

**THE WAR ON POLICE: HOW THE
FEDERAL GOVERNMENT UNDERMINES
STATE AND LOCAL LAW ENFORCEMENT**

HEARING
BEFORE THE
SUBCOMMITTEE ON OVERSIGHT, AGENCY
ACTION, FEDERAL RIGHTS
AND FEDERAL COURTS
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THE WAR ON POLICE: HOW THE FEDERAL GOVERNMENT UNDERMINES STATE AND LOCAL LAW ENFORCEMENT

TUESDAY, NOVEMBER 17, 2015

UNITED STATES SENATE,
SUBCOMMITTEE ON OVERSIGHT, AGENCY ACTION,
FEDERAL RIGHTS, AND FEDERAL COURTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:24 p.m., in Room 226, Dirksen Senate Office Building, Hon. Ted Cruz, Chairman of the Subcommittee, presiding.

Present: Senators Cruz [presiding], Sessions, Lee, Coons, Durbin, Whitehouse, Klobuchar, and Blumenthal.

OPENING STATEMENT OF HON. TED CRUZ, A U.S. SENATOR FROM THE STATE OF TEXAS

Chairman CRUZ. This hearing will come to order. Welcome to everyone here. Welcome to the witnesses in the first panel, and welcome to those who have come to participate in this hearing.

The purpose of this hearing is to look at the challenges facing the brave men and women of law enforcement. A great many of us have been growing more and more concerned at seeing police officers the subject of public vilification, seeing police officers being undermined, and hearing from police officers across this country that they are less and less able to do their jobs, that they feel their hands are tied, that they are scared if they engage in proactive policing in the community to keep the community safe that they risk being personally hung out to dry, that they risk seeing their careers, their livelihoods destroyed, that they risk seeing their family held up for public condemnation.

And, sadly, the consequences of this are significant. The men and women of law enforcement risk their life each and every day. Police officers go into dangerous neighborhoods with criminals, and every day they are taking a risk that their life may be lost protecting the community.

If the police are intimidated, if they are scared, if they are not willing to do their jobs, we know the result. The result is the loss of life. The result is rising crime.

Some recent headlines underscore the consequences of this. Just 3 days ago, the Washington Post reported that homicides have risen in several U.S. cities this year. This, quote, “dramatic surge in killings” has been confirmed as well by media outlets as diverse

as USA Today, National Review, The Economist, the New York Times, and the Wall Street Journal.

Indeed, here in the Nation's Capitol, according to the Washington Post, there have been 143 homicides so far this year. That is 53 more homicides than at the same point last year.

Nearby, Baltimore has suffered even worse. Baltimore has now suffered over 300 homicides this year. This gruesome milestone, the Washington Post lamented, resembles the violence Baltimore experienced decades ago.

Similar homicide statistics can be found in Milwaukee, in St. Louis, in New Orleans, in Chicago, in cities across the country. And of a great deal of concern to law enforcement. The number of law enforcement officers killed through acts of violence had been on a precipitous upswing, according to The Hill, in an article published this past May. Specifically, the officers killed in 2014 was nearly double those killed in 2013.

James Comey, the current Director of the Federal Bureau of Investigation, has been vocal about his concerns over crime trends. Director Comey has expressed the view that excessive, unjust scrutiny of State and local law enforcement may be contributing to this trend.

Now, everyone here agreed that we should enforce the law and we should vigorously enforce America's civil rights laws. In any government organization, there can be bad actors. In any large group of people, there can be individuals who choose to violate the law. And anyone who chooses to violate the law should be held accountable.

But in my view, it is deeply harmful not only for the men and women of law enforcement but for the safety of the American people for the Federal Government to treat police officers as the enemy, for the President or the Attorney General to be holding up police officers for vilification.

I will say I was particularly disappointed last year when President Obama nominated an individual to serve as the head of the Civil Rights Division who had previously represented an admitted cop killer—and had not just represented him but had represented him pro bono, for free, and had lionized and celebrated this cop killer.

Now, every individual in a criminal proceeding is entitled to representation, but those that you go out of the way to volunteer your time for for free and those who you lionize and celebrate reveal a great deal about your beliefs and where you stand.

I would note I was planned—proud to stand with others, including Pennsylvania Senator Pat Toomey, in helping lead the fight against confirming that nominee to the Justice Department. And it is worth noting that even with a Democrat Senate, even under the leadership of then-Majority Leader Harry Reid, the Senate refused to confirm that nominee as a number of Democrats joined the Republicans in saying we should not have a senior official in the Justice Department be an individual who has chosen to celebrate and lionize a murderer who has murdered police officers.

It was a few months ago that I attended the funeral in my hometown of Houston for Deputy Goforth. Deputy Goforth was shot at a gas station in an act of violence that I believe was a manifesta-

tion of the growing antipathy directed at law enforcement. And I will note that funeral service was an incredible and powerful funeral service. It was held at Second Baptist Church in Houston. Dr. Ed Young provided the eulogy. It was an incredible sight to sit in the sanctuary and to see thousands upon thousands of police officers filling that sanctuary. Everywhere you could see were men and women dressed in blue, in their dress uniforms there to honor that fallen officer.

Dr. Young in the eulogy powerfully observed that in the Old Testament, the Levites, the priests, wore blue. And he drew from the Lord's Prayer to describe the core mission of police and, indeed, in particular, one—one phrase in the Lord's Prayer, "Deliver us from evil," which Dr. Young rightly observed, if he were to sum up the mission statement of a police officer, it would be difficult to do so more effectively or more succinctly than "deliver us from evil."

I believe every one of us, Republican and Democrat, should stand unequivocally with the brave men and women of law enforcement. I do not believe it is beneficial for this country to have a culture where the men and women of law enforcement feel under siege.

I will note there was a seminal moment in this country when the members of the NYPD stood and turned their back on Mayor de Blasio. That was a moment I believe penetrated to the heart of millions of Americans. What on Earth are we doing when senior Government officials are treating the police officers as the bad guys?

This hearing is to discuss the challenges facing police officers, the degree to which they have been vilified publicly, and the consequences we are facing in terms of innocent men and women facing crime, facing murder, lives that have been lost because the police have been unable to do their job. And I appreciate everyone for being here for this hearing. I recognize Senator Coons.

**OPENING STATEMENT OF HON. CHRISTOPHER A. COONS,
A U.S. SENATOR FROM THE STATE OF DELAWARE**

Senator COONS. Thank you, Chairman Cruz, and thank you for the opportunity today to discuss the core issue of how it is that we can simultaneously honor and respect the constitutional rights, the civil liberties, the civil rights that are the very foundation of our constitutional order while still securing peace and safety, how it is that the law enforcement officers with whom I had the honor of serving in county government for a decade can meet their call to not just, as has been put, "deliver us from evil," but to actually protect and serve.

While I do think we have an important topic before us today, the title of the hearing, quote, "The War on Police" unquote, reflects unfortunately, I think, more overheated rhetoric, all too common in Congress when discussing complex policy matters rather than any on-the-ground reality. And it is belied by the fact that there are no law enforcement leaders testifying today, despite there being more than 17,000 law enforcement agencies in the United States, in support of the proposition that there exists a war on police being waged by the Federal Government. In fact, we will hear from two chiefs of police to the opposite.

My hope is that today's hearing can be an opportunity to have a constructive, broader discussion about public safety in our Nation

and the critical need for meaningful support from the Federal Government for State and local law enforcement and for the vigorous and appropriate enforcement of civil rights.

When I first arrived in the Senate in November 2011, I looked through the very long list of caucuses already in existence and discovered none of them was dedicated to the issues of law enforcement. So, I was pleased to join with Republican Senator Blunt of Missouri and establish the Law Enforcement Caucus, which continues on a bipartisan basis to meaningfully educate Members and staff on the real issues facing State and local law enforcement and their relationship with the Federal Government and to advocate for the brave men and women of law enforcement.

I am pleased our caucus includes a strongly bipartisan group of 26 Senators—14 Democrats and 12 Republicans—and will invite the Chair, should he be so inclined, to join us at some point. Together we work to ensure State and local law enforcement has a voice in Congress as we honor our commitment to public safety by supporting programs like the COPS Hiring Program and the Byrne Justice Assistance Grant.

One of our first events as a caucus in May 2012 discussed the Bulletproof Vest Partnership, a program which has literally saved the lives of over 3,000 law enforcement officers, including two in the New Castle County courthouse in my home town of Wilmington. I was honored to work with the champion of the legislation to reauthorize this program, Ranking Member Leahy. We have also held events that focus on the resources shared between Federal, State, and local law enforcement, such as Regional Information Sharing Services, funded by the Department of Justice, that provides critical equipment and specialized services that local law enforcement needs but most often can't afford.

I think these are the sorts of meaningful actions to really support law enforcement that we could and should be discussing today. So, at this time, I would like to enter into the record 11 letters, all bipartisan, which have represented the strong and continued interest by many Senators, myself include, in supporting Federal programs critical to the success of State and local law enforcement.

[The information appears as a submission for the record.]

Senator COONS. More recently, 4 weeks ago we welcome law enforcement leaders from Delaware and Missouri to a Law Enforcement Caucus event as they discussed their work improving the relationship between law enforcement and the communities they serve. It was a productive conversation that highlighted the successes and challenges in implementing modern community policing programs.

Which brings us to our topic today: the need to protect the civil liberties and constitutional rights of every American while providing the public safety services that are the core responsibility of Government. We cannot choose between these objectives. We must work to achieve both.

The role of the Department of Justice is both to support State and local law enforcement and protect the constitutional rights of every American, which sometimes requires intervention. The statute enforced by the Civil Rights Division, Section 14141, was enacted in 1994 as part of the Violent Crime Control Act and was in-

spired by national outrage over the beating of Rodney King in Los Angeles after a high-speed car chase. This provision ensures there can be no pattern or practice that deprives any of our constituents of the rights, privileges, and immunities secured under the Constitution. The idea that enforcement of this statute, which literally cribs from, is drawn from our foundational documents, represents somehow a war on police is, I think, contrary to our ideals as a Nation.

Of course, implementation of any statute, including this important one, requires effort and oversight, so I welcome the testimony of Ms. Gupta, and I look forward—and I look forward to exploring with her how we can work together to further advance the twin goals of public safety and civil rights.

We are aided in this effort by recent reporting, as the Chairman referenced, from the Washington Post and the PBS series “Frontline” in their joint investigation of police departments that have undergone reforms, and I will share just one of many case studies that I think are illustrative.

The Justice Department launched investigations of the Prince Georges County Police Department after dogs in its K-9 unit inflicted 800 bites over 7 years, and there were 47 officer-involved shootings resulting in death. The reforms the Justice Department required included provisions that supervisors approve the use of police dogs and that a board be established to review officer-involved shootings.

PG County Chief of Police, Mark Magaw, a department veteran, was recently quoted in this very article saying, quote, “It was a painful time, there is no question about it. But both of these agreements have made us better as a police agency hands down.” The article then notes the number of complaints to the NAACP regarding excessive police force have been reduced dramatically from nearly 15 calls a month to just 1 or 2.

I would also suggest to anyone watching at home and to the Chairman and Members of this Committee they might read a helpful report that just came out of a summit organized by the Police Executive Research Forum, or PERF, entitled “Civil Rights Investigations of Local Police: Lessons Learned.” The summit included police representatives from agencies all over this country, and I ask that that full report be included in this hearing record.

[The information appears as a submission for the record.]

Senator COONS. The report points specifically to the new Collaborative Reform Initiative from the COPS Office, and I look forward to hearing Chief Davis’ testimony on the state of that initiative today. I will briefly share one story from that instructive report.

The Las Vegas Review Journal published a series of articles on officer-involved shootings by the Las Vegas Metropolitan Police and raised questions about accountability. In response to those articles, then-COPS Office Director Bernard Melekian contacted Sheriff Doug Gillespie and offered the assistance of the COPS Office in developing reforms, in policy and procedures, training and tactics, investigation and documentation. Sheriff Gillespie sent a team of his executive command leaders to Washington to meet with the COPS Office and its leaders and to discuss the proposal. They reached an agreement, and 10 months later, in November 2012, the COPS Of-

fice released a full report detailing its findings, and I think all engaged have concluded this was a constructive and positive advance in both policing and civil rights.

As the most visible form of Government, law enforcement officers are at the front line of our responsibility to safeguard constitutional rights while ensuring public safety. It is unsurprising they are held to a very high standard given the tremendous responsibility we empower them with in our constitutional order. It is also why I believe when certain commentators talk about a so-called Ferguson effect with no evidentiary support, it is insulting to the brave men and women who do get out of their cars, who do put themselves on the line each and every day to protect communities across this country. I am not alone in that sentiment, and I might close with a quote from one of law enforcement's most important voices, a recent statement by national president of the Fraternal Order of Police, Chuck Canterbury, who, in response to comments by FBI Director Comey, stated:

"First, in rejecting FBI Director Comey's claim that when politicians use their police to deal with years of inequities and urban blight and do nothing to try and build a better life for their citizens, then it is these politicians and not the police who have failed their citizens. Law enforcement is generally left to deal with all the issues that other parts of government tend to avoid."

And a closing quote, if I might, from FOP President Canterbury: "Police officers have not been chilled and have not stopped responding to calls, especially high-priority calls that involve violence. This is evidenced by the fact 32 officers have been killed by firearms in the line of duty already this year. Officers who are killed or injured in the line of duty do not speak to a lack of engagement. It shows real engagement."

With that in mind, I would like to thank all of the witnesses from both panels for their time today and my colleagues for their interest in working together to support State and local law enforcement. Thank you, Mr. Chairman.

Chairman CRUZ. Thank you, Senator Coons.

I would now like to introduce our first two witnesses. Ms. Vanita Gupta currently serves at the Department of Justice as the Principal Deputy Assistant Attorney General and the head of the Civil Rights Division. A graduate of Yale and New York University School of Law, Ms. Gupta has previously worked for both the NAACP and the ACLU while also serving as an adjunct clinical professor.

And Mr. Ronald Davis is also with the Department of Justice. He serves as the Director of the DOJ's Community Oriented Policing Services, COPS Office, and he is also the Executive Director of the President's Task Force on 21st Century Policing. A graduate of Southern Illinois, Mr. Davis has a lengthy and distinguished law enforcement career in California before joining the Department of Justice.

I would ask each of the witnesses to please rise and raise your right hand. Do you affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. GUPTA. I do.

Mr. DAVIS. I do.

[Witnesses are sworn in.]

Chairman CRUZ. Thank you. Ms. Gupta, you may begin.

**STATEMENT OF VANITA GUPTA, PRINCIPAL
DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL
RIGHTS DIVISION, U.S. DEPARTMENT OF
JUSTICE, WASHINGTON, DC**

Ms. GUPTA. Chairman Cruz, Ranking Member Coons, and distinguished Members of the Committee, good afternoon. Thank you for the opportunity to participate in today's hearing and to share with you the Justice Department's efforts to support State and local law enforcement and to promote constitutional policing and public safety.

Our Nation is in the midst of an important conversation about policing and the relationship between law enforcement agencies and the communities they serve. As part of this conversation, we must all recognize the dedication and bravery of America's law enforcement officers. They put themselves in harm's way every day to keep the rest of us safe.

We must also recognize the pain in communities subjected to excessive force, discriminatory policing, or other misconduct. We are committed to working together to restore trust between law enforcement officers and community members where it has eroded.

We all want the same things: safe streets, officers who come home safely every night, and the protection of the rights of all people to be treated fairly and justly. We want thriving communities in which residents and law enforcement officers work hand in hand to ensure peace and safety. Mistrust between police and citizens, however, breaks down collaboration. It impedes the sharing of information, and it leads to less effective policing. This is dangerous for everyone—for residents and officers alike.

The Justice Department is committed to supporting State and local law enforcement and to strengthening local communities through funding for more officers and vital equipment, through training and research, and at times through the investigation of misconduct. Let no one mistake this. The overwhelming majority of women and men who police our streets do their jobs with honor, pride, and distinction. They are driven to the police academy out of a commitment to public service and a desire to make an impact in their communities. And as several recent assassinations of police officers remind us, they do all of this at considerable risk to themselves.

Moreover, the vast majority of law enforcement agencies police their communities professionally, successfully, and within the bounds of the law. As Congress has recognized, however, there are times when the federal government has a role to play in protecting Americans' constitutional rights. The Department's Civil Rights Division has long-standing authority to investigate individual officers for criminal violations of constitutional rights. And in carrying out this mandate, we are committed to impartial, fact-driven investigations. This means pursuing criminal charges when the evidence supports them and closing cases when they do not.

In addition, Congress in 1994 charged the Division with the responsibility to investigate law enforcement agencies for a pattern or practice of conduct that violates the Constitution or Federal statutes and to develop remedies to eliminate such misconduct where it is found.

During the last 20 years, we have incorporated lessons learned into our work and continually strive to achieve constitutional policing and promote public safety in the most effective and collaborative manner possible.

As part of these civil investigations, we speak directly with line officers and learn firsthand what challenges they face in their jobs and on the streets and what changes they think are necessary. They report often a lack of adequate support, training, and even equipment to keep themselves and their communities safe. And the truth is really that we ask more of our police officers than anyone can reasonably expect. Daily, they encounter people in crisis, people struggling with mental illness, alcohol and drug addiction, anger management problems, all social problems that they never envisioned consuming up so much of their time.

In pursuing remedies then, we aim to ensure that officers receive the equipment, the tools, the specialized training that they need to do their jobs consistent with the Constitution and the law. And we also strive to provide them with critically important professional support to cope with the stress and trauma that they encounter on the job.

The remedies that we seek—clearer policy, modernized data systems, better training, closer supervision, fairer accountability mechanisms, and more positive community engagement—are substantially informed by the input of policing experts and the work of professional police organizations, such as the Police Executive Research Forum, the International Association of Chiefs of Police, and the Major Cities Chiefs Association. And I routinely engage with these groups and others, such as the Fraternal Order of Police, the National Association of Police Organizations, and the National Sheriffs Association to ensure that we take into account their expertise and their experiences.

And informed by these perspectives and the perspectives of the community, the Civil Rights Division's reform agreements are helping to reduce unnecessary force, ensure bias-free policing, enhance public safety efforts, and strengthen the relationship between police departments and the communities they serve. From Portland, Oregon, to East Haven, Connecticut, from Seattle to Missoula, we are seeing meaningful change in building trust.

Thank you for the opportunity to discuss this important work at this very critical moment. I look forward to answering your questions.

[The prepared statement of Ms. Gupta appears as a submission for the record.]

Chairman CRUZ. Thank you, Ms. Gupta. Mr. Davis.

**STATEMENT OF RONALD L. DAVIS, DIRECTOR,
OFFICE OF COMMUNITY ORIENTED POLICING
SERVICES, U.S. DEPARTMENT OF JUSTICE,
WASHINGTON, DC**

Mr. DAVIS. Thank you, Senator. Good afternoon, Chairman Cruz, Ranking Member Coons, and distinguished Members of the Committee. Thank you for this opportunity to discuss the many ways in which the Department of Justice is providing valuable support and resources to the Nation's 800,000 law enforcement officers in the more than 16,000 local, State, and Tribe—Tribal police agencies and sheriffs' offices across the country.

I come to you today not just as the Director of the Department's Office of Community Oriented Policing Services, also known as COPS, but as one who has spent close to 30 years as a local police officer. I served 20 years in the Oakland Police Department, rising to the rank of captain, and close to 9 years as police chief for the city of East Palo Alto, California. For me, Senators, the decision to become a cop was a very easy one. I simply followed my father's footsteps, who served 25 years on the Philadelphia Police Department.

I can tell you as a 30-year, second-generation cop, there is no greater, more noble profession than policing, and I can also tell you without hesitation that the men and women who answer this calling are truly America's finest. As you can imagine the great satisfaction it brings me to lead the COPS Office and to work for the Justice Department, an agency that provides tremendous support to local, State, and Tribal law enforcement.

For example, since 2009, COPS has awarded over \$2 billion in hiring grants to create and preserve more than 10,000 police officer and deputy positions in nearly 2,600 law enforcement agencies across this country. For some agencies, providing funding for just one officer may mean the difference in having a full shift and making sure all officers have sufficient cover and safety.

COPS also supports the development of effective crime-fighting initiatives. As a former police chief, I have implemented several of these initiatives which contributed to dramatic reductions in murders in my city, a city that was once dubbed "the murder capital of the United States."

Over the past 20 years, COPS has been providing training to over 700,000 officers and deputies and supports valuable research, releasing publications on a wide range of issues from homeland security to reducing gang violence to building community trust to enhancing officer safety and wellness. These publications are extremely critical to the field because, as you know, most agencies have fewer than 50 officers and do not have the capacity to conduct this research on their own.

Just last month, COPS released two valuable research reports—one addressing ambush attacks against police, and another presenting models for protecting the physical and psychological health of police officers. These reports will enhance officer safety and save lives.

Through our executive session, COPS brings together the best and the brightest minds in the field to tackle issues such as crime and violence, preventing violent extremism, handling mass cas-

uality events, use of force, and officer safety. The information gleaned from these sessions is then distributed to the field.

Another way in which we help the field is through our COPS Collaborative Reform Initiative. At the law enforcement agencies' request, COPS examines key operational areas within an agency, such as training, internal investigations, use of force, and racial profiling, and provides recommendations that we believe will enhance community trust and public safety. The COPS Office then works closely with the agency in implementing these recommendations.

As was mentioned in the introduction, the Las Vegas Police Department was the first to complete this process, and we now have collaborative reform efforts under way in Spokane, Philadelphia, St. Louis County, Salinas, Calexico, and Fayetteville, with the latest coming last week from the Milwaukee police chief.

This voluntary process has received support from the Civil Rights Division and my esteemed colleague next to me, Ms. Vanita—Vanita Gupta. It is considered in some cases a viable option, when appropriate, over a pattern and practice investigation.

Through our cattle grants, COPS works with and supports the major law enforcement organizations in addressing key challenges facing law enforcement ranging from the use of force to animal cruelty to leadership development to mentoring and also safety and wellness. COPS also funds a critical response for technical assistance program that offers immediate real-time assistance to agencies dealing with major public safety incidences and crises.

For example, within days of the start of the mass demonstrations in Ferguson, COPS was able to connect regional police leaders with police executives with vast experience in dealing with similar issues. We have provided support to nearly a dozen agencies at their request and will continue to do so. And as with all COPS projects, the lessons learned from these cities are then shared with the over 16,000 law enforcement agencies throughout the United States.

This year, the COPS Office also served and provided administrative support to the President's Task Force on 21st Century Policing, a task force comprised of law enforcement and community leaders which issued 59 recommendations to help agencies and communities build trust and advance public safety.

While policing is primarily a local issue, it is clear the Federal Government has a critical role to play in helping our local law enforcement agencies respond to the challenges of policing in the 21st century. Under the leadership of President Obama and Attorney General Lynch, the Department of Justice has made supporting law enforcement one of the—one of the administration's top priorities. As a career police officer, I know firsthand just how important this support is, and I can say without hesitation that the men and women at the Justice Department make this their priority every day.

Thank you, Senators, and I look forward to your questions.

[The prepared statement of Mr. Davis appears as a submission for the record.]

Chairman CRUZ. Thank you very much, both of you, for coming and testifying here today.

On October 13th, I sent a letter to the Attorney General requesting some basic information about both the closed and the ongoing Civil Rights Division investigations of State and local law enforcement agencies, including municipal police departments. Yesterday, Monday, November 16th, the Department of Justice responded to that letter, and without objection, I will move both the letter and the response into the record.

[The information appears as a submission for the record.]

Chairman CRUZ. In response to our questions on this topic, the Department of Justice listed 16 State and local law enforcement agencies that have had investigations opened against them since January 1, 2011. Those agencies are the Albuquerque Police Department; the Baltimore Police Department; the Cleveland Division of Police; the Colorado City/Hilldale; Arizona, Marshals Office; the Evangeline Parish, Louisiana, Sheriff's Office; the Ferguson Police Department; the Los Angeles Sheriff's Department; the Meridian, Mississippi, Police Department; the Miami Police Department; the Missoula County Attorney's Office; the Missoula Police Department; the Newark Police Department; the Portland, Oregon, Police Bureau; the Seattle Police Department; the University of Montana Office of Public Safety, and the Ville Platte, Louisiana, Police Department. The letter also mentions that 9 of these 16 investigations have been closed via consent decree or settlements while 7 remain open.

Are there any additional open investigations against State or local law enforcement agencies currently in the Civil Rights Division?

Ms. GUPTA. No. The ones that we listed are the ones that are actively ongoing.

Chairman CRUZ. So, there are no additional investigations that are open?

Ms. GUPTA. No, not to my knowledge.

Chairman CRUZ. I want to turn for a moment to a case that has become known as the Danziger Bridge case. I suspect it is a case you are quite familiar with.

Ms. GUPTA. I am familiar with it, yes, Senator.

Chairman CRUZ. Can you summarize for this Committee the Department's conduct in the Danziger Bridge case?

Ms. GUPTA. Certainly, Senator, and first, thank you for the—for the question. The Danziger Bridge case involved significant prosecutorial misconduct that was found by the Office of Professional Responsibility at the Justice Department of two Assistant United States Attorneys who ultimately have now left the Department. And it is a case that is currently in ongoing litigation, and, therefore, I am not able to comment that much more in-depth about the matter. But it is a matter that obviously came to my attention as soon as I came into the building.

Chairman CRUZ. You know, I will note this began as an investigation to a shooting that occurred in Louisiana in the wake of Hurricane Katrina, but it has now produced two lengthy judicial opinions detailing what has been described as a widespread pattern of misconduct by the U.S. Department of Justice. Both the U.S. District Court for the Eastern District of Louisiana and the Fifth

Circuit Federal Court of Appeals have had the chance to review—review the facts underlying this case.

District Judge Kurt Engelhardt wrote a 129-page opinion chronicling what can be described as an unprecedented pattern of wrongdoing by the Department of Justice. Without objection, I am going to enter into the record both the district court opinion and the Fifth Circuit opinion in that case.

[The information appears as a submission for the record.]

Chairman CRUZ. The district court found that key attorneys in the U.S. Attorney's Office for the Eastern District of Louisiana and the Civil Rights Division were repeatedly posting online comments against the police officers who they were seeking to prosecute. They were doing so anonymously under pseudonyms, seeking to stoke up public anger and resentment directed at these police officers, agitating the potential jury pool.

One of these attorneys who was posting these anti-police online comments, as I understand it, was a Civil Rights Division attorney named Karla Dobinski. Ms. Dobinski's conduct at the Department of Justice was particularly astonishing given that her official responsibility was she was assigned to prevent the defendant police officers from having their public reputation smeared during the legal process.

It is more than a little astonishing that the lawyer charged with preventing the police officers from having their reputation smeared would be going online with an anonymous pseudonym smearing the reputation she was charged to protect. Is that conduct of which the Department is proud?

Ms. GUPTA. Senator, I share your view about the seriousness with which employee misconduct has to be taken at the Justice Department, and my understanding is that in light of the facts that emerged, that the Department's Office of Professional Responsibility conducted a thorough review of all three of the individuals of which you speak and concluded that two of the members of the United States Attorney's Office had indeed engaged in misconduct, but concluded after reviewing Ms. Dobinski's limited postings of what were absolutely ill-advised and inappropriate comments, that those did not rise to the level of misconduct.

The Civil Rights Division then reviewed the facts and circumstances pursuant to the law that governs our disciplinary procedures and processes and took appropriate action in light of that.

Chairman CRUZ. I will note that the Fifth Circuit described the Department of Justice's conduct as what could only be described as a, quote, "online 21st century carnival atmosphere." That is the Federal Court of Appeals describing the Department of Justice.

It went on to state that it was, quote, "beyond dispute" that, quote, "three supervisory level prosecutors committed misconduct in connection with the Danziger Bridge prosecution."

Do I understand correctly that Ms. Dobinski remains with the Department as a trial lawyer in the Civil Rights Division?

Ms. GUPTA. She remains with the Civil Rights Division. The Office of Professional Responsibility did conduct a thorough review of all three employees and found that Ms. Dobinski's actions, while, as I said, inappropriate and ill-advised, did not constitute misconduct, unlike the other two individuals.

Chairman CRUZ. Well, it seems both the Federal district court and the Federal court of appeals disagree with the Department in that regard. Senator Coons.

Senator COONS. Thank you, Chairman Cruz.

Let me just take us back, if I could, to the beginning of your testimony, Ms. Gupta, in which you began by observing that of the 800,000 law enforcement professionals in this country, I think the roughly, is it, 18,000 agencies at the State, local, and Tribal level, the overwhelming majority of law enforcement officers are honorable, dedicated, and carry out their public safety duties with exceptional quality and service. In fact, as the Chairman reviewed, you have had, I think, on average three cases per year since 2011 and have only seven open today out of 18,000 agencies. How many staff attorneys are there in the United States Department of Justice? How many attorneys are serving the whole country as part of the U.S. Department of Justice?

Ms. GUPTA. As part of the entire Department of Justice, there are over 100,000 professionals.

Senator COONS. Out of 100,000 professionals, how many of them are working for the Civil Rights Division, roughly?

Ms. GUPTA. Just under about 700.

Senator COONS. About 700. I will agree with you and with the Chairman that the conduct of the prosecutors in the Danziger Bridge case was absolutely outrageous, conduct unbecoming, inappropriate, and there have been sanctions taken by the Office of Professional Responsibility. But it is no more accurate to describe the entire Department of Justice or the entire Civil Rights Division as being out of control or outrageous or engaged in misconduct than it is to incorrectly smear the entire law enforcement community nationally because of a few isolated instances of misconduct.

In fact, Ms. Gupta, I have been struck by the depth of your support from national law enforcement organizations. Some of this was reported in a July 15th article in USA Today with the headline, "Department of Justice police unions finding common ground." It notes your nearly daily contact with the leadership of the Baltimore police during the crisis that occurred, and I would like to enter that union, excuse me—that article from USA Today into the hearing record.

Chairman CRUZ. Without objection.

[The information appears as a submission for the record.]

Senator COONS. I think there also was a recent letter addressed to you from the executive director of the Major Cities Chiefs Association, Darrel Stephens, that states, quote, "Your efforts to reach out to law enforcement to enhance communications and establish a collaborative relationship has been noticed and has made a real difference," unquote.

Could you just discuss your commitment to working respectfully and collaboratively with our Nation's police and how your work in upholding constitutional rights actually leads to better policing, safer for law enforcement officers and for the community, and enhances public safety?

Ms. GUPTA. Thank you, Senator. I would be happy to. You know, ever since I came into the Justice Department, it has been very important to me to reach out very often and to engage with law en-

forcement, with chiefs from around the country, with union leaders, with police officers, as well as with civil rights and community groups, in part, because we are all in this time together, really trying to assess some of the hard questions about how to build trust, because in too many communities around the country where there is frayed trust, where the community simply does not have the confidence of law enforcement, frankly it puts officers' lives at risk, and it creates—it undermines public safety. And our work at the Civil Rights Division to advance effective constitutional policing actually advances public safety. These things are not at odds. They are critically important. When the community trusts the police, they are partners in providing information to solve—solve and prevent crimes. They serve as witnesses in trials. And, of course, officers' lives are much more likely to be enhanced and protected and their jobs made more easier when they have the trust of the community.

And so my outreach really is because I think, frankly, a lot of people in law enforcement right now as well as community leaders are kind of working together to address and really understand how to rebuild trust where that has eroded because it is so critical to public safety.

Senator COONS. Thank you, Ms. Gupta.

If I might, Chief Davis, thank you for your 20 years of service with the Oakland Police Department and your 9 years with East Palo Alto. Can you also discuss how mistrust hurts public safety and describe the efforts that the Department is making, that the COPS Program is making, to address this issue and to improve law enforcement officer safety and public safety? And then, last, if you would just comment on how officers and police chiefs and leaders you know around the country are reacting to the idea of a so-called Ferguson effect or a war on police?

Mr. DAVIS. Thank you, Senator, for the question. To start with the first question with regards to trust, I think it would be fair to say that trust is the foundation of public safety. As Ms. Gupta has said, you really cannot achieve effective or sustaining crime reduction, enhanced public safety, or even national security if you don't have the trust of the community. And so, I think as a former police chief, your focus on building trust is your number one crime reduction tool. People testify, they give you information, they support you when there is trust. So, we know that is very important.

I think generally where the field is at right now is the field is acknowledging and recognizing that there is strain within communities, many communities—not all—and the police and that we need to do something to strengthen it. So, there is a lot of focus, Senator, from local police chiefs and union leaders to really focus on building that trust because it makes everyone's job easier.

With regard to the—to the so-called Ferguson effect, I think the opening statements that both Senator Cruz and yourself made really answers it best: first, that there really is no data to suggest that there is a Ferguson effect and that somehow that's linked to any increase in crime in certain cities, because we know there are some cities where there's an increase, but we also know there are cities where there are decreases. And so, we do need to find out. And I

think Director Comey was head on about really making sure we can find out the data and to have this conversation.

But I think we need to be very cautious, and I am just concerned we be very cautious that in having this discussion, Senator, we're not suggesting that the brave men and women who serve in law enforcement—and this is based on my 30 years—are somehow scared, which is a word I have heard people say, reluctant, or even suggested they are cowards and will not do their job because they are afraid of public scrutiny. Public scrutiny is not a negative. It is the foundation of policing in a democratic society. The officers are not afraid of accountability. They want what we want and everyone wants, Senator, which is fairness, consistency, and they just want to be able to recognize—people recognize the challenges of their job.

And so, I—I reject any notion that would suggest the officers are choosing not to do their job, that they are reluctant to protect the American people. I think all evidence is to the contrary.

Now, with that being said, Senator, we do have to acknowledge this is a very tough time to be a cop. And with intense scrutiny, with social media and videotaping, clearly it is adding to the stress of being a cop. But these new stresses are not an effect. They are going to be the challenge of policing in the 21st century. And I think this field is up to it. I think the chiefs that I know around the country and the law enforcement officers are up to the challenge, and I think they are working with the communities to do exactly that.

Senator COONS. Thank you, Chief. Thank you for your testimony.

Chairman CRUZ. Thank you. Senator Lee.

Senator LEE. Thank you, Mr. Chairman.

Ms. Gupta, I would like to ask you about an issue that is likely to come up within your Division at the Department of Justice, the Civil Rights Division. As you are probably aware, earlier this month, the U.S. Department of Education concluded that Township School District 211, located in Palatine, Illinois, had violated Title IX when it prohibited a transgender student identifying as a girl to change and shower in the girls' locker room at the public school that she attends without any restrictions.

Now, the school and the school district had permitted this student to participate on the girls' sports teams and to use the girls' restrooms at the school. However, to accommodate the student's request to use the girls' locker room, the school had sought to require the student to change behind privacy curtains.

Now, according to the U.S. Department of Education, in this letter that was dated November 2d of this year, just 2 weeks ago yesterday, requiring the transgender student to use private changing and showering facilities violated the student's rights because it resulted in differential treatment of a transgender student.

Even the plan to have the student change behind privacy curtains in the girls' locker room would apparently not be sufficient, according to the Department of Education in this letter issued on November 2d, because requiring only transgender students and not all students to change behind a curtain, according to this letter, amounts to differential treatment based on a sex-based consider-

ation and would, according to the Department of Education, therefore, constitute a violation of Title IX.

So, I have got a question for you. Is this—is this also the view of the Civil Rights Division of the U.S. Department of Justice, is it the view of your Division, the Civil Rights Division, that requiring a transgender student to change and shower behind a curtain while they are in a locker room of the opposite biological gender, that asking them to do even that would amount to a violation of Title IX?

Ms. GUPTA. Senator, thank you for the question, and I can say at the moment that the Justice Department has not taken a fixed position on this matter, and I can't get into internal deliberations, but we are aware of the matter and are in conversation about it.

Senator LEE. Okay. Well, as I am sure you are aware, if the school district does not conform to this standard, the Department of Education may well refer this case to your Division. Have you or has anyone else within the Civil Rights Division of the Department of Justice been in contact with the U.S. Department of Education about this matter?

