendation correctly restricts the use of striking instruments, OC spray, and ECWs on handcuffed individuals, but the exceptions provided are too broad. The Commission should recommend that the FCPD policy prohibit the use of ECWs against a person handcuffed or otherwise restrained.⁵⁴

The Commission should also strike any reference to use of the term “excited delirium”⁵⁵ from its recommendation. Excited delirium is a term used by some medical examiners to describe the cause of death for some individuals who died following exposure to ECWs. Using this term as a legitimate cause of death is controversial, at best. Neither the American Medical Association nor the American Psychological Association recognize the term as a medical condition.⁵⁶ In fact, following the death in custody of a mentally ill woman at the Fairfax County Jail, the Washington Post editorial board recently noted, “[o]utside of the medical examiner’s profession, the term does not seem to occur in medical textbooks.”⁵⁷ Instead, this term may be used to cover up excessive uses of force or inappropriate uses of force. Therefore, the Commission should recommend that the FCPD strike any reference to this term from Recommendation # 18 or any other PCPD policy.

- Recommendations #20 - 23.⁵⁸ Recommendations #20 - 21 focus on increasing training requirements for FCPD personnel who have access batons and OC spray.⁵⁹ Recommendations # 22-23 clarify when and how OC spray can be deployed. These recommendations would provide greater protection from the misuse or abuse of these less-lethal force options, and thus the Commission should recommend them.
- Parts of Recommendation #27 – Clarify that ECWs should not be used against passive subjects.⁶⁰ ECWs can cause serious injury or death.⁶¹ As such, the Commission should recommend that under no circumstance should an ECW be used against a passive individual. The Commission should recommend that ECWs only be used against a non-restrained individual who is actively resisting, but only if a reasonable officer could conclude that the resistance could result in serious injury to themselves or others and less severe force alternatives have been ineffective or deemed unacceptable for the situation.
- Parts of Recommendation #28 – Clarify risk of ECWs to visibly frail persons.⁶² The Commission should amend this recommendation to clarify an ECW may only be used on a

⁵³ *Id.* at 47-49.

⁵⁴ *Id.* at 48.

⁵⁵ *Id.*

⁵⁶ Editorial, *In Fairfax case, death by ‘excited delirium,’* WASH. POST, Apr. 27, 2015, available at https://www.washingtonpost.com/opinions/death-by-excited-delirium/2015/04/27/4f5f7a86-ed27-11e4-8abc-d6aa3bad79dd_story.html.

⁵⁷ *Id.*

⁵⁸ Police Executive Research Forum, *Use-of-Force Police and Practice Review of the Fairfax County Police Department*, pp. 52-53, June 2015, available at <http://www.fairfaxcounty.gov/policecommission/materials/fairfax-county-police-dept-final-report-june19.pdf>.

⁵⁹ *Id.*

⁶⁰ *Id.* at 55.

⁶¹ According to Amnesty International, 540 died between 2001 and 2013 after being struck by police Tasers. Amnesty International, *Annual Report: United States of America 2013*, May 29, 2013, available at <http://www.amnestyusa.org/research/reports/annual-report-united-states-of-america-2013?page=2>.

⁶² Police Executive Research Forum, *Use-of-Force Police and Practice Review of the Fairfax County Police Department*, p. 55, June 2015, available at

“frail person,” elderly person, child, or a person known to be pregnant if deadly force would be justified. These individuals face an elevated risk from ECWs, thus the threshold for justifying the use of an ECW on these populations should be elevated.

