



PROPOSED ACTION
MEMORANDUM

Preventing and Remediating Patterns or Practices
of Law Enforcement Misconduct

Department of Justice, Civil Rights Division
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I. Summary

The Civil Rights Division (CRT or Division) of the Department of Justice (DOJ) plays a critical role in ensuring that policing promotes, rather than undercuts, public safety and racial equality.¹ One way the Division plays this role is through its enforcement of 34 U.S.C. §12601, which gives the Attorney General the authority to identify and sue to eliminate patterns or practices of unlawful police conduct in the nation's state and local law enforcement agencies.² This authority to remedy systemic law enforcement misconduct has been delegated to the Special Litigation Section of the Civil Rights Division.³

The Trump administration has undermined the Division's ability to prevent and remedy state and local law enforcement misconduct even as the administration's actions more broadly have encouraged, facilitated, and, in some instances, constituted law enforcement misconduct. This memorandum focuses on three actions the Biden administration can begin immediately to restore the Division's police misconduct enforcement work and ensure that the Division once again leads on this issue, rather than lagging behind. These three actions include:

1. rescinding former Attorney General Sessions' "Consent Decree Memo"
2. reviewing certain rescinded guidance documents to determine whether they can and should be reissued, notwithstanding the "Prohibition on the Issuance of Improper Guidance Documents Within the Justice Department," a rule hastily promulgated by DOJ at the end of 2020
3. reviewing the Special Litigation Section's police-matters docket, both current cases and proposed investigations, and creating an interdisciplinary, inter-section task force to ensure the Division's enforcement work is effective and innovative

II. Background and Current State

To understand why these recommendations are critical to restoring robust civil rights enforcement, it is important to appreciate the unprecedented nature of the Trump administration's hostility to holding law enforcement agencies accountable for their conduct, particularly through the use of federal consent decrees.

Trump signaled his disdain for constitutional policing from the outset. On July 28, 2017, he told a large law enforcement group in New York not to be "too nice" to criminal suspects being transported in police vehicles. This advice was immediately recognized by responsible law enforcement officials across the country as encouraging excessive force.⁴

Throughout his tenure, Attorney General Jeff Sessions undercut the Civil Rights Division's ability to reform law enforcement agencies. As Trump's nominee, then-Senator Sessions contended during his confirmation hearing that federal consent decrees designed to remedy patterns or practices of unconstitutional law enforcement conduct "undermine the respect for police officers" and he refused to pledge support for their use.⁵

¹ For the sake of brevity and except where otherwise noted, this memorandum uses "racial inequality" and similar phrases to include not only race but also inequality between different ethnic and national origin groups.

² 34 U.S.C. §12601 was previously codified as 42 U.S.C. §14141 and the police reform investigations and consent decrees are sometimes referred as "14141 cases."

³ See Justice Manual §8-2.262.

⁴ Brian M. Rosenthal, *Police Criticize Trump for Urging Officers Not to Be 'Too Nice' With Suspects*, N.Y. Times, July 28, 2017, <https://www.nytimes.com/2017/07/29/nyregion/trump-police-too-nice.html>

⁵ Matt Zapotsky, et al., *Sessions emphasizes the primacy of the law over his political views*, Wash. Post, January 10, 2017,

Broadly speaking, civil rights consent decrees are a set of remedial measures negotiated between the Division and an entity (in the policing context, generally a city, county, or state) the Division has found to have violated individuals' statutorily or constitutionally protected civil rights. Consent decrees are court orders and are generally accompanied by ongoing court oversight. They often require the appointment of an independent monitor to ensure they are fully implemented. Consent decrees are thus powerful tools used to address systemic violations of civil rights in a variety of contexts, from policing, to prisons, housing, education, employment, voting, and disability rights. In the years leading up to the Trump administration, the Civil Rights Division used consent decrees most prominently in its investigations of law-enforcement agencies.⁶

Consistent with the sentiments expressed during his confirmation hearing, Attorney General Sessions spearheaded an unprecedented attack on the use of consent decrees to remedy law enforcement misconduct.⁷ In March 2017, Sessions ordered a review of all policing consent decrees, asserting the review was necessary to ensure that consent decrees did not undermine officer safety or crime suppression.⁸ There was concern at the time that this could result in the Department arguing in court for some existing consent decrees to be dismissed entirely.⁹ Although this did not happen, several consent decrees were amended as a result of this review. Numerous other proposed changes were fended off by diligent behind-the-scenes advocacy by career attorneys.