Ms. GUPTA. We are aware that, of course, that could happen. It is why we are right now in conversation about this issue. But we haven't taken any position on it, and I am not aware of direct communications with the Department of Education on this right now. There are a lot of deliberations happening in the building on the various issues.

Senator LEE. So, you have been consulted on it?

Ms. GUPTA. We are aware that the Department of Education filed that matter and that it very well could be headed over to the Justice Department.

Senator LEE. Will the Department of Justice seek enforcement of Title IX on this issue if the school district at issue doesn't conform to the demands of the letter issued on November 2d by the Department of Education?

Ms. GUPTA. Unfortunately, I am not able to comment on that as we have not made any decision.

Senator LEE. Based on my description of what happened and based on what you know about this instance, do you think the U.S. Department of Education correctly concluded that it is against the law for the school district to say that a transgender student who identifies as female but was born male needs to shower and change behind a curtain? Do you agree with that assessment that that would violate Federal law?

Ms. GUPTA. Senator, it would be inappropriate for me to comment on this given that the Justice Department has not yet made its position known.

Senator LEE. Okay. I—I want to make clear that I find that surprising, I find it a little stunning that you can't right now sit here and tell me that it wouldn't be a problem. Now, I have got a 14-year-old daughter. She is in junior high. And if what you are telling me is that it is too close to call such that if a transgender student at her school who identifies as female but was born male would have to be able to shower and use the locker room in the girls' locker room, just like any other girl, without being asked to use a privacy curtain or anything like that, if you cannot tell me

that that does not violate the law, then what you are telling me is that her principal could and should be expected to be hauled into court for making that determination on a local basis based on the needs of that school. If you can't tell me that, I think you are going to have a lot of parents who have a lot of questions. A lot of parents of daughters, parents of sons, who are going to wonder why it is that our Department of Justice has to get so mired in the administration of a school that it is getting into questions like who and under what circumstances someone who was born male but is a transgender student identifying as female must be given full, unfettered access to showers, locker rooms, and changing facilities within the school.

I hope you will follow-up on that. The American people certainly deserve clarity on that. And if we're going to start taking away educational resources from local school districts to fight battles like this in court, that's money that cannot be spent on legitimate educational programs. And they need to be given discretion so that they can run their school districts in a manner that they deem fit. Thank you. I see my time has expired.

Chairman CRUZ. Thank you, Senator Lee. Senator Durbin.

Senator DURBIN. Thanks, Mr. Chairman.

Now, the title of this hearing is "The War on Police: How the Federal Government Undermines State and Local Law Enforcement." I know there was an effort to make this a neutral title for this hearing, but I think it leans a little bit in a provocative way.

So, I asked my staff, take a look at the actual investigations initiated by the Obama administration of police departments. They came up with the fact that there were some 17,000 departments. I heard Senator Coons say 18,000 departments in the United States. And under the Obama administration, they have opened investigations on 23 police departments, about one-tenth of 1 percent of the police departments across the United States. And this is being characterized by some as a "war on police."

I would like to ask you, Ms. Gupta and Chief Davis, isn't it true that many investigations were requested by local agencies?

Ms. GUPTA. Thank you, Senator, for your question. That is indeed the case. In many of the jurisdictions we ended up going into, they were initially requested, and it was only after we conducted a preliminary investigation to determine whether there was enough evidence that would merit our involvement did we get involved. But that is indeed the case.

Senator DURBIN. And isn't it true that the vast majority of these investigations, the 23 out of 18,000 police departments, were conducted with the cooperation of the jurisdiction and resolved on a voluntary basis?

Ms. GUPTA. Yes, that is correct.

Senator DURBIN. Some war.

Let me ask you a little bit about video cameras, if I can. There is going to be testimony in the next panel, Chief Davis, that video cameras inhibit police work and lessen their determination to pursue crime. It's interesting, when we look at the money that's given out by the Justice Department to help local law enforcement pay for these video body cameras, in September the Justice Department awarded \$23 million in funding for body cameras under a pilot pro-

gram, \$23 million. Seventy-three law enforcement agencies in 32 states, including 3 in my State—Chicago, Elgin, Lake County Sheriff—received funds under this program. According to the Bureau of Justice Assistance, 285 agencies from 42 States applied for these body-worn camera funds. There wasn't enough money to serve them all. It would have taken more than twice the total amount to pay for all the body cameras that police departments across the United States were asking for as part of their law enforcement.

So, what is your take, Chief Davis, from that statistic and your experience in dealing with body cameras?

Mr. DAVIS. Thank you, Senator, for the question, and I think the number is actually larger than that. That would be the close to 300 that applied for this specific program versus the thousands that are equipping their officers as we speak, that are still looking for assistance to do so.

What made this program unique, the \$23 million, Senator, is that it was about working with law enforcement, working with academia to identify the best practices, policy implications, making sure we have policies regarding privacy, so these were more demonstrations sites to help the field in using this technology.

Now, what you will hear from most agencies, what I am hearing from the field, is that—that the cameras, when part of a larger accountability program, are very positive. We know there are results from Rialto, California, for example, where they see over 70-percent reductions in uses of force. We hear stories all over the country where they are reducing use-of-force complaints, and I think what the officers are starting to see, even in one of my old agencies in Oakland, after decades of using them, is that the cameras prove what I think everyone in this hearing has said: It captures the overwhelmingly outstanding job that the men and women are doing in law enforcement, and it clears them more than it ever indicts them. But when it is capturing misconduct, it is misconduct that needs to be held to account, and it is the righteous thing to do.

Senator DURBIN. That is such an important point, because cameras may capture misconduct, but they might also capture the truth of the situation when charges are made against a person in law enforcement that are just plain wrong and unfair. And, I think, as we are dealing with this new world, with DNA evidence, science behind police work, and this hard body of evidence coming out of video cameras, that I would agree with you, it would seem to me that most members of law enforcement would feel that this body camera will tell a true story about what actually happened when specious and wrongful charges are brought against them. So, I thank you for that. Thank you, Mr. Chairman.

Chairman CRUZ. Thank you, Senator Durbin. Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman. This is a hearing that I think is important. We need to talk about some of these issues, and there is a perception, not altogether unjustified, that this Department, the Civil Rights Division, goes beyond fair and balanced treatment but has an agenda. That's been a troubling issue for a number of years, frankly.

Your predecessor nominee was rejected for this job, the Civil Rights Division job, because, according to the Fraternal Order of Police, they wrote a letter that noted that, "Under his leadership

the Legal Defense Fund for the NAACP volunteered their services to represent Wesley Cook, better known as Mumia Abu-Jamal, our country's most notorious cop killer. This nomination can be interpreted only one way: as a thumb in the eye of our Nation's law enforcement officers. It demonstrates a lack of regard or empathy for those who strive to serve you and everyone in our Nation and keep them safe in their streets and homes. We believe that law enforcement in minority communities need to build even greater bonds of trust and respect, yet your Civil Rights Division under the leadership of the prior officers, Thomas Perez, and Roy Austin, has increasingly built obstacles to this goal with this punitive approach toward local law enforcement agencies."

So, now your nomination. You have been named as Acting, is that right, but have not yet been nominated?

Ms. GUPTA. That is correct.

Senator SESSIONS. And prior to joining the Department of Justice, you served as deputy legal director for the American Civil Liberties Union and director for its Center for Justice. And prior to that you were an attorney for the Racial Justice Program, and prior to that you served as a lawyer for the NAACP Legal Defense and Educational Fund. So, I would just say that you come from a background that indicates an aggressiveness in these cases.

The Civil Rights Division can fulfill an important role. I've seen attorneys, I've worked with them in a grand jury investigating police, and the goal is and must be to obtain truth and find out what the real facts are.

So, let's talk about this a bit here. First, Mr. Davis, I talked to an experienced law enforcement officer in Alabama, and he said the kind of problems that we are seeing and the legal actions that have been taken and the marches and protests about police do have the tendency to cause people, as he said, "to stay under the shade tree" and not walk the streets like community-based policing that you advocate and promote.

We will not go into the details about it, but I truly believe community-based policing is a great thing. And police are going to be in dangerous situations, I know you'll agree, and sometimes they will confront people who are violent, and they have to be able to defend themselves, do they not?

Mr. DAVIS. Yes, sir, they do.

Senator SESSIONS. And sometimes that can lead to misunderstandings and false claims by the criminal against the police officer sometimes.

Mr. DAVIS. That is correct, Senator, and I would say to you—and I'm sure that your esteemed colleague in your State will share this with you—when it comes to the evaluation of those decisions, the officers are more concerned about the decisions within their local department and local elected leaders and how they are going to be treated for those decisions. So, that's always a concern because the officers just want fairness and want people to understand the nuance and the difficulty of being police.

Senator SESSIONS. It is difficult. I keep thinking about that Gilbert and Sullivan—I think it is "Pirates of Penzance."—"When constabulary duty's are to be done—to be done...A policeman's lot is not

a happy one.” So, it’s not easy to go out and arrest people and have to make these decisions and put them in the slammer sometimes.

In your speech that you made to the United States Attorneys in New Jersey, Ms. Gupta, you said there—you talk about the charges made against police and what police say in their own defense and conclude there is truth in both these perspectives, presumably what both sides say about it, the criminal or arrestee or not. And you also close by saying, “If we would take time to listen, really listen, why—why protesters take to the streets, why police officers risk their lives every day, we would find that while perspectives may differ, people’s aspirations and their values tend to be very similar. We all want safe streets. We all want stronger communities. We all believe in justice.”

This was an article written by Roger Clegg and Hans von Spakovsky, both former members of the Civil Rights Division of the Department of Justice, your Division. And they say, “We find it hard to imagine that, for example, Black Lives Matter protesters in St. Louis chanting, ‘Pigs in a blanket, Fry ‘em like bacon,’ right after two New York police officers were assassinated, have the same aspirations and values as law enforcement officers who risk their lives every day.”

Do you see the concern that police officers might have about those kind of comments?

Ms. GUPTA. I find those kinds of comments abhorrent, and I think that they do a disservice to the legions of peaceful protesters that are raising attention to serious issues around the country.

Senator SESSIONS. Well, I was really referring to your comments. In 2013, while working for the ACLU, you wrote an op-ed in the New York Times in which you stated you were elated when you learned that Attorney General Holder had, quote, “directed all Federal prosecutors to exercise their discretion toward ending the relentless warehousing of inmates the vast majority of whom are minorities in Federal prison for low-level drug crimes.” Do you think most of the prisoners are for low-level drug crimes?

Ms. GUPTA. Senator, at the helm in my job—

Senator SESSIONS. How would you define a low-level drug crime? There are only 15 in the Federal penitentiary, I understand, for simple possession of drugs.

Ms. GUPTA. Senator, as the head of the Civil Rights Division, I enforce the civil rights statutes that we are given and do not have a say-so in our sentencing policies at the Division.

Senator SESSIONS. Well, I am troubled by your comments. That is all I am saying. You want to be the head of the Civil Rights Division. I don’t feel good about that comment.

How about this? In the Fordham Law Review in 2005, you wrote, “We do not have a criminal justice system whose subjugation of people of color is contingent upon”—excuse me. “We do have a criminal justice system whose subjugation of people of color is contingent upon individualizing all cases. It is how we have managed to rationalize racism in the criminal justice system.”

Now, as I understand this theory—and it has been about for some times—it says you should not evaluate individual cases based on whether or not a person is guilty of that crime or not, but some other theory involving racism. Do you think a case should be evalu-

ated simply on the facts whether a person is guilty of the crime or not?

Ms. GUPTA. Senator, at the Civil Rights Division, I oversee career prosecutors and lawyers who are committed to investigating the facts and the evidence and going where the law takes them based on that, and that is what we are committed to at the Civil Rights Division.

Senator SESSIONS. Well, I am very troubled by that radical statement you made in that article. You go on to say in that article, "Critical race lawyering is about transforming business as usual in the criminal justice system—a business that is usually masked as being racially neutral, bias-free, and a just-the-crime-facts-ma'am industry. We have to transform that "business as usual" into a counter-narrative about police practices, racial bias, and the irrationality of many of our criminal justice policies."

Do you still adhere to those views?

Ms. GUPTA. Senator, that was an article that I wrote I think over a decade ago, but at the Civil Rights Division, I, as I said, enforce the statutes that Congress has given us to enforce, and that is what I do, and that is what the career lawyers and prosecutors do at the Civil Rights Division each and every day.

Senator SESSIONS. Well, it is clear that police officers all over America are concerned about the Department of Justice, and I think based on those writings that the Acting head that you now have, about law enforcement and police gives them a basis to be concerned.

Chairman CRUZ. Thank you, Senator Sessions. Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman, Senator Coons.

I served 8 years as a chief prosecutor in Hennepin County, which is our State's biggest county, and our view was that we took our role as ministers of justice seriously. That meant our role was to convict the guilty and protect the innocent. And one of the things I learned is that it is especially vital that our law enforcement officers have the training that is necessary to do their jobs, that they have the equipment, that they have the information systems so that they can better coordinated, and our judges can get information on those in front of them. And I also saw how effective law enforcement could be in reducing crime and working with the community through the COPS Program, the Byrne Justice Program. And, actually, since I have gotten to the Senate, I have championed those programs and led the bills to increase funds for those programs.

The COPS Program has put more than 100,000 cops on the beat since 1994. In my home States, COPS grants funded 155 additional police officers and sheriff deputies. And I guess I would start with you, Mr. Davis. You have an extensive law enforcement background with the police departments of Oakland and East Palo Alto. Thank you for your service. And how has your personal experience as a career law enforcement officer shaped your belief in the COPS Program? And do you think we have sufficient resources for it now?

Mr. DAVIS. Thank you, Senator, for the question. As a former chief, I was a very happy consumer of COPS grants and the sup-

port for my agency, which was very challenged—a beautiful city but very challenged with high crime and violence. To be able add two or three officers made a difference.

But what also made a difference, Senator, is that a lot of the research and the publications that the COPS Office put out is I used that information because I did not have a research component. I was able to implement evidence-based programs that actually worked, that were very effective, that reduced crime in a very challenging neighborhood because of the research that was done nationally.

Through the COPS Office and their convenings, I was able to connect with my peers so that I could learn a lesson that was valuable and, quite frankly, when reforming an organization, the challenge I had as a chief was an organization in need of reform, as I turned to the lessons learned from the consent decrees from the Civil Rights Division which now shape the lessons learned for the Collaborative Reform Agreement so that we could not only reduce crime but do it in such a way, Senator, that embraced the core values of this country, that embraced the Constitution, to your point.

So, for me to then be appointed here was a dream come true because I was a supporter, a consumer, and it really contributed to the effectiveness of my cities.

Senator KLOBUCHAR. And so, do you think there is—my second question was just the funding. As we go into this budget, as we go into next year, do you think that our police departments could be helped in the pursuit of justice and fighting crime with more COPS grant resources?

Mr. DAVIS. On behalf of the thousands of chiefs that call me and speak to me, the same as you, Senator, they would—they really drastically need, they want more resources, more support. Policing today is not just local. I think recent events will highlight the role that local police will play in national security. So, they need the staffing, the resources, and the support. That is why I think this hearing is critically important. We do need to support them.

Senator KLOBUCHAR. Yes.

Mr. DAVIS. But I think they need those additional resources.

Senator KLOBUCHAR. And, obviously, I invite my colleagues to join me on this bill. We are going to be reintroducing it again this year.

The other piece of this is just the protecting the innocent piece. In my job for 8 years, we worked really hard on that piece of it, with DNA reviews, with—we have videotape interrogation in our State. We were one of the first States to do that. At first, the police were not big fans of it, and then I think they came to see instances where it actually helped them to convict the guilty. How people appeared on a videotape immediately after committing a crime was useful for the jurors to see. And I also think that it obviously improved policing because they could see if mistakes were made, and it certainly did not limit their interrogation at all.

The issue we talk about in that vein right now is body cameras, and I am just wondering what both of you are hearing from the police when you go around and talk to them about that issue. What are some of the concerns? And how would that be helpful going forward?

Mr. DAVIS. I will start, Senator. So, thank you for the question. I think the biggest challenge for many agencies locally for the body cameras is the cost of storage is a challenge, and then also navigating obviously privacy issues. And so, in one sense we need them for enhanced accountability. The officers are seeing the benefit. The communities are seeing the benefit. But as you can imagine, there is a lot of privacy concerns, and there is also cost.

And so, I think we can provide support by helping develop best practices—and when we say “help develop,” it is not that we do it as the Federal Government, but we help the field advance the field. We bring the best and brightest to come up with model policies, and then we can help them with issues of storage, training, and even the ability to purchase, because for some agencies even the cost of a camera is too much for their general fund budget.

Senator KLOBUCHAR. Ms. Gupta, do you want to add anything?

Ms. GUPTA. Yes, I would just say that I think right now a lot of jurisdictions are really engaged in a lot of thinking around the policies that I think they haven’t been set, and we have a lot to learn at the Justice Department about the ways in which local jurisdictions are managing the privacy issues, the cost issues, and so we have been in a lot of conversation with local jurisdictions about what their experiences are so that those can actually—we can take back and it can inform the work that we are putting out to support best practices and policies around these issues right now.

Senator KLOBUCHAR. All right. Thank you very much to both of you.

Chairman CRUZ. Thank you very much. I would like to thank both of the witnesses for your public service and also for your testimony today.

Chairman CRUZ. With that, we will move on to the second panel. I would like to ask the second panel of witnesses to come forward, and as soon as everyone is seated, we will move on to the second panel of witnesses.

[Pause.]

Chairman CRUZ. I want to thank each of the witnesses from the second panel for being here. I will briefly introduce them. We have six witnesses.

We will begin with Ms. Heather Mac Donald, who is the Thomas W. Smith Fellow at the Manhattan Institute and a contributing editor of City Journal. A graduate of Yale, Cambridge, and Stanford University Law School, Ms. Mac Donald’s writings on policing, profiling, criminal justice reform, and race relations have appeared in a wide variety of respected publications over the years.

Ms. Sherrilyn Ifill is the president and director-counsel of the NAACP Legal Defense and Educational Fund. A graduate of Vassar College and the NYU School of Law, Ms. Ifill has also worked for the ACLU, served as a professor at the Maryland School of Law, and published a book on the legacy of lynching in the 21st century.

Mr. John P. Walters is the chief operating officer at the Hudson Institute. A graduate of Michigan State and the University of Toronto, Mr. Walters served for 7 years in the George W. Bush administration as a Cabinet member and the Director of the White House Office of National Drug Control Policy. Before that, he

worked in the Department of Education during the Reagan administration.

Dr. Cedric Alexander currently serves as the chief of police for DeKalb County, Georgia. Dr. Alexander obtained his doctoral degree in clinical psychology, a Master's degree in marriage and family, and a Bachelor's degree in sociology. Prior to leading DeKalb County's Police Department, Dr. Alexander worked as the TSA's Federal Security Director at the Dallas-Fort Worth International Airport. I hope your time in Texas was a pleasant one, Dr. Alexander.

Mr. Robert Driscoll leads the Washington, DC, office of the law firm McGlinchey Stafford and serves as co-chair of the firm's white-collar government investigations group. A graduate of Georgetown School of Business and Law Center, Mr. Driscoll previously served as the Deputy Assistant Attorney General and Chief of Staff for the Department of Justice's Civil Rights Division.

And, finally, Mr. Andrew McCarthy is a senior fellow at the National Review Institute and a contributing editor to National Review. A graduate of Columbia and the New York Law School, Mr. McCarthy served as a Federal prosecutor for 18 years in the United States Attorney's Office for the Southern District of New York. Perhaps most notably, he was the lead prosecutor in the terrorism case against the Blind Sheikh and 11 others convicted in 1995 of conspiring to wage a war of urban terrorism against the United States. Mr. McCarthy is the author of several books on terrorism and national security.

I thank each of you for being here, and, Ms. Mac Donald, we will begin with you.

**STATEMENT OF HEATHER MAC DONALD, FELLOW,
MANHATTAN INSTITUTE, NEW YORK, NEW YORK**

Ms. MAC DONALD. Thank you so much. Esteemed Senators, my name is Heather Mac Donald. I am a fellow at the Manhattan Institute, a think tank in New York City. I am honored to address you today.

For the last year, the Nation has been convulsed by a protest movement known as "Black Lives Matter." The movement holds that police officers are the greatest threat facing young men today and that the criminal justice system is racially biased. Cops are now routinely called racists and murderers. Policing in urban areas has become dangerously fraught.

President Barack Obama has done little to rebut the central theses of the Black Lives Matter movement; indeed, he has amplified them over the last year. Speaking in New York City this May, for example, the President claimed, quote, "[Young Black men] experience being treated differently by law enforcement—in stops and in arrests, and in charges and incarcerations," end quote.

In fact, there is no Government agency more dedicated to the proposition that Black Lives Matter than the police. Tens of thousands of Black lives have been saved thanks to the data-driven policing revolution that began in the 1990s in New York City. The police could end all uses of lethal force tomorrow, and it would have a negligible effect on the Black death-by-homicide rate. Over 6,000 Blacks are murdered each year, more than the number of whites

and Hispanics combined, even though Blacks are less than 13 percent of the Nation's population. Their murderers are neither the police nor white civilians, but other Blacks. The rate of police shootings of Blacks—less than one-third of all police fatalities—is less than what the Black crime rate would predict. Blacks commit over 60 percent of all robberies and nearly 60 percent of all murders in the largest U.S. counties, and they commit 40 percent of all cop lethal shootings. I request permission to submit for the record the relevant Justice Department documents.

Ms. MAC DONALD. Countless law-abiding residents in inner-city communities fervently support the police. At a police-community meeting in New York City's South Bronx this June, an elderly woman spontaneously exclaimed: "Oh, how lovely when we see the police; they are my friends!" Residents begged for a police surveillance tower to protect them against gang shootings and asked the police to break up the crowds of teens hanging out on corners and fighting. A routine request at police-community meetings in urban areas is for more drug enforcement, not less.

As for the broader claim that the criminal justice system is biased, that, too, is false. The overrepresentation of Blacks in prison is a function of their elevated crime rates. I request permission to submit for the record "Is the Criminal Justice System Racist?," from the City Journal, which addresses this question in depth.

Ms. MAC DONALD. Crime is now spiking across the country. FBI Director James Comey observed in October, quote, "Most of America's 50 largest cities have seen an increase in homicides and shootings this year, and many of them have seen a huge increase," end quote.

Director Comey also suggested that the cause of this crime spike is what I and others have dubbed the Ferguson effect. For the last year, activists have relentlessly denounced pedestrian stops and public order enforcement as racist. In response, officers are doing less of those activities. Rather than getting out of their cars to question someone hanging out on a known drug corner at 1 a.m., they increasingly now just drive on by.

The available data document this drop in proactive discretionary policing, and the key here is this is discretionary policing. Certainly the police are responding to 911 calls, but the whole realm of proactive policing is what is under threat. In New York City, for example, summons for low-level offenses like public urination and drinking were down 26 percent in the first half of 2015; arrests in every crime category were down 15 percent as of late October, even as homicides were up 8 percent. In Los Angeles, arrests were down 10 percent—even as violent crime is up 20 percent.

Despite evidence of the crime surge and the reason for it, President Obama had the temerity this month to accuse Director Comey of "cherry-picking data" and pursuing a "political agenda."

To be sure, police departments must work relentlessly on improving officer courtesy and making sure that officers use lethal force only as a last resort. But the President's delegitimation of law enforcement is irresponsible. It puts officers' lives at risk since suspects are more likely to resist arrest with force if they believe that the cops are racist. It puts the lives of law-abiding residents at risk since, when the cops back off, crime shoots up. But it also threat-

ens the very legitimacy of law and order itself, which puts our very civilization at risk. Thank you.

[The prepared statement of Ms. Mac Donald appears as a submission for the record.]

Chairman CRUZ. Thank you, Ms. Mac Donald. Ms. Ifill.

**STATEMENT OF SHERRILYN IFILL, PRESIDENT
AND DIRECTOR-COUNSEL, NATIONAL ASSOCIATION
FOR THE ADVANCEMENT OF COLORED PEOPLE'S
LEGAL DEFENSE AND EDUCATIONAL FUND, INC.,
WASHINGTON, D.C.**

Ms. IFILL. Good afternoon, Chairman Cruz, Ranking Member Coons, and Members of the Subcommittee. On behalf of the NAACP Legal Defense and Educational Fund, I want to thank you for the opportunity to testify about the crucial role that the Department of Justice has played in investigating and supporting this country's law enforcement agencies.

While I am grateful to appear before you today, I regret that the name of this hearing so inaccurately describes the relationship between law enforcement and the communities they serve. There is no "war on police." What has been called a war is an admittedly painful but necessary national conversation about the police use of excessive, sometimes fatally excessive force against unarmed citizens. A disproportionate number of these victims are African American.

The protests that have erupted around the country are in response not to just what the entire Nation has seen in graphic and disturbing videos over the last year. Instead, they reflect the decades-long reality of the relationship between police and many communities of color. Our painful confrontation with this long simmering issue has compelled us to confront what FBI Director James Comey has described as "hard truths" about race and law enforcement. The conversation we are having is long overdue, but I am confident that it will result in better policing, stronger and more trusting relationships between the police and the communities they serve, and a safer America.

It's not only appropriate but we believe that Americans expect our Federal Government to bring its resources and leadership to bear when we find ourselves confronting an issue of national magnitude that threatens public confidence in our justice system. The Department of Justice is a resource to local law enforcement and communities throughout this country, and as you heard earlier, the linchpin of their process has been collaboration.

The Department has through the COPS Program provided an array of technical assistance to local police departments, including training at critical moments as unrest developed in communities around this country over the last year. Where necessary, they have used their enforcement powers to ensure that local police departments are not violating the law. This goes to the heart of the function of the Justice Department.

Some have raised concerns about the cost of the Department's pattern and practice reviews, but, in fact, the cost to local jurisdictions of police misconduct is astronomical. The Wall Street Journal reported this summer that between 2010 and 2015, the 10 cities

with the largest police departments paid out a total of over a \$1 billion in settlements and court judgments in private police misconduct cases. The entire annual budget of the Department of Justice Division overseeing pattern and practice investigations is but a fraction of that amount.

I would like to address comments made today and recently about the so-called Ferguson effect. There is no credible evidence that increased scrutiny of policing has led to an uptick in violent crime. What we do know, however, is that a lack of confidence in police does exacerbate crime because good and effective policing depends on vigilant citizens who not only know what is going on in their communities, but are willing to share vital information with law enforcement. A collaborative relationship between the police and the communities they serve produces this result.

The question is not whether citizens should closely scrutinize the professional practices of public servants. In a democracy, this is precisely what citizens should do. You are doing it today on behalf of those you represent with this hearing. The fact that citizens are more closely observing police and taking videos of police encounters is not the problem. The real questions, Senator, on what that increased scrutiny reveals, and, sadly, what the public has witnessed over the past year is a disturbing pattern of policing that has resulted in the lowest level of public confidence in the police in 23 years.

If there is a Ferguson effect, I would describe it quite differently. The effect of the protests and increased scrutiny of law enforcement has provoked a conversation that includes law enforcement leaders, lawmakers, citizens, and members of the general public. We should be encouraged by the widespread consensus about the need for several critical reforms. These include the need for body-worn cameras and better and more effective training. Twenty-first century police officers need training in managing encounters with persons with mental illness, with young people, and with members of the LGBT community, as well as training in implicit bias, which the FBI Director recognizes also as critically important.

Finally, almost all agree that we lack reliable data on police-involved killings and assaults. In our view, this Committee should applaud the extraordinary work of the Department of Justice over the past year. They have carefully deployed their resources and expertise to support much needed reforms and policing. Where they have used their enforcement powers, they are fulfilling a key aspect of their core mission to ensure that the rule of law is followed by State and local law enforcement and to promote public confidence in our justice system. Thank you.

[The prepared statement of Ms. Ifill appears as a submission for the record.]

Chairman CRUZ. Thank you, Ms. Ifill. Mr. Walters.

**STATEMENT OF JOHN P. WALTERS, CHIEF
OPERATING OFFICER, AND DIRECTOR, CENTER
FOR SUBSTANCE ABUSE POLICY RESEARCH,
HUDSON INSTITUTE, WASHINGTON, DC**

Mr. WALTERS. Thank you, Mr. Chairman, Members of the Committee. Is that better? I am sorry. I would ask that my written

statement be submitted to the record. I am just going to make a couple of comments to try to get to the points that have been covered before.

I am here as an individual. I served in the past in the administration of both George W. Bush, George Bush's father, and President Reagan. I got started at the Department of Education working on the drug issue when crack and cocaine were sweeping our country and a problem even for our schools.

I think the hearing has shown that in some sense there is not a disagreement about the courage and the dedication of people in law enforcement. There is not, it seems to me, although I am somewhat unclear from the testimony, that there are not more instances of misconduct by anybody, that they're minor, and they're wrong when they're wrong, but there is still an amazing amount of professionalism and courage in our law enforcement agencies every day, and we all support that.

The big difference now, it seems to me, is the indictment of the criminal justice system without substance, especially by senior Federal officials, past and current in this administration, and the indictment of the criminal justice system as punishing people wrongly in our prison system. We have had a remarkable decline in crime. Most of that crime is focused in neighborhoods where people have a lesser voice. We have saved thousands, if not tens of thousands of lives through reductions in murders, especially among young Black males, which have been a particularly concern for every administration and every American citizen who cares about the safety of our fellow citizens.

The difference seems to be that the President and past Attorney General Holder, at any rate, led the impression that our jails and prisons are somehow an example of injustice, that people have not been—that even though they have been apparently convicted through due process and fairly, there has been no massive indictment of unjust convictions, that somehow the sheer number of people and the racial composition of our criminal justice system is somehow an indictment of the people in it, especially the police, who are the ones with direct contact with members of the community.

Now, we know, because the Federal Government has created this data, that the victimization of individuals matches the results in our criminal justice system, that we are protecting the very people of color who are more frequently, unfortunately, victims of crime. We are protecting the very people who have less money and less resources who are very frequently the victims of crime. We know from the very data the Federal Government has been collecting that we've been able to reduce things like drug crime and addiction in communities in the past.

Nonetheless, the administration has made it a priority to indict the criminal justice system, and not just the Federal system but the State and local system. And the danger of that, of course, is to make everybody in the criminal justice system and the institution of Government seen as aggressors, perpetrators of wrongdoing, if not victimizers of citizens, the very citizens they're sworn to protect.

This corruption—and I agree with the earlier statement, and I think we all know trust is the basis of our Government as well as law enforcement. This is the fundamental corrosion of the institution of justice and the relationship between citizens and communities and the criminal justice system to see these acts of protection as acts of wrongdoing. That is what is really going on here, and it is unfortunate, and it is wrong, and it is false. And it is a situation that has led to reducing penalties. You are going to consider reducing mandatory minimum sentences that have protected many people from crime, have broken down drug organizations, that have victimized the least powerful in our communities.

You are going to be asked to look at changing the structure of relationships between the Federal and State government. As the Justice Department witnesses earlier testified and as you heard, the sentiments that those people presented when they were in private life that Senator Sessions raised that are then seen in positions of power lead people to believe that people that are supposedly fair are unfair, are perpetrating falsehoods, are suggesting the criminal justice system is the criminals. That's what is wrong here. And that's something that needs a voice, and I am pleased that you have been able to get people here together for a hearing like this. It has taken—far too few people have had the courage to do that.

So, thank you for doing this, and thank you for giving us an opportunity to state what I think most Americans know and wonder why they do not hear.

[The prepared statement of Mr. Walters appears as a submission for the record.]

Chairman CRUZ. Thank you, Mr. Walters. Dr. Alexander.

**STATEMENT OF CEDRIC L. ALEXANDER, PH.D.,
CHIEF OF POLICE, DEKALB COUNTY POLICE
DEPARTMENT, TUCKER, GEORGIA**

Dr. ALEXANDER. Thank you, Chairman Cruz and Ranking Member Coons and the Subcommittee, for an opportunity to be here with you today. I have been looking forward to this.

It is an honor to be here today to participate as a witness in the Senate hearing on, "The War on Police: How the Federal Government Undermines State and Local Law Enforcement." I would like to acknowledge and thank you very much, Senator Cruz, for holding this hearing because I think it is very important, and I think it is very timely as well, too.

I speak to you from the perspective of a law enforcement officer for over the last 39 years. And I have been through several generations of the profession going back to 1977 to today. I've seen law enforcement change tremendously over the years. Growing up in Pensacola, Florida, and spending some of my early years of life in the great State of Alabama, I've learned that, for me, law enforcement and public safety is one of the most valued opportunities that we all must have and share in order to have safe communities and have a safe country as well, too.

I have also had the opportunity to most recently serve as Immediate Past President of NOBLE, the National Organization of Black Law Enforcement Executives, whose mission is to ensure equity in

administration of justice and the provision of public service to all communities, and to serve as the conscience of law enforcement by being committed to justice by action.

It is my position that this country has a unique opportunity today to address the lack of trust and understanding of law enforcement in any community—communities across this country. It is imperative that every citizen that we collectively deploy solutions in the areas of training, community policing, and technology to ensure that America is secure both domestically and internationally.

Second, through these solutions, we are able to further the hopes and dreams of many of our forefathers in realizing, excuse me, in realizing the true civil rights and human rights, as stated in the Declaration of Independence: “We hold these truths to be self-evident, that all men are created equal, they—that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.”

The most recent events that we all are very familiar with—Ferguson, Missouri; Staten Island, New York; and other cities across this great Nation—when combined with real or perceived attacks on civil rights, legislation have created an environment where many people—across this country—feel disenfranchised by their national and local governments.

So, what are some of the solutions we can talk about here, solutions to building bridges of understanding and partnership between law enforcement and communities they are to protect and serve?

Training is a very important element. Cultural competency, a word we often hear a lot of, is a critical component to bridging this gap among law enforcement and communities of color. We know, too, as this country as great as ours, as diverse as it is, we all must be sensitive to the variety of cultures and attitudes that exist among us. And I think it’s important that we all have some sense of cultural competency, understanding, too, at the end of it all we all are Americans at the end of the day.

It is important to note, too—and I am not going to bore you with that, but when I think about community-oriented policing, it is a recommendation that law enforcement and communities adopt community policing as a philosophy of policing in this country. When I started out in law enforcement 39 years ago in South Florida, Dade County, Florida, it was one of those very troubling times in America and a time where we had just come off a very major riot, the MacDuffie riots of 1980, the loss of a lot of lives, a lot of property, a lot of civil unrest, and racial issues that extended out of that particular event. But we overcame that because we understood the importance that that community at that particular time that police and community had to find a way to work together. And we did, and community-oriented policing is, as you have said, Senator Sessions, very important to public safety across this Nation.

And if I could very quickly before my time runs out, I want to talk just one moment about advancing policing under the idea of this whole war on policing. As a veteran officer and as a conservative senior law enforcement administrator, I feel the issues deserve much further discussion, and I certainly look forward to having that discussion and answering any questions that you may have, because I think I would like to share, if given the oppor-

tunity, some of my thoughts about this whole idea, this whole notion of war on police in this country and what it means to some as being true and what it means to others as being a misperception.

Thank you very much for this opportunity.

[The prepared statement of Dr. Alexander appears as a submission for the record.]

Chairman CRUZ. Thank you, Dr. Alexander. Mr. Driscoll.

**STATEMENT OF ROBERT N. DRISCOLL, MEMBER,
MCGLINCHEY STAFFORD PLLC, WASHINGTON, D.C.**

Mr. DRISCOLL. Thank you, Chairman Cruz, Ranking Member Coons, and Members of the Committee. I appreciate the opportunity to discuss the role of the Department of Justice in enforcing its pattern and practice statute—I will refer to it as “Section 14141”—in the context of law enforcement. I had the privilege of serving as a Deputy Assistant Attorney General in the Civil Rights Division for 2 years under Attorney General Ashcroft and Assistant Attorney General Ralph Boyd, and I was active in supervising the Special Litigation Section’s investigations of and resolutions of consent decrees or agreements with law enforcement agencies in Cincinnati, Columbus, Miami, and PG County, as was mentioned earlier, and others.

