

The Authority of State Attorneys General and Their Efforts on 21st Century Policing

By Emily Myers and Ayeisha Cox

Several situations in 2015 and 2016 challenged the attorney general's role as representative of the state in litigation and his or her ability to determine when to seek judicial review, particularly in connection with policy issues that are being hotly debated. Additionally, attorneys general have the vital task of cooperatively enforcing state laws and promoting sound law enforcement policies. To that end, the second half of this article covers police body-worn cameras as part of a national AG initiative on 21st century policing.

The Authority of State Attorneys General to Control State Litigation

The attorney general of a state is its chief law officer, with authority to represent, defend and enforce the legal interests of the state government and the public. Litigation on behalf of the state is one of the attorney general's primary duties. The attorney general is typically authorized, in either state statutes or the state constitution, to "appear for the state in all causes in the supreme and federal court wherein the state is directly interested, also in all civil cases of like nature in all other courts of the state whenever, in his opinion, the interests of the state require it."¹

In addition to this explicit authority to control the legal business of the state, in most states the attorney general has common law powers not specified by statute but long recognized by the courts. Although common law powers are defined differently in the states, they generally include "the right to institute, conduct and maintain all suits necessary for the enforcement of the laws of the State, preservation of order and the protection of public rights."²

Several recent situations have challenged the attorney general's role as representative of the state in litigation and his or her ability to determine when to seek judicial review. These issues have arisen in connection with policy issues that are being hotly debated throughout the country. In some cases, the governor or the legislature disagreed with the attorney general's decision to file suit in a particular case. In other cases, the governor or legislature wanted the attorney general to file suit and the attorney general declined to do so. In each of these circumstances, the question of who represents the state was raised, and in each case, the attorney general's authority was confirmed.

In the most recent instance, Colorado Attorney General Cynthia Coffman filed three federal lawsuits against the federal government that the governor did not support, challenging rules promulgated by the U.S. Department of the Interior and the Environmental Protection Agency. The governor filed a petition in the Colorado Supreme Court, seeking a ruling on the authority of the attorney general to sue the federal government without the consent of the governor. Colorado statutes state that the attorney general "shall appear for the state and prosecute and defend all actions and proceedings, civil and criminal, in which the state is a party or is interested when required to do so by the governor." Gov. John Hickenlooper argued that the governor is the supreme executive of the state and that his decision is therefore binding on the attorney general; that the language of the statute limited the attorney general's authority to sue to situations in which the governor requested her to do so; and that by undertaking these lawsuits against his wishes, the attorney general created a conflict of interest that prevents her from advising the governor on issues involved in the cases.

The attorney general argued that an earlier decision by the Colorado Supreme Court, involving a similar situation, had already established that the executive power of Colorado is intentionally diffused, rather than hierarchical, as the governor argued; that the Colorado attorney general, in addition to powers conferred by statute, has common law powers which have not been specifically repealed by any statute; and that, "the Attorney General must consider the broader institutional concerns of the state even though these concerns are not shared by an individual agency or officer." The attorney general noted that in prior cases where the governor had disagreed with the attorney general, he had filed an amicus brief expressing his views as governor.

Although it did not address any of these arguments specifically, the court, citing its prior decision, held that the governor had an “adequate alternative remedy” and denied the governor’s petition.³

Other state officials also have tested the authority of an attorney general to decline to challenge legislation. In Indiana, several parties challenged the constitutionality of an Indiana statute addressing enforcement of immigration laws. The attorney general represented the state and the case had already begun when the U.S. Supreme Court issued a decision striking down an Arizona statutory provision identical to one in the Indiana litigation. The attorney general acknowledged that the Indiana statutory provision was unconstitutional, and stated that the provision “will not be defended and a ruling by this Court to that effect will be accepted.” Although the attorney general continued to defend other provisions of the state law, three state senators sought to intervene in the case to defend the statutory provision that the attorney general declined to defend.

The court cited longstanding Indiana case law under which the attorney general “has exclusive power and right in most instances to represent the State, its agencies and officers, and the agencies and officers may not hire outside counsel unless the Attorney General has consented in writing.” The court declined to allow the intervention, because “allowing the three individual legislators to intervene here in their official capacities as State Senators not only would conflict with this well-settled state law, but would provide the legislators a trump card with respect to the Attorney General’s statutorily derived discretion in this context.”⁴