In April 2017, the Department took the unprecedented step of trying, albeit unsuccessfully, to back out of the consent decree the Civil Rights Division had negotiated with the Baltimore Police Department to remedy the patterns of misconduct its own investigation had demonstrated.¹⁰ In another unprecedented move, DOJ refused to follow through on an agreement-in-principle the Division had reached with the City of Chicago to negotiate a consent decree to end unconstitutional policing practices.¹¹ Subsequently, and despite the states' rights rhetoric Sessions espoused as one basis for his views, the Division affirmatively opposed a negotiated reform agreement between the State of Illinois and the City of Chicago.¹²

Sessions' opposition to the Civil Rights Division's police-reform work, and consent decrees in particular, continued through his last day as Attorney General. One of his last acts at DOJ was to issue a memorandum making clear to Division attorneys that seeking a consent decree to remedy systemic police misconduct would

https://www.washingtonpost.com/world/national-security/sessions-faces-plenty-of-issues-in-confirmation-hearings-but-is-expected-to-be-approved/2017/01/09/17d85a52-d681-11e6-9f9f-5cdb4b7f8dd7_story.html.

⁶ For an overview of this work, see, *The Civil Rights Division's Pattern and Practice Police Reform Work: 1994-Present*, Report by the Civil Rights Division, U.S. Department of Justice (January 2017),

<https://www.justice.gov/crt/file/922421/download#:~:text=The%20Division's%20pattern%20or%20practice,than%20isolated%20instances%20of%20wrongdoing.&text=The%20Division%20conducts%20a%20thorough,forth%20in%20its%20public%20findings>.

⁷ See, e.g., Ed Chung, *The Trump Administration Is Putting DOJ Policing Reform Efforts at Risk*, CTR. AM. PROGRESS (Apr. 13, 2017, 9:00 AM),

<https://www.americanprogress.org/issues/criminal-justice/news/2017/04/13/430461/trump-administration-putting-doj-policing-reform-efforts-risk>; Ian Millhiser, *Trump's Justice Department Has a Powerful Tool to Fight Police Abuse. It Refuses to Use It*, Vox (June 30, 2020, 5:00 AM EDT), <https://www.vox.com/2020/6/30/21281041/trump-justice-department-consent-decrees-jeff-sessions-police-violence-abuse>.

⁸ Memorandum from Jefferson B. Sessions III, Att'y Gen., U.S. Dep't of Justice, to Heads of Department Components and United States Attorneys (Mar. 31, 2017); <https://www.documentcloud.org/documents/3535148-Consentdecreebaltimore.html>; Sari Horwitz et al., *Sessions orders Justice Department to review all police reform agreements*, N.Y. TIMES (Apr. 3, 2017).

⁹ Id.

¹⁰ Camila Domonoske, *Federal Judge Approves Consent Decree to Overhaul Baltimore Police*, NAT'L PUB. RADIO (Apr. 7, 2017, 5:38 PM ET),

<https://www.npr.org/sections/thetwo-way/2017/04/07/523055618/federal-judge-approves-consent-decree-to-overhaul-baltimore-police>; Peter Hermann & Justin Jouvenal, *Justice Dept. Expresses Skepticism in Court over Baltimore Police Consent Decree*, WASH. POST (Apr. 6, 2017),

https://www.washingtonpost.com/local/public-safety/justice-department-expresses-skepticism-in-court-over-baltimore-police-consent-decree/2017/04/06/64d2a756-1a40-11e7-9887-1a5314b56a08_story.html.

¹¹ Bill Ruthhart, *Justice Department: No Agreement with Chicago on Police Reform*, CHI. TRIB. (June 7, 2017), <https://www.chicagotribune.com/politics/ct-department-of-justice-chicago-police-reform-20170607-story.html>.