The work of the Section is important, and it is difficult, and the men and women who do it deserve our respect. But I think that the DOJ leadership and those who have oversight over DOJ should more carefully analyze the appropriate use of this pattern and practice statute to ensure that it’s not used as a tool to manipulate political outcomes but, rather, is used to fulfill its purpose of enforcing constitutional standards where there has been a pattern of violations by State and local law enforcement.

Just to add a little bit of law here to put some context into this, the statute was passed in the wake of the Rodney King beating and trial, and it was essentially patterned under an unsuccessful bill that was brought up in 1991. The legislative history of the provision made clear that 14141 is a “gap-filler” statute. It was designed to fill a gap that exists in Section 1983, the long-standing civil rights law by which private citizens can sue for violations of their constitutional rights. The gap in 1983 is that if your constitutional rights are violated, if you are beaten by an officer, you can recover money damages, but there is no mechanism by which to enforce any change in the police department. So, you could have success of 1983 actions that wouldn’t be successful in reforming the police department. But 14141 was passed to fill that gap, and thus, if there is a proven pattern of constitutional violations, the Attorney General has authority to get an injunction against a police department and say fix that policy or fix that practice or fix that procedure and get a Federal court order to do that.

However, Section 14141—and important if you go back and look at the legislative history—did nothing to change the constitutional standard of proof for a violation of the Constitution, and it didn’t make the Civil Rights Division a roving police practices review board, with the ability to require best practices all around the country.

But over time, the pattern and practice statute has been used much more broadly by DOJ. For example, recently the Department will find a pattern or practice of constitutional violations without ever proving any individual underlying violation of the Constitution. This happened recently in Alamance County, North Carolina, where the Division went to trial and lost against the sheriff's department down there, alleging a pattern and practice of racial profiling, and the Federal district court judge found there wasn't proof of any constitutional violations, never mind a pattern and practice. So, oftentimes the pattern and practice statute is used for unsuccessful attempts to prove any individual violation.

Of more concern, remedies under these consent decrees often go well beyond enjoining the specific pattern and practices of unconstitutional conduct, but overflow into what appear to be explicitly political or regulatory decisions that would and should otherwise be handled locally or legislatively. For example, if you read the Cleveland Consent Order, which is one of the big consent orders the Department has highlighted this past summer, it establishes a Community Policing Commission; it has specific provisions in the order to ensure diversity of the commission and how often it is going to meet and how often it is going to issue reports. And the order is 100 pages long, and if you read the order, I submit to you it is downright statutory in nature. It is as though the Department of Justice drafted a new statute under which this Department is going to operate.

Committees like this may or may not be a good idea. I tend to think community policing, like everyone else, is a good idea and community involvement is good. But the city of Cleveland can decide whether or not it wants to create a committee through the local political process, and requiring establishment of a committee in a Federal consent decree is far beyond any remedy necessary to correct a specific pattern of constitutional violations. Rather, such provisions use the consent decree negotiation as a process through which DOJ and local municipalities can obtain political outcomes—such as creation of a new committee—through a Federal court order rather than the political process.

If insufficient attention is paid to limiting the pattern and practice statute to this use to enjoin specific practices, the Civil Rights Division becomes a roving best practices unit, appearing periodically to tell a local law enforcement agency that it must collect certain racial data, it must use a particular discipline system, it must report uses or force in a certain way, regardless of the underlying facts. When the Division functions in this manner, it operates as a regulatory and not as an enforcer. And the regulations in question then are not reviewable, are not subject to comment, and are not authorized by Congress.

And, for example, to use raw racial disparities, as the Department did in *Ferguson*, to accuse the Ferguson Police Department of racially biased policing, that said as the panel has pointed out, those same disparities exist in all law enforcement agencies in the country. And so, that is essentially letting every law enforcement agency know you had better be doing data collection because if we show up, we will find a disparity and we will require you to do this kind of data collection as a remedy.

So, this type of broader imposition of policy and political structures on local governments breeds resentment by law enforcement, who feel they have been accused and convicted of a pattern of civil rights violations without proof whenever they have agreed to “settle” a pattern and practice case, rather than simply having the Department enforce constitutional standards and target policies and training directed at proven constitutional violations. I welcome any questions you have.

[The prepared statement of Mr. Driscoll appears as a submission for the record.]

Chairman CRUZ. Thank you, Mr. Driscoll. Finally, Mr. McCarthy.

**STATEMENT OF ANDREW C. McCARTHY, FORMER
CHIEF ASSISTANT UNITED STATES ATTORNEY,
SOUTHERN DISTRICT OF NEW YORK, U.S.
DEPARTMENT OF JUSTICE, NEW YORK, NEW YORK**

Mr. McCARTHY. Thank you, Mr. Chairman, Senator Coons, Members of the Committee. It is an honor to be here. Apart from my submitted testimony, Mr. Chairman, I feel compelled to say something about the title of the hearing since it has been the subject of such debate back and forth.

I don’t see that there could be any conceivable question that there is a war on the police. Police have been threatened, police have been assaulted, and police have been killed. That’s not a national conversation. That’s a war on the police.

I took the question of the hearing not to be whether the Justice Department was the totality of the war on the police. I took the question presented by the hearing to be that there is a war on police and has the Justice Department created the impression among the police that it is on the wrong side.

What I would like to direct my limited time to is the ethos or culture of police departments and law enforcement. When an agency ethos informs police that taking enforcement action can at a minimum expose an officer to internal forms of discipline and derail the possibility of career advancement; and, in addition, may expose the officer to criminal and civil liability, entailing all the hardships of the criminal justice process, including the need to retain legal counsel, the public stigma of being suspected of wrongdoing, and the anxiety of worrying about the financial and social well being of the officer’s family, then inevitably there will be a reduction in law enforcement activity. And there is ere is abundant reason to believe that this is exactly what is happening in our country at the present time.

My submitted testimony outlines three reasons or rationales for this police passivity. First, the Obama administration has powerfully signaled in various ways that it is sympathetic to a demagogic narrative that depicts the Nation’s police as systematic violators of the Federal civil rights laws.

This narrative essentially proceeds on a disparate impact theory, which holds that statistical disparities in racial and ethnic make-up of people who are subjected to police investigative tactics are the result of police bias. This simplistic and deceptive method of statistical inference is itself systematically skewed: It fails to account for criminal behavior—as it occurs and as it is reported by

crime victims, witnesses, and criminals who confess. When criminal behavior is accounted for, the fact is that employment of police investigative tactics by police—such as stop-and-frisk techniques—to minority suspects actually underrepresents their portion in the criminal population even if it overrepresents their portion in the general population. Since a great deal of crime involves minority offenders preying on minority communities, it is those communities that bear the brunt of police passivity.

The second rationale for police passivity involves a pattern of extremely destructive—rather extremely destructive of effective law enforcement that the Justice Department has followed over the past several years.

A tragic event occurs with racial overtones, whether real or manufactured. It will be patent that there is insufficient evidence of intentional killing or intentional deprivation of civil rights by the police. Yet minority community activists will demand prosecution.

Rather than help the communities understand that not all tragic events constitute Federal criminal wrongs, the Justice Department and its Civil Rights Division convey the opposite message, appearing to confirm the activists' claims that violations have occurred—even pressuring State law enforcement agencies to embark on prosecutions based on insufficient evidence. Naturally, this fans the flames of community discord.

Inevitably, it becomes obvious that no civil rights or other prosecutable violation occurred. Yet while unable to bring a case in connection with the tragedy that drew its attention, the Justice Department exploits the controversy to commence a large-scale civil rights investigation—a so-called pattern or practice investigation—not just of the individual police officers involved in the tragedy but of the entire police department. These investigations and the threat of civil suits have been used by the Justice Department to obtain effective control over several police departments, as we have heard already today in the testimony. While there can be little doubt that some real abuses should be addressed and these do turn up in these investigations—just as a thoroughgoing investigation of the Justice Department itself would turn up abuses—the claim that these departments are systematically violating people's rights is absurd.

I would also stress, in light of some of the testimony already, it is not the use—number of cases against the police department that the Department of Justice has brought that is the material thing. It is that these cases are used as a proxy for cases the Justice Department can't bring because it lacks evidence. It appears under the circumstances in which these cases are brought to validate the anti-cop narrative. Thank you, Mr. Chairman.

[The prepared statement of Mr. McCarthy appears as a submission for the record.]

Chairman CRUZ. Thank you very much, Mr. McCarthy.

I want to note at the outset that I, like many Members of this Committee, served a number of years in law enforcement, both at the United States Department of Justice and as the Solicitor General of the State of Texas. We have seen many aspersions cast in recent months and years directed at the men and women in law enforcement. I want to start, Mr. Walters, with you. In your long

experience in the world of law enforcement, are you aware of any evidence that there is a widespread pattern of racism among police officers?

Mr. WALTERS. No. To the contrary, they are devoting themselves to try to save young people even when other institutions fail—the family, education, the care of young people—to get them the care they need. They see themselves as trying to make—again, there are mixtures of rare people who are obviously bad actors in any institution, but the pattern that is talked about now way too commonly is not only false, but it is an insult to the many people who have dedicated their lives to making people who are on the wrong track back on the right track.

Chairman CRUZ. Well, Mr. Walters, I will say your experience precisely mirrors mine, that in the years I have served in law enforcement, I have seen dedicated professionals, both police officers and prosecutors, who care passionately about following the law. And, indeed, in a very large percentage of the cases where you are prosecuting criminals, the victims are members of the minority community. The victims are African American. The victims are Hispanic. They are the ones that are being preyed upon.

Ms. Mac Donald, there has been considerable discussion in this hearing about whether there is a pattern of increased crime nationwide. The New York Times, that famed right-wing outlet, in August described the murder rates in a number of large cities. The city of Milwaukee has seen, from 2014 to 2015, an increase of 17 percent in the homicide rate as of August of this year; New Orleans, an increase of 18 percent; Baltimore, an increase of 35 percent; DC, an increase of 30 percent; St. Louis, an increase of 37 percent; New York, an increase of 9 percent; Chicago, an increase of 20 percent.

Ms. Mac Donald, how do you explain the number of people at this hearing and, for that matter, Democratic politicians nationwide that keep insisting pay no attention to your lying eyes, we have no evidence that crime is increasing?

Ms. MAC DONALD. Senator Cruz, I think it is because the rise in crime is seen as a block to their preferred narrative. So, the thinking is because we don't like the facts, the facts must not be true.

I find it astonishing that President Obama apparently thinks he knows more about crime patterns in this country than his own FBI Director, who is the source of the place where crime statistics are kept.

When Director Comey confirms what not only the New York Times but the liberal blog 538 has said, which is that when you look at all of the 60 largest cities, you have a crime and murder increase of 16 percent, which is a huge increase. If there was a drop of 16 percent in homicides, we would all be high-fiving each other. It is simply preposterous that—that Obama thinks he knows more about the crime patterns in this country than FBI Director Comey.

And to pick up on the question about whether the cops are racist, the very fact that we are dependent on what Mr. McCarthy talks about, the disparate impact theory of racism, is because we have so little evidence of intentional discrimination. And so, instead we have to fall back upon the fact that, sadly, most any enforcement

of the criminal law is going to have a disparate impact on Blacks because of the elevated rates of crime and the breakdown of the Black family. But that is because officers are there to protect lives, not because they are racist.

Chairman CRUZ. And I want to underscore the point you just made. Mr. Comey is the Director of the FBI. He was appointed to that position by President Barack Obama. He was confirmed by the United States Senate into that position. What do you make of the President of the United States impugning the integrity and the veracity of the Director of the FBI that he appointed simply for having the temerity to speak the truth about the rising murder rates and crime rates we are seeing in large cities across this country?

Ms. MAC DONALD. I think it is sadly a demonstration of the extent to which ideology rules this White House. It is of the piece with President Obama claiming that the criminal justice system is racist. When the Justice Department's own statistics show that the relationship between crime and incarceration, when the President can go around claiming that the prison population is driven by drug enforcement, when the Justice Department statistics show that nationally only 16 percent of State prisoners are in for drug crimes and less than 4 percent are there for drug possession, and yet our very President is going around stating an untruth. That is because this is an administration, I think, that is ruled by an ideology that claims that law enforcement is somehow racist, and that, as you say, is a disservice to officers of all colors who are there to help the good people in the community.

Chairman CRUZ. You know, Mr. McCarthy, you rightly observe that the title of this hearing, "The War on Police," is directed far more broadly than simply the Department of Justice. But it is, rather, what I see as a pervasive, to use a term of art, "pattern and practice" across the Federal Government in this administration. And, indeed, I think no one bears more direct responsibility than the President of the United States.

As Ms. Mac Donald just noted, President Obama has directly tried to attack his own FBI Director for observing that violent crime and homicides are increasing. And we saw at the very beginning of the Obama administration where the President chose in a confrontation in Cambridge, Massachusetts, to immediately assume that the police were in the wrong and were demonstrating racism.

There was a time back in the 1968 Democratic convention where the radicals and anarchists outside protesting against the cops, describing the cops as "oppressive," that used to be a fringe view. We now see that vilification coming from the very top, from the President of the United States, echoed by the Attorney General of the United States, manifested in things like appointing as the head of the Civil Rights Division an attorney who voluntarily for free represented and lionized an admitted cop killer.

In your view, Mr. McCarthy, does having a President who at every turn—in Ferguson, in Baltimore—assumes the police are guilty until proven innocent, assumes the police are bad actors and blames police officers and holds them up for vilification?

Mr. MCCARTHY. I think, Senator, it is a terrible development for the country, because in our previous experience—and I had the privilege of working in the Justice Department under administra-

tions of both parties. The Government took it to be, as I understood at least, and certainly in the traditions of the Justice Department, its duty to clarify narratives that were fraudulent and certainly narratives that were evil. And what we are seeing today is a Government that puts its thumb on the scale, and it has had a terrible effect on the country.

The one silver lining I would point out from your remarks and from also Ms. Mac Donald's, I actually had the pleasure of serving in the U.S. Attorney's Office with Director Comey under then-U.S. Attorney Giuliani, more years ago than either of us would want to admit to. He is a very straight shooter, and I imagine he is going to make a lot of people around here pretty uncomfortable.

Chairman CRUZ. Thank you, Mr. McCarthy.

The final line of questions I want to ask, I want to go back to you, Ms. Mac Donald. In April, in Baltimore, we saw the death of Mr. Gray. There were protests. The police were held up for vilification and demonization. In the court of public opinion, the police officers were convicted at the outset before one shred of evidence was gathered.

The very next month, the month of May, there were 42 homicides in the city of Baltimore. Two months later, in July, there were 45 homicides in Baltimore, which matches the monthly record last set in 1972. The most murders the city of Baltimore has ever seen since 1972 occurred in July of this year following the protests and vilification of the police officers. Forty-five people were murdered. Of those 45 people, 43 of them were African American. In the context of protests, talking about Black Lives Matter, who pays the price when police officers are not able to do their jobs and crime rates and murder rates go up and 43 Black lives are taken by violent criminals and are murdered? Who pays the price when the police officers cannot protect our inner cities?

Ms. MAC DONALD. The people who pay the price when the cops back off are the people that the Black Lives Matter movement purports to be speaking for, but is inevitably silent about, which are law-abiding and sometimes, let us be honest, criminal residents of poor inner-city neighborhoods. But those are the people who I hear again and again saying, "We support the cops. I need the cops." I think about Mrs. Sweeper, an elderly cancer amputee in the Mount Hope section of the Bronx, who said the only time she feels safe to go down to her lobby and pick up the mail is when the police are there. She said, "Please, Jesus, send more police." They do not have a problem with the cops, and I have spoken to a lot of young Black men who have been stopped and frisked by the police. And they'll say the police were doing their jobs, because in these communities informal social control has broken down. The family has broken down. And when that happens, the police are the only thing that stands between law-abiding residents and anarchy.

So, if we want to save Black lives, we have to stop this vilification, because the data is clear. The police are not engaged in precisely the type of policing that was key to the 50-percent crime drop that this Nation has experienced over the last two decades. It's now reversing because cops are not making proactive pedestrian stops. They are not enforcing quality-of-life laws, and the peo-

ple who are going to be hurt are going to be residents of inner-city communities.

Chairman CRUZ. And, Ms. Mac Donald, when in July of this year 45 people were murdered in Baltimore, the most since 1972, when 43 of them were African American, were there any protests from left-wing groups about the Black lives that were lost to the skyrocketing murder rates? Did President Obama speak out about the Black lives that had been taken from skyrocketing homicide rates?

Ms. MAC DONALD. It would seem that that crime is taken as a matter of course. I have not heard the Black Lives Matter movement protest against criminal murderers. No cop starts out with criminal intent. That is the difference. We've been hearing that somehow it is a miscarriage of justice that grand juries do not routinely convict cops of murder. The reason for that fact is that grand juries understand the difference between a murderer with criminal intent and an officer who in a split second of pressure and confusion may make the wrong call in retrospect.

Chairman CRUZ. Thank you, Ms. Mac Donald. Senator Coons.

Senator COONS. Thank you, Chairman Cruz, and I appreciate the opportunity to speak to exactly the issue now raised repeatedly. Do minority communities plagued by crime welcome policing? Absolutely. So, let's review the record of what happened in the appropriations process earlier this year. We just heard paraphrased a cry, "Please, God, send more police."

I'll note that in the appropriations process it was the Democrats, led by Senator Mikulski, who offered an amendment to the appropriations bill for Commerce, Justice, Science that would have added \$60 million for U.S. Attorneys, \$35 million for the U.S. Marshals Service, \$58 million for the DEA, \$153 million for assistance to State and local law enforcement, and \$95 million for the COPS Hiring Program. This amendment was, sadly, rejected on a party-line vote.

This hearing has tolerated a wide range of sloppy, unfounded, and unscientific insults to the law enforcement community that has suggested somehow that it is citizens protesting civil rights violations that are causing increases in crime.

Allow me to read again from the statement from the national president of the Fraternal Order of Police, Chuck Canterbury, who, in part, in responding to what he views as the offensive comments of FBI Director James Comey in suggesting in February that police officers need to acknowledge, quote, "the widespread existence of unconscious bias," unquote, FOP President Canterbury later in his letter says, "To blame the rise in crime on officers' behavior is just not grounded in fact and is wrong."

I think the sloppy suggestion that there is a so-called Ferguson effect in which cops back off because they are afraid of accountability was directly addressed by Chief Davis earlier who said in a democracy law enforcement officers welcome accountability, and in the earlier testimony of Ms. Gupta that detailed how successful partnerships between the Civil Rights Division and a series of police departments has actually improved policing through investments in equipment, training, staffing, and accountability.

I would be interested, Chief Alexander, if you have any comments on the valuable program that NOBLE led, in part under

your leadership, called “The Law and Your Community,” to improve the relationships between 13- to 18-year-old young men of color and minority communities and the law enforcement profession, why that is valuable, and the role of the COPS Office in helping support proactive policing.

And, Ms. Ifill, I would just like to invite you to expand on a comment that was in your written testimony, and I will just remind you: quote, “This has been referred to as a Ferguson Effect....,” unquote. “Even if Comey’s speculation proves to be supported by data, it reveals the need to engage even more intensely with police departments and with communities to build trust, to promote reforms, and to facilitate a culture of collaboration...,” although earlier you say there is no data to support it whatsoever.

So, if you would first, Chief, and then Ms. Ifill, tell us about the investments that are valuable and that NOBLE has helped lead to try and restore relations between police and community. And, Ms. Ifill, what do you think we should be doing to deal with the rise in crime and with some of the assertions made today about whether there is or is not a so-called war on police. Chief Alexander.

Dr. ALEXANDER. Yes, sir. If you would also oblige me just for a moment or two to give a little backdrop. We keep referring to the comments made by Director Comey certainly that may across this country see in a variety of different ways. But here is what I also need to note as well, too. Back in February, I think it was, Director Comey at Georgetown University also stated that this country’s law enforcement need to acknowledge the fact that we have done some things wrong over the years, and that is absolutely true. We have to go back through this Nation’s history and take a look at policing and the things that have been done to people across this country, particularly people of color and particularly people that may have well been white as well, too, but did not have the ways and means to do better for themselves.

The whole notion here is that somehow we just got here today. We did not just get here today. This has been a long haul. And since the Michael Brown event of last year, which really brought all of this pretty much to bear and everything that followed, there have been a number of incidents that follow one just behind the other.

But let me say this: I am a 38-year veteran. I am the only 38-year veteran active-duty police administrator that is sitting at this table. So, I am going to talk to you about this from a realistic point of view—not a Black point of view, not a white point of view, or Republican or conservative point of view, but from a police point of view.

This is a very complex issue. When we start talking about engaging in community policing. There is a lot of history, a lot of feelings, and a lot of legacy that is still to be lived down and moved through. That’s what we are in the process of doing. That’s what this administration, the President, the COPS Office, the Department of Justice have made attempts to do. They have afforded the opportunities of financing and helping departments across this country to be better. Most of the police departments across this country that have reached out and asked for help, even organizations such as NOBLE, have had somewhere to go in order to be

able to say what can I do to better my police department in my community. And there are a number of agencies across this country, a number of them, that are reaching out to the COPS Office every day.

So, I think it is important to note that this is not as simple as I am quite sure as a lot of people would like for it to be, because this is rooted in the fact that there are men and women out there every day. They are not racist. They are not sexist. They are dedicated men and women who want to do a fantastic job, but you have 800,000 police officers in this country. Are you going to have one or two or several here that go off the rail? Yes, we are upon occasion. You are going to find that in any profession anywhere, and we see it from the top of Government to the last individual born on the face of this Earth or leaves the face of this Earth. We all have fault. But much of what we see as it relates to crime in this country, as it relates to this so-called Ferguson effect, which has become a term that somehow has gotten coined to be of some real significance. Well, I suggest to you today here it is of no real significance, Senator, because my thought of it is this: We have issues right now in this country that we have some relationship issues in this country, as relates to policing. And it is all not about white policing on Black subjects. I hear it the other way as well, too. I hear Black police officers violating people's rights. I hear Hispanic police officers violating people's rights, women violating other women's rights, police officers.

So, this is a broad issue. This is not just a racial issue. This is a human rights issue, a civil rights issue. But I will contend and I will confess to you today as a long-term law enforcement official that we need all the help that we can get out here, and that help, of course, is contingent upon the fact that the facts are reported to you, not the notions of friends that we all have who sometimes talk about how bad it is, because we are in a place where policing is changing in this country, and we have to accept that.

I am almost 4—40 years at this, and this is a long time, a very long time. And I hate that at some time in the near future I am going to leave this profession pretty much like I found it 40 years ago. But, I think the work that the Justice Department is doing, I think the work that this administration is doing, in all fairness to both, is they are doing their best to change policing across this country. And I think we have to continue to demand that policing change. And I think that there needs to be continued funding for programs such as NOBLE, to your question, Senator, as it relates to the law in your community. We got funding from the Justice Department—to do what? To go out and teach these young men and women across this country between the ages of 13 and 14—between the ages of 13 and 18, I'm sorry, to tell them what the law is. How do you respect the law? How is it important for you that when you are stopped, what are you supposed to do? Basic fundamental things that you and I may have had the opportunity to learn, but that many of these youngsters in these urban communities might not have had that opportunity. And it is meaningful for them. It helps them better understand how to respect authority, because we are expecting sometimes for them to do things in which they have

no prior training. Not no fault of their own, but we know that to exist.

So, these programs have proved to be quite successful, and if I would just close by adding to this as well, too. We talk about uptick of homicides across this Nation. For every city there is an uptick that we are seeing, we are also seeing cities where there are declines in homicides as well, too. We do not know what's driving this.

Now, we can take Ferguson—I am sorry, we can take Baltimore. That was an anomaly. That was a clear, noted voiced slowdown of work following the death of Freddie Gray. We know that. But if I talk to my colleague tomorrow in Chicago, which I did on yesterday, McCarthy, superintendent there, his men and women are not slowing down. A department of over 10,000 police officers, they recovered over 25 percent more guns this year than they did last year. But the raise and the rise in homicides are not just based on the fact of this administration as some—some vendetta on police. The issues are far bigger and far greater.

And I would also say to the rest of my colleagues out there in the law enforcement community as well, too, they know—because I talk to them every day, as many of you say you do. I talk to them every day, in large cities to moderate-size to small cities across this country. Nobody is telling me that their men and women are slowing down. Are they a little bit more cautious? Do they have a little bit more pause as a result of the negative comments and the things that might be being said to them or about them in communities? Yes. It is a tough time to be a police officer. But it is these tough times that police officers across this Nation always at the end of the day get it done for us. And they are getting it done. They are fighting every day. They are getting shot at every day. And I can attest to that coming from a community of 750,000 residents and 1,000 police officers. I know what they are doing every day. And they haven't slowed down one bit. And that's not based on something I heard from someone else. That's based on what I see every day in metro Atlanta and other cities across this country.

Thank you, sir.

Senator COONS. Thank you, Chief.

Ms. Ifill, would you just speak to the Ferguson effect and whether there is any support for it and the role of private litigants and the Office of Civil Rights in terms of addressing challenges and the complex discussion you raised earlier.

Ms. IFILL. I am in the unusual position, Senator, of feeling as though I have to be counsel for the FBI Director, which is quite unusual for me. But let me just be sure to clarify Mr. Comey's remarks.

There is no question that there are many communities in which there has been an uptick in violent crime, and he did say that. The controversial part of the statement was that he opined—he opined that this might be a Ferguson effect. He never claimed that he had any data to support that there was a correlation between the uptick in violent crime and the increased scrutiny of police departments. And, I think, it's critically important that we be very careful that we not make these leaps, because it can really move into the realm of irresponsibility.

I and many others in this country have a higher ambition and believe that it is possible for us to have safer communities, sound policing, respect for police officers, and policing that is constitutional and that adheres to the rules of law and that also upholds the dignity of the people who live in those communities.

It's important for this Committee to recognize that we are sitting here at a snapshot moment in which the Nation's consciousness has been heightened to an issue that has been discussed in African American communities for many decades. We did not have this hearing the year before last when Anthony Anderson was killed by the Baltimore police. We did not have this hearing the year before that when Tyrone West was killed by the Baltimore police. Those matters were managed by the community in Baltimore and by the police chief who conducted his own investigation. These issues have been percolating to the surface over time.

We did not think that there was a war on policing in June 2014, a month before Eric Garner was killed in New York, and several months before Mike Brown was killed in Ferguson, when two police officers, Igor Soldo and Alyn Beck, were ambushed and executed in Las Vegas by a husband and wife who then threw a Nazi flag over them and screamed, "Don't tread on me," as they were taken away. But they were killed in June 2014.

So, depending on how far back we take our lens tells us what the story is. And I want to caution this Committee from taking this very narrow lens and suggesting that what we see today is the product of what has happened over the last year. As the letter that you read at the beginning of this hearing demonstrates, we are seeing the product of decades of policies and practices that have produced the conditions that we see in many of our Nation's cities. And now we have an opportunity to address a problem.

I would suggest to this Committee that we cannot look at a video of Walter Scott being shot in that park in North Charleston and a police officer appear to go back and drop a Taser next to him, we cannot watch Samuel DuBose killed as he was in Cincinnati, we cannot watch a police officer—police officer barrel into a pool party of teens and do what they did, and suggest that we do not have a problem. So, we have an opportunity.

We also know what the police report said and what the video showed. We know that if we didn't have that video, we would have all believed the police report, because we are hard-wired to believe the police, because we do understand the difficult job that they do and the challenges that they face. But now America has been able to see a different reality, and it's a reality that has existed in the communities that I represent over decades. And it's incumbent upon us in this democracy to get our hands around this problem and to recognize that when the State—when agents of the State whom we have empowered and we have given a gun and a shield and pepper spray and a Taser and we have authorized them to take life on our behalf where necessary, when they violate the law, it has a particularly pernicious effect in the community.

And the last thing I would say is once again the snapshot that we take is very important. There are regular protests about violence in the African American community, including in May—I have had the advantage of living in Baltimore for 20 years—includ-

ing in May and June, when there were continuous protests about the uptick in the murder rate. And it has continued unabated. There have been protests in Chicago and cities all over this country.

I admit they do not get the media attention of other kinds of protests, but I think this kind of anecdotal sense of what is happening really has to be challenged because we are at such a critical and delicate moment.

Senator COONS. Thank you very much for your testimony. Thank you, Chief.

Senator WHITEHOUSE. Thank you—Chairman, can I ask unanimous consent that I be allowed to put a statement in the record? I have been at the hearing, and I have to leave now. My time has run out on me, unfortunately. So, if I would be able to do that—

Senator SESSIONS. I would yield, Senator, if you wanted to ask—

Chairman CRUZ. If Senator Sessions would yield his time to Senator Whitehouse—

Senator WHITEHOUSE. That is kind of you, Senator. I appreciate it. He is a good friend and a good man, and that is just another expression of that.

I just wanted to say this: The politics is now a big part theater, and some of the groups that are represented here are part of the theater of politics. So, it's not surprising to me how some of the testimony has come out.

But I do want to say, having been the United States attorney in my State and having been the Attorney General of my State, which in Rhode Island also means you are the D.A., that there is nothing that I see in Rhode Island that communicates to me anything like a Federal war on police.

I just had a meeting this past week with the head of the Rhode Island State Police, Colonel O'Donnell, and with the head of the Provident Police Department, Colonel Clements. They have both been friends for decades. They get along very well. The United States Attorney Peter Neronha was there as well. It was a meeting that was with the community. We had local NAACP leaders present. It was at a community group called "Open Doors," and it was to help advise me on what we can do to keep the criminal sentencing bill that we have worked on in this Committee moving forward. And nobody was concerned, not for a second, that there was anything like a war on the police happening.

The U.S. attorney has led joint investigations in which our local police departments have participated. One of them was against Google and led to a massive settlement that rewarded those police departments and their municipalities enormously. So, if anything, if there is a war on police in Rhode Island, it is a very lucrative one for the local communities, and it is one that the local police don't seem to notice.

Community Relations Service has come to Rhode Island on several occasion. They've been helpful. I have not seen them do any harm. And not too long ago, I left an awards ceremony in which the State police, the Providence police, and a number of community organizations all share awards for having gotten together and formed a commission, a police community commission, to look at

the question of profiling. And that community and police together effort was so effective that they actually have come up with a bill that has passed in the Rhode Island General Assembly as a result of their work.

So, the notion that one witness suggested, which is that for the Department of Justice to force a police department to enter into some kind of a community commission relationship, in Rhode Island nobody had to force us. We did that on our own, and everybody thought it was great, and the outcome was very positive for the police departments. They were there receiving their awards with great pride and great satisfaction in the work that had been accomplished.

So, I think Chief Alexander hit the nail on the head. This is more complicated than it seems. I don't think it is appropriate for theater. And throughout local law enforcement, there are innumerable efforts to make policing better. And in those efforts, we find, at least in Rhode Island, that the support of our Federal law enforcement community has been very beneficial to those efforts.

So, that has just been our experience, and I just wanted to share it for the record, and I thank the Chairman for indulging me, and I thank my good friend Senator Sessions for letting me take that time. Thank you, sir.

Chairman CRUZ. Thank you, Senator Whitehouse, and I thank Senator Sessions as well for graciously yielding his time. I recognize Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman. And I thank all of you. It is a very, very important panel today. And, Ms. Ifill, you did a good job kind of by yourself there. You made some very valid points.

And I would just say this: All of us in—I say “in law enforcement.” I used to be that for a long time. We know how sensitive these issues are, how careful we need to be, how people can misinterpret things. But I do think it is a real problem when we have Black Lives Matter making statements that are really radical, that are absolutely false, and then being invited to the White House to meet with Valerie Jarrett, and never, to my knowledge, have the head of the Civil Rights Division criticize some of the statements like “Pigs in a blanket, Fry ’em like bacon,” talking about the police.

So, I just think we do have to—have to be careful how we handle these issues, but I would expect that the leadership in this country would be effective in defending the legitimate day-to-day work of police.

Mr. McCarthy, you have prosecuted a long time. You have thought about these issues. What about the acting head of the Civil Rights Division in 2005, not too long ago, wrote a Fordham Law Review article, which ought to be carefully considered, saying, quote, “We do have a criminal justice system whose subjugation of people of color is contingent upon individualizing all cases. It is how we have managed to rationalize racism in the criminal justice system,” close quote. In other words, it is wrong to treat cases individually, that we should see them in some sort of pattern, I suppose. Does that trouble you that we have the head of the Civil

Rights Division taking that view? And do you think it is an extreme view?

Mr. MCCARTHY. Senator, it really—it certainly troubles me that she took that view at a time that she was thinking deeply about this. I would note that in every single joint trial in America, Federal judges and State judges tell the juries that they are supposed to consider each defendant individually and not allow the evidence that only is pertinent to one defendant to taint the other. And that's because our tradition—and I think it's a worthy one—is that guilt is, in fact, individual.

And I would say that, having—having been a prosecutor for a very long time and having worked with law enforcement even before that, there's nothing that makes prosecutors' jobs more difficult than corrupt prosecutors. And there's nothing that makes good cops' jobs more difficult than corrupt cops. And when we find them, there's probably nothing more important to the administration of justice than that we come at them with the full force of the law, which means prosecuting them with vigor.

But the point is that you can have a credible justice system, you can have the rule of law the way we have always had it, which is that guilt is individual and that people who have public positions, positions of public trust, know that if they walk outside the lines, the system has a powerful incentive to go after them double what they—what the incentive is with respect to other actors.

Senator SESSIONS. I think you are right about that. I don't think there is any other system that can claim justice to its name that doesn't individually determine whether the individual did wrong or not. Goodness gracious.

I just—this doesn't answer the question we have talked about, but I see an article here back from a few weeks ago, Rahm Emanuel, mayor of Chicago, President Obama's Chief of Staff for a number of years, says, "Intense media and public criticism is making police officers too passive—'going fetal,'" close quote.

"All of us want officers to be proactive [but] to be able to do community policing in a proactive way, we have to encourage them so it's not their job on the line or that judgment call all the time that, if they stop, this could be a career-ender."

"If that happens, it's going to have an impact, and we are seeing it. That's why every other police chief and mayor and U.S. attorney applauded what I said [that]," close quote. So, my best judgment, having been at this business for a long time, starting in the mid-1970s as a prosecutor, it is having an impact. Maybe I am wrong, but my judgment is it is.

Now, Mr. Walters, I have a sense, having been appointed by Reagan in 1981, when drug use among high school students was at 50 percent by their own admission, the authoritative University of Michigan Study—under a series of Presidents and over a period of time, isn't it correct that drug use dropped to under 25 percent among high school students?

Mr. WALTERS. It dropped 25 percent in the last administration, during those 7 years. It dropped more than 25 percent between the peak at roughly 1978 through to 1992. It went up from 1992 to 19—2000. Then it went down again. It has now—

Senator SESSIONS. But at one point—

Mr. WALTERS. It has now rebounded.

Senator SESSIONS. But what—you get the numbers correct. The Michigan study showed 50 percent use around 1980.

Mr. WALTERS. Right.

Senator SESSIONS. And it dropped steadily until it got below—to 25 percent, I believe it was.

Mr. WALTERS. Yeah. I do not think it ever got as low as 25 percent. The 25 percent is the reduction from 2000 to 2008. That's the reduction in the numbers. I just want to make—

Senator SESSIONS. All right.

Mr. WALTERS. I know too much—

Senator SESSIONS. I have been corrected by the drug czar here, so why should I—

Mr. WALTERS. I know.

Senator SESSIONS. But great progress was made.

Mr. WALTERS. Yes.

Senator SESSIONS. Substantial progress. Do you see that the difficulties we are having in the streets, the increase in the murder rate, the increase in drug use, the President's own statement—goodness gracious, I have to ask you about that because I know how hard you have worked on trying to reduce crime and drug use. Well, I have lost it, but the President himself said it's not much different than alcohol or smoking. And so, we are now seeing—one study I saw recently—that drug use among high school seniors admittedly by them was 49 percent. So, that has gone back up.

Will, in your opinion, all of this result in more crimes of all kinds? Will it result in more drug use? Will it result in more addiction? And is this a very bad trend that we are on? Could we be starting on a very bad trend?