In another case involving the decision of an attorney general not to challenge a statute, the New Hampshire Senate enacted HB 89, a bill which “requir[ed] the Attorney General to join the lawsuit challenging the Patient Protection and Affordable Care Act.” The state Supreme Court held that HB 89 was unconstitutional because it violated the separation of powers doctrine in the New Hampshire Constitution, which provides, “In the government of this state, the three essential powers thereof, to wit, the legislative, executive and judicial, ought to be kept as separate from, and independent of, each other as the nature of free government will admit.” Citing previous decisions, the court held that “the New Hampshire Separation of Powers clause is violated when one branch usurps an essential power of another.” Reviewing the history of the state’s constitution, the court concluded that

the constitution gives “the executive the exclusive power to enforce the law” and made the executive responsible for “initiating civil actions on behalf of the State ... The executive branch alone has the power to decide the State’s interest in litigation.” The court did not agree with the legislature that this statute was an exercise of the legislature’s power “to set forth the several duties, powers and limits, of the several civil and military officers of this state....” Rather, the court stated, “In mandating this action—to join a specific lawsuit on a particular side—the legislature would exceed its authority to prescribe the duties of the attorney general. In so doing, it would deprive the executive of its essential power to determine the State’s interest in civil litigation.” The court also dismissed the legislature’s argument that the filing of this case was a political, rather than a legal, decision. The court stated, “It is the executive, not the legislative branch, in which the constitution vests the power to determine the State’s interest in any litigation.”⁵

The attorney general’s authority to control litigation filed on behalf of the state will undoubtedly be tested and affirmed around the country as new public policy debates arise.

The Pros and Cons of Police Body-Worn Cameras

“To Protect and Serve with 21st Century Policing” is the National Association of Attorneys General 2015–16 presidential initiative. Its goal is to offer the latest approaches, processes and possible solutions in such areas as community protection and involvement, officer-involved shootings and campus sexual assaults. This section focuses on police body-worn cameras, or BWCs.

Police body-worn cameras have gained public interest in recent years in response to demands for more transparency in allegations of police brutality.⁶ As a result, states and municipalities have begun integrating BWCs into law enforcement policies.⁷ A 2014 Accenture survey found that 8 out of 10 Americans believed the “expanded use of new and advanced digital tools would improve police services.”⁸ Use of BWCs has support from organizations such as the American Civil Liberties Union, known as the ACLU. The ACLU supports BWC policies that ensure the public privacy of citizens, while at the same time maintain public confidence in the integrity of those privacy protections.⁹

The implementation of BWCs will provide for more accountability and transparency. However, BWCs are not a panacea. The sustainability and

long-term utility of BWCs is uncertain. This article explores the benefits and negative effects of implementing BWCs, and addresses actions that federal government and state attorneys general have taken to implement BWC programs.

Implementing Policies

Police departments have discretion in implementing their own BWC policies. A successful BWC program will take into consideration the benefits and negatives of BWCs, with the overall goal of reducing police use-of-force incidents and false police brutality complaints. The following are issues to consider when implementing BWC policies.

Police departments may or may not be required to release videos. Because of the enormous volume of data compiled by jurisdictions using BWCs, this is posing a special problem for those states who would otherwise release the videos. A number of states are in the process of considering legislative responses to dealing with this problem of having to balance compliance with existing laws with the extraordinarily huge administrative burden of cataloging and archiving hundreds of thousands of hours of videos. Additionally, many states' open record laws are subject to the "ongoing investigation" exemption. This exemption has been used on numerous occasions to withhold BWC videos of high public interest.

Benefits of Body-Worn Camera Programs

Overall, studies show law enforcement has become more accountable and professional from the use of BWCs.¹⁰ Offices that have been experimenting with BWCs for the past five years have reported significant reductions in officer complaints.¹¹ The most obvious benefit of BWCs is the reduction of police brutality and abuse of power. A Rialto study examined BWCs from February 2012 to July 2013 in Rialto, Calif.¹² It revealed that shifts where officers were not equipped with BWCs had twice as many incidents of force as shifts where officers were equipped.¹³ A separate experiment in Mesa, Ariz., revealed similar results, with a 12 percent decline in use-of-force incidents and a 23 percent decline in citizen complaints against officers.¹⁴

Not only have police officers' behavior improved when using BWCs, but research also suggests members of the community who interact with law enforcement have exhibited better behavior when a camera is present.¹⁵ Police officers are deterred from using inappropriate, aggressive conduct and civilians are also deterred from inappropriate behavior.