¹² Katie Benner, *Sessions, in Last-Minute Act, Sharply Limits Use of Consent Decrees to Curb Police Abuses*, N.Y. TIMES (Nov. 8, 2018),

<https://www.nytimes.com/2018/11/08/us/politics/sessions-limits-consent-decrees.html>; Lynn Sweet, Jon Seidel & Frank Main, *Trump's Justice Department to Oppose Pending Chicago Police Consent Decree*, CHI. SUN-TIMES (Oct. 10, 2018, 6:46 AM CDT),

<https://chicago.suntimes.com/2018/10/10/18390126/trump-s-justice-department-to-oppose-pending-chicago-police-consent-decree>; Debra Cassens Weiss, *Justice Department Will Oppose Consent Decree to Reform Chicago Police Department*, A.B.A. J. (Oct. 10, 2018, 12:25 PM CDT),

https://www.abajournal.com/news/article/justice_department_will_oppose_consent_decree_to_reform_chicago_police_department.

be futile.¹³ The memorandum required new layers of review for proposed consent decrees; set out new criteria, beyond what the law requires, that DOJ attorneys must meet to get even internal approval of a decree; and imposed constraints on the relief DOJ attorneys can seek, even where the law explicitly permits consent decrees to include such relief. The memorandum also impacts the Division's ability to effectively implement consent decrees already in place, most notably by requiring that *any change* to a consent decree be subject to the same restrictions as an entirely new consent decree.¹⁴

Attorney General William Barr continued in the same vein. The Division brought only one new investigation—of a single unit of the small police department of Springfield, Massachusetts—during the entire four years of the administration. This is, unsurprisingly, far less robust than the Obama administration's enforcement of the police misconduct statute. Perhaps more strikingly, it falls woefully short of DOJ's enforcement record under the George W. Bush administration, which itself was seen as hostile to the police misconduct work.¹⁵

In addition to the lack of new investigations and reform agreements, the Trump administration shut off almost all communication between the Division's Police Practice Group and outside advocates for police reform. This deprived Division attorneys of outside perspectives and locked away the most concentrated wealth of police reform expertise in the United States.

One of the steps that formalized this break in both communication and technical assistance was Sessions' issuance of a November 2017 memorandum titled "Prohibition on Improper Guidance Documents."¹⁶ The memorandum set out guidelines for the future issuance of DOJ guidance documents. In January 2018, Associate Attorney General Rachel Brand issued the "Brand Memo," expanding the prohibitions in Sessions' memo to all federal agency guidance documents.¹⁷ Pursuant to these memoranda, Sessions rescinded a total of forty-nine guidance documents: twenty-five on December 21, 2017, and another twenty-four on July 3, 2018.¹⁸ Among the scores of rescinded guidance documents were the *Dear Colleague Letter on Enforcement of Fines and Fees (March 2016)* and the related *Advisory for Recipients of Financial Assistance from the U.S. Department of Justice on Levying Fines and Fees on Juveniles (January 2017)*, as well as two guidance documents on access to courts for persons with limited English proficiency, including *FAQs About the Protection of Limited English Proficiency (LEP) Individuals under Title VI of the Civil Rights Acts of 1964 and Title VI Regulations, March 1, 2011*, and *Draft language Access Planning and Technical Assistance Tool for Courts, December 18, 2012*. As discussed in Section IV infra, these documents had been useful not only to the Division, but to community stakeholders, including state and local courts, facilitating understanding of and compliance with critical civil rights laws. The Sessions and Brand memos were

¹³ Memorandum from Jefferson B. Sessions III, Att'y Gen., U.S. Dep't of Justice, to Heads of Civil Litigating Components and United States Attorneys (Nov. 7, 2018), <https://www.justice.gov/opa/press-release/file/1109681/download>; see also Sari Horwitz, *In One of His Final Actions as Attorney General, Sessions Moves to Restrict Police Reform Agreements*, WASH. POST (Nov. 9, 2018, 4:04 PM EST), https://www.washingtonpost.com/world/national-security/in-one-of-his-final-actions-as-attorney-general-sessions-moves-to-restrict-police-reform-agreements/2018/11/09/76a64e5c-e437-11e8-8f5f-a55347f48762_story.html (stating that DOJ attorneys now must meet additional requirements "beyond establishing that a police department repeatedly violated the Constitution" to gain approval for a consent decree).