Mr. WALTERS. Yes, I don't think there is any question those of us that have worked on this problem, those in law enforcement, know the—the catalytic effect substance abuse has on crime, on child endangerment, on addiction, and on the survivability of young people that are in at-risk situations over time.

Look, the real shame here is—and I say this without any kind of partisanism or theater—President Obama had—has a unique connection to young people, a younger President, the example he sets is very powerful. All Presidents have an important example that they are to young people and to the American people. But he had a particularly strong one. He could have talked about substance abuse in his generation, his own experience. He could have been the most—more powerful than Nancy Reagan in terms of being a leader in prevention and changing attitudes of young people.

Instead what we have is a downplaying of the seriousness of substance abuse in the comments you have quoted, a suppression of Federal law to allow the legalization of marijuana in States, which has been horrific and created forms and concentrates of marijuana we have never seen before, bringing suits in the Supreme Court from surrounding States who are affected by Colorado. The growth of heroin in this country that has been devastating is not—it is partly a result of what we have talked about in terms of opioid pharmaceuticals and transmission. What it's really about—and I have done some analysis of this—it's really about the explosion of

supply out of Mexico. And we have not worked effectively with our international partners on these. And, by the way, the biggest single source of heroin is, of course, Afghanistan. That heroin is already in Canada. We can have—this could be the prelude to the worst explosion of substance abuse we’ve ever seen. The growth of marijuana, the potential for spreading marijuana into communities, first under the guise of medicine, which is false, and, second, under just free flow sale and then the kinds and concentrates of this will be devastating. And it will not just be one generation. We now know not only does the marijuana use heavily as young people cause permanent IQ loss that we did not know years ago, but it also changes the chemistry of the brain to make people more susceptible to substance abuse for the rest of their lives. Baby Boomers have higher rates—you may have seen the recent study of death from substance abuse and overdose and suicide by Baby Boomers as they reach older age.

So, there is—there is such a catalytic effect of destruction in this phenomenon that for us to turn our backs, for us to say that we shouldn’t enforce the law, for us to lie about who is in jail—the criminal justice system has sorted people into treatment through drug courts who need treatment, you in the Senate have passed—bypassed this to make sure low-level offenders do not go into Federal prison. To change—to suggest these laws are unjust, to break the tools that have been a key for State, Federal, and local governments, to break criminal organizations, to bring people to justice, to protect communities, to cause declines in substance abuse and addiction, to turn all that around when we know what works, we have made these achievements, and to throw them away—I mean, look, I don’t have to do this. I could go back to my private life. I was pleased to serve. I’m here—and I recognize this is controversial. I’ve been called as some others of you have been called all kinds of names for what I do, the drug czar is not a hip guy in parties or on campus. But the reason I’ve gone and continued to say these things is I’ve also sat with the parents who say, “You have got to do something. You have to be my voice.”

And I went and spoke at the funeral—the funeral of Angela Dawson in Baltimore in 2002. Angela Dawson, as you may recall, stood up to drug dealers in her community of Baltimore. She said, “You are not going to take my kids. You are not going to take my community.” They tried to kill her with a firebomb. They offered to move her out and put her into witness protection, and she said, “No. I will not give up.”

They came back, an individual who was supposedly under supervision and wasn’t, and firebombed her house, killed her, her husband, and her five children. I spoke at that funeral. I looked at those small coffins. She is an example of the kind of victims whose voices don’t get heard until it’s too late.

I know what is going to happen if we do not stand up and speak. And maybe I am too passionate. Maybe it seems like theater to some of the Members of the Committee. But the fact of the matter is this is going to be worse than we have seen before if we do not turn around. And we need the support of national leaders. We need the large and vocal support. And that’s why I congratulate you on having this hearing. And I think, you know, to argue about wheth-

er or not we have data about the effects of criticism and attacks on police, I think that's a diversion. I think we really all know—I mean, Director Comey is an expert witness if there ever was one on this. And, second, I think we all see what the numbers are happening in terms of crime. And, third, while it can be anecdotal, I would say randomly just start asking police officers you see whether they feel they are under attack, and I would say you will—you will not find it a close call.

Senator SESSIONS. Well, thank you. You know, we are having 120 deaths a day from drug overdose in America. That is just a stunning figure. It has monumental impacts throughout our entire culture.

I gave up many times, I often regret, being with my family, meeting with drug—anti-drug groups in the '80s when I was United States Attorney, and it worked. Drug use went down substantially, and fewer people became addicted, and the crime rate began to go down after a time. And we—to me, I can just see us letting it slip away. The gains, the lessons we learned, as you said, Mr. Walters, we are ignoring, and the culture and the Nation will pay a price for it. Thank you.

Chairman CRUZ. Thank you, Senator Sessions, and thank you, Mr. Walters, for that powerful testimony a moment ago.

You know, I will say something Mr. Walters said a minute ago I think is powerfully correct. As I travel both the State of Texas and the country, I am stopped by police officers almost on a daily basis who express to me one after the other that they feel they are under assault. I cannot tell you the frequency with which individual officers in cities all over the country say, "Thank you for standing up for me." That sentiment is being felt, and it is being felt powerfully.

You know, there's been some suggestion that there has not been a vilification of law enforcement, and I think that suggestion is counter to the facts and counter to the evidence. Indeed, if you go back to 2009, President Obama was newly elected, and you had an incident with a Harvard professor. And President Obama, who, I might note, was not there in Cambridge, Massachusetts, did not know what the facts were. But even not knowing what the facts were, the President saw fit to say, quote, "The Cambridge police acted stupidly." Now, I for one don't think the President of the United States ought to be insulting police officers for, quote, "acting stupidly," when the President by his own admission doesn't know the facts of what occurred.

That started to set the stage for beginning with the assumption police officers are guilty until proven innocent. President Obama in 2014 at the United Nations stood in front of the world and held up law enforcement in a negative way. He said, "I realize that Americans' critics will be quick to point out that at times we, too, have failed to live up to our ideals, that America has plenty of problems within its own borders." This President has made a pattern of describing what he thinks are America's problems and doing it in front of foreign nations.

He continued: "This is true. In a summer marked by instability in the Middle East and Eastern Europe, I know that the world also took notice of the small American city of Ferguson, Missouri, where

a young man was killed and a community was divided.” President Obama, in front of the United Nations, comparing the police officers to terrorists in the Middle East.

And let’s be clear. He is giving his opinion on that. A young man was killed. “We have failed to live up to our ideals.” Those are President Obama’s words. “This is true. We have failed to live up to our ideals. This is true.” He is rendering judgment and verdict. I would note the grand jury in Ferguson disagreed with President Obama, the actual people our Justice Department charges with reviewing the evidence, something that doesn’t seem to trouble President Obama when he is opining law enforcement must be in the wrong. The grand jury that reviewed the evidence concluded to the contrary, but President Obama goes in front of the United Nations and lambastes police officers. You do not think that message is heard by police officers throughout the country?

In 2015, President Obama said, “There are some police who aren’t doing the right thing. Rather than close ranks,” he said, “some police chiefs recognize they have got to get their arms around the problem.” But President Obama continued: “We can’t just leave this to the police.”

It is important to understand he does not think the police can govern themselves. Instead, President Obama is saying, “I think there are police departments that have to do some soul searching. I think there are some communities that have to do some soul searching. But I think as a country, we have to do some soul searching. This is not new. It has been going on for decades.” The President is standing as judge and jury, convicting police officers.

In response to his own FBI Director, Mr. Comey, President Obama, speaking right after Mr. Comey, stands up and says, “We do have to stick with the facts. What we can’t do is cherry—cherry-pick or use anecdotal evidence to drive policy or feed political agendas.”

How about what we can’t do is have the President of the United States impugning the integrity—is he suggesting the Director of the FBI is cherry-picking data? It is not an implicit suggestion. It is an explicit suggestion.

In the summer of 2014, the Department of Justice, targeting the Seattle Police Department, said in writing that the officers were engaged in, quote, “discriminatory practices subconsciously.” I’m very pleased to know that the U.S. Department of Justice have now become psychiatrists, have now become mystics, delving into the subconscious. How about the Department of Justice enforce the laws instead of worrying about the deep subconscious of police officers, which the President has already told us apparently they are acting stupidly, anyway.

We have talked about the President nominating for a senior Department of Justice position a lawyer who not only voluntarily and for free represented an admitted cop killer but lionized him, held him out as a cause célèbre. But, you know, that is not the only cop killer that the administration has turned a blind eye to.

We should all remember Joanne Chesimard. Now, who is Joanne Chesimard? Joanne Chesimard is on the FBI’s Most Wanted List. She is wanted for escaping from prison in Clinton, New Jersey, while serving a life sentence for murder. On May 2, 1973,

Chesimard, who was part of the revolutionary extremist organization known as the “Black Liberation Army,” and two accomplices were stopped for a motor vehicle violation on the New Jersey Turnpike by two troopers with the New Jersey State Police. At the time, Ms. Chesimard was wanted for her involvement in several felonies, including bank robbery. Chesimard and her accomplices opened fire on the troopers. One trooper was wounded and another was shot and killed execution style at point-blank range.

Chesimard fled the scene but was subsequently apprehended. One of her accomplices was killed in the shootout, and the other was also apprehended and remains in jail. In 1977, Chesimard was found guilty of first-degree murder, assault and battery of a police officer, assault with a dangerous weapon, assault with intent to kill, illegal possession of a weapon, and armed robbery. She was sentenced to life in prison.

On November 2, 1979, Chesimard escaped from prison and lived underground—underground before being located in Cuba in 1984. She is still living in Cuba. We were all given the pleasing situation of seeing President Obama and John Kerry and the Obama administration embracing apparently our new-found friends Raul Castro and Fidel Castro, cruel communist dictators. You know, in the whole course of opening this rapprochement with Cuba, and the whole course of opening an American embassy in Cuba, in the whole course of opening a Cuban embassy in Washington, DC, in the whole course of the State Department silencing Cuban dissidents in Washington, DC. Did the Obama administration ever once say of their new communist buddies, “How about you hand over the cop killer living in Cuba?”

If you are going to be part of this community of Nations, if we’re going to embrace Cuba in a way that will make every leftist faculty lounge in America cheer, how about as the tiny price of that you hand over a cop killer instead of shielding someone who murdered a New Jersey State trooper in cold blood execution style?

Does anyone in their right mind think that the Obama administration ever even once mentioned that? You want to know why the cops feel thrown overboard? Because nobody would suggest they would even think to say, “Hand over the cop killer.”

You know, it’s not an accident that at Deputy Goforth’s funeral President Obama was nowhere to be found. It is not an accident that at funeral after funeral of police officers who have been murdered, targeted, singled out for defending their communities, that President Obama is nowhere to be found?

There is a consequence when you vilify, when you demonize, when you hold out for contempt the good men and women who protect our communities.

Of course, there can be individuals who violate the law, and we have a justice system—if there is an individual in law enforcement who violates the law, we have a justice system to handle that. But this President, this Department of Justice, has not approached it saying, “Let us enforce the law.” They have started with the assumption that law enforcement is, as they said to the Seattle Police Department, subconsciously discriminating they’re guilty. And we’ve seen the consequences. We’ve seen crime rising. We have seen homicides rising. We’ve seen Black lives being lost over and

over and over again being murdered. It is wrong. And I believe it should end.

Senator Coons.

Senator COONS. Mr. Chairman, as we come to the close of what has been a very long afternoon, I simply want to thank the two police chiefs who have actually testified today, both Chief Davis and Chief Alexander, and the many other witnesses who have testified from a wide range of backgrounds and perspectives, but have helped us focus on the fact that increases in crime are the result of very complex issues and require us to pay attention to knowing the facts.

There has been a great deal of opining today on a wide range of issues. I will simply close by suggesting two things that I think are worth reflecting on.

One, as I said at the outset, is a very pointed comment by the national president of the Fraternal Order of Police who takes some umbrage at those, including witnesses today, who suggest that it is the fault of police officers who are refusing to actively police that there is an increase in crime. He said, "To blame the rise in crime on officers' behavior is just not grounded in fact and is wrong." And as we search the many complex possible sources for why there might be an increase in crime, I'll suggest one thing that was not addressed in any meaningful way in today's hearing, which is the hundreds of millions of dollars of additional support for local law enforcement requested and denied in this year's appropriations process. There are 18,000 law enforcement agencies across this country, hundreds and hundreds of them applying to the COPS Office for increased resources, training, equipment, and support, which they will not receive this year because of appropriations priorities and decisions of a Republican-controlled Congress, and it is to my regret that we have not yet achieved a bipartisan consensus on how to responsibly work together to support local law enforcement.

It is my hope, Mr. Chairman, that we can find a path toward doing more of cooperating to support law enforcement and less of vilifying the very officers who we rely on to secure order and enforce our Constitution. Thank you.

Chairman CRUZ. Thank you, Senator Coons.

I will briefly make an observation that I would note that it's not just FBI Director Comey who has observed about the Ferguson effect, but also the DEA Administrator Chuck Rosenberg, who said Comey was, quote, "spot on," regarding his comments on the Ferguson effect. And he said, quote, "I have heard the same things from police. I think it is worth talking about."

I want to thank each of the witnesses for coming today. I want to thank you for your learned testimony. I think this has been a valuable conversation and one that I hope will continue well beyond this hearing.

We will be keeping the hearing record open for an additional five business days, which means the record will close on the end of the business day on Tuesday, November 24, 2015.

Ms. Mac Donald in her opening statement asked for a number of things to be submitted to the record. They will be, without objection.

[The information was submitted as a submission for the record.]

I will also note that the Dr. Alexander mentioned in his testimony that for every large city and jurisdiction where crime rates and murder rates have gone down that there are an equal number that have gone up—that there are an equal number that have gone down. This Committee would certainly welcome any data to that effect, and I would encourage you to submit that data so that we might have a full and complete record. That is at a minimum not what the reporting of the New York Times and other news establishments have indicated, and so we certainly want to invite any and all data that the witnesses have access to.

And, with that, I want to thank each of you for being here and wish you a good evening. The hearing is adjourned.

[Whereupon, at 5:18 p.m., the hearing was adjourned.]

[Additional material submitted for the record follows.]

Testimony of Dr. Cedric Alexander
National Immediate Past President of the National Organization of Black Law
Enforcement Executives (NOBLE)
Deputy Chief Operating Officer for Public Safety, DeKalb County, GA
Before the U.S. Senate Judiciary Committee on "War on Police: how the federal
government undermines state and local law enforcement"
November 17, 2015

Chairman Cruz and members of the Subcommittee, thank you for this opportunity to be here with you today.

My name is Dr. Cedric Alexander, National Immediate Past President of NOBLE, and Deputy Chief Operating Officer for Public Safety, DeKalb County, GA. It is an honor to be here today to participate as a witness in the Senate hearing on the "War on Police: how the federal government undermines state and local law enforcement." I want to acknowledge and thank Senator Cruz for holding this hearing and inviting me to participate.

I speak to you from the perspective of a person who has over 38 years of law enforcement experience and who has held positions at the highest levels both at the federal, county, and city levels. In addition, I hold a doctorate in clinical psychology.

I have in the past, represented an organization, NOBLE, whose mission is to ensure EQUITY IN THE ADMINISTRATION OF JUSTICE in the provision of public service to all communities, and to serve as the conscience of law enforcement by being committed to JUSTICE BY ACTION.

It is my position that this country has the unique opportunity TODAY to address the lack of trust and understanding of law enforcement in many communities. It is imperative to every citizen that we collectively deploy solutions in the areas of training, community policing, and technology to ensure that America is secure both domestically and internationally.

Secondly, through these solutions, we are able to further the hopes and dreams of many of our forefathers in realizing true Civil Rights and Human Rights as stated in the Declaration of Independence: *"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."*

The recent events in Ferguson, Missouri, Staten Island, New York, and many others cities, when combined with real and/or perceived attacks on civil rights legislation have created an environment where many people feel disenfranchised by their national and local governments.

Solutions to Building Bridges of Understanding and Partnership Between Law Enforcement & Communities They Are to Protect & Serve

Training

Cultural competency is a critical component to bridging the gap amongst law enforcement and communities of color. It is the foundation for people of different cultures and socio-economic backgrounds to interact effectively. When developed and implemented as a framework, cultural competency enables systems, agencies, and groups of professionals to function effectively to understand the needs of culturally diverse groups. It is critical that law enforcement reevaluate its training methodologies to ensure that they reflect the 21st century needs and incorporate cultural competency training for police officers that is part of the recruit and in-service training.

Community Oriented Policing

It is our recommendation that the law enforcement community adopt community policing as the philosophy of policing in the U.S.

Here are the key components of community policing:

- Community policing allows officers to demonstrate their support for the community. Residents and officers are allies. Officers respect and protect the civil rights of residents. Racial profiling and other forms of discrimination are strictly prohibited.
- Community policing demands that officers interact with people who live or work in neighborhoods that they patrol. Officers are trained to communicate with people, solve community problems and develop an appreciation of cultural and ethnic differences.
- Community policing emphasizes the importance and value of human life. The use of excessive force is absolutely prohibited and deadly force is reserved strictly for when an officer's life or the life of a citizen is at risk.

NOBLE has launched a pilot program entitled "The Law and Your Community" through funding from the Department of Justice – COPS Office. The program's aim is to develop trust and understanding between law enforcement and the community. The Law and Your Community is an interactive training program for

young people ages 13-18 designed to improve their communications with law enforcement officers and their understanding of their federal, state and local laws. Components of the program include:

- Citizenship: What does it mean to be a citizen? What are the laws governing everyday life including traffic laws? What are your rights as a citizen?
- Basic Laws: Understanding the basic laws governing issues such as “stand your ground,” gun ownership, staying safe within your community, and maintaining positive affiliations – including peer relationships, maintaining good grades, adult relationships, and benefits of mentors.
- Law Enforcement Engagement: Educating young people and adults on how to engage and navigate communication with law enforcement officers, what is Community policing? and understanding the realities of working in Law Enforcement.

Technology

We feel that technology can be leveraged to support the effective implementation of community policing and ensure maximum transparency to the public. Through technology, partnerships with communities can be strengthened

in the areas of problem-solving and partnership initiatives. Likewise, there is an important role in applying technology in improving the effectiveness of law enforcement training.

Listed below are technology recommendations:

- Requirement of body cameras for law enforcement officers.
- Deployment of various social media platforms to allow law enforcement departments to better communicate and interact with local residents.
- Use-of-force and firearms training systems.

Obama Administration: Advancing Policing vs. War on Policing

As a 38-year veteran, psychologist, and a conservative senior law enforcement administrator, I would like to discuss this notion on the “war on policing”. I feel this issue deserves further discussion. I’ve had the opportunity to speak to a number of police administrators whom I respect and regard as leaders and none of them have yet to express to me this notion of “war on policing”. Not to minimize the fact there may be a few who feel very different. I am yet to have had that conversation and I travel quite frequently across this country. With the recent police conflict in Baltimore, Maryland involving 25 year-old Freddie Gray and the execution style shooting of two New York Police Department Officers, Wenjian Liu and Rafael Ramos, there was a reported brief work slowdown;

however, officers very quickly turned around and continued to show their dedication and give 100%. The “Ferguson Effect” notion suggests that police officers are lying down, but there is nothing in the science that supports that notion to be widespread. Are law enforcement officers conscious of the increased shootings amongst police officers and community relationships? Yes, they are. Law enforcement officers are being held to a higher standard and are being held accountable. As a firm law and order official, I have yet to see, feel or experience anything that suggests there is a “war on police”. Is it a challenging issue facing America? For some it is; however, most people understand that policing is changing. For example, how we recruit and train officers is going in a new direction. As a seasoned executive law enforcement official, I feel that the Obama Administration, Department of Justice & the Community Oriented Policing (COPS) Office, has done more to encourage positive police interactions with the community through Obama’s 21st Century Policing Initiative.

**Experience with the Department of Justice and the
Community Oriented Policing Office**

At the request of the Former Police Chief of Tampa Police Department (Tampa, FL) and on behalf of the Department of Justice, I participated on the Community Oriented Policing (COPS) critical site visit, where I will be given an opportunity to

provide an expert objective review of profiling complaints of significant concern in that community. This review will be based on my experience, the evidence placed in front of us and the ability to fairly assess the concerns of both the police officers, who I wholly support, and the entire community who expects nothing but the best from this agency.

I was also requested by the Sheriff of Tompkins County Sheriff's Office, Tompkins, NY, to assess a SWAT incident in which a wanted homeowner barricaded inside his residence, subsequently killing himself. Elected officials and community members had a number of concerns in regards to how local Sheriff/Police responded to the incident. Providing an objective view into these incidents assists the Sheriff's Office and the COPS Office in clarifying questionable and controversial police practices.

By implementing these recommendations on training, community policing and technology, we believe that real progress can be made in improving the relationship between law enforcement and the communities they serve. This would greatly improve the state of civil rights and human rights in America. I thank the Committee for the opportunity to testify and I would be happy to answer any questions.

TESTIMONY OF RONALD L. DAVIS

*Senate Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts
Tuesday, November 17, 2015
Washington, D.C.*

Introduction

Chairman Cruz, Ranking Member Coons, and distinguished Members of the Committee – the Department of Justice (the Department or DOJ) greatly appreciates the opportunity to participate in today’s hearing.

Our nation’s police, sheriffs and other law enforcement officers are dedicated public servants who provide invaluable service to our nation. They deserve our highest praise for keeping our neighborhoods safe, our families secure, and dangerous criminals behind bars. It is critical that they have the tools and support they need to do their jobs effectively and safely. For this reason, building on her years of experience as a prosecutor, Attorney General Lynch has made support for state and local law enforcement among her highest priorities.

DOJ invests substantial resources to support police, sheriffs and other law enforcement agencies around the country – to advance effective policing, ensure officer and public safety, and bolster trust between law enforcement and the communities. The Department employs a variety of tools toward these ends, including funding, equipment, training, technical assistance, and enforcement actions.

Supporting State and Local Law Enforcement with Funding for New Officers, Equipment, Training, Convenings, and Research

The Department supports state and local law enforcement agencies by providing them funding and resources to aid them in protecting their communities.

Since 2009, the Department has awarded over \$2 billion in local grants through its Office of Community Oriented Policing Services (COPS). These funds have created or preserved positions for more than 10,000 officers at nearly 2,600 agencies. Nearly half of these positions were funded through \$1 billion in economic stimulus funding designed to save jobs during the economic downturn. In the last fiscal year alone, COPS awarded more than \$113 million in grants to hire or save 915 officer positions.

For Fiscal Year 2016, the Administration has requested an additional \$303 million for the COPS Office to continue the important mission of advancing public safety through community policing. In recent comments before the International Association of Chiefs of Police, the President reiterated his commitment to law enforcement by increasing funding for the COPS Office. The President told the more than 14,000 law enforcement officers in attendance that he

has asked Congress “to increase funding for the COPS program so we can hire even more police officers and make sure you have the training and equipment you need. That’s what I value.”

In addition to enabling agencies to hire or retain officers, COPS funding has enhanced crime-fighting technology, supported crime-prevention initiatives, and provided training and technical assistance sought out by local leaders. COPS has also funded valuable research on a wide range of issues from countering violent extremism and reducing gang activity and drug-related violence to school and campus safety and building community partnerships. For example, just last month, COPS released two research reports, one addressing ambush attacks against police¹ and another presenting models for protecting the physical and psychological health of officers².

The ambush research report follows an in-depth after action assessment of a high profile ambush in Tampa. The Tampa report reconstructs events that followed the shooting of two officers during a late-night traffic stop in the summer of 2010, focusing on the 96-hour manhunt for the suspect, and includes findings and recommendations that offer valuable lessons learned and best practices that can assist the law enforcement community nationwide. In addition, at the request of the sheriff of the Las Vegas Metropolitan Police Department, the COPS Office is currently conducting an after action assessment of the tragic June 2014 ambush of two officers who were simply sitting and enjoying lunch in a Las Vegas restaurant. Last month, the COPS Office also released a report on four case studies that offer an opportunity to better understand the significance and value that officer wellness programs present in successfully reducing officer sickness, injuries, and deaths associated with poor health or traffic-related accidents. The four case studies serve as models for safety, health, and wellness programs and each offers practical strategies that have shown positive results.

The President has strongly condemned violence against police officers and recently underscored that, “Targeting police officers is completely unacceptable – an affront to civilized society.” The entire Department of Justice shares this view as is evidenced by the projects funded across the branches of the Department. In May, the President signed into law the Rafael Ramos and Wenjian Liu National Blue Alert Act of 2015, which establishes a nationwide alert system to warn about threats to police officers. This Administration is dedicated in its work to ensure the safety of our nation’s 800,000 honorable men and women in uniform.

COPS is also working with the major law enforcement organizations³ on a Comprehensive Law Enforcement Review that will be released in early 2016. This project was

¹ George Fachner and Zoe Thorkildsen, *Ambushes of Police: Environment, Incident Dynamics, and the Aftermath of Surprise Attacks Against Law Enforcement*, available at <http://ric-zai-inc.com/Publications/cops-p340-pub.pdf>.

² Joseph B. Kuhns, Edward R. Maguire, and Nancy R. Leach, *Health, Safety, and Wellness Program Case Studies in Law Enforcement*, available at <http://ric-zai-inc.com/Publications/cops-p332-pub.pdf>.

³ The Major County Sheriffs’ Association, National Sheriffs’ Association, Fraternal Order of Police, Major Cities Chiefs Association, International Association of Chiefs of Police, National Organization of Black Law Enforcement Executives, Association of State Criminal Investigative Agencies, and Police Executive Research Forum.

undertaken at the request of the major law enforcement agencies. The Comprehensive Law Enforcement Review seeks to summarize what is understood about the current state of law enforcement from research, empirical evidence, and practice in eight thematic areas: police legitimacy and public trust; crime reduction strategies; efforts to fight terrorism; alternatives to incarceration; officer wellness and safety; technology; federal initiatives and policy reform; and the future of policing. The project has involved over 80 individuals actively serving in state and local law enforcement.

The COPS Office has also worked in partnership with major law enforcement organizations to conduct executive sessions on topics ranging from preventing violent extremism, handling mass casualty events, use of force, policing near military bases, to constitutional policing and officer safety. These sessions provide professional perspectives on substantive policing issues affecting law enforcement professionals across the country, and can then be summarized to enable others to benefit from such insights.

The Department's Office of Justice Programs (OJP) has also invested heavily in supporting local policing, particularly through the work of the Bureau of Justice Assistance (BJA). The State and Local Law Enforcement Assistance appropriation, which funds BJA's programs, provides over \$1.1 billion per year for a variety of state and local criminal justice needs. BJA has trained over 21,300 officers through its VALOR program, launched in 2010 in response to attacks against officers in the line of duty. Every line of duty death is tragic. The VALOR program aims to save lives by helping officers to identify armed subjects, recognize emerging threats, and de-escalate potentially violent encounters. It also addresses law enforcement wellness issues that directly impact an officer's safety. Additionally, a partnership under the VALOR program, the Advanced Law Enforcement Rapid Response Training (ALERRT) program, has provided active-shooter training for approximately 70,000 officers with BJA's support since 2002. Since 1999 the Bulletproof Vest Partnership has provided more than 1.2 million vests to law enforcement officers and personnel. OJP's National Institute of Justice (NIJ) continues to improve the equipment performance standard and compliance testing program to help ensure that the vest worn by the men and women of law enforcement perform as needed. Modern police body armor is credited with saving over 3,100 officers lives, since it was introduced into practice as the result of NIJ-funded research in 1975. The BJA-funded Blue Courage program provides support and continuing education to law enforcement officers on a range of topics, including judgment, integrity, leadership, and stress management. During the last fiscal year, it served more than 2,200 officers from 358 agencies.

BJA has funded important new technology, awarding more than \$23.2 million in grants to 73 local and tribal agencies across 32 states this past September to expand and study the use of body-worn cameras in support of the Administration's Community Policing Initiative. BJA also produced a much-needed toolkit on body-worn cameras, to assist local agencies in implementing the new technology in a way that enhances officer and public safety and strengthens relationships between law enforcement personnel and community members. Furthermore, BJA supports 45 sites through its Smart Policing Initiative, a program that brings together law enforcement leaders and researchers to employ evidence-based practices that target local crime challenges.

Last year, DOJ launched the Violence Reduction Network (VRN) to coordinate data-driven best practices on the most pressing violence problems at each site. These collaborations continue to produce tangible results. In Wilmington, Delaware, for example, police are focusing on improving clearance rates for homicide cases; the clearance rate before VRN was only about 10 percent. Today, it's about 50 percent.

Over the past several years, OJP has also worked with COPS, in partnership with the Major Cities Chiefs Association (MCCA), to support the Officer Safety and Wellness (OSW) Group. The OSW Group brings together representatives from law enforcement, federal agencies, and the research community to address the significantly high number of officer gunfire fatalities and to improve officer safety and wellness. NIJ is currently studying the tragic fact that law enforcement officials are committing suicide. As part of this effort, NIJ is evaluating best practices regarding suicide prevention out in the field and will share this information so that lives can be saved.

Promoting Effective Policing and Meaningful Reform Where Trust Has Eroded or Problems Exist

Addressing mistrust that exists between the police and the communities they serve is vital to advancing public safety. Mistrust breaks down collaboration, impedes the sharing of information, leads to less effective policing, and ultimately can put officer safety and the community at risk. Given the unprecedented national conversation around policing today, the Department views this moment as an important opportunity to collaborate and achieve meaningful, lasting reform.

In addition to providing officers with the resources they deserve, as previously mentioned, the Department also has an array of other tools at its disposal to use where trust has eroded between law enforcement officers and the communities they serve. These tools—ranging from data-driven assessment and targeted interventions to in-depth investigations—are means toward the same principal goal: ensuring strong communities where officers and residents work together to combat crime consistent with shared values. And in deploying these tools, DOJ ensures that there is appropriate communication and coordination among each of its relevant components.

One tool, designed to tackle discrete criminal justice challenges, is the OJP State and Local Help Desk and Diagnostic Center (the Center). This resource provides hands-on technical assistance, with a focus on data analysis and evidence-based solutions. The Center has helped communities across the country with a variety of objectives, such as improving homicide clearance rates and improving management of juveniles in detention facilities. For example, in July 2015, investigative supervisors and homicide prosecutors from the Wilmington Police Department (WPD) participated in a peer exchange with the Richmond, Virginia Police Department and shadowed its investigative teams. As a result of all of these combined efforts, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) established a Matchpoint ballistic imaging system within WPD. This system eliminated the backlog of ballistic matches and comparisons, which are now obtained within minutes as opposed to weeks and months; the

State Prosecutor's Office and the WPD established a case review process for all homicide and shooting cases, and the homicide clearance rate for 2015 cases is currently 50 percent and increasing. The Center has also been helpful to law enforcement leaders committed to ensuring fair and impartial policing and improving relations with area residents. For example, in January 2015, at the request of the Minneapolis Police Department (MPD), the Center completed an assessment of MPD's officer oversight and discipline process. The Center identified weaknesses in MPD's early intervention system—a data-tracking tool that helps identify officers who need additional support, as well as department-wide practices that must be corrected—and issued recommendations that were welcomed by MPD. In implementing these recommendations, MPD showed its commitment to promoting transparency and public engagement, to institutionalizing accountability, and to doing so in a way that will benefit officers and help them perform their jobs more effectively.

Sometimes, local leaders seek a more holistic approach to improving police-community relations. Recognizing this, last year DOJ launched the National Initiative for Building Community Trust and Justice, a three-year, \$4.75 million project designed to support local officials in building trust between minority communities and law enforcement while also ensuring effective crime-fighting. Led by their mayors and police chiefs, cities across the country applied to this competitive program, and six pilot cities were selected: Birmingham, AL; Fort Worth, TX; Gary, IN; Minneapolis, MN; Pittsburgh, PA; and Stockton, CA. These cities are partnering with researchers from the John Jay College of Criminal Justice, Yale Law School, UCLA, and the Urban Institute to develop new programs and establish best practices with a focus on procedural justice, implicit bias, and racial reconciliation—elements essential to enhancing trust throughout our criminal justice system.

[See written statement of Vanita Gupta]

Although some circumstances warrant a pattern-or-practice investigation, in other circumstances the Department employs another critical tool: the Collaborative Reform Initiative for Technical Assistance, run through the COPS Office. The Department created Collaborative Reform in 2011 for police departments willing and able to institute effective reforms voluntarily. At a law enforcement agency's request, COPS examines key operational areas—including training, internal investigations, use of force, and racial profiling—and provides recommendations for reforms that will enhance public safety and public trust. For example, in 2012, COPS published the results of its in-depth analysis of five years of officer involved shootings involving the Las Vegas Police Department. The police department implemented nearly every reform recommendation, achieving a significant decline in officer-involved shootings of unarmed suspects, along with improvements in public safety and community relations. Collaborative Reform efforts are underway across the country, in Spokane, WA; Philadelphia, PA; St. Louis, MO; Salinas, CA; Calexico, CA; and Fayetteville, NC.

The COPS Office also funds a Critical Response for Technical Assistance program that provides targeted technical assistance to law enforcement agencies dealing with high-profile events, major incidents, or sensitive challenges of varying need. Through subject matter experts, interviews and direct observations, and extensive research and analysis, the COPS Office helps state and local law enforcement agencies improve their policies and procedures, operating

systems, and professional culture. The Department has engaged in Critical Response work in Baltimore, Ferguson, Detroit, San Diego, New Orleans, Tampa, and Pasco, Washington. Often COPS publishes a report of findings and recommendations that hold the potential to benefit other law enforcement agencies facing similar issues.

Key Principles in DOJ's Approach to Effective Policing and Building Trust

Whether through the work of the Diagnostic Center, the Civil Rights Division's enforcement actions, or the COPS Office's comprehensive technical assistance, the Department has identified practices that promote effective, constitutional policing and increase trust between law enforcement and the community. These are consistent with best practices advanced by professional organizations like the Police Executive Research Forum (PERF), the International Association of Chiefs of Police (IACP), and the Major City Chiefs Association (MCCA).

They are also consistent with the work of the President's landmark Task Force on 21st Century Policing, a diverse group of law enforcement experts, individual rights advocates, and community leaders tasked with developing recommendations to strengthen trust and reduce crime. In May, the Task Force, staffed by the COPS office, provided its final report to the president, issuing 59 specific recommendations and action items focused on six primary pillars: building trust and legitimacy, policy and oversight, technology and social media, community policing and crime reduction, training and education, and officer wellness and safety.⁴ The Task Force made clear that only a multi-faceted approach, shaped by committed engagement from police officers and residents alike, can achieve meaningful reform.

Federal Law Enforcement Agencies

The Department's law enforcement components, including ATF, FBI, DEA, and USMS, are also involved in assisting and supporting state and local officials to address key crime and public safety initiatives. For example, these DOJ agencies were recently embedded with the Baltimore Police Department (BPD), and along with the support of US Attorney Rod Rosenstein, created a task force working in the Homicide Section to help solve 2015 homicides and reduce crime by leveraging federal resources such as crime labs, gun tracing capabilities, and technology.

Since the inception of the FBI's Safe Streets Violent Crime Initiative in 1992, Safe Streets Task Forces, a partnership between federal law enforcement and state and local agencies, have been and continue to be at the forefront of the FBI's campaign against violent gangs and violent crimes throughout the nation. The success of this initiative has been predicated on their ability to apply short-term reactive strategies with long-term sophisticated techniques while cooperating in a task force environment with other federal, state and local counterparts. Through the efficient use of the Enterprise Theory of Investigation, Safe Streets Task Forces pursue violent gangs and violent crime through sustained, multi-jurisdictional, coordinated

⁴ http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf

investigations that support prosecutions under United States Code, Titles 18 and 21, including violations such as racketeering, Hobbs Act (commercial robberies), drug conspiracy and firearm violations. Currently, there are 164 Safe Streets Violent Gang Task Forces, 45 Safe Streets Violent Crime Task Forces and 15 Safe Trails Task Forces.

In addition, the Civil Rights Division and FBI work closely with state and local law enforcement in investigating hate crimes, human trafficking, and crimes committed under color of law throughout the United States.