Footage from BWCs will provide concrete, solid evidence, which is crucial for prosecutors.¹⁶ They will be helpful in resolving factual disputes between police officers and members of the community.¹⁷ Footage also can be used to train young officers on tactical mistakes and how to improve responses.¹⁸

Negative Effects of Body-Worn Camera Programs

One major concern for law enforcement is the cost of BWCs. Prices range depending on the capability to meet law enforcement's needs and can cost up to \$1,000 per camera.¹⁹ Costs include the initial purchase of cameras and costs of implementation. For law enforcement offices that struggle with low budgets, the initial costs may be easily absorbed. However, the costs to implement the cameras and store data may become a significant burden.²⁰ Policies must include a plan to store data for a certain amount of time, which can be difficult to assess.²¹

Creating policies for when to start and stop recording will be challenging. There are costs involved in reviewing footage. Law enforcement must spend hours reviewing, or hiring personnel to review, hours of footage from each officer patrolling each day.²² Video recordings present additional concerns for prosecutors. Prosecutors have ethical requirements to turn evidence over to the defense. This puts pressure on prosecutors to timely review the video recordings, which can come from different law enforcement agencies that may use different equipment and methods.²³ Prosecutors may need to redact and cut information from the recordings and have discretion to consider what is useful.²⁴

Privacy issues are also a concern. Anonymity is a useful tool for law enforcement to investigate various crimes.²⁵ Tips and leads come from informants and witnesses who wish to remain anonymous for protection, and the use of cameras may deter citizens from reporting crimes and helping during investigations.²⁶ There is an expectation of privacy in certain settings and the use of BWCs has the potential to violate that privacy.²⁷

BWCs are not a panacea for accountability of police officers. Recordings are beneficial, but they do not amount to the high effectiveness of the human eye.²⁸ Footage will not be captured at all times and from the officer's peripheral vision.²⁹ BWCs may also result in community members having high expectations in the accountability of law enforcement officers. Jurors may expect footage to be used in trial, and may cause jurors to be impartial if footage is not available.

Federal Government Action

In September 2015, U.S. Attorney General Loretta Lynch announced that the U.S. Justice Department would award \$23 million to help local agencies fund 50,000 BWCs and study their impact.³⁰ Agencies awarded grants will be responsible for purchasing equipment and developing policies to improve transparency and accountability. Policies must implement a plan for long-term storage of data. The pilot program will allocate \$19.3 million to purchase body-worn cameras, \$2 million for training and technical assistance, and \$1.9 million to study the impact of the use of body-worn cameras.

The Bureau of Justice Assistance's Smart Policing Initiative also awarded grants to law enforcement in Miami, Milwaukee and Phoenix to study the impact of BWCs.³¹ To assist local police departments, the Bureau launched an online toolkit to help police departments implement successful practices and policies for BWCs.³²

State Actions

Attorney general offices in Maine and Ohio started BWC program discussions and drafting model policies. Washington Attorney General Bob Ferguson issued an opinion in 2014 addressing some of the issues surrounding BWCs.³³

Delaware

In September 2015, Delaware Gov. Jack Markell launched a 30–45 day pilot program to deploy body cameras to various law enforcement agencies across the state.³⁴

Missouri

In 2014, Missouri Attorney General Chris Koster recommended statutory changes to the law at the Roundtable on Representative Policing. One of the recommendations was to implement body-worn police cameras on law enforcement officers while on active patrol duty.³⁵

New Jersey

New Jersey recently provided state funding for police BWCs. New Jersey Acting Attorney General John Hoffman issued a directive to law enforcement personnel in July 2015.³⁶ The directive served as guidance for New Jersey law enforcement personnel on the use of BWCs. The directive instructed law enforcement agencies to have policies that 1) require BWCs be activated only while on performance of duties, 2) require footage be retained for no less than 90 days with extension of retaining

records for certain investigations and complaints, and 3) state the circumstances under which requests for footage can be denied.³⁷

Conclusion

BWCs are largely beneficial in establishing better relations and trust between law enforcement and local communities. However, BWCs are not a panacea and policies should reflect the limitations of implementing BWC programs.

Notes

¹ Minn. Stat. §8.01.

² *Hood ex rel. Mississippi v. AstraZeneca Pharms. L.P.*, 744 F. Supp. 2d 390, 395, N.D. Miss. 2010).

³ In re: *Hickenlooper v. Coffman*, No. 2015SA296 (Colo. Dec. 3, 2015).

⁴ *Buquer v. City of Indianapolis*, 2013 WL 1332137 (S.D. Ind. Mar. 28, 2013).

⁵ *Opinion of the Justices (Requiring Attorney General to Join Suit)*, No. 2011-319 (N.H., June 15, 2011).

⁶ Maciag, Mike. *What We Can Learn From the Police That Pioneered Body Cameras. Governing the States and Localities*, April 13, 2015. Available at <http://www.governing.com/topics/public-justice-safety/gov-body-cameras-chesa-peake-virginia.html>.

⁷ For example, the District of Columbia recently passed legislation to allow officers to review footage before writing a police report. Stein, Perry. *Should Officers Be Able to Review Body Camera Footage Before Writing Police Reports?*, available at https://www.washingtonpost.com/news/local/wp/2015/12/17/should-officers-be-able-to-review-body-camera-footage-before-writing-police-reports/?hpid=hp_no-name_hp-in-the-news%3Apage%2Fin-the-news (last visited Feb. 5, 2016).