¹⁴ Katie Benner, *Sessions, in Last-Minute Act, Sharply Limits Use of Consent Decrees to Curb Police Abuses*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/us/politics/sessions-limits-consent-decrees.html>; Christy E. Lopez, *Here's Why Jeff Sessions' Parting Shot Is Worse than You Thought*, MARSHALL PROJECT (Nov. 19, 2018, 10:00 PM), <https://www.themarshallproject.org/2018/11/19/here-s-why-jeff-sessions-parting-shot-is-worse-than-you-thought>.

¹⁵ The Obama and Bush administrations each initiated twenty-three law enforcement misconduct investigations over eight years. *Police Reform and Accountability Accomplishments*, U.S. DEP'T JUST., <https://www.justice.gov/opa/file/883386/download>; Timothy M. Phelps, *Obama Administration cracks down on police abuse, draws challenges*, L.A. TIMES (Oct. 22, 2015) (noting that the Bush administration brought 23 investigations but often settled for informal reform agreements while the Obama administration generally required consent decrees), <https://www.latimes.com/nation/la-na-obama-police-reform-20151022-story.html>. See also, *United States v. City of Los Angeles*, 288 F.3d 391 (9th Cir. 2002) (arguing that ACLU and other community groups should be permitted to intervene in DOJ consent decree with Los Angeles Police Department after election of George W. Bush because Bush had "expressed opposition to consent decrees between the federal government and local law enforcement agencies on several occasions during his campaign.")

¹⁶ Memorandum from Attorney General, U.S. Dep't of Justice, to All Components (Nov. 16, 2017), <https://www.justice.gov/opa/press-release/file/1012271/download>.

¹⁷ Memorandum from Associate Attorney General, U.S. Dep't of Justice, to Heads of Civil Litigating Components and United States Attorneys (Jan. 25, 2018), <https://www.justice.gov/file/1028756/download>.

¹⁸ <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-25-guidance-documents>; <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-24-guidance-documents>.

incorporated into Justice Manual §§[1-19.000](#) and [1-20.000](#) in December 2018, and codified into the Code of Federal Regulations in August and October of 2020, respectively.¹⁹

As with consent decrees, Attorney General Barr continued Sessions' practice of breaking off communication with advocates for police reform. In January 2020, Barr established the "Presidential Commission on Law Enforcement of the Administration of Justice."²⁰ The Commission was broadly understood as an attempt to undermine the Obama administration's Task Force on 21st Century Policing.²¹ Though the Department touted the "diverse experience and backgrounds" of the Commissioners, the Commission was made up entirely of law enforcement officials, including state and federal prosecutors alongside federal, state, and local law enforcement officials.²² In October, a federal judge found that the commission violated federal law by, among other things, including only law enforcement officials and failing to provide public notice of its meetings or make them open to the public. The court prohibited the Department from publishing a final report from the Commission, but did allow the Commission to release a draft report, with a disclaimer.²³ The advocacy group Fair and Just Prosecution released a statement that the disclaimer "will be a message to all of the lack of legitimacy reflected by a process that blatantly ignored federal law."²⁴ The NAACP Legal Defense Fund, which brought the successful lawsuit, noted in a statement that "[a] balanced and fair Commission would never have supported the conclusions of this report."²⁵

During the Trump administration, the budget to the Civil Rights Division was cut and, when partly restored, positions that had been cut from the Special Litigation Section's Police Practice Group were not reinstated: the group included approximately thirty-three full-time equivalencies at the end of the Obama administration and is currently capped at twenty-one. Additionally, several contract positions were lost and have not been replaced. A considerable number of Police Practice Group attorneys and support staff left the Division, taking the number of employees working on these issues into "the low teens."²⁶

Although DOJ's hostility to its work has forced the Division to be largely somnolent during the Trump administration, the country as a whole has experienced an awakening to the reality that policing in the United States must be reformed, and that structural racism in American society writ large plays a role in policing's unnecessary harms.²⁷ This awakening came to the fore after the police killing of George Floyd in May 2020, which resulted in the most widespread protests in American history and reflected increasingly diverse support

¹⁹ See, 28 C.F.R. §50.26 (Limitation on issuance of guidance documents); 28 C.F.R. §50.27 (Processes and procedures for issuance and use of guidance documents).