Conclusion

State and local law enforcement agencies carry out their selfless responsibilities with professionalism, integrity, and uncommon valor. The Department is committed to using its resources and expertise to support them—in their vital efforts to protect the public, in safeguarding individuals' constitutional rights, and in building strong relationships with community members.

The Department looks forward to continuing to collaborate with the distinguished Members of this Committee and this Congress. Thank you, Mr. Chairman, once again, for providing Department of Justice officials with an opportunity to testify this afternoon. We look forward to your questions.

TESTIMONY OF ROBERT N. DRISCOLL
BEFORE THE SUBCOMMITTEE ON OVERSIGHT, AGENCY ACTION,
FEDERAL RIGHTS AND FEDERAL COURTS

TUESDAY, NOVEMBER 17, 2015
02:15 P.M.
DIRKSEN SENATE OFFICE BUILDING 226

I appreciate the opportunity to discuss the role of DOJ in enforcing its pattern and practice statute, 42 U.S.C. § 14141, in the context of law enforcement. I had the privilege of serving as a Deputy Assistant Attorney General in the Civil Rights Division for two years under Assistant Attorney General Ralph Boyd, and was active in supervising the Special Litigation Section's investigations of and resolutions with law enforcement agencies in Cincinnati, Columbus, Miami, and other cities. The work of the Section is important, and often difficult, and the men and women who undertake it deserve our respect. In addition, though, I believe that DOJ leadership, and those who have oversight authority with respect to DOJ, should more carefully analyze the appropriate use of the statute and ensure that it is not used as a tool to manipulate desired political outcomes, but rather, is used to fulfill its purpose of enforcing constitutional standards where there has been a pattern of violations by state and local law enforcement agencies.

To put my contentions in context, I start with the history of the statute. The Rodney King beating, trial of the LAPD officers involved, and the related civil unrest brought national attention to police misconduct in the early 1990s, leading to the 1994 passage of section 14141, which was essentially the same provision found in a failed 1991 police reform bill. The legislative history of this previous effort reveals that section 14141 was viewed as a "gap-filler" with respect to the longstanding civil rights statute section 1983, 42 U.S.C. § 1983, which allows private citizens to sue for violations of their constitutional rights. One limitation of section 1983 is that, while an individual can be awarded damages for his or her injuries, she is generally unable to obtain any injunctive or prospective relief against a law enforcement agency unless she could show that *her* individual rights were likely to be violated in the future. Thus, section 1983

is generally ineffective for the purpose of forcing change to policies, procedures, or practices of a law enforcement agency that produce a pattern of constitutional violations. Section 14141 was written to fill that gap—to provide the Attorney General with the power to respond to a pattern or practice of constitutional violations by seeking injunctive relief against the law enforcement agency in question—forcing changes in policy or training to ensure the pattern is ended. However, section 14141 did not change the standards of proof for constitutional violations, nor did it make the Civil Rights Division a roving police practices review board, with the ability to require “best practices” on any law enforcement agency it chooses.

To provide a hypothetical example of what I would consider a totally appropriate use of the statute, imagine that a given law enforcement agency engages in a pattern of using excessive force against those who have been arrested and detained by repeatedly deploying pepper spray when handcuffed individuals “mouth off” or spit at officers. Use of force reporting demonstrates that this conduct occurs repeatedly, supervising officers are aware of it and in fact, sign off on use of force reports that state pepper spray was deployed against restrained individuals. While an individual could sue, and likely prevail, in an excessive force case against the officer in question, if the conduct continued over time, the Civil Rights Division could investigate, establish a pattern or practice of constitutional violations existed, and obtain a federal court injunction or other resolution that required a new policy prohibiting the practice, appropriate training on how to deal with restrained individuals who continue to resist, and reporting of pepper spray deployments to be reviewed by supervising officers.

Over time, however, section 14141 has been used much more broadly by DOJ. For example, the Department will often “find” a pattern and practice without sufficient proof of any underlying individual constitutional violations, as a federal district court recently found, after trial, in Alamance County, North Carolina. Of more concern, the remedies sought and enforced by DOJ often go well beyond enjoining specific pattern and practices of unconstitutional conduct, but overflow into what appear to be explicitly political or regulatory decisions that would and should otherwise be handled locally and or legislatively. For example, the Cleveland Consent Order establishes a Community Police Commission, with specific provisions ensuring diversity of representation on the Committee, and regarding scheduling of meetings and requirements for reports. The language of the order, which spans 100 pages, is frankly statutory. Such committees may or may not be a good idea, and the City of Cleveland may or may not want to create one through the local political process, but requiring establishment of such a committee in a federal consent decree is far beyond any remedy necessary to correct a specific pattern of constitutional violations. Rather, such provisions use the consent decree negotiation as a process through which DOJ and local municipalities can obtain political outcomes (such as creation of a new citizen oversight board) through federal court order rather than the political process.

If insufficient attention is paid to limiting section 14141 to its intended use to enjoin specific patterns and practices of unconstitutional conduct, the Civil Rights Division becomes a roving “best practices” unit, appearing periodically to tell a local law enforcement agency that, for example, it must collect certain racial data, it must use a particular discipline system, it must report uses or force in a certain way, regardless of the underlying facts. When the Division functions in this manner, it operates on a regulatory model (or a regulation by litigation model),

not an enforcement model, and the regulations in question are not reviewable, are not subject to comment, and are not authorized by Congress. For example, using raw racial disparities regarding arrests or stops to establish discriminatory policing (as DOJ did in Ferguson) would support that allegation against virtually any law enforcement agency. This means, in practice, the Civil Rights Division can impose a policy objective (such as racial data collection) virtually anywhere it chooses, and every law enforcement agency that has disparities in stops and arrests (which will be virtually all law enforcement agencies) knows DOJ will require data collection and is incentivized to preemptively adopt a preferred policy. This transforms what is supposed to be a gap-filler statute with respect to section 1983 into a federalization of local law enforcement. If Congress would like to impose additional federal data collection requirements on local law enforcement, it could through various means, but having a branch of DOJ essentially write standards for local law enforcement in this regard strike me as an overreach with constitutional implications. This type of broader imposition of policy and political structure on local government breeds resentment by local law enforcement, who feel they have been accused and convicted of a pattern of civil rights violations without proof when local jurisdictions agree to “settle” a pattern and practice case, agreeing to broad reforms rather than targeted policies and training directed at proven constitutional violations.

Because DOJ consent decrees have frequently tackled issues far removed from actual constitutional violations, it is particularly hard to judge whether they have been effective, as the Washington Post article discussing law enforcement consent decrees this weekend noted. Kimbriell Kelly, Sarah Childress, & Steven Rich, *Forced Reforms, Mixed Results*, THE WASHINGTON POST, Nov. 13, 2015,

<http://www.washingtonpost.com/sf/investigative/2015/11/13/forced-reforms-mixed-results/>.

Moreover, as the Washington Post found, these decrees, which often seek to “remake” a department, can be crushingly expensive, costing jurisdictions millions of dollars with no guarantee the initial problem identified will be fixed.

I recognize, of course, there are no bright lines as to what goes “too far.” Some pattern of violations are indeed severe enough to require more comprehensive remedies to correct a problem. But it often seems that there is little attempt being made to even ask the question of whether a particular remedy is actually required to correct a constitutional violation, or is simply a policy preference or objective of DOJ. This distinction is, I believe, critical to proper enforcement of section 14141. Should the committee look to make changes to section 14141, my view is the that CRIPA, the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 *et seq.*, provides a model of appropriate standards by requiring, prior to initiation of any action, the following certification by the Attorney General, which I quote in full for context:

(1) that at least 49 calendar days previously the Attorney General has notified in writing the Governor or chief executive officer and attorney general or chief legal officer of the appropriate State or political subdivision and the director of the institution of—

(A) the alleged conditions which deprive rights, privileges, or immunities secured or protected by the Constitution or laws of the United States and the alleged pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities;

(B) the supporting facts giving rise to the alleged conditions and the alleged pattern or practice, including the dates or time period during which the alleged conditions and pattern or practice of resistance occurred; and when feasible, the identity of all persons reasonably suspected of being involved in causing the alleged conditions and pattern or practice at the time of the certification, and the date on which the alleged conditions and pattern or practice were first brought to the attention of the Attorney General; and

(C) the minimum measures which the Attorney General believes may remedy the alleged conditions and the alleged pattern or practice of resistance;

(2) that the Attorney General has notified in writing the Governor or chief executive officer and attorney general or chief legal officer of the appropriate State or political subdivision and the director of the institution of the Attorney General's intention to commence an investigation of such institution, that such notice was delivered at least seven days prior to the commencement of such investigation and that between the time of such notice and the commencement of an action under section 1997a of this title—

(A) the Attorney General has made a reasonable good faith effort to consult with the Governor or chief executive officer and attorney general or chief legal officer of the appropriate State or political subdivision and the director of the institution, or their designees, regarding financial, technical, or other assistance which may be available from the United States and which the Attorney General believes may assist in the correction of such conditions and pattern or practice of resistance;

(B) the Attorney General has encouraged the appropriate officials to correct the alleged conditions and pattern or practice of resistance through informal methods of conference, conciliation and persuasion, including, to the extent feasible, discussion of the possible costs and fiscal impacts of alternative minimum corrective measures, and it is the Attorney General's opinion that reasonable efforts at voluntary correction have not succeeded; and

(C) the Attorney General is satisfied that the appropriate officials have had a reasonable time to take appropriate action to correct such conditions and pattern or practice, taking into consideration the time required to remodel or make necessary changes in physical facilities or relocate residents, reasonable legal or procedural requirements, the urgency of the need to correct such conditions, and other circumstances involved in correcting such conditions; and

(3) that the Attorney General believes that such an action by the United States is of general public importance and will materially further the vindication of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

42 U.S.C. § 1997b(a). Whether or not the statute is amended, these reasonable standards, which simply remind DOJ to stick to its constitutional objectives, require the minimum necessary

modifications to comply with the Constitution, and not drift onto regulatory or policy issues, are worth following.

I welcome your questions.

TESTIMONY OF VANITA GUPTA

*Senate Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts
Tuesday, November 17, 2015
Washington, D.C.*

Introduction

Chairman Cruz, Ranking Member Coons, and distinguished Members of the Committee – the Department of Justice (the Department or DOJ) greatly appreciates the opportunity to participate in today’s hearing.

Our nation’s police, sheriffs and other law enforcement officers are dedicated public servants who provide invaluable service to our nation. They deserve our highest praise for keeping our neighborhoods safe, our families secure, and dangerous criminals behind bars. It is critical that they have the tools and support they need to do their jobs effectively and safely. For this reason, building on her years of experience as a prosecutor, Attorney General Lynch has made support for state and local law enforcement among her highest priorities.

DOJ invests substantial resources to support police, sheriffs and other law enforcement agencies around the country – to advance effective policing, ensure officer and public safety, and bolster trust between law enforcement and the communities. The Department employs a variety of tools toward these ends, including funding, equipment, training, technical assistance, and enforcement actions.

Supporting State and Local Law Enforcement with Funding for New Officers, Equipment, Training, Convenings, and Research

[See written statement of Ronald L. Davis]

The Department supports state and local law enforcement agencies by providing them funding and resources to aid them in protecting their communities.

Since 2009, the Department has awarded over \$2 billion in local grants through its Office of Community Oriented Policing Services (COPS). These funds have created or preserved positions for more than 10,000 officers at nearly 2,600 agencies. Nearly half of these positions were funded through \$1 billion in economic stimulus funding designed to save jobs during the economic downturn. In the last fiscal year alone, COPS awarded more than \$113 million in grants to hire or save 915 officer positions.

For Fiscal Year 2016, the Administration has requested an additional \$303 million for the COPS Office to continue the important mission of advancing public safety through community policing. In recent comments before the International Association of Chiefs of Police, the President reiterated his commitment to law enforcement by increasing funding for the COPS Office. The President told the more than 14,000 law enforcement officers in attendance that he

has asked Congress “to increase funding for the COPS program so we can hire even more police officers and make sure you have the training and equipment you need. That’s what I value.”

The Department’s Office of Justice Programs (OJP) has also invested heavily in supporting local policing, particularly through the work of the Bureau of Justice Assistance (BJA). The State and Local Law Enforcement Assistance appropriation, which funds BJA’s programs, provides over \$1.1 billion per year for a variety of state and local criminal justice needs. BJA has trained over 21,300 officers through its VALOR program, launched in 2010 in response to attacks against officers in the line of duty. Every line of duty death is tragic. The VALOR program aims to save lives by helping officers to identify armed subjects, recognize emerging threats, and de-escalate potentially violent encounters. It also addresses law enforcement wellness issues that directly impact an officer’s safety. Additionally, a partnership under the VALOR program, the Advanced Law Enforcement Rapid Response Training (ALERT) program, has provided active-shooter training for approximately 70,000 officers with BJA’s support since 2002. Since 1999 the Bulletproof Vest Partnership has provided more than 1.2 million vests to law enforcement officers and personnel. OJP’s National Institute of Justice (NIJ) continues to improve the equipment performance standard and compliance testing program to help ensure that the vest worn by the men and women of law enforcement perform as needed. Modern police body armor is credited with saving over 3,100 officers lives, since it was introduced into practice as the result of NIJ-funded research in 1975. The BJA-funded Blue Courage program provides support and continuing education to law enforcement officers on a range of topics, including judgment, integrity, leadership, and stress management. During the last fiscal year, it served more than 2,200 officers from 358 agencies.

BJA has funded important new technology, awarding more than \$23.2 million in grants to 73 local and tribal agencies across 32 states this past September to expand and study the use of body-worn cameras in support of the Administration’s Community Policing Initiative. BJA also produced a much-needed toolkit on body-worn cameras, to assist local agencies in implementing the new technology in a way that enhances officer and public safety and strengthens relationships between law enforcement personnel and community members. Furthermore, BJA supports 45 sites through its Smart Policing Initiative, a program that brings together law enforcement leaders and researchers to employ evidence-based practices that target local crime challenges.

Promoting Effective Policing and Meaningful Reform Where Trust Has Eroded or Problems Exist

Addressing mistrust that exists between the police and the communities they serve is vital to advancing public safety. Mistrust breaks down collaboration, impedes the sharing of information, leads to less effective policing, and ultimately can put officer safety and the community at risk. Given the unprecedented national conversation around policing today, the Department views this moment as an important opportunity to collaborate and achieve meaningful, lasting reform.

In addition to providing officers with the resources they deserve, as previously mentioned, the Department also has an array of other tools at its disposal to use where trust has eroded between law enforcement officers and the communities they serve. These tools—ranging

from data-driven assessment and targeted interventions to in-depth investigations—are means toward the same principal goal: ensuring strong communities where officers and residents work together to combat crime consistent with shared values. And in deploying these tools, DOJ ensures that there is appropriate communication and coordination among each of its relevant components.

[See written statement of Ronald L. Davis]

There are also occasions in which the proper federal role is to conduct investigations into officer conduct. The Department's Civil Rights Division (the Division) has longstanding authority to investigate individual officers for potential criminal violations of constitutional rights. In addition, in 1994, partly as a response to concerns surfaced after the 1992 Los Angeles riots, Congress charged the Division with the responsibility to investigate law enforcement agencies for a pattern or practice of misconduct, such as excessive force and discriminatory policing, and to develop remedies to eliminate such misconduct where it is found.¹ Eliminating patterns or practices of unlawful conduct—many of which took years to develop—cannot be done overnight, and we must aim for these remedies to be sustainable. This requires intense and concerted effort: better training, closer supervision, and more positive, constructive community engagement.

As Congress recognized in creating these statutory authorities, the power of law enforcement to restrict liberty and, at times, use deadly force must be exercised in accordance with the Constitution. In each of these enforcement contexts, the Department aims to promote effective and accountable policing that is consistent with the law and responsive to community needs.

In its criminal enforcement, the Division is committed to impartial, fact-driven investigations of individual officers for federal offenses, such as assaults, thefts, and sexual assaults committed under color of law. This means pursuing prosecution when the evidence supports it, as in the case of a Hawaii police officer who, without provocation, kicked a civilian in the head and then threw a metal stool at him, before subsequently filing a false report about the incident. It also means closing investigations when the evidence does not support charges. For example, the Department closed criminal investigations into the deaths of Michael Brown in Ferguson, Missouri; Dontre Hamilton in Milwaukee, Wisconsin; and Anastasio Hernandez-Rojas in San Diego, California. We declined prosecutions in each of those cases because the evidence did not indicate that the law enforcement officials had violated federal criminal civil rights laws or other federal laws. In each of those cases, we explained our decision publicly and closed the cases. In every single case, our objectivity is paramount, and particularly valued where communities may lack trust in local officials.

Thus, criminal enforcement is an important tool focusing on individual criminal liability. Where the Division identifies a pattern or practice of unconstitutional policing, it relies on its civil authority to seek systemic reform. Often, jurisdictions recognize their need for assistance and invite the Division to conduct an investigation— as has been the case recently in Baltimore,

¹ 42 U.S.C. § 14141

Newark, New Orleans, Cleveland, and Miami. In Baltimore, for example, the mayor, police chief, and union president all called for or publicly supported the Division's investigation.

When the Division identifies a pattern or practice of conduct that violates civil rights, it has the statutory authority to sue to remedy the unlawful conduct—although the Division always seeks to reach an agreement with the local jurisdiction that implements the necessary reforms. In all cases in this Administration, the Department publishes its findings.

In our civil investigations we speak directly with police commanders, union representatives, and line officers; attend roll calls and participate in ride-alongs; and learn first-hand what challenges officers face and what changes they think necessary. Often, these individuals report a lack of adequate support, training, policy guidance, supervision, and even equipment to keep themselves, and their communities, safe. These investigations also involve comprehensive engagement with community members. Division investigators conduct often hundreds of interviews, host town hall meetings, and meet with residents in their neighborhoods. And where the Division finds a pattern or practice of unlawful conduct, it relies on the input of community members and officers themselves in crafting proposed remedies.

The Department is currently enforcing 16 agreements with law enforcement agencies, including 13 consent decrees. Since 2009, the Civil Rights Division has opened 23 investigations into police departments. The Department does not always find constitutional violations. In the past six years, the Department has concluded six investigations of law enforcement agencies without finding constitutional violations.

Throughout our investigation and reform efforts, the Division works directly with experts in the field—including current and former police chiefs. In addition to assisting with incident analysis and data analysis, these experts participate in site visits and communicate directly with local officers, providing them real-time technical assistance. They also assist us in devising remedies for identified problems, based on their experience and knowledge of best practices, appropriately tailored to the jurisdiction's particular needs. In addition, during the pendency of pattern-or-practice investigations, DOJ provides real-time technical assistance through COPS and other components.

The Division's pattern-or-practice work has helped local law enforcement agencies enhance their public safety efforts and strengthen their relationship with their communities. In Portland, Oregon, for example, two years after we identified an institutional pattern of excessive force against people with mental illness, we have worked with the police department to retrain officers and strengthen accountability measures. As a result, officers and the community are safer and the use of force has declined dramatically. In Seattle, where we identified similar problems, the police department has embraced change. As a result of improvements to policy and training, the police department recently reported that officers used force in less than 2% of encounters with people with mental illness, of which there were almost 2,500 in a three-month period earlier this year. This is down from the 70% figure reported by the police department in 2011.

In Los Angeles, independent researchers found that our consent decree helped increase community trust in the police department. “The quality of service to residents is higher, the perception of the LAPD as fair has risen, and the use of force is down,” they wrote.² In East Haven, Connecticut, where we documented a pattern of biased policing and entered into a consent decree three years ago, residents are reporting significantly improved relations with their police department.³ And in just two years, pursuant to a memorandum of agreement that resulted from a pattern-or-practice investigation, the Missoula, Montana, Police Department and University of Missoula Police Department have become models of how law enforcement agencies should respond to allegations of sexual assault. Data collection required by our agreements there indicate that while incidents of sexual assault have remained the same, reporting is up, victims of sexual assault report feeling that the police response helped, rather than re-traumatized them, and officers feel better about their work and their contributions to making the entire community safer. Due to the swift progress of these agencies, we closed both cases earlier this year.

Key Principles in DOJ's Approach to Effective Policing and Building Trust

[See written statement of Ronald L. Davis]

Whether through the work of the Diagnostic Center, the Civil Rights Division's enforcement actions, or the COPS Office's comprehensive technical assistance, the Department has identified a series of principles and practices that promote effective, constitutional policing and increase trust between law enforcement and the community. These are consistent with best practices advanced by professional organizations like the Police Executive Research Forum (PERF), the International Association of Chiefs of Police (IACP), and the Major City Chiefs Association (MCCA).

They are also consistent with the work of the President's landmark Task Force on 21st Century Policing, a diverse group of law enforcement experts, individual rights advocates, and community leaders tasked with developing recommendations to strengthen trust and reduce crime. In May, the Task Force, staffed by the COPS office, provided its final report to the president, issuing 59 specific recommendations and action items focused on six primary pillars: building trust and legitimacy, policy and oversight, technology and social media, community policing and crime reduction, training and education, and officer wellness and safety.⁴ The Task

² Christopher Stone, Todd Foglesong & Christine M. Cole, *Policing Los Angeles Under a Consent Decree: The Dynamics of Change at the LAPD*, May 2009, at 1, available at http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centers-programs/programs/criminal-justice/Harvard_LAPD_Report.pdf (last visited Nov. 8, 2015).

³ Esteban L. Hernandez, *Latinos in East Haven Applaud Police Efforts to Heal Community*, New Haven Register, Feb. 7, 2015, available at <http://www.nhregister.com/article/NH/20150207/NEWS/150209600> (last visited Nov. 8, 2015).

⁴ http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf

Force made clear that only a multi-faceted approach, shaped by committed engagement from police officers and residents alike, can achieve meaningful reform.

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In addition, the Civil Rights Division and FBI work closely with state and local law enforcement in investigating hate crimes, human trafficking, and crimes committed under color of law throughout the United States.

Conclusion

State and local law enforcement agencies carry out their selfless responsibilities with professionalism, integrity, and uncommon valor. The Department is committed to using its resources and expertise to support them—in their vital efforts to protect the public, in safeguarding individuals' constitutional rights, and in building strong relationships with community members.

The Department looks forward to continuing to collaborate with the distinguished Members of this Committee and this Congress. Thank you, Mr. Chairman, once again, for providing Department of Justice officials with an opportunity to testify this afternoon. We look forward to your questions.



**Testimony of
Sherrilyn Ifill, President and Director-Counsel
NAACP Legal Defense and Educational Fund, Inc.**

**Before the United States Senate Committee on the Judiciary
Subcommittee on Oversight, Agency Action, Federal Rights and Federal
Courts**

**Hearing on
“War on Police: How the Federal Government
Undermines State and Local Law Enforcement”**

**Dirksen Senate Office Building
Room 226**

November 17, 2015

I. Introduction

Good afternoon Chairman Cruz, Ranking Member Coons, and Members of the Subcommittee. On behalf of the NAACP Legal Defense and Educational Fund, Inc. (LDF), I would like to thank you for the opportunity to testify about the crucial role that the U.S. Department of Justice (DOJ) has played in both investigating and supporting this country's law enforcement agencies and the communities they serve. LDF is the nation's oldest and foremost civil rights legal organization. For 75 years, it has relied on the Constitution and federal and state civil rights laws to pursue equality and justice for African Americans and other persons of color in the areas of education, voting, employment and housing. Additionally, LDF has fought to address racial bias at every stage of the criminal justice system - from police stops to sentencing¹ to reentry.²

LDF's work to address unlawful and discriminatory policing practices dates back to its inception, when founder Thurgood Marshall represented African-American men who were brutally beaten by police and forced to confess to crimes they did not commit.³ Since then, LDF has advocated for unbiased and responsible policing through litigation and policy advocacy.⁴ Importantly, during this time it has represented members of law enforcement in a long line of cases as they sought to enforce their rights to equal employment opportunities within their own local police agencies.⁵

¹ See, e.g., Case of Duane Buck, <http://www.naacpldf.org/case-issue/duane-buck-sentenced-death-because-he-black>. See also *United States v. Blewett*, Case Nos. 12-5226/5582 (6th Cir. Dec. 3, 2013), <http://www.naacpldf.org/case-issue/united-states-v-blewett>.

² See, e.g., LDF Statement on President Obama's Actions to Promote Rehabilitation and Reintegration of Persons with Criminal Records (Nov. 3, 2015), <http://www.naacpldf.org/press-release/ldf-statement-president-obama%E2%80%99s-actions-promote-rehabilitation-and-reintegration-perso>.

³ See, e.g., *Shepherd v. Florida*, 341 U.S. 50 (1951). See generally Gilbert King, *Devil in the Grove: Thurgood Marshall, the Groveland Boys, and the Dawn of a New America* (HarperCollins 2012).

⁴ See, e.g., Complaint, *Davis, et al. v. City of New York, et al.*, Case No. 1:10-cv-00699-SAS-HBP (S.D.N.Y. Jan. 28, 2010) (challenging the unlawful stopping, questioning and arresting of African-American and Latino public housing residents and their guests by New York City Police Department officers), <http://www.naacpldf.org/update/court-approves-final-settlement-federal-class-action-lawsuit-challenging-police-practices-nyc>. See also, *Tolan v. Cotton*, Case No. 13-5551, Motion for Leave to File U.S. Supreme Court Amicus Brief, <http://www.naacpldf.org/case-issue/tolan-v-cotton> (alleging excessive use of force by the Bellaire, Texas Police Department); Sherrilyn Ifill, *Statement by the NAACP Legal Defense and Educational Fund, Inc. Before the President's Task Force on 21st Century Policing* (Jan. 13, 2015), http://www.naacpldf.org/files/case_issue/Sherrilyn%20Ifill%20Testimony-Task%20Force%20on%2021st%20Century%20Policing.pdf.

⁵ See *Waisome v. Port Authority of New York and New Jersey*, 999 F.2d 711 (2d Cir. 1993) (class action on behalf of African-American police officers at the Port Authority regarding discrimination in promotions). See also *Police Ass'n of New Orleans Through Cannatella v. City of New Orleans*, 100 F.3d 1159 (5th Cir. 1996) (defended decree entered in settlement of class action by African-American police officers in New Orleans regarding discrimination in hiring and promotions).

Today's hearing comes at a time when public trust in police is at its lowest since 1993, after the highly publicized beating of Rodney King by Los Angeles police officers was captured on video and aired nationwide.⁶ The public's plummeting confidence in police is not surprising given sustained news reports and graphic videos of police-involved deaths and assaults of unarmed men, women and children. A disproportionate number of the victims of these assaults and killings are African American. The videos of the police shootings of 12-year-old Tamir Rice as he played with a toy gun in a park in Cleveland in 2014, and of Walter Scott, who was shot in the back as he ran for his life in North Charleston, South Carolina earlier this year, and many others, have raised the legitimate concern of Americans across the country about the link between policing and racial discrimination.

Underlying that concern is the absence of accountability for police officers who use excessive or deadly force on unarmed citizens. For example, in 2012, Rekia Boyd, an unarmed African-American woman, was fatally shot in the head by a Chicago, Illinois police officer as she innocently stood with a group in a park. This year, a judge acquitted the officer of involuntary manslaughter charges.⁷ Also, in August 2015, the jury trial of a Charlotte police officer who shot and killed Jonathan Ferrell, an unarmed African-American man, resulted in a mistrial.⁸ Even DOJ's federal criminal investigations of law enforcement officers who used deadly force against a civilian have often resulted in no indictments or acquittals.⁹

These are not isolated incidents. Many communities have experienced consistent and repeated occurrences of police use of excessive force against unarmed citizens with little or no accountability for this pattern of conduct. Consequently, many community leaders, elected officials, and in some cases police chiefs, have recently asked DOJ to use its authority under the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141,¹⁰ to conduct civil rights investigations of law enforcement agencies whose officers have a track record of using excessive force or engaging in unlawful policing practices. These civil rights investigations have

⁶ Jeffrey M. Jones, *In U.S., Confidence in Police Lowest in 22 Years*, Gallup, Inc. (June 19, 2015), <http://www.gallup.com/poll/183704/confidence-police-lowest-years.aspx>.

⁷ Steve Schamadeke & Jeremy Gomer, *Anger follows acquittal in rare of Chicago cop*, Chicago Tribune (Apr. 21, 2015), <http://www.chicagotribune.com/news/local/breaking/ct-chicago-police-detective-manslaughter-trial-0421-mct-20150420-story.html>.

⁸ Javier De Diego & Greg Botelho, *Mistrial declared in case of Charlotte police officer Randall Kerrick* (Aug. 21, 2015), <http://www.cnn.com/2015/08/20/us/charlotte-kerrick-trial/index.html>.

⁹ See, e.g., U.S. Department of Justice, *Department of Justice Report Regarding the Criminal Investigation of Into the Shooting Death of Michael Brown By Ferguson, Missouri Police Officer Darren Wilson* (Mar. 4, 2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown.pdf. See also *United States v. Shafer*, 384 F. Supp. 496 (N.D. Ohio 1974).

¹⁰ Under the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141, the Attorney General has the authority to investigate and eliminate a pattern or practice of conduct by law enforcement officers who deprive persons of their rights, privileges, or immunities secured by the Constitution and federal law.

the potential of building trust between police and the communities they serve by advancing policies and practices that will result in fair and lawful policing.

There is no war on police. Instead this has been a year in which we have been compelled to face what Federal Bureau of Investigation (FBI) Director James Comey earlier this year called “hard truths” about law enforcement and race.¹¹ Many of the communities that are most often subject to excessive force by police also welcome reliable, competent and unbiased policing. Their advocacy, engagement and willingness to speak publicly about clear and serious problems in policing have raised the consciousness of law enforcement, lawmakers and Americans across the country. Most agree that law enforcement would benefit from increased, specialized and ongoing training, a uniform system of data collection around police-involved killings, and the implementation of a body-worn camera program. The promotion of these innovations in police departments around the country are a direct result of citizen activism and demand for reforms in policing practices.

Without question, we are in a moment of heightened consciousness and demand for improved policing practices. It is impossible to view some of the encounters between police and unarmed citizen without concluding that some changes must be made. From the chokehold death of Eric Garner at the hands of police in Staten Island, New York, to the police shooting death of Walter Scott in North Charleston, South Carolina, video recordings of police officers’ use of deadly force against unarmed African Americans and other people of color have provoked a national conversation about policing and demand for reforms. The airing of these images, the subsequent and sustained peaceful protests they provoked, and DOJ’s ongoing investigations of police departments do not constitute a “war” on police. Instead they represent a collective and important effort to address illegal policing practices and to create the conditions for the development of trust between law enforcement and the communities they serve.

II. Federal Oversight of State and Local Law Enforcement Is Needed Now More than Ever

It is important to remember what motivated Congress to empower DOJ to review patterns of discrimination and excessive force in local police departments. Congress passed the Violent Crime Control and Law Enforcement Act of 1994 as a response to an urgent concern about unchecked police abuse against the public. The Committee Report for a predecessor bill containing almost identical language to §14141, the Police Accountability Act of 1991, described the brutal beating of Rodney King by the Los Angeles Police Department (LAPD) officers in detail, and emphasized that, “[u]nfortunately, the . . . King incident [wa]s not an aberration . . . [Instead] . . . ‘there [were] a significant number of officers in the LAPD who repetitively use excessive force against the public.’”¹² Even worse, the Report concluded that “the problem [wa]s not limited to Los Angeles . . . [but rather] . . . [p]olice chiefs from 10 major cities convened

¹¹ James B. Comey, Director, Federal Bureau of Investigation, *Hard Truths: Law Enforcement and Race* (Feb. 12, 2015), <https://www.fbi.gov/news/speeches/hard-truths-law-enforcement-and-race>.

¹² See House Report No. 102-242, *Omnibus Crime Control Act of 1991, Title XII, Subtitle A – Police Accountability Act of 1991*, at 135 (Oct. 7, 1991), 1991 WL 206794.

soon after the King incident and emphasized that ‘the problem of excessive force in American policing [wa]s real.’”¹³

The Committee Report noted that, notwithstanding pervasive police violence, “[t]he Justice Department . . . lack[ed] the authority to address systemic patterns or practices of police misconduct.”¹⁴ It “c[ould] only prosecute individual police officers, whom juries are often reluctant to convict.”¹⁵ And, “[i]f an officer was poorly trained, or was acting pursuant to an official policy, it [wa]s difficult to obtain a conviction, and Justice ha[d] no authority to sue the police department itself to correct the underlying policy.”¹⁶

Since Congress enacted § 14141, DOJ has carefully exercised its authority to investigate cases, often limiting their probes to agencies that appeared to engage in a pattern or practice of unlawful policing. In 21 years, DOJ has investigated approximately 64 law enforcement agencies and has entered into an agreement in some form with approximately 35 of those agencies.¹⁷ In other words, in two decades, a mere 0.19% of the almost 18,000 law enforcement agencies nationwide had consent decrees or out-of-court settlement agreements with DOJ to improve their policing practices. Certainly, the relatively few federal civil rights investigations of state and local law enforcement agencies strongly indicates that rather than declaring “war” on police, DOJ is using its enforcement authority to challenge civil rights violations by police in a measured way.

Despite rhetoric to the contrary, killings of police officers have been on a steady decline.¹⁸ Preliminary estimates for 2014 and figures for 2013 are consistent with the average number of such killings in recent years.¹⁹ Every killing of a police officer is a tragedy and

¹³ *Id.*

¹⁴ *Id.* at 137.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See The Marshall Project, *The Department of Justice’s § 14141 Civil Rights Investigations*, https://github.com/themarshallproject/doj14141/blob/master/data/doj_data.csv (last visited Nov. 11, 2015) (analyzing information about federal civil rights investigations received through a request to the Department of Justice). See also U.S. Department of Justice, *Police Reform and Accountability Accomplishments*, <http://www.justice.gov/file/police-reform-and-accountability-fact-sheet/download> (last visited Nov. 14, 2015).

¹⁸ See Federal Bureau of Investigations, *FBI Releases 2013 Statistics on Law Enforcement Officers Killed and Assaulted* (Nov. 24, 2014), <https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2013-statistics-on-law-enforcement-officers-killed-and-assaulted>. See also Mark Berman, *Fewer police officers shot and killed over first half of 2015 than 2014*, *The Washington Post* (June 30, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/06/30/fewer-police-officers-shot-and-killed-over-first-half-of-2015-than-2014/>; Officer Down Memorial Page, *Honoring Officers Killed in 2015* <https://www.odmp.org/search/year> (last visited Nov. 11, 2015).

¹⁹ Federal Bureau of Investigations, *FBI Releases 2014 Preliminary Statistics for Law Enforcement Officers Killed in the Line of Duty* (May 11, 2015), <https://www.fbi.gov/news/pressrel/press-releases/fbi->

constitutes a threat to the strength of law enforcement. But recent scrutiny of illegal police practices cannot be credibly connected to an increase in killings or assaults on police officers.

By contrast, while there is no reliable official census of civilians killed by police,²⁰ an accounting by *The Washington Post* reveals that over 840 civilians have been killed by police this year.²¹ Twenty-four percent of persons killed by police were African American,²² even though they comprise only 13 percent of the country's population. Twenty-nine were unarmed.²³ Earlier this year, FBI Director James Comey lamented the lack of reliable national data on police-involved killings of civilians. He noted that, "[d]emographic data regarding officer-involved shootings is not consistently reported Because reporting is voluntary, our data is incomplete and therefore, in the aggregate, unreliable."²⁴

More recently, Director Comey opined that the recent uptick in violent crime reported in some cities across the country positively correlates with law enforcement's reluctance to enforce laws because communities of color and local and federal officials are scrutinizing police actions.²⁵ This has been referred to as a "Ferguson Effect," in reference to Ferguson, Missouri, which became the epicenter of citizen protests against police killings of unarmed citizens in 2014. No reliable criminology data supports Director Comey's claim.²⁶ Even if Comey's speculation proves to be supported by data, it reveals the need to engage even more intensely with police departments and with communities to build trust, to promote reforms and to facilitate a culture of collaboration between law enforcement and the communities they serve.

releases-2014-preliminary-statistics-for-law-enforcement-officers-killed-in-the-line-of-duty (noting that 51 officers were killed in the line of duty in 2014 compared to the average 64 officers killed each year in the past 34 years).