⁸ *Eight out of 10 Citizens Believe More Digital Tools Can Improve Police Services, According to New Research by Accenture*. <http://newsroom.accenture.com/news/eight-out-of-10-citizens-believe-more-digital-tools-can-improve-police-services-according-to-new-research-by-accenture.htm> (last visited Feb. 2, 2016).

⁹ <https://www.aclu.org/police-body-mounted-cameras-right-policies-place-win-all>.

¹⁰ Feeney, Matthew. *Watching the Watchmen. Best Practices for Police Body Cameras*, Oct. 27, 2015. Available at <http://www.cato.org/publications/policy-analysis/watching-watchmen-best-practices-police-body-cameras>.

¹¹ *Id.*

¹² Simmons, Kami. *Body-Mounted Police Cameras: A Primer on Police Accountability vs. Privacy*. 58 HOWARD L.J. 881, 885 (2015).

¹³ *Id.*

¹⁴ *Id.* at 886.

¹⁵ *Supra* n. 5.

¹⁶ *Body-Worn Cameras by Police Officers—A Prosecutor's Perspective: Hearing Before the Subcomm. on Crime and Terrorism of the Sen. Comm. on the Judiciary*, 114th Cong. (2015) (testimony of Peter A. Weir, Dist. Atty.).

¹⁷ *Id.*

¹⁸ Harris, Meena. See “Looking at Police-Community Relations Through the Lens of Body-Worn Cameras.” *The National Law Review*, Dec. 19, 2014. Available at <http://www.natlawreview.com/article/looking-police-community-relations-through-lens-body-worn-cameras>.

¹⁹ Merzon, Antonia. *The Colorado Best Practices Committee for Prosecutors Presents Body Worn Cameras: A Report for Law Enforcement*, p.5. (2015). Prices range from \$119.95 to \$1,000 per camera.

²⁰ Sallee, Vern, *Outsourcing the Evidence Room: Moving Digital Evidence to the Cloud*. http://www.policiechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=3319&issue_id=42014 (last visited Jan. 21, 2016).

²¹ *Id.*

²² Jackson, Jodie, *Police Body Camera Footage Increases Workload, Prosecutor Says*, Oct. 28, 2014. Available at http://www.columbiatribune.com/news/local/police-body-camera-footage-increases-workload-prosecutor-says/article_d8c948c9-ec63-58cf-a148-5717c65015fd.html (last visited Jan. 5, 2016).

²³ Cohen, Kay. *The Impact of Body-Worn Cameras on a Prosecutor*. <https://www.bjatraining.org/media/blog/impact-body-worn-cameras-prosecutor> (last visited Jan. 21, 2016).

²⁴ Prosecutors will have to review recordings marked by police officers and decide what is most useful for their case. *Id.*

²⁵ Letourneau, Dru. Note, *Police Body Cameras: Implementation with Caution, Forethought, and Policy*. 50 U. RICH. L. Rev. 469, 456 (2015).

²⁶ *Id.* Cameras may have a chilling effect on witness and informants.

²⁷ *Id.* at 453.

²⁸ Finnemore, Melody. *High-Tech: Electronic Evidence from a Broadening Array of Sources is Creating a Sea Change for Police, Prosecutors and Defense Attorneys*. 76 OR. ST. B. BULL. 26, 28. (2015). Challenges such as poor lighting or jumble during physical activity affect quality of the footage.

²⁹ Circumstances may occur where it is difficult for an officer to turn the camera on. *Id.*

³⁰ *Justice Department Awards over \$23 Million in Funding for Body-Worn Camera Pilot Program to Support Law Enforcement Agencies in 32 States*, Sept., 21, 2015. Available at <http://www.justice.gov/opa/pr/justice-department-awards-over-23-million-funding-body-worn-camera-pilot-program-support-law>.

³¹ *Id.*

³² *Id.* Toolkit is available at <https://www.bja.gov/bwc/>.

³³ Video and Audio Recording of Communications Between Citizens and Law Enforcement Officers Using Body Cameras Attached to Police Uniforms, WA AGO 2014 No. 8.

³⁴ *State Announcing Pilot Program for Police Body Cameras*. Available at <http://news.delaware.gov/2015/09/23/state-announces-pilot-program-for-police-body-cameras/>. (last visited Jan. 5, 2016).

³⁵ *Attorney General Koster's Roundtable on Representative Policing*. Recommendation No. 1, p.2, Oct. 1, 2014. Available at <https://ago.mo.gov/docs/default-source/press-releases/2015/agkoster-roundtablerepresentativepolicingreport.pdf?sfvrsn=4>.

³⁶ *Law Enforcement Directive Regarding Police Body Worn Cameras (BWCs) and Stored BWC Recordings*, July 28, 2015. Directive No. 2015-1.

³⁷ *Id.*

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