²⁰ <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-announces-establishment-presidential-commission-law>

²¹ Robert Greene, *Trump's Law Enforcement Commission Broke the Law* (opinion), L.A. Times (Nov. 5, 2020), <https://www.latimes.com/opinion/story/2020-11-05/trump-policing-panel-broke-the-law>.

²² <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-announces-establishment-presidential-commission-law>

²³ Tom Jackman, *Judge rules federal law enforcement commission violates law, orders work stopped as attorney general prepares to issue report*, Washington Post (Oct. 1, 2020),

<https://www.washingtonpost.com/crime-law/2020/10/01/judge-rules-federal-law-enforcement-commission-violates-law-orders-work-stopped-attorney-general-prepares-issue-report/>; Sarah N. Lynch, *After blocking its release, U.S. judge lets Trump policing panel publish report*, Reuters (Nov. 2, 2020), <https://www.reuters.com/article/us-usa-justice-policing/after-blocking-its-release-u-s-judge-lets-trump-policing-panel-publish-report-idUSKBN27J01O>.

²⁴ <https://fairandjustprosecution.org/wp-content/uploads/2020/11/FJP-Statement-FACA-Decision-11-2-2020-.pdf>

²⁵ <https://www.naacpldf.org/press-release/ldf-issues-statement-on-disclaimer-ruling-for-president-trumps-law-enforcement-commission/>

²⁶ In April, 2016, the SPL had assigned to its Police Practice Group about 33 full-time equivalent employees, including 22 staff attorneys, 5 supervisory attorneys, 2 investigators, and 4 contracted outreach specialists. USDOJ Office of Inspector General *Audit of the Department of Justice's Efforts to Address Patterns or Practices of Police Misconduct and Provide Technical Assistance on Accountability to Reform Police Departments* at 5 (Feb. 2018) (noting that "[t]hese personnel investigate, litigate, and negotiate remedies for cases involving patterns or practices of police misconduct"); Ryan J. Reilly, *5 Years After Ferguson, The Justice Department Has All But Ended Federal Police Reform*, HuffPost (Aug. 9, 2019) (reporting that about a dozen employees had left the Special Litigation Section's Police Practice Group, bringing the number "into the teens," while the Trump administration had capped the unit to 21 spots), https://www.huffpost.com/entry/ferguson-justice-department-police-reform-trump-pattern-or-practice_n_5d4b18b3e4b0066eb70bad87.

²⁷ See, e.g., David Smith, *Nine out of 10 Americans say racism and police brutality are problems, poll finds*, The Guardian (July 8, 2020); Anna North, *White Americans are finally talking about racism. Will it translate into action?* Vox (June 11, 2020).

for police reform.²⁸ In the wake of these protests, a majority of Americans (including a bare majority of White Americans) stated that “major changes” are needed to make policing better.²⁹

The Trump administration, meanwhile, doubled down on its “law-and-order” rhetoric, which plays on longstanding racialized fear of crime and falsely asserts that calls for major police reform both undermine effective policing and threaten officer safety.³⁰ Consistent with administration rhetoric, Attorney General Barr resisted pleas—including pleas from Minnesota’s Republican state senators—to investigate allegations that George Floyd’s death reflected a pattern of systemic constitutional violations within the Minneapolis Police Department.³¹

III. Justification

The open hostility of the Trump Department of Justice towards civil rights and police accountability generally, and to the Civil Rights Division’s police reform work in particular, has resulted in consequential changes to formal policies and informal norms within the Department and Division. These include Sessions’ “consent decree memo,” his order to review consent decrees, and the rescission of guidance documents discussed above. Collectively, these alterations of policies and norms have fundamentally changed the course of the DOJ’s civil rights enforcement in the policing context.