²⁰ See Arun Rath, *Hundreds of Homicides by Police Go Uncounted in FBI Statistics*, National Public Radio (Dec. 7, 2014), <http://www.npr.org/2014/12/07/369191143/hundreds-of-homicides-by-police-go-uncounted-in-fbi-statistics>.

²¹ *Investigation: Police Shootings, The Washington Post*, <https://www.washingtonpost.com/graphics/national/police-shootings/> (last visited Nov. 16, 2015).

²² *Id.*

²³ *Id.* See also Appendix, *infra*.

²⁴ James B. Comey, Director, Federal Bureau of Investigation, *Hard Truths: Law Enforcement and Race* (Feb. 12, 2015), <https://www.fbi.gov/news/speeches/hard-truths-law-enforcement-and-race>.

²⁵ See Evan Perez, et al., *FBI chief tries to deal with the 'Ferguson effect,'* CNN Politics (Oct. 27, 2015), <http://www.cnn.com/2015/10/26/politics/fbi-comey-crime-police/index.html>.

²⁶ Samuel Walker, *Comey's Bid to Silence Cops Critics is Disgraceful and Wrong*, The Crime Report (Oct. 30, 2015), <http://samuelwalker.net/wp-content/uploads/2015/11/ComeyFBI.pdf>.

III. DOJ's Civil Rights Investigations Help Law Enforcement Agencies to Adopt and Carry Out Best Policing Practices and Is Among Several Tools

DOJ's investigative power is undoubtedly a critical tool for ensuring lawful and fair policing practices nationwide, particularly in communities of color. As in every other area of civil rights enforcement, the statutory authority provides the federal government an independent ability to assess the extent of civil rights compliance and to take action where necessary. Ultimately, DOJ's investigations serve to assist state and local police agencies in achieving full compliance with civil rights laws, a goal that Congress should welcome.

For example, all but 4 of the 22 law enforcement agencies investigated by DOJ under the Obama Administration voluntarily entered into agreements, suggesting that the elected officials and police chiefs understood the benefits of the policy and practice reforms detailed in the agreements.²⁷ Additionally, DOJ concluded five investigations of law enforcement agencies without finding constitutional or statutory violations, demonstrating that consent decrees or out-of-court settlement agreements are entered into only when violations are found.²⁸

The terms of many of the agreements emphasize several common goals: ending the unlawful use of excessive force and racially-biased policing; advancing recruitment, hiring and promotion practices that will build diverse and capable police forces; promoting additional and meaningful training programs for police focused on encounters with the mentally ill and with youth; and fostering community-oriented problem solving policing.²⁹ These investigations offer an opportunity for meaningful and substantial engagement in designing and implementing changes to help build positive community-police relations. Given the current climate of distrust between law enforcement and the communities they serve in many areas in the country, we have urged DOJ to engage in more, not fewer, civil rights investigations of state and local police departments, in order to support a more widespread adoption of these important interventions. For example, LDF recently requested that DOJ open a probe of the North Charleston Police Department following the police-involved shooting death of Walter Scott.³⁰

Federal investigations are certainly not the only tool that DOJ has used to reform policing at the state and local level. Since 2011, its Community Oriented Policing Services (COPS) Office

²⁷ See U.S. Department of Justice, *Police Reform and Accountability Accomplishments* (last visited Nov. 14, 2015), <http://www.justice.gov/file/police-reform-and-accountability-fact-sheet/download>.

²⁸ *Id.*

²⁹ See, e.g., *United States v. City of Cleveland*, Settlement Agreement (May 26, 2015) http://www.justice.gov/sites/default/files/crt/legacy/2015/05/27/cleveland_agreement_5-26-15.pdf.

³⁰ See Letter from LDF to U.S. Attorney General Loretta Lynch, *Request for Federal Investigations of the North Charleston Police Department and the Police-Involved Shooting Death of Walter Scott* (July 13, 2015), http://www.naacpldf.org/files/case_issue/LDF%20et%20al%20Letter%20to%20Attorney%20General%20Lynch%20re%20N.%20Charleston.pdf.

has administered a Collaborative Reform Initiative for Technical Assistance,³¹ which allows police personnel to proactively assess and change its policing practices in a non-adversarial process. To date, COPS has completed assessments of several agencies at the request of their police chiefs, including the St. Louis County Police Department and the Philadelphia Police Department.³² Collaborative reform is an opportunity for police chiefs to identify problems, such as increased use of force incidents, and invite independent assessors to come in to evaluate the problem and make suggestions for reform. The assessments are public documents allowing member of communities to review and support the recommended changes to policing policies and practices.

IV. Conclusion

At a time when police violence against civilians, often with impunity, is on the rise, and public confidence in the police has fallen to the lowest level in over two decades, it is our view that DOJ should be doing more, not less, when it comes to federal oversight of state and local law enforcement agencies. It is imperative that Congress provide DOJ with all the necessary funding, resources and tools to ensure that police agencies across the nation are doing everything within their power to ensure full compliance with civil rights laws by all individuals associated with law enforcement. This includes investigations into wrongdoing, but also includes more support in terms of proper recruitment and training of officers, and data collection and reporting of police-involved use of force. While the investigative and enforcement authority is a critical component in addressing racial bias in policing, it is incumbent upon Congress to ensure that the federal government is doing all it can to promote accountability of state and local law enforcement agencies.

³¹ Community Oriented Policing Services, U.S. Department of Justice, *Collaborative Reform Initiative for Technical Assistance Fact Sheet* (Oct. 2015), http://www.cops.usdoj.gov/pdf/technical_assistance.pdf.

³² See Blake Norton, et al., *Collaborative Reform Initiative: An Assessment of the St. Louis County Police Department*, COPS (2015), <http://ric-zai-inc.com/Publications/cops-p316-pub.pdf>. See also George Fachner & Steven Carter, *Collaborative Reform Initiative: An Assessment of Deadly Force in the Philadelphia Police Department*, COPS (revised Apr. 2015), <http://ric-zai-inc.com/Publications/cops-w0753-pub.pdf>.

Appendix:
List of Unarmed African Americans Killed by Police in 2015

Source: *Investigation: Police Shootings*, The Washington Post,
<https://www.washingtonpost.com/graphics/national/police-shootings/> (last visited Nov. 16, 2015)

1. **Bennie Lee Tignor**, an unarmed 56-year-old black man, was shot on Oct. 31, 2015, in Opelika, Ala. After Opelika police attempted a traffic stop, Tignor led police on a short chase. The shooting occurred as an officer was trying to take him into custody.
2. **Junior Prosper**, an unarmed 31-year-old black man, was shocked with a stun gun and shot on Sept. 28, 2015, on a street in Miami, Fla. A Miami-Dade police officer responded to a traffic accident involving a taxi cab that had struck a light pole. The driver fled on foot, ran onto an interstate ramp and then bit the officer who approached him.
3. **Keith Harrison McLeod**, an unarmed 19-year-old black man, was shot on Sept. 23, 2015, in Reisterstown, Md. Police were called to a pharmacy after the man attempted to fill a prescription that had been forged. After a short chase, officers confronted the man.
4. **India Kager**, an unarmed 28-year-old black woman, was shot on Sept. 5, 2015, in Virginia Beach, Va. Kager was driving a car in which a homicide suspect was the passenger. When Virginia Beach police approached the car while it was parked at a convenience store, the suspect, Delano Perry, began shooting at officers. Police returned fire, killing Perry and Kager.
5. **Felix Kumi**, an unarmed 61-year-old black man, was shot on Aug. 28, 2015, on a street in Mount Vernon, N.Y. New York police were conducting an undercover gun sting operation. When the suspect pointed a gun at an officer's head, the officer opened fire. He shot the suspect and accidentally killed Kumi, who was a bystander.
6. **Christian Taylor**, an unarmed 19-year-old black man, was shot on Aug. 7, 2015, in a store in Arlington, Tex. He drove his SUV into a car dealership and a security company reported a burglary in progress at the business. Arlington police confronted him in the showroom.
7. **Samuel DuBose**, an unarmed 43-year-old black man, was shot on July 19, 2015, in Mt. Auburn, Ohio. A University of Cincinnati police officer struggled with DuBose after stopping him for a missing license plate. DuBose tried to drive away, and the officer shot him in the head.
8. **Darrius Stewart**, an unarmed 19-year-old black man, was shot on July 17, 2015, on a street in Memphis, Tenn. Memphis police said Stewart fought back when an officer attempted to handcuff him during a traffic stop.
9. **Albert Joseph Davis**, an unarmed 23-year-old black man, was shocked with a stun gun and shot on July 17, 2015, in an apartment building in Orlando, Fla. Orlando police officers attempted to arrest Davis after they were called to a fight. Davis fled and then struggled with police.
10. **Salvado Ellswood**, an unarmed 36-year-old black man, was shocked with a stun gun and shot on July 12, 2015, in a parking lot in Plantation, Fla. A Plantation police officer was patrolling an area behind an office building when he encountered him. He punched the officer in the face when he was told to leave.

11. **Victor Emanuel Larosa**, an unarmed 23-year-old black man, was shot on July 2, 2015, in a yard in Jacksonville, Fla. Larosa struck a Jacksonville police officer with his vehicle and rammed a police cruiser during a drug sting. He fled on foot and reached for his waistband as he turned toward police.
12. **Spencer McCain**, an unarmed 41-year-old black man, was shot on June 25, 2015, in an apartment in Owings Mills, Md. Baltimore County deputies were called for possible domestic violence incident. McCain threatened suicide while officers were on their way. Police said he acted as if he had a weapon.
13. **Kris Jackson**, an unarmed 22-year-old black man, was shot on June 15, 2015, in a motel in South Lake Tahoe, Calif. South Lake Tahoe police shot Jackson as he tried to climb through a motel room window. Police were responding to a 911 call about a woman screaming and crying.
14. **Brendon Glenn**, an unarmed 29-year-old black man, was shot on May 5, 2015, on a street in Venice, Calif. Glenn, who was homeless, scuffled with a bouncer outside a bar. He had a physical altercation with two Los Angeles police officers who were trying to detain him and was shot.
15. **David Felix**, an unarmed 24-year-old black man, was shot on April 25, 2015, in an apartment building in New York, N.Y. Felix, who was diagnosed with schizophrenia, fled from New York City detectives who wanted to interview him about a robbery. He grabbed an officer's radio and struck a detective on the head.
16. **William Chapman**, an unarmed 18-year-old black man, was shot on April 22, 2015, in a parking lot in Portsmouth, Va. Chapman, a shoplifting suspect, was shot during a struggle with a Portsmouth police officer.
17. **Frank Shephard**, an unarmed 41-year-old black man, was shot on April 15, 2015, after a car chase in Houston, Tex. Shephard climbed out of his vehicle and Houston police officers ordered him to raise his hands. After he reached into his car, police opened fire.
18. **Walter Scott**, an unarmed 50-year-old black man, was shocked with a stun gun and shot on April 4, 2015, in a parking lot in North Charleston, S.C. A North Charleston police officer shot Scott in the back as he fled a traffic stop and struggle.
19. **Eric Harris**, an unarmed 44-year-old black man, was shot on April 2, 2015, on a street in Tulsa, Okla. A Tulsa County sheriff's reserve deputy inadvertently fired a gun instead of a Taser as Harris was being subdued on the ground by other officers.
20. **Brandon Jones**, an unarmed 18-year-old black man, was shot on March 19, 2015, on a street in Cleveland, Ohio. Officers with the Cleveland Police Department confronted Jones as he came out of a grocery store that he had broken into.
21. **Bobby Gross**, an unarmed 35-year-old black man, was shot on March 12, 2015, in a subway tunnel in Washington, D.C. Metro transit police said Gross, who was wearing no shoes or pants, rushed at them wielding a large tree branch. Law enforcement officials described Gross as troubled.
22. **Anthony Hill**, an unarmed 27-year-old black man, was shot on March 9, 2015, in Atlanta, Ga. Hill, naked and acting erratically, was shot when he ran toward a DeKalb County police officer. Hill was a veteran and had mental health issues.
23. **Tony Robinson**, an unarmed 19-year-old black man, was shot on March 6, 2015, in a house in Madison, Wis. Robinson had taken hallucinogenic mushrooms and was reported to Madison police for running in traffic and battery. Police said he assaulted a responding officer as he entered his residence.

24. **Naeschylus Vinzant**, an unarmed 37-year-old black man, was shot on March 6, 2015, on a street in Aurora, Colo. Vinzant was shot by Aurora police officers trying to arrest him on a warrant.
25. **Charly Leunden Keunang**, an unarmed 43-year-old black man, was shocked with a stun gun and shot on March 1, 2015, on a street in Los Angeles, Calif. Keunang, a homeless man, was shot in an altercation with Los Angeles police officers patrolling Skid Row. He had a history of mental health issues.
26. **Thomas Allen**, an unarmed 34-year-old black man, was shot on Feb. 28, 2015, in a vehicle in St Louis, Mo. Allen was a passenger in a car stopped by St. Louis County police. When he tried to drive away, an officer climbed into the car to stop him and shot him during the altercation.
27. **Lavall Hall**, an unarmed 25-year-old black man, was shocked with a stun gun and shot on Feb. 15, 2015, on a street in Miami Gardens, Fla. Hall's mother called 911 because he was outside in the cold in his underwear. Miami Gardens police shot him after he refused to drop a broomstick handle. Hall was diagnosed with bipolar disease and schizophrenia, his family said.
28. **Jeremy Lett**, an unarmed 28-year-old black man, was shot on Feb. 4, 2015, in a yard in Tallahassee, Fla. A Tallahassee police officer investigating a burglary at an apartment complex confronted Lett, a resident. They fought and the officer shot Lett five times.
29. **Artago Damon Howard**, an unarmed 36-year-old black man, was shot on Jan. 8, 2015, in a parking lot in Strong, Ark. Howard was shot as he struggled with a Union County sheriff's deputy who had responded to a burglary alarm at a pharmacy.

**Written Testimony of
Heather Mac Donald
Fellow, Manhattan Institute
Before the United States Senate Committee on the Judiciary
Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**

**Hearing on “The War on Police: How the Federal Government Undermines State and
Local Law Enforcement”
November 17, 2015**

Esteemed Senators, my name is Heather Mac Donald. I am a fellow at the Manhattan Institute, a think tank in New York City. I have written extensively on policing and crime. I am honored to address you today on the war on the police.

For the last year, the nation has been convulsed by a protest movement known as Black Lives Matter. The movement holds that police officers are the greatest threat facing young black men today and that the criminal justice system is infected with racial bias. That belief has led to riots, die-ins, the assassination of police officers, a campaign to eliminate traditional grand jury proceedings when police use lethal force, and a presidential task force on policing. Cops are now routinely called racists and murderers at protests and as they go about their daily duties. Policing in urban areas has become dangerously fraught, with jeering, hostile crowds surrounding officers and interfering with their authority when they try to make an arrest or conduct an investigation.

President Barack Obama has done little to rebut the central theses of the Black Lives Matter movement; indeed, he has amplified them over the last year. Speaking in New York City this May, for example, the President claimed: “The law is not always applied evenly in this country. [Young black men] experience being treated differently by law enforcement — in stops and in arrests, and in charges and incarcerations. The statistics are clear, up and down the criminal justice system. There's no dispute.”

In September, at a Congressional Black Caucus awards dinner in Washington, DC, President Obama called the criminal justice system a “profound barrier to opportunity in too many communities.” He added: “We need to make sure the laws are applied evenly. This is not a new problem. It’s just that in recent months, in recent years, suddenly folks have videos and body cameras, and social media, and so it’s opened our eyes to these incidents.”

In fact, there is no government agency more dedicated to the proposition that black lives matter than the police. Tens of thousands of black lives have been saved thanks to the data-driven policing revolution that began in the mid-1990s in New York City and spread nationally. The police could end all uses of lethal force tomorrow, and it would have a negligible effect on the black death-by-homicide rate. Over 6000 blacks are murdered each year, more than the number of white and Hispanic murder victims combined, even though blacks are less than 13% of the nation’s population. Their murderers are neither the police nor white civilians, but overwhelmingly other blacks. The rate of police shootings of blacks—less than one-third of all police fatalities—is less than what the black crime rate would predict. Over the past decade,

blacks were responsible for 40% of all known homicides of law enforcement officers. Blacks were charged with 62% of all robberies and 57% of all murders in the 75 largest U.S. counties in 2009. I request permission to submit for the record the relevant Justice Department documents.

You wouldn't know it from the Black Lives Matter movement, but countless law-abiding residents in inner-city communities fervently support the police. This June, I attended a police-community meeting in New York City's South Bronx. An elderly woman spontaneously exclaimed: "Oh, how lovely when we see the police; they are my friends!" Residents begged for a police surveillance tower to protect them against gang shootings and asked the police to break up the crowds of teens hanging out on corners and fighting. A routine request at police-community meetings in urban areas is for more drug enforcement, not less. "We want the dealers off the corner; you arrest them and they're back the next day," is the common complaint.

These voices are rarely heard in the media.

As for the broader claim that the criminal justice system is biased, that, too, is false. Criminologists have tried to find evidence of such bias for years and have always come up short. The overrepresentation of blacks in prison is a function of their elevated crime rates, the analysts have been forced to conclude. I request permission to submit for the record "Is the Criminal Justice System Racist?," from the City Journal, which addresses this question in depth.

Crime is now spiking across the country. FBI Director James Comey observed in October: "Most of America's 50 largest cities have seen an increase in homicides and shootings this year, and many of them have seen a huge increase." Since summer, police chiefs and mayors have been meeting in emergency sessions to strategize over the double digit rise in homicides and shootings. The New York Times reported in September that homicides in 35 big American cities were up 19% and that 62% of cities reported an increase in non-fatal shootings. The blog Five Thirty Eight looked at homicide data from most of the nation's 60 largest cities in September and found a 16 % percent rise.

Director Comey also suggested that the cause of this crime spike is what I and others have dubbed the "Ferguson effect." For the last year, activists have relentlessly denounced pedestrian stops and public order enforcement as racist. In response, officers are doing less of those activities, a reaction both predictable and understandable. Officers worry that if they have to use force against a resisting suspect, a cell phone video will fail to capture the behavior that provoked the use of force and could cost them their career. Rather than getting out of their cars to question someone hanging out on a known drug corner at 1 am, say, they now increasingly just drive on by.

The available data document this drop in proactive policing. In New York City, for example, summons for low-level, quality-of-life offenses like public urination and drinking were down 26% in the first half of 2015; arrests in every crime category were down 15% as of late October, even as homicides were up 8%. In Los Angeles, arrests are down 10%--even as violent crime is up 20%. Arrests dropped 56% in Baltimore in May following the anti-cop riots and the indictment of six officers for the death of drug dealer Freddie Gray.

Despite evidence of the crime surge and the reason for it, President Obama had the temerity this month to accuse Director Comey of “cherry-picking data” and pursuing a “political agenda.” The idea that President Obama knows more about crime patterns and policing than the FBI director is ludicrous.

The acting chief of the Drug Enforcement Administration, Chuck Rosenberg, has seconded Comey’s observations about the Ferguson effect, leading to Rosenberg’s own dressing down from the White House.

Police departments must and usually do work relentlessly on improving officer courtesy and making sure that officers use lethal force only as a last resort. But the President’s delegitimation of law enforcement is dangerous and irresponsible. It puts officers’ lives at risk, since suspects are more likely to resist arrest with force if they believe that the cops are racist. It puts the lives of law-abiding residents of crime-ridden neighborhoods at risk, since when the cops back off, crime shoots up. But it also threatens the legitimacy of law and order itself, which puts our very civilization at risk.

Andrew C. McCarthy

**Testimony before the Senate Judiciary Committee
Subcommittee on Oversight, Agency Action, Federal Rights
and Federal Courts**

November 17, 2015

My name is Andrew C. McCarthy. I am currently a senior fellow at National Review Institute and a contributing editor at *National Review*. From 1985 through late 2003 (but for a short break in service in 1998), I was an assistant United States Attorney for the Southern District of New York (SDNY), one of the Justice Department's busiest and most important district offices. I retired in 2003 as the chief assistant U.S. attorney in charge of the SDNY's satellite office (which oversees federal law enforcement in six counties north of the Bronx), a position I held for nearly five years. Over the years, I held various other supervisory positions in the Office, which involved training new federal prosecutors, advising law enforcement agencies, the formulation of office policy, and representing the United States before the U.S. Court of Appeals for the Second Circuit.

During my nineteen years as a federal prosecutor, I worked very closely with virtually all of the federal, state and local law

enforcement agencies in New York City and upstate. Indeed, because my responsibilities ranged from front-line participation in investigations and prosecutions to management duties involving approving charges, directing investigations, establishing policy, and enforcing policy guidelines, I had particularly close contact, from the street level to the top supervisory levels, with the Federal Bureau of Investigation (which is the lead federal agency in most criminal cases), the Drug Enforcement Administration (which is the lead federal agency on many narcotics investigations), and the New York Police Department.

Moreover, beginning shortly after the World Trade Center (WTC) was bombed on February 26, 1993, through the end of the years I was privileged to work for the Justice Department, I was deeply involved in national security and counterterrorism efforts. From 1993 until 1996, I was the lead prosecutor in charge of the investigation and prosecution of the terrorism cell of Sheikh Omar Abdel Rahman, which resulted in the convictions of numerous jihadists for conspiring to wage a war of urban terrorism against the United States – a war that included the WTC bombing and a subsequent plot to bomb New York City landmarks, and a war that has never ceased, as most recently demonstrated by last weekend's atrocious jihadist attacks in Paris.

I participated and provided advice in several other terrorism investigations after the Blind Sheikh prosecution. I also helped supervise the command post established near Ground Zero by federal and state law enforcement and national security agencies in the aftermath of the 9/11 attacks. Consequently, I worked closely with national security and intelligence agencies, at both the front-line and supervisory levels, particularly agents of the FBI's National Security Division (formerly known as the Foreign Counter-Intelligence Division) and the Joint Terrorism Task Force, which is run by the FBI and prominently features participation by the NYPD. Because of the grave threat jihadist terrorism poses, and the fact that New York City was (and to my mind, remains) the principal target of radical Islamic terror networks, I forged good working relationships with the NYPD's upper ranks.

My nineteen years as a prosecutor involved in law enforcement and national security matters is also informed by the years I spent working as a deputy United States marshal in the Witness Security Division (SDNY), as well as interning in the SDNY before I was hired as a prosecutor. Since retiring from the Justice Department in 2003, I have remained closely involved in law enforcement and national security matters as an author, commentator and analyst.

For example, I testified before a subcommittee of the Senate Judiciary Committee in support of the Real ID Act proposed by former Senator Jon Kyl. I also consulted with members of Congress in both parties in urging passage of the Patriot Act reauthorizations.

My combined experience has made it abundantly clear to me that state and local law enforcement, like federal law enforcement agencies, are profoundly affected – indeed, in many ways *controlled* – by policies made at the federal level, particularly by the Justice Department. Common sense tells us why this must be so.

State and local police agencies, in conjunction with the populations they serve, are the great force-multiplier in law-enforcement and intelligence-gathering. They dwarf the comparatively modest resources of federal law-enforcement in terms of personnel. In fact, to take an obvious example, there are roughly three times as many police officers just in New York City than there are FBI agents throughout the United States. Nevertheless, law enforcement has necessarily become more federalized in the last half-century as the U.S. Supreme Court and the lower federal courts have incorporated

many of the Constitution's federal civil rights guarantees against the States.

Federal criminal defendants are tried in U.S. courts by Justice Department prosecutors, and they appeal their convictions as of right in the U.S. appellate courts where the Justice Department represents the law-enforcement position. Moreover, after direct appeals have been exhausted, defendants collaterally challenge their convictions in habeas corpus review (under Section 2255 of Title 28) – and even state defendants can challenge their convictions and conditions of confinement (under Section 2254). Those collateral challenges generally involve claims that constitutional and otherwise fundamental rights have been violated.

The federal courts must dispose of questions involving police conduct in connection with investigations, searches and seizures, other investigative techniques, temporary detention, arrest, post-arrest statements, grand jury procedures, indictment, assistance of counsel, plea negotiations, trial rights, sentencing – the full gamut of the criminal justice process. Inexorably, the Justice Department must formulate guidance based on this developing jurisprudence, balanced against the demands of law enforcement and national

security. The Justice Department's policies, in turn, influence the way courts analyze cases – it is, in fact, a commonplace for courts to ask the Justice Department to weigh in on significant criminal justice questions.

To the growing extent that the principles implicated and refined in this process are derived from the Constitution, and that the courts apply the federal Constitution to the states, state and local law enforcement are necessarily affected by the judicial promulgation of federal standards and Justice Department policies designed to ensure compliance with those standards.

Furthermore, the last half-century has seen an increasing trend of federal-state cooperation. The Joint Terrorism Task Forces throughout the United States are, perhaps, the best-known example, but they are hardly unique. There have been similar cooperative arrangements in a plethora of crime areas – organized crime, narcotics trafficking, gang crime, civil rights enforcement, child pornography, political corruption, various forms of fraud, etc. In my experience, while states and their subdivisions are often anxious to participate in these joint efforts (which typically involve funding streams that would not otherwise be available to support state efforts), the efforts tend to be federal initiatives, supervised

by lead federal agencies – usually the FBI, but the DEA and other federal agencies, too. Naturally, if state agencies are going to participate in federally-led initiatives, there is an expectation that they must conform to federal practices.

In addition, as terrorism has been a continuous threat to the homeland for most of the past quarter-century, it has been imperative to improve channels of cooperation and communication between federal, state and local law enforcement. As already noted, state and local police, and the communities they serve, are the best sources of information regarding threats within our borders – the feds simply do not have comparable resources. Yet, while some larger police departments that protect and serve palpable terror targets (like the NYPD) have cultivated relationships with counterparts in foreign countries, the federal government must obviously remain the nation's leader in collecting national defense information from, and sharing it with, foreign governments and sources. So, again, it is only natural that states and municipalities who are given access to this vital intelligence are expected to conform to federal requirements regarding its use.

For the most part, this federal-state cooperation is an extraordinarily positive development for national security, good policing, and the rule of law. It signals the development of a consensus about what our basic civil rights are and how policing should proceed, balancing appropriate deference to liberty with the demands of protecting communities.

A large but often unnoticed reason why it has worked so well over time is that federal law enforcement officials, having served their local communities and partnered with local police, have developed (a) an appropriate respect for challenges confronting local police that are unique to their communities, and (b) an admiration for the sensible manner in which local police handle those unique challenges, informed by an intimate knowledge of their communities that cannot be replicated at the further remove of the federal level. The federal officials who are most effective serving the public in cooperative efforts with their state and local colleagues are the ones who recognize that the federal government's best role is frequently *a support role*, not a managerial one, and certainly not an overbearing one.

Because state and local police know their communities best and deal with members of their communities with exponentially more

regularity than federal law enforcement does, the Justice Department has traditionally understood that it has much to learn from police practices at the local level. Indeed, it was the expectation of the Framers – and the guarantee that they made when adoption of the Constitution was being debated – that law enforcement was and would remain primarily the responsibility of the states. That goes a long way towards explaining why Congress did not even establish the Justice Department until 1870, some 81 years after the start of constitutional governance, and why the Justice Department as we know it today did not exist until long after that.

It is the genius of the federal system that the best policing practices will evolve as different communities grapple with different crime problems, different threat environments, and different socio-economic circumstances. Because policing deals intimately with real life, and real life is dynamic, it often does not lend itself to antecedent guidelines and uniform standards.

This, of course, goes a long way toward explaining why the criminal justice system in the United States has always been based on prosecutorial discretion rather than a mandate that all statutes be enforced to the letter in all situations. One-size-fits-all policing

would be inappropriate in a moderate-size city; plainly, it would poorly serve a nation of over 300 million.

Policing at the state and local level over the past 20 years has not just been evolutionary, it has been revolutionary. Programs developed by the NYPD – and spread nationally – forged an intelligence-based rather than a reactive form of policing. It has focused on statistical analyses about the occurrence of crime, as well as intelligence-gathering regarding crime trends and criminal elements derived from lawful arrests for low-level crimes and lawful temporary detention based on reasonable suspicion (known as *Terry* stops – see *Terry v. Ohio*, 392 U.S. 1 (1968) – or “stop and frisk”). Streams of accumulated information gathered from interviews, arrests and searches, combined with input from informants and other lawful means of gathering information, have been used to target police resources to crime problems as they emerge, and divert or retarget those resources as circumstances change.

The result, over the last generation, has been a dramatic reduction in crime, in particular violent crime. As the Manhattan Institute’s Heather Mac Donald recently observed, “crime dropped 50 percent nationally over the last two decades.” In New York City, which

was ravaged by crime waves when I grew up in the Bronx in the 1960s and 1970s, murder fell by almost 80 percent, and other serious felonies by about 75 percent.

The intelligent policing strategy that contributed mightily to the reduction in crime is a good example of how the federal government can contribute positively to effective state and local law enforcement. The techniques used, while innovative, were all consistent with federal constitutional principles and with federal policy, especially that pursued in the 1980s to confront crime aggressively and to throw federal resources at organized crime, narcotics and gang activity.

A more unintended but still significant alignment of federal and state interests came in the area of national security. The terrorist campaign that began with the 1993 WTC bombing eventually culminated in the jihadist attacks of September 11, 2001. After those eight years, there came a realization at the national level that our priorities had to change: i.e., that it was more important to prevent catastrophic terror strikes from occurring than to content ourselves with prosecutions after mass-murder attacks occurred.

That meant moving to a counterterrorism strategy that prioritized intelligence-gathering and attempting to disrupt plots, from what had primarily been a law-enforcement posture of conducting post hoc investigations. It also meant recognizing that meaningful intelligence that might help prevent domestic attacks was much less likely to come from comparatively limited federal resources than from citizen vigilance (hence, the “if you see something, say something” ad campaigns) and engaged local police.

There is no question that this harmony of state and federal interests, as well as the federal encouragement of state vigilance in protecting the homeland, contributed significantly to the historic reduction in crime and the remarkable prevention of a 9/11 reprise – even though we know well that terror networks have worked tirelessly to attempt to attack the United States.

This brings me to the point that I would most like to stress to this afternoon.

There are many experts who are fully equipped, more so than I am, to provide the committee with (a) alarming statistics which illustrate that we are trending back towards the bad old days of rising crime, and (b) that this phenomenon is directly attributable

to a sea change in Justice Department policy – one that substantially discourages intelligent policing and puts police on the defensive; one that, for reasons I find hard to fathom, is more solicitous of criminals (including violent criminals) than of the communities (predominantly, minority communities) on which those criminals prey.

I believe it is imperative, however, to emphasize what I refer to as the “ethos of law enforcement agencies” and how that ethos is dictated by leadership at the Justice Department.

It is a reliable rule of thumb that prudent people do not like to live on the margins of their authority, which invites legal jeopardy. Consequently, there is virtually always a prophylactic layer around the literal rules and regulations that define a law enforcement agent’s authority. It guides what is expected of the agent, as opposed to what the agent is permitted by law to do.

Sometimes this prophylactic guidance is written. For example, the U.S. Attorney’s Manual has always set forth a disclaimer that the guidance in the manual does not and is not intended to create any enforceable claims or rights for criminal defendants and other potential litigants. The idea behind this disclaimer is that we would

prefer for federal prosecutors and the agents and police they advise to enforce the law comfortably within the limits of their power. We understand that, in appropriate circumstances, they may have to press the limits of the law – in exigencies, they may even have to test those limits. But we realize the letter of the law is indulgent of law enforcement because police operate clearly within the letter of the law the vast majority of the time. Encouraging them to do so projects the appearance of propriety, which promotes the rule of law.

Much of the time, though, the guidance law enforcement agents are given is not written down. Or, if it is, the guidance is vague, leaving much of the day-to-day application to the discretion of agency superiors – with the added benefit (for the authors of the guidance) of wiggle room to claim that a proper interpretation would have forbidden or permitted the controversial act that was or was not taken by police.

Let me be more concrete. In the mid-1990s, the Justice Department provided the FBI and federal prosecutors with guidance that became known, infamously, as “the wall.” The wall was meant to control cooperation between criminal investigators, on the one hand, and national security agents, on the other. There was a

hypothetical fear that if criminal investigators lacked sufficient evidence to show probable cause for search warrants or wiretap orders, they could manufacture a terrorism angle that would enable them to use the same techniques under national security authorities that were arguably less demanding.

For various reasons, I – like some other prosecutors involved in terrorism cases at the time – contended this fear was unrealistic. Nevertheless, the specter of rogue agents using the Foreign Intelligence Surveillance Act (FISA) to authorize evidence collection that would not be permitted by the Fourth Amendment in ordinary criminal cases was sufficiently powerful among Justice Department leadership that regulations – the wall – were prescribed. They placed tight controls on the sharing of information between intelligence agents and criminal investigators.

Of course, if agents cannot combine information to develop a full threat mosaic, they are apt to miss plots, which in terrorism cases can lead to massive carnage. No one wants to be thought responsible for such a horrific thing, so naturally the wall regulations were written with enough wiggle room that the Justice Department could contend, in the event of a terrorist attack, that information should have been shared, but could also contend, in

the event that some hypothetical criminal case was “tainted” by FISA evidence, that the information should not have been shared.

Clearly, this disserved the agents who needed clear guidance in a complex legal thicket. Worse, though, was how the wall worked in practice – the ethos it created. What resulted was paralysis, as if there were, in fact, a bright-line prohibition against intelligence sharing.

Agents were working in a culture that told them, in no uncertain terms, that the only way they could get in trouble was by *cooperating* with each other. Of course the agents who were involved in terrorism investigations – whether on the law-enforcement or national security side of the FBI’s house – understood better than anyone how reckless it was to forbid the left hand from knowing what the right hand was doing. No one benefitted except the terrorists, and the public was profoundly endangered.

As we now know from various government and media reports about the 9/11 attacks, the Justice Department’s wall regulations led FBI headquarters to prevent intelligence agents and criminal investigators to collaborate when suspected terrorist Khalid al-

Midhar was discovered to have entered the United States in August 2001. Just a few weeks later, al-Midhar was part of the team of jihadists that piloted Flight 77 into the Pentagon, part of the operation in which nearly 3,000 Americans were killed. The 9/11 Commission report gently concluded that an agent primarily responsible for deciding, based on the wall regulations, not to permit information sharing in Midhar's case "appears to have misunderstood the complex rules that could apply to this situation." *9/11 Commission Report* (2004), pp. 269-71 & nn.

The point is that police take their guidance more from the manner in which guidelines are applied than from what the guidelines literally say. It could hardly be otherwise. Most police officers are not lawyers, and even those who have legal training are bound by the construction of rules dictated by the upper ranks of their agencies.

When the agency ethos informs police that taking enforcement action can, at a minimum, expose an officer to internal forms of discipline and derail the possibility of career advancement; and, in addition, may expose the officer to criminal and civil liability – entailing all the hardships of the criminal justice process, including the need to retain legal counsel, the public stigma of being

suspected of wrongdoing, and the anxiety of worrying about the financial and social well being of the officer's family, then inevitably there will be a drastic reduction in enforcement action.

There is abundant reason to believe that this is exactly what is happening in our country at the present time.

Let me address three reasons for the increasing police passivity.

First, the Obama administration has powerfully signaled in various ways that it is sympathetic to a demagogic narrative that depicts the nation's police as systematic violators of the federal civil rights laws.

This narrative essentially proceeds on a disparate impact theory, which holds that statistical disparities in the racial and ethnic make-up of people who are subjected to police investigative tactics are the result of police bias. This simplistic and deceptive method of statistical inference is itself systematically skewed: It fails to account for *criminal behavior* – as it occurs and as it is reported by crime victims, witnesses, and criminals who confess. When criminal behavior is accounted for, the fact is that employment of police investigative tactics – such as stop-and-frisk techniques – to

minority suspects actually under-represents their portion of the *criminal* population even if it over-represents their portion of the *general* population.