- Parts of Recommendation #29 – Implement additional ECW restrictions.⁶³ The Commission should amend this recommendation to prohibit the use of ECWs on handcuffed or otherwise restrained individuals.
- Recommendation #30 – Replace the term “non-deadly” with “less-lethal” force to describe ECWs.⁶⁴ As noted above, ECWs have been linked to hundreds of deaths and should not be considered “non-deadly,” thus the Commission should recommend this recommendation.
- Recommendation #32 – Certify officers in ECW use.⁶⁵ In addition to this recommendation, because it may be difficult for FCPD personnel to distinguish between individuals under the influence of drugs or alcohol and individuals whose behavior is a manifestation of a disability or mental illness, the Commission should require that all officers equipped with ECWs receive training to distinguish between these behaviors prior to being equipped with an ECW.
- Recommendation #33 – Tighten policy to acknowledge risks regarding repeated use of ECWs.⁶⁶ The Commission should recommend that the FCPD treat each ECW cycle as an independent application of the device, thus requiring its own justification. As Amnesty International noted, multiple or prolonged ECW shocks “may increase the risk of adverse effects on the heart or respiratory system.”⁶⁷
- Recommendation #34 – Clarify that the risks of ECWs and OC spray are not equal.⁶⁸ As noted above, while OC spray and ECWs are both less-lethal force options, ECWs carry a much greater likelihood of causing serious injury or death, thus it is imperative that FCPD personnel distinguish between these two force options and weigh their relative risks when determining whether the situation merits the force option’s use.
- Recommendation #37 – Expand policy against ECWs for pain compliance.⁶⁹ The Commission should recommend that FCPD personnel be prohibited from using the ECW drive stun mode for pain compliance.
- Recommendations #39-40.⁷⁰ These recommendations would ensure that medical help is more quickly available (Recommendation # 39) prior to ECW exposure and automatically sought (Recommendation #40) following ECW exposure.⁷¹ Because of the serious risks associated with ECW exposure, it is vital that medical evaluation be sought and provided as quickly as possible after exposure.
- Recommendations #41 - 42.⁷² These recommendations ⁷³ would ensure better training to ensure proper ECW use (Recommendation #41) and better reporting requirements

<http://www.fairfaxcounty.gov/policecommission/materials/fairfax-county-police-dept-final-report-june19.pdf>.

⁶³ *Id.*

⁶⁴ *Id.* at 56.

⁶⁵ *Id.*

⁶⁶ *Id.* at 56-57.

⁶⁷ Press Release, Amnesty International Urges Stricter Limits on Police Taser Use as U.S. Death Toll Reaches 500, Amnesty International, Feb. 15, 2012, *available at*

<http://www.amnestyusa.org/news/press-releases/amnesty-international-urges-stricter-limits-on-police-taser-use-as-us-death-toll-reaches-500>.

⁶⁸ Police Executive Research Forum, Use-of-Force Police and Practice Review of the Fairfax County Police Department, p. 57, June 2015, *available at*

<http://www.fairfaxcounty.gov/policecommission/materials/fairfax-county-police-dept-final-report-june19.pdf>.

⁶⁹ *Id.*

⁷⁰ *Id.* at 57-58.

⁷¹ *Id.* at 58.

⁷² *Id.* at 58-59.

following the deployment of an ECW (Recommendation #42). Training and reporting are two key elements to ensuring a more transparent, accountable, and safe FCPD, thus the Commission should recommend these recommendations.

- Recommendation #43 – Require certification for PepperBall use.⁷⁴ By adding a certification requirement, the Commission will better ensure proper use of PepperBalls.
- Recommendation #67 – Establish the “Memphis Model” for crisis intervention, with specifically trained teams as well as base-level training for all officers.⁷⁵ The Memphis Model originated with the Memphis Police Department in 1988. It is a comprehensive approach to interacting with community members with mental health issues. The approach trains officers and dispatchers, and, where implemented, has resulted in fewer officer injuries as well as less need for use of force.

Section IV – Conclusion

While there is no silver bullet to ensuring a safe and effective police force, with restoration of effective civilian oversight the recommendations outlined in this memo will help make the FCPD a model for what policing in a democratic society should look like. We urge their adoption.

⁷³ *Id.* at 59.

⁷⁴ *Id.*

⁷⁵ *Id.* at 79.