In any event, bias is a positive state of mind, not an unintended statistical outcome. To be sure, there are corrupt police officers. Where there is solid evidence that police have willfully violated civil rights, and especially when that solid evidence indicates decisions based on racial prejudice, it is imperative that such police officers be removed from the force – and there should be aggressive prosecutions toward that end to convey in the strongest terms that such abuse of power will not be tolerated.

In the absence of solid evidence, however, divining racial prejudice by statistical hocus-pocus or projecting it by demagoguery tells police that the safest course for their livelihoods is to refrain from enforcement action.

Since a great deal of crime involves minority offenders preying on minority communities, it is those communities that bear the brunt of police passivity. Assuming for argument's sake the good intentions of a civil rights enforcement approach that is hostile to police investigations of minority suspects, the approach ironically

harms the communities its advocates claim to champion – and the vast majority of law-abiding people are made to suffer for the benefit of law-breakers.

The second rationale for police passivity involves a pattern extremely destructive of effective law enforcement that the Justice Department has followed over the last seven years.

A tragic event occurs, such as the killing of a young black male during a conflict with a non-black male or a police officer in which the young male is at least partially if not primarily responsible. It will be patent that there is insufficient evidence of intentional killing or intentional deprivation of civil rights. Yet, minority community activists will demand prosecution.

Rather than help the communities understand that not all tragic events constitute federal criminal wrongs, the Justice Department and its Civil Rights Division convey the opposite message, appearing to confirm the activists' claims that violations have occurred – even pressuring state law enforcement agencies to embark on prosecutions based on insufficient evidence. Naturally, this fans the flames of community discord and, to my mind, has contributed to the unrest, rather than easing it.

Inevitably, it becomes obvious that no civil rights or other prosecutable violation occurred. Yet, while unable to bring a case in connection with the tragedy that drew its attention, the Justice Department exploits the controversy to commence a large-scale civil rights investigation not just of individual police officers involved in the tragedy but of the entire police department. This is done under a 1994 law known as the Violent Crime and Law Enforcement Act. It licenses the Justice Department to prosecute “any government authority” that it claims “engage[s] in a pattern or practice of conduct by law enforcement officers ... that deprives a person of [federal] rights, privileges, or immunities.” Crucially, it authorizes the attorney general to sue municipalities and their subdivisions civilly to “obtain appropriate equitable and declaratory relief to eliminate the [offensive] pattern or practice.”

These investigations and the threat of civil suits have been used by the Justice Department to obtain effective control over police departments in numerous major cities and towns across the United States. While there can be little doubt that some real abuses that should be addressed turn up in these investigations – just as a thoroughgoing investigation of the Justice Department itself would

turn up abuses – the claim that these departments are systematically violating people’s rights is absurd.

Nevertheless, Congress funds the Justice Department to the tune of nearly \$30 billion per year and, to my knowledge, does virtually nothing to restrict how it uses these funds – including how the Civil Rights Division spends its share. Cities and towns are targeted for investigation on such allegations as “subjecting individuals to excessive force” – in particular, “using excessive force against persons of color” and “escalating situations and using excessive force when arresting individuals for minor offenses.” The targeted municipalities either cannot afford to compete with the Justice Department’s resources in waging a vigorous defense, or are governed by politicians sympathetic to the Justice Department’s agenda (or both). For the most part, they surrender, entering consent decrees that mandate far-reaching changes in their procedure (to the more passive style of policing preferred by today’s Justice Department).

Again, the message conveyed to police by the federal government is that the best way to stay out of harm’s way is to minimize enforcement action.

Finally, a third rationale for police passivity is found in Justice Department corruption plainly intended to harm the rights of police officers.

The Justice Department has been cited by U.S. District Judge Kurt D. Engelhardt in Louisiana for intentionally corrupting the trial of New Orleans police officers involved in shooting deaths on the Danziger Bridge that occurred in what the court described as “the anarchy following Hurricane Katrina.”

After the U.S. attorney’s office indicted several officers on civil rights, firearms and obstruction of justice charges, the court made the shocking discovery that high-ranking federal prosecutors, under assumed names, were conducting a public smear campaign against the police defendants on the website of the New Orleans *Times-Picayune*. For example, they portrayed the NOPD as a fish “rotten from the head down.”

The prosecutors concealed their corrupt conduct throughout the trial of the case. It was finally discovered afterwards – and only after Justice Department officials serially misled the court. Eventually, it emerged that complicit in the smear campaign, in addition to government lawyers in New Orleans, was Karla

Dobinski, a longtime veteran of the Civil Rights Division at Main Justice.

The district judge was sufficiently outraged by what he described as the “grotesque” and “appalling” Justice Department misconduct that he ordered the convictions reversed in a scathing 129-page opinion issued in September 2013. His ruling was recently upheld by the U.S. Court of Appeals for the Fifth Circuit. In its opinion, the appellate court observed that Ms. “Dobinski is disturbingly vague ... about how many other people in her department were aware” of her participation in the smear campaign.

Astoundingly, it appears (to my knowledge) that no meaningful prosecutorial or disciplinary action has been taken by the Justice Department in this matter. Some implicated prosecutors resigned, some retired with their benefits intact, and – at least in August 2015, when I wrote about the case – Ms. Dobinski was reportedly still in her job at the Civil Rights Division, having received only a reprimand. (McCarthy, “The Justice Department’s ‘Grotesque’ Misconduct against New Orleans Cops” (*National Review*, August 22, 2015) (<http://www.nationalreview.com/article/422923/justice-departments-grotesque-misconduct-against-new-orleans-cops-andrew-c-mccarthy>) (linking to relevant court opinions)).

In sum, in its public positions, legal actions, and corrupt misconduct, the federal government has powerfully communicated to the nation's police officers that they take great risks – risks well beyond the dangers their jobs innately entail – if they engage in lawful enforcement actions. It would defy common sense to believe that the notable increase in crime rates in many parts of the nation is unrelated to the demonstrable reduction in arrests and other enforcement action by police. They have been intimidated into passivity, and it is beginning to show – not yet like it showed from the 1960s into the 1980s, but the trend lines are ominous.

As last weekend's events in Paris showed once again, we are in a period of high risk. Terrorist enemies of the United States continue to threaten the homeland. We cannot afford to forfeit the astonishing national prosperity that has resulted from the heroic policing that caused crime to plummet for the last quarter-century. Nor can we afford the heightened national security peril caused by a lack of intelligence about our threat environment. But that is exactly what we invite when we fail to support good faith, lawful policing.

Hearing before the
Senate Committee on the Judiciary
Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts
On

“The War on Police: How the Federal Government Undermines State and Local Law Enforcement”

Tuesday, November 17, 2015
Dirksen Senate Office Building, Room 226

Written Statement of John P. Walters, Chief Operating Officer, and Director, Center for Substance Abuse Policy Research, Hudson Institute, and Former Director, White House Office of National Drug Control Policy

Chairman Cruz, Ranking Member Coons, and members of the Committee, thank you for this opportunity to address the importance of supporting our nation’s law enforcement officers. Every day, federal, state, and local law enforcement are working, often in collaboration, to protect our communities from the violence, drugs and criminal organizations that systematically threaten them. They often put themselves in grave danger to do this, and they deserve our admiration and thanks.

In this testimony I will briefly share what I have learned about the importance of federal support for our nation’s law enforcement efforts. Specifically, I will share what I learned during the eight years I spent as the Director of National Drug Control Policy, where I assisted our national efforts to push back against the flow of illegal drugs by criminal organizations and heal those Americans harmed by these drugs.

Positive features of the federal role: what has worked in the past?

United States law is unitary, but has role differentiation by agency, by jurisdiction, and by authority. Effective integration of programs, capacities, and activities across the various dimensions of federal, state, local, and tribal arenas is a critical responsibility in all circumstances, and can become imperative under certain circumstances, such as when the nation is confronted by threats that themselves contain multiple levels of operation.

When properly structured and constrained under Constitutional guidance, the federal role in law enforcement can be a positive and even necessary adjunct for achieving justice and public safety. Below, I will review the challenges which make a federal role essential in coordinating the totality of our efforts, and provide examples where the proper functioning of federal programs has been important.

Needless to say, where there is great power and authority at the federal level, there is also the potential for great disruption where federal law enforcement activities are not properly structured and constrained. In these cases, the interventions of the federal government can become intrusive or even counterproductive.

The presence of a federal role for integrating functions can be seen when the threat itself is multi-dimensional across the boundaries of respective responsibilities. The effort to counter the terror threat and the effort against illicit drugs are two primary examples where effective integration is essential, given that the threat phenomena are presented in a networked continuum, themselves crossing boundaries, and exploiting the seams and interstices of agencies and jurisdictions.

The forms of organization and action presented by the threat must be met by counterpart organizations and actions in response, as the threat transits from an outer boundary of national security challenges found in international arenas, moving into a variety of domestic law enforcement and juridical domains, and finally arriving at and acting at the level of local communities.

Further, just as the threat itself is presented in these various arrays of organization and activities, a central means by which the threat remains viable depends upon their capacity to secure financial instruments, either as a goal of the action, or as a mechanism for sustaining its continuation. It follows that an integrated counter-threat response must address the multiple dimensions of threat: finance, from the acquisition and movement of cash supply through money-laundering and access to banking legitimacy, to broader questions of institutional legitimacy, the weakening of democratic governance, and the threat of corruption.

My experience at the Office of National Drug Control Policy (ONDCP), where I was charged with the function of coordinating multiple federal agencies and budgets into an effective strategic whole, the actions of which could then be integrated at all levels of law enforcement and the judiciary.

Each of the respective domains of law enforcement and the system of the judiciary, from the international arena to the intersection with borders down to the community and street level, possesses particular assets, capabilities, and knowledge. These features must be tied together for effective and sustained response.

Specifically, beyond the powers assigned to certain authorities, there are common elements required by all actors: intelligence, targeting, mobilization, interdiction, and prosecution are among them.

Certain actions, such as international engagement, interdicting maritime and aerial trafficking, and securing borders can only be undertaken at the federal level; as well, large-scale public health and medical research activities are best supported by federal resources. Yet other functions require specific state authorities, involving everything from medical licensing or state

policing units, while at the community level policing and courts, often augmented by federal resources, operate in conjunction with educational and social services support.

But each jurisdiction and agency has limited reach and limited resources. Thus it is a principle federal responsibility to create and sustain frameworks where resources and capacities can be fused to ensure such outcomes as de-confliction, jurisdictional hand-off, reinforced joint operational capacity, and a continuum of effort whereby successful prosecutions can be linked to the acquisition of intelligence for subsequent effective attack.

Joint task-forces, intelligence fusion centers, and cross-authorization of personnel and powers against the threat can be force-multipliers—and they can make the difference between stopping a threat and merely weakening it a bit.

During my service at ONDCP, we helped manage many programs that contained essential federal dimensions that worked in partnership with state and local authorities. Examples ranged from the National Youth Anti-Drug Media campaign, a multi-year exercise in prevention and communication, to efforts associated with the Counter-Drug Technology Assessment Center (CTAC), which not only supported medical research efforts aimed at strengthening drug treatment, it implemented the transfer of critical technologies (such as detection, analysis, surveillance and monitoring technologies) into the hands of state and local law enforcement forces. Our federal efforts provided for community anti-drug coalitions, the promulgation of drug courts, and support for essential data collection and analysis.

The High Intensity Drug Trafficking Area (HIDTA) program is a powerful example of how the coordination and interaction of federal, state, local and tribal resources can be stood up and activated. This program, currently budgeted at \$238 million a year and overseen by the ONDCP in conjunction with the Department of Justice, brings together federal, state, and local law enforcement entities to set coordinated goals and strategies in specific regions where drugs pose a elevated threat.

Additional examples of entities that work with or support local law enforcement efforts include the El Paso Intelligence Center (EPIC), the National Drug Intelligence Center (NDIC), the border control agencies under the Department of Homeland Security, the Drug Enforcement Administration (DEA) and the Organized Crime Drug Enforcement Task Force (OCDEF), both of the Department of Justice, and the State Department's Bureau of International Narcotics Control and Law Enforcement (INCLE), as well as various national intelligence agencies.

As these federal organizations coordinate and support the work of local law enforcement, they can have remarkable success. A federal/local law enforcement partnership aimed at stopping the trafficking of drugs and their illicit proceeds on U.S. roads, highlighted in the 2008 National Drug Control Strategy, is a good example of the types of positive outcomes of this type of law enforcement cooperation can have:

For drugs to reach individual communities, they usually are transited across our national interstate highway system. The transportation of massive quantities of illicit drugs and cash on our nation's roads and highways, which span countless jurisdictions, both state, local, and tribal, requires a coordinated law enforcement response.

A traffic stop performed by officers of the Colorado State Patrol last year illustrates how these local actions can have a broader law enforcement impact. Two men driving a pickup truck containing 461 pounds of marijuana were stopped on an interstate in Logan County, Colorado. The details of the arrests were passed to DEA, which determined that the driver of the vehicle was a courier connected to OCDETF/DEA investigations in Phoenix, Arizona; Yakima, Washington; and Fargo, North Dakota. Thus, the Logan County traffic stop substantially strengthened key priority cases. In a similar example, a traffic stop in Texas that resulted in the seizure of \$149,000 led to an ICE investigation that eventually identified the head of an organization responsible for transporting bulk currency from the United States to Mexico for at least three Mexican cartels. As a result of information provided by ICE during the course of this investigation, Mexican authorities were able to initiate the first money laundering wire intercept in Mexico. Pursuant to the joint Mexican and U.S. investigation, 14 subjects were arrested including 12 Mexican nationals. In this way, highway interdiction programs make a vital contribution to the disruption of major drug trafficking organizations both domestically and internationally.

The task of the coordinating federal agency, in this case, ONDCP, is first to set the strategy and the goals, as well as the measures of effectiveness and accountability, across the interagency. Next, strategy implementation augments particular budget authority among the agencies contained in the drug-control nexus, and allows for prioritization of agendas and programs.

The drug threat is a specialized danger that requires actions across a broad horizon of agencies and concerns, because the response requires coordinating a variety of public health, educational, law enforcement, international aid, and national security forces as it develops a comprehensive strategy involving drug-use prevention, treatment, and supply reduction programs.

The latter are made up of sequenced programs of domestic arrests and prosecutions, international partner engagement, border and transit zone interdiction, counter-corruption and training activities, and organizational attack against transnational criminal elements as well as their financial resources.

The transnational criminal organizations themselves frequently merge with counter-terror and national security threats, both against the U.S. Government and the institutions of partner nations.

There are implications running from families, schools, community police and local courts, to national health research institutions, entities from the Departments of State, Defense, and Homeland Security, the state and federal courts and their capacities, and international bodies operating under treaty responsibilities.

The federal government and local law enforcement have a long record of working together to combat criminal activities that seek to exploit jurisdictional borders--international, state, county, or local. This success is a product of each level of law enforcement building trust with the others by operating in good faith within their constitutionally defined sphere. Examples of this include the precipitous decline in domestic methamphetamine production in the 2000's after a coordinated focus at the national and local level, and the huge reduction in cocaine usage that began in 2007 after a multi-pronged law enforcement effort to disrupt its production and distribution.

These examples are but a few of the many that demonstrate the real effect focused, coordinated law enforcement efforts can have on crime, particularly when the federal government is a contributing partner. But recent history has also shown us that when this coordination of policy goals and efforts are not maintained, these gains can quickly evaporate.

Thank you.

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I. Follow-Up on Hearing Testimony

- During your testimony, you reaffirmed that the 16 named state and local law enforcement agencies cited in the Department of Justice’s production¹ of documents and information from Monday, November 16, 2015 – which was in response to my October 13, 2015, letter to Attorney General Loretta E. Lynch – were the only state and local law enforcement agencies that had had a civil rights investigation initiated against them by the Civil Rights Division since January 1, 2011.
 - Despite this claim, the Committee is aware that the Civil Rights Division is also currently conducting at least one civil rights investigation against a state and local law enforcement officer, who is being investigated for alleged civil rights violations that took place in the course of his official duties with his employing agency.² Information about this newly initiated investigation was not included in the pre-hearing production.
1. Does the Civil Rights Division consider a civil rights investigation of a state or local law enforcement officer, who may have violated the civil rights of an individual in the course of his or her official duties with his or her employing agency, to not also be a civil rights investigation of the employing agency?
 - a. If the Civil Rights Division does not consider the above scenario to be an investigation of the employing agency, what is the purpose of this distinction?
 - b. In a situation where the Civil Rights Division is conducting an investigation of an individual state or local law enforcement officer, who may have violated the civil rights of an individual in the course of his or her official duties with his or her employing agency, has the Civil Rights Division ever expanded such an investigation to scrutinize the entire employing agency?
 - c. Is the Civil Rights Division prohibited, via either statute, regulation, or internal rules or guidance, from expanding a civil rights investigation that is initially just an investigation of an individual law enforcement officer into an

¹ See Letter from Asst. Attorney General Peter J. Kadzik to Sen. Ted Cruz (Nov. 16, 2015) and attachments (hereinafter KADZIK LETTER). According to this letter, the 16 agencies cited by the Department of Justice are the Albuquerque Police Department, the Baltimore Police Department, the Cleveland Division of Police, the Colorado City/Hildale (Arizona) Marshal’s Office, the Evangeline Parish (Louisiana) Sheriff’s Office, the Ferguson Police Department, the Los Angeles Sheriff’s Department, the Meridian (Mississippi) Police Department, the Miami Police Department, the Missoula County Attorney’s Office, the Missoula Police Department, the Newark Police Department, the Portland (Oregon) Police Bureau, the Seattle Police Department, the University of Montana Office of Public Safety, and the Ville Platte (Louisiana) Police Department.

² See generally Sarah Kaplan, *Justice Dept. opens civil rights probe into police shooting of Zachary Hammond*, WASH. POST (Aug. 13, 2015).

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investigation of the employing agency? If the answer is yes, please cite the statute, regulation, or internal rules or guidance that prohibits such expansion.

- d. Can you explain why the Department of Justice, out of an abundance of caution and in the interest of full disclosure, would not err on the side of identifying these investigations against individual law enforcement officers as investigations against their employing agencies?
2. Please provide the following:
- a. The number of open civil rights investigations against all state and local law enforcement agencies that are currently being conducted by the Civil Rights Division and were initiated or expanded between January 20, 2005, and January 1, 2011, and the names of these agencies.
 - b. The number of open civil rights investigations against all individual state and local law enforcement officers, that are currently being conducted by the Civil Rights Division and were initiated or expanded between January 20, 2005, and January 1, 2011, and the names of the agencies that employ or employed those individual officers.
 - c. The number of closed civil rights investigations against all state and local law enforcement agencies that were conducted by the Civil Rights Division and were initiated or expanded between January 20, 2005, and January 1, 2011, and the names of these agencies.
 - d. The number of closed civil rights investigations against all individual state and local law enforcement officers that were conducted by the Civil Rights Division and were initiated or expanded between January 20, 2005, and January 1, 2011, and the names of the agencies that employ or employed those individual officers.
 - e. The total number of open civil rights investigations that are being handled by the Special Litigation Section, regardless of the date of initiation or expansion of the investigation or the target of the investigation, and the identities of the investigative targets, even if such targets are non-law enforcement.³

³ For the sake of completeness, you may include the list of state and local law enforcement agencies that were provided in the November 16, 2015, production.

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II. Potential Ethical Misconduct and Criminal Conduct in the Danziger Bridge Case

- During your testimony, you commented on the well-documented misconduct of several Department of Justice employees in the course of the so-called Danziger Bridge case. The Danziger Bridge case is undeniably unique, not only in terms of the significant scope of misconduct by Department of Justice employees, but also in the court-documented nature of the misconduct.⁴
- Among the information learned by the District Court prior to its September 17, 2013, decision, in which it vacated the convictions against the defendant police officers and ordered a new trial, is the following (among other disturbing revelations):
 - Former Assistant U.S. Attorney Salvador “Sal” Perricone’s initial statements about being the only Department of Justice employee who was inappropriately posting online (under several pseudonyms) about the Danziger Bridge case and the defendant police officers while the case was ongoing were later demonstrated to be false.
 - Former First Assistant U.S. Attorney Jan Mann – who was essentially the second in command under former U.S. Attorney for the Eastern District of Louisiana Jim Letten – was herself inappropriately posting online (under the pseudonym “eweman”) about the case and the defendant police officers.
 - Upon the designation of two Assistant U.S. Attorneys from the Northern District of Georgia to coordinate the investigation of the Department of Justice’s misconduct, Former U.S. Attorney Letten, Ms. Mann, and her husband and fellow Assistant U.S. Attorney, Jim Mann, all resigned from the U.S. Attorney’s Office for the Eastern District of Louisiana.
- 3. The Department of Justice’s Office of Professional Responsibility (OPR) issued an investigation summary report in December 2013 (after the District Court’s decision), which identified Mr. Perricone and Ms. Mann as having engaged in professional misconduct as a result of their inappropriate online posting under**

⁴ The history of the Department of Justice misconduct here will not be recounted in full, but is available in the relevant prior court decisions for review at your convenience. *See generally* U.S. v. Bowen, 969 F.Supp.2d 518 (E.D.La. 2013); U.S. v. Bowen, 799 F.3d 336 (5th Cir. 2015). The content of the two decisions will be referenced at several other points, without citation. *See also generally* Department of Justice, Office of Professional Responsibility, *Investigation of Allegations of Professional Misconduct Against Former Assistant United States Attorneys Salvador Perricone and Jan Mann, United States Attorney’s Office for the Eastern District of Louisiana* (Dec. 20, 2013) (hereinafter OPR REPORT).

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pseudonyms during the Danziger Bridge case.⁵ **Please explain what consequences, if any, Mr. Perricone and Ms. Mann have faced since the release of OPR’s report in December 2013, other than being identified in the report for professional misconduct.**

4. For reasons that are unclear, the OPR report did not investigate whether Mr. Letten or Mr. Mann had been involved in any professional misconduct in connection with the Danziger Bridge case, notwithstanding their close proximity to the case, their close working relationships with Mr. Perricone and Ms. Mann, the marital relationship between Ms. Mann and Mr. Mann, and their resignations during the District Court’s inquiry of the Department of Justice’s misconduct. **Please explain why the OPR report did not specifically investigate Mr. Letten and/or Mr. Mann for possible misconduct.**
5. Please provide the names and titles of the Department of Justice employees (including former Department of Justice employees) who were responsible for determining which Department of Justice employees would be investigated by OPR and/or discussed in its December 2013 report.
 - Subsequent admissions by the Department of Justice revealed that Karla Dobinski, an attorney who has worked in the Civil Rights Division for approximately 30 years, was also inappropriately posting online (under the pseudonym “Dipsos”) about the case and the defendant police officers. Ms. Dobinski’s misconduct was considered all the more egregious in light of the fact that she had been tasked with leading the Department of Justice’s “taint team,” which was responsible for protecting the reputations of cooperating police officers.
 - Beyond repeatedly simply posting online comments about the police officers under the pseudonym “Dipsos,” Ms. Dobinski is alleged to have aggressively encouraged negative public commentary about the defendant police officers. “Dipsos” not only repeatedly encouraged others to keep posting statements strongly condemning all the police officer defendants (including the officers she was tasked with protecting), their witnesses, and their entire defense, but also told some of the more forceful commentators in the online forum that they were all “performing a valuable public service” by being critical of the police. It goes without saying that such conduct – which was not disputed by either Ms. Dobinski or the Department of Justice – raised serious questions about Ms. Dobinski’s fitness for continued employment with the Department of Justice.

⁵ See generally OPR REPORT, *supra* note 4.

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- Despite the array of documented misconduct on the part of Ms. Dobinski, you confirmed at the hearing that Ms. Dobinski remains employed in the Civil Rights Division. It also appears, based on information provided by the Department of Justice, that Ms. Dobinski continues to be employed at the Department of Justice because “OPR concluded that Karla Dobinski’s limited posting of inappropriate and ill-advised online comments constituted poor judgment, but not professional misconduct.”⁶
- 6. Please explain, with the assistance of OPR employees (if necessary), how Karla Dobinski’s inappropriate online posting about the Danziger Bridge case and the defendant police officers is distinguishable from the conduct of Mr. Perricone and Ms. Mann, which was found to be professional misconduct.
- 7. Based on your awareness of the Danziger Bridge case and Ms. Dobinski’s documented, confirmed conduct in that case, do you believe, as the current acting head of the Civil Rights Division, that Ms. Dobinski engaged in conduct that could reasonably qualify as professional misconduct?
- 8. Given that you are the acting head of the Civil Rights Division, do you believe that Ms. Dobinski’s conduct was such that she should be terminated from her employment with the Department of Justice? If your answer is no, please provide a detailed explanation as to why she should not be terminated from her position as a Department of Justice attorney.
- 9. Given that you are the acting head of the Civil Rights Division, do you believe that Ms. Dobinski’s conduct was such that she should at least be precluded from handling any aspect of any civil rights cases involving state or local law enforcement agencies or officers? If your answer is no, please provide a detailed explanation as to why she should not be precluded from handling any aspect of any civil rights cases involving state or local law enforcement agencies or officers.
- 10. Have you personally had any conversations with either former Attorney General Eric H. Holder, Jr., current Attorney General Loretta E. Lynch, Deputy Attorney General Sally Yates, or any other Department of Justice leadership official about Ms. Dobinski, for any reason? If the answer is yes, please provide additional details, including the identity/identities of the official(s) and the date(s) of conversation(s).

⁶ See KADZIK LETTER, *supra* note 1.

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11. Have you ever personally discussed Ms. Dobinski’s employment status with any federal employee? If the answer is yes, please provide additional details, including the identity/identities of the employee(s) and the date(s) of conversation(s).
12. Please provide the following information about Ms. Dobinski:
 - a. Her current federal employee classification.
 - b. Her current federal base salary.
 - c. Whether she has received any federal bonuses since January 1, 2010, and, if the answer is yes, the amount(s) and timing of the bonus(es).
 - d. Whether she currently maintains any non-Department of Justice employment or receives any non-Department of Justice income.⁷
13. Please provide a list of all of the open civil rights cases with which Ms. Dobinski is or has been involved in a direct or indirect way, even if in a purely advisory capacity.⁸
14. Please provide a list of all of the closed civil rights investigations and prosecutions with which Ms. Dobinski was involved in a direct or indirect way, even if in a purely advisory capacity.
 - o At some point during the District Court’s inquiry into the Department of Justice’s misconduct, the Department of Justice conceded, in a supplemental report to the court, that it “could not forensically recover computer data evidence from the USAO’s internet portals for years 2010 and 2011 (prior to December 19, 2011) because it ‘did not retain data for the period before that.’ Thus, critical information regarding further prosecutorial misconduct in the months before and during this trial seems forever unavailable.”
15. Please provide additional information about the above-discussed loss of Department of Justice data, including:

⁷ The District Court noted in its decision that Ms. Dobinski had been involved in the Danziger Bridge case for many years, including as a consultant for sides in the state-level prosecution of the police officers. It is unclear if this was as a paid or unpaid consultant.

⁸ I must emphasize that providing this requested information would in no way interfere with the integrity of any of these open investigations.

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- a. The date when the first Department of Justice employee first became aware of the loss of the relevant data.
 - b. The name(s) of the Department of Justice employee(s) who first reported the loss of the relevant data.
 - c. What the Department of Justice’s policy regarding the retention of internet portal data was at the time of the loss of the relevant data.
 - d. If the relevant data were lost as a result of a failure to adhere to the Department of Justice’s internet portal data retention policy.
- The publicly available version of the previously discussed OPR investigation summary report is heavily redacted, and appears to be redacted in places that would provide additional information about individuals who may have been involved in the inappropriate online posting.⁹
16. Please preserve¹⁰ an **uncut, unedited, unredacted copy** of the OPR report and all of the documents and information used to produce the report (including internal Department of Justice communications about the subject matter), and provide a copy of the report to the Committee immediately.
17. Please provide the names and titles of all of the Department of Justice employees (including former Department of Justice employees) who were responsible for drafting, editing, and/or approving any aspect of the OPR report (including the final report).
18. Who inside the Department of Justice was responsible for setting the parameters for the OPR investigation and/or deciding which Department of Justice employees would be investigated by OPR? Please provide the names and titles of these employees (even if they are already identified in the answer to Question 17).
- It is our understanding that, in addition to several known online pseudonyms that were definitively traced to Department of Justice employees, there were two other online pseudonyms that were used by very active participants in the derogatory online discussions of the defendant police officers during the Danziger Bridge case:

⁹ See generally OPR REPORT, *supra* note 4.

¹⁰ Any failure to properly preserve the requested material could subject Department of Justice employees to subsequent criminal prosecution. See generally 18 U.S.C. § 1505.

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“crawdaddy” and “123ac.” As of this writing, there is no documentation in the public domain that in any way identifies the individuals who used these two pseudonyms.

19. Did any current or former employees in the Civil Rights Division other than Ms. Dobinski post inappropriate online comments under either “crawdaddy” or “123ac” (or both) during the Danziger Bridge case?
20. Did any current or former employees in the Civil Rights Division other than Ms. Dobinski post inappropriate online comments under any other pseudonym(s) during the Danziger Bridge case?
21. Please preserve¹¹ and provide any internal Department of Justice documentation (including e-mail communications) include or reference “crawdaddy” or “123ac” (or the identities of “crawdaddy” or “123ac”) in any way.
22. Was Jim Letten “crawdaddy” and/or “123ac”?
23. Was Jim Mann “crawdaddy” and/or “123ac”?
24. Was any other Department of Justice employee “crawdaddy” and/or “123ac”?
25. Please provide a complete list of all Civil Rights Division employees (in addition to Ms. Dobinski) who worked in any capacity on the Danziger Bridge case.
- It is our understanding that the District Court, in the wake of the discoveries that led the court to vacate the convictions against the defendant police officers and order a new trial, recommended that the Department of Justice appoint a special prosecutor to conduct a full and impartial investigation into the misconduct of Department of Justice employees in the Danziger Bridge case. The Department of Justice under Attorney General Holder, however, apparently declined the request.
26. Based on your understanding of the court-documented misconduct of Department of Justice employees involved in the Danziger Bridge case, would you recommend the appointment of a special prosecutor to Attorney General Lynch?

¹¹ Any failure to properly preserve the requested material could subject Department of Justice employees to subsequent criminal prosecution. See generally 18 U.S.C. § 1505.

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27. Do you know if Attorney General Lynch is contemplating appointing a special prosecutor to investigate the court-documented misconduct of Department of Justice employees in the Danziger Bridge case?

28. Please explain what would prevent a subsequent presidential administration from appointing a special prosecutor to investigate the court-documented misconduct of Department of Justice employees in the Danziger Bridge case.

III. Civil Rights Investigations of Assaults on Law Enforcement Officers

- Much attention is paid to alleged civil rights violations of civilians by law enforcement officers, but little if any attention has been focused on the potential civil rights violations of law enforcement officers by civilians. Several recent high-profile news stories regarding lethal and non-lethal violence against law enforcement officers – sometimes in the wake of alleged civil rights violations of civilians by law enforcement officers – reminds that this is more than just a hypothetical concern.
29. How many requests has the Civil Rights Division received to investigate whether the civil rights of assaulted or murdered state or local law enforcement officers were violated (if any)?
30. How many investigations has the Civil Rights Division commenced to investigate whether the civil rights of assaulted or murdered state or local law enforcement officers were violated (if any)?
31. If the answer to both Questions 29 and 30 is zero, please provide a detailed explanation as to why the Civil Rights Division is not conducting investigations in the possible civil rights violations of assaulted or murdered state or local law enforcement officers.
32. Does the Civil Rights Division believe that it has jurisdiction over civil rights investigations involved assaults and murders of state and local law enforcement officers? If the answer is no, please provide a detailed explanation as to why.
33. Does the answer to Question 32 depend on the race of the assaulted or murdered state or local law enforcement officer? Whether your answer is yes or no, please provide a detailed explanation.

IV. Civil Rights Division Coordination or Collaboration with State and Local Officials

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- Written hearing testimony notes that a state or local government may, depending on the circumstances, be inclined to acquiesce to a Civil Rights Division’s consent decree in order to achieve end results that the state or local government knows it could not achieve through democratic means. The logic behind this theory is that such acquiescence represents a pain-free, cost-free, blame-shifting way to achieve desired political goals without having to receive approval from voters.
 - In its pre-hearing production, the Department of Justice provided copies of several letters that were sent by elected officials in various jurisdictions, and represented formal requests by those officials to have the Department of Justice conduct civil rights investigations against various state and local law enforcement agencies. Only copies of paper letters were provided.
34. Is there currently any statutory or regulatory disclosure requirement, whereby the Department of Justice is required to notify Congress about the basis for the commencement of a civil rights investigation?
35. Is there currently any statutory or regulatory disclosure requirement, whereby the Department of Justice is required to notify Congress when an elected or other government official requests the commencement of a civil rights investigation?
36. How many requests, in paper or electronic form, has the Civil Rights Division received from a non-government official since January 20, 2009, requesting that a state or local law enforcement agency or officer be investigated for possibly violating the civil rights of a civilian?
37. How many requests, in paper or electronic form, has the Civil Rights Division received from a federal, state, or local government official since January 20, 2009, requesting that a state or local law enforcement agency or officer be investigated for possibly violating the civil rights of a civilian?
38. How many requests, in paper or electronic form, has the Civil Rights Division received (regardless of source) since January 20, 2009, requesting that a civilian individual be investigated for possibly violating the civil rights of a state or local law enforcement officer?
39. In a situation where a state or local government aligns with the Civil Rights Division in terms of either the perceived civil rights problem or the preferred remedy, but the state or local law enforcement agency itself disagrees with the Civil Rights Division and/or the state or local government, please explain what

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steps (if any) the Civil Rights Division takes to ensure that the state or local law enforcement agency’s perspective is involved in consent decree, settlement, or other resolution negotiations.

V. Current Civil Rights Division Hiring Practices and Trends

- During your testimony, you stated that the Civil Rights Division employs approximately 700 employees.
40. What is the exact number of Department of Justice employees who work for the Civil Rights Division? **Please include detailees (whether from other components within the Department of Justice, or from outside the agency) in this figure.**
41. Regarding these approximately 700 employees:
- a. How many have previously worked for the American Civil Liberties Union?
 - b. How many have previously worked for the National Association for the Advancement of Colored People’s (NAACP) Legal and Education Defense Fund (LDF)?
42. How many individuals who were formerly employed by the Civil Rights Division have departed from the division since January 20, 2009?
43. Please provide a roster (preferably in the form of an Excel spreadsheet) of **all** current employees of the Civil Rights Division that includes:
- a. The sections within the Civil Rights Divisions to which they are assigned.
 - b. Their titles.
 - c. Their salaries.
 - d. Their respective first days of employment with the Department of Justice.
 - e. Their last assignment within the Department of Justice prior to joining the Civil Rights Division (if applicable).
 - f. Whether they are full-time employees or detailees.

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- g. If a detailee, the employing component within the Department of Justice or other employing agency.

VI. Scope of Consent Decrees

- Written and oral hearing testimony suggests that the Civil Rights Division may be engaging in an aggressive, over-expansive use of consent decrees in order to shape the structure and behavior of state and local law enforcement agencies around the United States. Robert N. Driscoll, who is an alumnus of the Civil Rights Division, noted that an expansive application of consent decrees – which, in some instances, are used to dramatically restructure law enforcement agencies – might actually run afoul of the limited gap-filling role that was intended for 42 U.S.C. § 14141, which gives the Department of Justice the authority to conduct “pattern or practice” investigations.¹²

44. Do you agree with the statement that 42 U.S.C. § 14141 limits a consent decree-based remedy for a state or local law enforcement agency’s violation of civil rights law to a remedy that is tailored to the violative pattern or practice of that state or local law enforcement agency? If your answer is no, please provide a detailed answer, using statutory and case law citations, where appropriate.

45. Please explain how the “pattern or practice” language of 42 U.S.C. § 14141 would permit the application of an expansive consent decree-based remedy, using statutory and case law citations, where appropriate.

- In its pre-hearing production, the Department of Justice, in response to a question about whether the Department of Justice has ever required a state or local law enforcement agency to make a payment to a third party as part of a civil rights settlement agreement or order, responded by stating that “the Department of Justice does not require state or local law enforcement agencies to make payments to third-parties to facilitate the closure of investigations or satisfy the Department’s concerns.” It did concede, however that “[a]greements to pay for a monitor are included in consent decrees and settlement agreements.”

46. Notwithstanding the Department of Justice’s answer in the pre-hearing production, has the Department of Justice ever required, at any point in its history, that a state or local law enforcement agency, subject to a consent decree or any other settlement agreement stemming from a civil rights investigation,

¹² 42 U.S.C. § 14141 states that “[i]t shall be unlawful for any governmental authority, or any agent thereof, ... to engage in a *pattern or practice* of conduct ... that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States,” and empowers the Attorney General to “obtain appropriate equitable and declaratory relief to eliminate the *pattern or practice*.” *Id.* (emphasis added).

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that such agency must pay some amount to a third party? If the answer is yes, please provide additional information about such instances, including the identities of such third parties and the amounts of money transferred to such third parties.

47. With respect to the monitors mentioned in the pre-hearing production, please provide additional information regarding such monitors, including:
- a. Who or what can and cannot qualify to serve as a monitor (if applicable).
 - b. Whether the federal government or the state or local law enforcement agency covers the cost of the monitor.

VII. Prior Writings on Civil Rights Laws and Policies

- You have previously published some pretty radical statements, which you made while a practicing attorney employed with the NAACP LDF. In an article entitled “Critical Race Lawyering in Tulia, Texas,”¹³ you wrote the following passages:
 - “Critical race theory, as an analytical tool, helps us understand that underneath the insidious veneer of such code words and mottos as ‘the rule of law,’ ‘colorblindness,’ ‘equal justice for all,’ and ‘equal protection,’ the law is contingent upon the social and political realities of inequality and racial power.”
 - “If critical race theory is to be relevant in these difficult times, it has to be more than an analytical tool that describes how the law has been used to perpetuate white supremacy in this country.”
 - “[Critical race theory] must also be a tool for reforming and transforming, through careful, strategic, thoughtful advocacy, the very systems in place that are destroying our communities and maintaining the subordination of people of color.”
 - “Freddie Brookins was one of 46 individuals whose family and community was ripped apart because of one corrupt officer, his many supervisors, and a system of justice predicated upon the warehousing of black and brown individuals.”
48. Do you believe that concepts such as “the rule of law,” “colorblindness,” “equal justice for all,” and “equal protection” are racist?

¹³ See generally 73 FORDHAM L. REV. 2055 (Apr. 2005).

Senator Cruz Questions for the Record for
Vanita Gupta, Acting Principal Deputy Assistant Attorney General
U.S. Department of Justice
Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts
“The War on Police: How the Federal Government Undermines
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49. Do you believe that our legal system is “used to perpetuate white supremacy in this country”?
50. Please provide additional detail about the “systems” that you believe “are destroying our communities and maintaining the subordination of people of color.”
51. Please explain what system of justice you were referring to when you described “a system of justice predicated upon the warehousing of black and brown individuals” in your published materials.

VIII. Your Status as Acting Head of the Civil Rights Division

- On October 15, 2014, you were appointed by President Barack Obama to serve as the acting head of the Civil Rights Division.¹⁴ Your appointment to serve as the acting head of the Civil Rights Division comes in the wake of the departure of former Assistant Attorney General Thomas E. Perez and the failed nomination of President Obama’s radical nominee for Assistant Attorney General, Debo Agdebile.¹⁵
52. Can you explain why you were not formally nominated for the position you currently hold?
 53. As the unconfirmed, acting head of the Civil Rights Division, please indicate which duties and responsibilities (if any) that you are unable to fulfill because you were not confirmed to your position.

¹⁴ See generally U.S. Department of Justice, Office of Public Affairs, *Attorney General Holder Announces Vanita Gupta to Serve as Acting Assistant Attorney General for the Civil Rights Division* (Oct. 15, 2014).

¹⁵ See generally Wesley Lowery and Ed O’Keefe, *Senate rejects Obama appointment of Debo Agdebile to top civil rights post*, WASH. POST (Mar. 5, 2014).

Senator Cruz Questions for the Record for
Andrew C. McCarthy
Senior Fellow, National Review Institute
Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts
“The War on Police: How the Federal Government Undermines
State and Local Law Enforcement”
Tuesday, November 17, 2015

I. Possible Statutory Limits on the Civil Rights Division Discretion

- In your written testimony, you note how the Department of Justice has an annual budget in the vicinity of \$30 billion, and how Congress “does virtually nothing to restrict how [the department] uses these funds – including how the Civil Rights Division spends its share.”
- 1. In your opinion and based on your experience, do many state and local law enforcement agencies (or the governments with responsibility for those agencies) settle civil rights claims initiated against them by the Civil Rights Division because they lack the financial resources to defend themselves in federal litigation?
- 2. In your opinion and based on your experience, what sort of statutory restrictions, if any, would you recommend in order to ensure that the Civil Rights Division does not abuse its investigative authority?

II. Broken Windows Theory of Policing

- Despite substantial empirical and anecdotal evidence to the contrary, critics of what is known as the broken windows theory of policing have, at various times, criticized it for being harassing and ineffective.
- 3. In your opinion and based on your experience, is the broken windows theory of policing an effective crime prevention tool for state and local governments?
- 4. Do you think it could be reasonably argued that some of the apparent, current increases in crime in some parts of the United States can be attributed to a rejection (or abandonment) of the broken windows theory of policing?
- 5. Do you think jurisdictions’ rejection (or abandonment) of the broken windows theory of policing increases the chances of terrorist activity in the United States?

III. General Question

- 6. Are there any other points or issues that were not explored (or sufficiently explored) during the hearing that you would like to bring to the Subcommittee’s attention?

Senator Cruz Questions for the Record for
John P. Walters
Chief Operating Officer, Hudson Institute
Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts
“The War on Police: How the Federal Government Undermines
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I. Follow-Up on Hearing Testimony

- During your testimony, you stated that substance abuse can have a “catalytic effect ... on crime and child endangerment, on addiction, and on the survivability of young people in at-risk situations over time.” You went on to state, in essence, that the federal government is about to undo (or impair the value of) existing federal laws and policies that have dramatically reduced crime over the last few decades, and that such changes could spur more substance abuse and also more crime.
 1. Please provide more detail about the specific federal laws and policies you referenced in your testimony.
 2. What current federal laws exist, but are not being enforced, that you think are of substantial value to state and local law enforcement efforts (or would be, if they were enforced)?
 3. What changes to current federal law should be made to better aid state and local law enforcement efforts?
 4. What changes to current federal law should not be made in order to preserve state and local law enforcement effectiveness?
- During your testimony, you also discussed at several points how substance abuse and the illicit drug industry affect crime. You also discussed the violence of the drug trade.
 5. Do you think that the Obama Administration’s failure to enforce federal criminal drug statutes has had a negative impact on the effectiveness of state and local law enforcement efforts? If your answer is yes, please provide additional information and/or some examples.
 6. Do you think our porous borders, particularly our border with Mexico, have a negative impact on the effectiveness of state and local law enforcement efforts? If your answer is yes, please provide additional information and/or some examples.
 7. Please provide additional information regarding international terrorist organizations and their roles (if any) in the international drug trade.
- During your testimony, you also specifically identified Colorado, and indicated how its current marijuana policy is negatively impacting state and local law enforcement, both in Colorado and outside of Colorado.

Senator Cruz Questions for the Record for
John P. Walters
Chief Operating Officer, Hudson Institute
Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts
“The War on Police: How the Federal Government Undermines
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8. Please provide additional information regarding this point, particularly with respect to how Colorado’s in-state marijuana policy is having an intrastate effect.

II. General Question

9. Are there any other points or issues that were not explored (or sufficiently explored) during the hearing that you would like to bring to the Subcommittee’s attention?

Senator Jeff Sessions
Questions for the Record for John Walters
Chief Operating Officer, Hudson Institute
Former Director, Office of National Drug Control Policy

1. Do you believe the Administration's release of potentially thousands of federal felons – many of whom have been convicted of felony drug trafficking or drug sale charges – pursuant to the U.S. Sentencing Commission's retroactive changes to the guidelines will result in more crime nationwide? Please explain.
2. Do you believe that individuals who have been convicted of felony drug trafficking or drug sale charges should be described as "low-level, non-violent drug offenders"? Please explain.
3. S. 2123, the Sentencing Reform and Corrections Act of 2015, would, among other things, permit the release of an unknown number of felons from federal prison. Many of the felons who would be eligible for release have been convicted of felony drug trafficking or drug sale charges. Do you believe that crime would increase nationwide if S. 2123 were to become law? If your answer is yes, please explain.
4. How do legal sales of marijuana for recreational purposes affect the illicit marijuana market?
5. In your opinion, does increased cartel drug activity in the United States increase the importation of other illegal controlled substances, such as heroin and cocaine, into the United States?
6. In a November 4, 2015, briefing to reporters, DEA Administration Chuck Rosenberg said the following regarding the notion that smoked marijuana has medicinal purposes:

"What really bothers me is the notion that marijuana is also medicinal – because it is not. We can have an intellectually honest debate about whether we should legalize something that is bad and dangerous, but don't call it medicine – that is a joke. . . . [S]moking the leaf of marijuana – which is what people are talking about when they talk about medicinal marijuana – it has never been shown to be safe or effective as a medicine."

What are your views in this regard, particularly with respect to the scientific studies and positions taken by professional medical organizations that support Mr. Rosenberg's conclusions?

Responses of Robert N Driscoll to Senator Cruz's QFR's

I. Follow-Up on Hearing Testimony

1. **Is it your view that it is the obligation of the Civil Rights Division, under current federal civil rights statutes, to target or limit remedies for civil rights violations to the specific patterns or practices found, per the language in 42 U.S.C. § 14141? If your answer is yes, please provide an explanation as to why.**

Yes. First this is a simple matter of statutory interpretation. The statute's enforcement mechanism allows the Attorney General to "obtain appropriate equitable and declaratory relief *to eliminate the pattern or practice.*" 42 U.S.C. § 14141 (emphasis added). The "pattern and practice" referred to is a pattern and practice of violations or violations of rights secured by the constitution or federal law. 42 U.S.C. § 14141 (a). Thus the statute only authorizes relief necessary to eliminate the pattern and practice—not relief unrelated to the pattern and practice. Second, as a constitutional matter, the only source of authority for Congressional enactment of section 14141 is section 5 of the 14th Amendment. Thus, the statute may properly be interpreted to enforce and remedy violations of those rights protected by the 14th Amendment but does not change those substantive rights. Accordingly, in order to be a constitutional enactment, section 14141's remedies must be limited to those pattern and practices of violations of rights that are identified. *See U.S. v. City of Columbus*, No. Civ.A.2;99CV1097, 2000 WL 1133166, at *9 (S.D. Ohio Aug. 3, 2000).

2. **Do you believe the Civil Rights Division may be exceeding its authority by imposing sweeping consent decree-based remedies (on state and local law enforcement agencies) that are not tailored to the specific patterns or practices of those agencies? If your answer is yes, please provide an explanation as to why.**

The issue is one of constitutional interpretation of the statute. Specifically, the Constitution creates a federal government of limited powers, and the powers granted are articulated within the Constitution. Section 5 of the 14th Amendment grants the federal government the right to enforce the constitutional limits on state and local law enforcement, but does not grant unlimited powers to set policies and procedure, nor does it grant unlimited authority to require "best practices" as defined by the federal government. Section 14141 remains constitutional only to the extent it is interpreted as an enforcement remedy for those rights protected by the statute. Any remedy created by the statute must be congruent and proportional to the rights being protected. *See City of Boerne v. Flores*, 521 U.S. 507, 508 (1997). Thus, while constitutional remedies may be broader than the right protected in order to prophylactically protect that right, if the statute is interpreted without regard to, or any connection with, the constitutional violations found, it would be an unconstitutional statute. *See City of Boerne*, 521 U.S. at 530 ("While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented."). It can be difficult to draw a line as to when a proper remedy to a constitutional violation expands in scope to the point where it is no longer congruent and proportional to the right being protected, but clearly some of the consent decrees entered into by DOJ and law enforcement agencies test and exceed those limits. For example, setting up entirely new

Responses of Robert N Driscoll to Senator Cruz's QFR's

requirements for citizen review panels or other requirements that specific forms of community engagement be implemented appear to further a *policy* of community engagement and do not prevent, prophylactically, a particular constitutional violation. Many experts may advocate for more community engagement, but creating a citizen review board and the like is not a constitutional requirement, nor, in my view, closely enough tied to, for example, use of force violations, to be a valid remedy. Conversely, a decree requiring the specific use of force policy (e.g., a prohibition on use of pepper spray against restrained individuals where a pattern of unconstitutional use of pepper spray against such individuals has been found) would, in my view, be supported by a constitutional interpretation of the statute.

3. **Does the Civil Rights Division currently have to make any evidentiary showing before the federal court that would enforce a consent decree against a state or local law enforcement agency in order for that consent decree to be accepted by (or acceptable to) the court?**

If the jurisdiction contested the DOJ, yes. But the vast majority of investigations resolve by agreement (for reason that span from factual to political), and thus the factual basis for the vast majority of decrees are never challenged or presented to a court. Rather, summary allegations are made by the DOJ and the jurisdiction agrees to the remedy. Where DOJ has been challenged, Courts have been skeptical of DOJ's proof. *See U.S. v. Johnson*, No. 1:12cv1349, 2015 WL 4715312 (M.D.N.C. Aug. 7, 2015); *U.S. v. City of Columbus*, No. Civ.A.2;99CV1097, 2000 WL 1133166 (S.D. Ohio Aug. 3, 2000). For your reference, Westlaw links to both cases are below:

[https://a.next.westlaw.com/Document/Ic173ca503f7611e590d4edf60ce7d742/View/FullText.html?transitionType=UniqueDocItem&contextData=\(sc.DocLink\)&userEnteredCitation=2015+WL+4715312](https://a.next.westlaw.com/Document/Ic173ca503f7611e590d4edf60ce7d742/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.DocLink)&userEnteredCitation=2015+WL+4715312)

[https://a.next.westlaw.com/Document/I868c6b4653d111d997e0acd5cbb90d3f/View/FullText.html?transitionType=UniqueDocItem&contextData=\(sc.UserEnteredCitation\)&userEnteredCitation=2000+WL+1133166](https://a.next.westlaw.com/Document/I868c6b4653d111d997e0acd5cbb90d3f/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=2000+WL+1133166)

4. **Do you have any sense of how much, on average, it might cost a state or local law enforcement agency to challenge Civil Rights Division-initiated civil rights charges in federal court, in the event such agency rejected the allegations and refused to accept a consent decree?**

There is no comprehensive list that could provide an average of costs, but federal intervention can be quite expensive. For example, the cost to monitor Cleveland's progress under the settlement agreement could cost up to \$4.95 million. Similarly, Cincinnati paid approximately \$4.2 million for an independent monitor to oversee reforms in their police department, while the Los Angeles consent decree cost about \$15 million to monitor. For your reference, see the articles below:

http://www.cleveland.com/court-justice/index.ssf/2015/10/los_angeles_consulting_firm_ch.html

Responses of Robert N Driscoll to Senator Cruz's QFR's

<http://www.newsnet5.com/news/local-news/cleveland-metro/implementing-doj-consent-decree-expected-to-cost-cleveland-millions-of-dollars>

http://www.policeforum.org/assets/docs/Critical_Issues_Series/civil%20rights%20investigations%20of%20local%20police%20-%20lessons%20learned%202013.pdf

5. **When the Civil Rights Division requires, via consent decree, that a state or local law enforcement agency must accept an infrastructural remedy in order to accord with federal civil rights law, do you know if the federal government also provides accompanying federal funding to the state or locality to pay for the new infrastructural remedy, or is the expectation that that the state or locality will absorb the associated costs?**

The costs of a decree must be borne by the jurisdiction. Some jurisdictions apply for federal grants from the Justice Department COPS office or Office of Justice programs, but that process is independent of the Civil Rights Division.

6. **In a situation where the federal government creates a financial, court-ordered burden on a state or local law enforcement agency, do you think this might fairly be construed as an unfunded mandate on that state or local government?**

If the decree in question were limited to remedying constitutional violations, I do not think it would create an "unfunded mandate." Constitutional minimum standards must be met, irrespective of costs. However, this fact is why expansive definitions of what constitutes a constitutional violation are dangerous, because remedies, being court-ordered, are anti-democratic, not subject to local control, and must be paid for and financed before any state or local expenditure that would be discretionary (e.g., schools, roads, social services, etc.). Thus, for example, without a decree or order, a citizen review board must compete with other worthy projects (e.g., roads, schools, equipment, business development) that seek funding through municipal or state appropriations processes. A decree short circuits that process by compelling the creation of such a board.

7. **Can you provide some examples of how the Department of Justice has used the consent decree process to impose political goals and policies via federal court order that could not be achieved through democratic means?**

The establishment of a Community Policing Commission in the Cleveland Consent Decree. See ¶¶15-22 of the Settlement Agreement:

http://www.justice.gov/sites/default/files/crt/legacy/2015/05/27/cleveland_agreement_5-26-15.pdf

The Cleveland Consent Decree's requirements regarding diversity in hiring and recruitment. See ¶¶300-311 of the Settlement Agreement.

The establishment of the Community Police Commission in the Seattle Consent Decree. See ¶¶3-12 of the Settlement Agreement:

Responses of Robert N Driscoll to Senator Cruz's QFR's

http://www.justice.gov/sites/default/files/crt/legacy/2012/07/31/spd_consentdecree_7-27-12.pdf

Note that none of these examples are necessarily bad policy and are reasonable choices for jurisdictions to make. My concern is that they are not remedies to a pattern and practice of constitutional violations that are appropriate for Court Order.

8. **In situations where a state or local government has differences of opinion with a law enforcement agency, and the state or local government is the entity negotiating terms with the Department of Justice, does the law enforcement agency have a right to be “at the table” during these negotiations under current statutory law?**

This is an open legal question, but it points to a conflict of interest that often exists. For example, a mayor or a city council may well be in favor of certain policing “reforms” sought by DOJ. In the absence of a consent decree, such reforms would have to be negotiated/collectively bargained with the rank and file officers. But by agreeing to have a court order the change, that bargaining process may be short-circuited. Thus, on at least one occasion, local police have successfully sought to intervene in civil rights cases on the grounds that the party negotiating on behalf of the jurisdiction did not adequately represent them and the “remedy” would fall on them, not the parties agreeing to settle the case. *See generally U.S. v. City of Columbus*, No. Civ.A.2;99CV1097, 2000 WL 1133166 (S.D. Ohio Aug. 3, 2000).

9. **Do you think the consent decree process, as historically deployed by the Department of Justice, represents a threat to federalist and democratic principles?**

It has certainly challenged them. The issue is that, by their nature, constitutional rights are anti-democratic—it does not matter what the majority thinks, for example, about whether the 4th Amendment is a good idea or whether there should be a right to a jury trial in certain cases. Thus, a constitutional remedy will, in some sense, always override local control—the point of the Constitution is to limit the authority of governmental authorities. However, by “bootstrapping” either factually weak or legally tenuous alleged constitutional violations (e.g., using “disparate impact” analysis of arrest rates or police interaction rates without establishing proper baselines) to seek sweeping policy reforms unrelated to those violations, the DOJ has, at times, violated principles of federalism and democratic control. Thus, as mentioned above, requiring civilian review boards, or banning or requiring certain use of force policies that are unrelated to any pattern of constitutional violations established in that case are examples of remedies that threaten federalist principles and undermine local democracy.

II. General Question

10. **Are there any other points or issues that were not explored (or sufficiently explored) during the hearing that you would like to bring to the Subcommittee's attention?**

Responses of Robert N Driscoll to Senator Cruz's QFR's

Yes. The Committee might wish to explore the standards used by the DOJ to determine whether to open a pattern and practice investigation and seek to clarify what standards DOJ uses to define a "pattern or practice." Entities being investigated are not given any definition of how many incidents constitute a pattern or what level of proof DOJ is using. Unfortunately, many cases appear to be opened, not in response to a previously known "pattern" of misconduct, but as a parallel to a controversial incident, such as in Ferguson, Missouri or Chicago, Illinois. While a pattern and practice investigation is civil and separate from a criminal investigation, it sometimes appears that such investigations can be used to provide "cover" for DOJ to be seen as "doing something" in the event a particular criminal investigation does not result in an indictment or conviction.

Thus, in Ferguson, Missouri, notwithstanding that DOJ found that Officer Wilson acted properly, it also issued a severely critical "findings" letter accusing the Ferguson Police of misconduct, based in large part on statistical analysis of the racial breakdown of arrests, police interactions, etc. This type of analysis would find racial disparities in virtually all law enforcement agencies (including the FBI, ATF, and DEA) and is thus available anytime the DOJ desires to be perceived as "doing something" in response to police community tension in a certain jurisdiction. While there may well be problems or constitutional violations in Ferguson, the investigation (of a small police department) does not appear to have been driven by any previous pattern of established constitutional violations, but a political exercise that would insulate DOJ from criticism if and when Officer Wilson was cleared (which he was, conclusively, by a thorough DOJ investigation). The public and law enforcement community would benefit by knowing what standards, if any, are used to decide which jurisdictions are investigated.

Similarly, in Chicago, Illinois, whatever record of a pattern or practice of constitutional violations that exist has existed for some time. The decision to open an investigation now, during the public outcry over an individual case, leads to the perception that either the McDonald case alone constituted sufficient ground to investigate a "pattern and practice," or that a pattern and practice of violations had existed for some time and was not investigated previously given the political clout of Mayor Emmanuel, a political ally of the Obama Administration. Whatever the true reasons for opening the Chicago investigation are, they should be made public to reassure the public and law enforcement that the decision was fact-based and not driven by political considerations.

Questions for the Record
Senator Orrin G. Hatch
Senate Judiciary Committee
Subcommittee on Oversight, Agency Action, Federal Rights, and Federal Courts
Hearing: “The War on Police: How the Federal Government Undermines
State and Local Law Enforcement”
Tuesday, November 17, 2015

Questions for Ms. Heather Mac Donald, Thomas W. Smith Fellow, Manhattan Institute

1. You’re an expert on policing and crime. How are the administration’s words and actions affecting police morale in this country? How are they affecting citizens’ attitudes toward law enforcement? What are some specific examples of how the administration is making law enforcement’s job more difficult?

There is no precedent in recent memory for President Barack Obama’s relentless attacks on the nation’s police officers and criminal justice system. The president now routinely charges the police and the court system with racial bias. Speaking at the annual Congressional Black Caucus Foundation dinner in Washington DC in September 2014, for example, the President claimed:

Too many young men of color feel targeted by law enforcement, guilty of walking while black, or driving while black, judged by stereotypes that fuel fear and resentment and hopelessness. We know that, statistically, in everything from enforcing drug policy to applying the death penalty to pulling people over, there are significant racial disparities.

Addressing the nation in November 2014 at a moment of extreme racial tension, after a grand jury declined to indict Ferguson, Missouri, Officer Darren Wilson for the death of Michael Brown, the President saw fit to seize the opportunity to accuse the police of discrimination:

The law too often feels like it’s being applied in a discriminatory fashion . . . communities of color aren’t just making these problems up . . . these are real issues. And we have to lift them up and not deny them or try to tamp them down.”

Speaking in the Bronx in May 2015, the President asserted:

The law is not always applied evenly in this country. [Young black men] experience being treated differently by law enforcement — in stops and in arrests, and in charges and incarcerations. The statistics are clear, up and down the criminal justice system. There’s no dispute.

Such examples could be multiplied almost indefinitely.

The negative effect of such rhetoric on the morale of the police, on the perceived legitimacy of the criminal justice system, and on the atmosphere in which police operate is incalculable. The commander-in-chief is repeatedly telling the police that he views them as constitutional blackguards who routinely violate the rights of blacks. Any officer who enforces the law in minority communities is now doing so under a cloud of suspicion that emanates from the highest office of the land. That suspicion cannot help but inhibit officers’ willingness to engage in discretionary, proactive policing, especially when combined with street-level challenges to police authority.

It is bad enough for a president to undercut the legitimacy of the police and the criminal justice system. But the most galling aspect of President Obama's crusade against law enforcement is that it rests on falsehood. Study after study has shown that policing, prosecution, and incarceration are accurate reflections of crime. *Pace* Obama, the criminal justice system is not racist; it is fair. Arrests match the race of offenders as reported by crime victims; those victims are themselves disproportionately minority. Blacks are actually less likely to be charged with a felony following an arrest than whites. The disproportionate representation of blacks in the criminal justice system is a function of their disproportionate crime rates, not of racism. Following is a link to "Is the Criminal Justice System Racist?," from City Journal, which addresses this question in greater detail. http://www.city-journal.org/2008/18_2_criminal_justice_system.html A Slate magazine investigation of race and the criminal justice system in November 2014 confirmed the findings of City Journal: <http://slatestarcodex.com/2014/11/25/race-and-justice-much-more-than-you-wanted-to-know/>

What President Obama fails to say about law enforcement can be as corrosive as what he does say. In March 2015, the Criminal Section of the Justice Department's Civil Rights Division issued a 100-page report demolishing the Black Lives Matter narrative about the August 2014 shooting of Michael Brown in Ferguson, Mo. The Justice Department report eviscerated every lie that had been spread about the shooting and uncritically reinforced by the media. Eyewitnesses who had been previously terrified into silence and extensive forensic evidence confirmed that Brown had assaulted Ferguson police officer Darren Wilson and tried to grab his gun; Wilson reasonably believed that he was facing a lethal threat. Physical evidence demonstrated that Brown had not been shot in the back or while trying to surrender.

President Obama could have provided an enormous service to the nation had he publicized the Justice Department findings. He could have laid to rest once and for all the poisonous narrative that Brown was shot in cold blood by a racist police officer. Instead, Obama publicly claimed that the Brown-Wilson encounter was still shrouded in mystery. "We may never know what happened," Obama said during a town hall at South Carolina's Benedict College on March 6, 2015. This claim is irresponsible and false. The Justice Department report provides a definitive account of the interaction, based on physical evidence and multiple, consistent eyewitness reports. The report supports the grand jury's decision not to indict Officer Wilson and supports the Justice Department's decision not to bring civil rights charges against Wilson. And yet President Obama, following the lead of then-Attorney General Eric Holder, implied in his South Carolina town hall that only an overly stringent standard of proof in civil rights proceedings prevented the Justice Department from bringing civil rights charges against Officer Wilson. In fact, under no standard of proof, no matter how lax, would charges against Wilson be reasonable or justified.

President Obama's failure to whole-heartedly support his own Justice Department's exoneration of Officer Wilson proved catastrophic. Michael Brown has continued to be treated as a martyr to police brutality, providing an endless source of fuel to the incendiary Black Lives Matter protest movement. Brown's ongoing martyrdom, however baseless, makes police protection in inner-city communities increasingly fraught and dangerous.

The police play no more important function than maintaining civil order and preventing the wanton destruction of people's property and livelihoods. Yet as a second round of rioting loomed over Ferguson, Mo., after the non-indictment of Officer Wilson, President Obama chose to chastise the police in advance for their presumed overreaction to whatever was going to transpire:

I also appeal to the law enforcement officials in Ferguson and the region to show care and restraint in managing peaceful protests that may occur. . . . They need to work with the community, not against the community, to distinguish the handful of people who may use the grand jury's decision as an excuse for violence . . . from the vast majority who just want their voices heard around legitimate issues in terms of how communities and law enforcement interact.

Such skepticism about the ability of the police to maintain the peace appropriately was unwarranted; the forces of law and order didn't fire a single shot under fire during the riots that once again tore apart Ferguson, destroying the labor

and assets of small store owners and their employees. Had Obama grasped the seriousness of his responsibilities regarding law and order, he would have confined his remarks to a reiteration of the grounds for not indicting Wilson and thanked the jurors for their service and courage in following the evidence where it led them. He could have concluded by noting that there is no fairer criminal justice system in the world than the one we have in the United States.

The data are clear: police are pulling back from discretionary enforcement and violent crime is going up in major cities across the country, as FBI Director James Comey confirmed in an October address at the University of Chicago law school. To be sure, White House rhetoric is not the only factor leading to depolicing. Other factors include the virulent, sometimes violent, hostility directed at officers in the street, officers' concern that a cell phone video will not capture the reason for their use of force against a resisting suspect, officers' lack of confidence that their police chief or mayor will have the spine to rebut unjustified accusations of bias, and the chilling effect from overreaching criminal indictments, such as were issued against six Baltimore police officers following the death of Freddie Gray in April 2015.

But while it is ultimately impossible to disentangle the multiple causes of officers' reluctance to intervene in suspicious behavior, there can be no question that the President's repeated charge of racism contributes powerfully to that reluctance. The police are uniquely authorized to use force against their fellow citizens. Officers need to know that their lawful use of force will be supported by political leaders. And the public needs to know that political leaders back the police. If officers lose their legitimacy in the eyes of the public, they will face increasing levels of resistance, possibly even murderous resistance. Such resistance increases the chances that officers will have to use force against suspects, possibly even lethal force. And should officers have to resort to deadly force, it will only fuel the false narrative against them.

Policing is political. When officers fail to receive political support, they will shy away from challenged forms of policing. At the present moment, pedestrian and car stops, as well as so-called Broken Windows policing (the enforcement of low-level public order offenses), are most under attack and declining precipitously. This decline in enforcement is an understandable and predictable reaction to the vitriol that has been directed against the cops over the last year. The only mystery is why the Black Lives Matter movement refuses to acknowledge the fall-off in policing, or denounces it while half-acknowledging it. A cessation of proactive policing in inner-city areas is precisely what the Black Lives Matter movement has called for; now that they are getting that cessation and crime is going up, the activists denounce the police for not doing their jobs. Remarkably, the president, too, denies both the crime drop and the reason for it, shamelessly accusing his own FBI director of cherry-picking data and pursuing a political agenda.

2. My staff and I have been told by a number of sources that individuals are feeling increasingly emboldened to stand up to law enforcement and to challenge their authority. As one Utah police chief said, "People are feeling proud to push back against police officers." In your view, what is driving this new sense of resistance, this feeling that standing up to law enforcement is the right thing to do? How have the administration's actions played into this shift in attitudes?

Officers across the country tell disturbing stories of being pelted by rocks and water bottles when they try to make an arrest or conduct an investigation in urban areas. A mini-riot broke out in Cincinnati this July when the police responded to a drive-by shooting whose victims included a four-year-old girl shot in the head. The target of the mini-riot? Not the shooters but the police, who were trying to enforce outstanding warrants to avert a retaliatory shooting. Civilians are refusing to obey officers' lawful requests to clear a crime or accident scene. An emergency services unit officer in the Bronx was trying to free a woman pinned under an overturned car during the summer; a bystander intruded on the accident scene, stuck his cell phone in the officer's face, and refused to get back on the sidewalk when asked to do so. "You can't tell me what to do," the bystander replied hostilely to the officer's request. The cop

recalls: “A few years ago, I would have taken police action. Now, I know it won’t end well for me or the police department.”

This dangerous defiance is fueled by the narrative that the cops are a scourge on black communities. The media and the nation’s political class, from President Obama on down, are sending the incessant message that police authority is unconstitutional and biased; as a result, civilians are emboldened, if not encouraged, to resist that authority. It is impossible to overstate how vicious the hatred directed against the police has been. Black Lives Matter protests inevitably denounce the police as murderers and racists. “Fuck the police” T-shirts are standard attire. Neither the president nor members of his party have pushed back against that rhetoric, leaving the impression that the hatred is justified.

When political leaders undermine police legitimacy by falsely accusing the police of racial bias, it is no surprise that many civilians will take advantage of the situation and defy the police. And let us not be naive. A portion of the agitation and force directed against police in the streets is committed by criminals and their hangers-on.

3. What can we in Congress be doing to strengthen law enforcement? What can we be doing to rebut the narrative that the police are the bad guys?

Contemporary race-based critiques of the police rest on suppression of the facts regarding racial crime rates and the disorder in inner city communities. The fundamental flaw in all such racial profiling analysis is to compare police activity—stops or arrests, say—to population demographics, rather than to crime rates. In New York City, for example, the New York Police Department is routinely accused of racial bias because a majority of pedestrian stops have black subjects, even though blacks are only 23% of the city’s population. But population ratios are the incorrect benchmark for evaluating police activity. Crime incidents, not population demographics, drive police deployment. The media, however, invariably refuse to disclose the facts of crime. Blacks commit over 75% of all shootings in New York City, for example, and 70% of all robberies, according to victim and witness reports. Add Hispanic shootings to black shootings, and you account for over 98% of all shootings in New York. Whites, by contrast, commit less than 2% of all shootings, though they are 34% of the city’s population. Such crime disparities mean that virtually every time that the police are called out to a shooting they will be going to minority neighborhoods looking for minority suspects. The cops do not wish that; it is a necessity forced on them by the reality of violent crime.

The public remains overwhelmingly ignorant about how great such racial crime disparities are. The public is also ignorant about the data-driven policing revolution that targets police resources to where crime victims are most being preyed upon. Congress could provide a great service by getting the facts out about crime rates and how they affect patterns of policing. Hearings on inner-city crime could feature the many unqualified supporters of the police, people like the elderly woman from the Bronx who blurted out at a police-community meeting I observed in June 2015: “Oh how lovely when we see the police; they are my friends!” Such hearings could foreground the constant requests that the police receive from law-abiding members of inner-city communities to enforce public order laws against trespassers, pot-smokers, and unruly youth hanging out and fighting on street corners. In today’s environment, the police cannot respond to those heartfelt requests for order without generating the racially disparate stop and arrest data that the Justice Department and ACLU will use against them in a racial profiling law suit.

The Obama administration has been calling on police departments to collect racial data on their pedestrian and car stops. Such data is worse than useless since it will invariably be measured against a population benchmark. Congress could demand that the Justice Department sponsor the development of an appropriate benchmark against which to measure police activity, and that until such a benchmark is created, no action be taken against police departments based on faulty statistical models. A proper benchmark would start from crime rates and driving behavior, though it would not end there. Though research on driving behavior has been taboo for decades, the few studies that have been

done show that blacks speed at higher rates than whites. Seatbelt and car seat behavior is also not equal across races. A proper benchmark for profiling analysis would also need to account for the changing demographic composition of roadways, which varies by time of day and day of the week.

Also useful for understanding police activity would be information on different rates of resisting arrest. In Chicago, for example, blacks resist arrest at ten times the rate of whites, and one hundred times the rate of Asians, according to Chicago Police Department arrest data. The Justice Department has found that the biggest predictor of police behavior is civilian behavior; if a civilian resists arrest or uses force against an officer, the officer is likely to escalate his own use of force. Data on homicides of police officers should also be part of the public discourse about policing. Over the past decade, blacks were responsible for 40% of all known homicides of law enforcement officers, though they make up less than a third of all officer fatal shootings of civilians.

Hearings on the paramount role of proactive policing in the nation's now threatened two-decades long crime drop would also be useful. Such hearings would highlight the tens of thousands of black lives saved thanks to the police.

Federal monitoring of police departments for alleged civil rights violations needs reform. The Special Litigation Section of the Justice Department's Civil Rights Division imposes complicated, lengthy consent decrees on police departments then handpicks federal monitors with input from the ACLU and other anti-law enforcement groups. Often those monitors have little experience with big city policing. There are no objective standards for when a department is in compliance with the consent decree. Without benchmarks, these decrees become annuities for the monitor who has sole authority on compliance. It should never take ten years to fix whatever may be wrong in a department, yet federal oversight routinely stretches on that long, at great expense to the city's taxpayers.

A P P E N D I X

to

THE WAR ON POLICE: HOW THE FEDERAL GOVERNMENT UNDERMINES STATE AND LOCAL LAW ENFORCEMENT

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<https://www.govinfo.gov/content/pkg/CHRG-114shrg52542/pdf/CHRG-114shrg52542-add1.pdf>

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