As detailed in the previous section, the Trump administration succeeded in its efforts to shut down new police pattern-or-practice enforcement efforts, and even more so in its effort to end the use of consent decrees to bring about needed change. The Department refused to negotiate an agreement with the Chicago Police Department, despite the previous administration’s findings of a pattern and practice of law enforcement misconduct there. In the Ville Platte/Evageline Parrish (LA) matter, the Department required only a weak Memorandum of Agreement to resolve the investigation, even though a much more robust response is almost certainly required to eliminate the pattern of unlawful conduct the Department found there.³² And in an unprecedented fashion, the Department failed to negotiate *any* reform agreement to resolve the Springfield, Massachusetts, investigation, even though *the administration itself* found a pattern of law enforcement misconduct there.³³

²⁸ Lara Putnam, Erica Chenoweth & Jeremy Pressman, *The Floyd Protests Are the Broadest in U.S. History—And Are Spreading to White, Small-Town America*, WASH. POST (June 6, 2020, 2:10 AM), <https://www.washingtonpost.com/politics/2020/06/06/floyd-protests-are-broadest-us-history-are-spreading-white-small-town-america>.

²⁹ Steve Crabtree, *Most Americans Say Policing Needs ‘Major Changes,’* GALLUP (July 22, 2020), <https://news.gallup.com/poll/315962/americans-say-policing-needs-major-changes.aspx>.

³⁰ See, e.g., Ankita Rao, *Trump makes ‘law-and-order’ pitch—but his rhetoric is at odds with reality*, The Guardian (Sept. 25, 2020), <https://www.theguardian.com/us-news/2020/sep/25/trump-law-and-order-crime-reality>; Ayesha Rascoe, *How Trump’s ‘Law and Order’ Message Has Shifted As He Seeks A 2nd Term*, NPR (Aug. 27, 2020), <https://www.npr.org/2020/08/27/905916276/how-trumps-law-and-order-message-has-shifted-as-he-seeks-a-second-term>; Beth Schwartzapfel, *What Trump Really Means When He Tweets “LAW & ORDER!!!”* The Marshall Project (Oct. 7, 2020), <https://www.themarshallproject.org/2020/10/07/what-trump-really-means-when-he-tweets-law-order>.

³¹ Sadie Gurman & Chad Day, *Justice Department Considering Probe of Minneapolis Police Department*, WALL ST. J. (June 24, 2020, 8:19 AM EST), <https://www.wsj.com/articles/justice-department-considering-probe-of-minneapolis-police-department-11593001145>; Tim Pugmire, *GOP State Lawmakers Want AG Barr to look at Minneapolis Police Department*, MPR NEWS (June 24, 2020, 1:16AM CST), <https://www.mprnews.org/story/2020/06/23/gop-state-lawmakers-want-barr-to-look-at-mpls-pd>; *Transcript: Attorney General William Barr on “Face the Nation”*, CBS NEWS (June 7, 2020), <https://www.cbsnews.com/news/bill-barr-george-floyd-protests-blm-face-the-nation-transcript> (Barr stating, “I don’t think necessarily starting a—a pattern-or-practice investigation at this stage is warranted”). Chiraag Bains & Dana Mulhauser, *The Trump administration abandoned a proven way to reduce police violence*, WASH. POST (June 9, 2020) (Asserting there is “no replacement for a federal government with deep experience in police reform” and noting Minnesota Department of Human Rights investigation of whether Minneapolis Police Department has engaged in systemic discrimination because federal government “missing in action”).

³² Ian MacDougall, *How the Trump Administration Went Easy on Small-Town Police Abuses*, ProPublica (Aug. 27, 2018), <https://www.propublica.org/article/ville-platte-louisiana-police-consent-decree-trump-justice-department>; Investigation of the Ville Platte Police Department and the Evageline Parrish Sheriff’s Office, USDOJ Civil Rights Division (December 19, 2016), <https://www.justice.gov/opa/file/919436/download>.

³³ <https://www.justice.gov/opa/pr/justice-department-announces-findings-investigation-narcotics-bureau-springfield>

The Division's cap on staff to enforce the police misconduct statute has resulted in insufficient capacity to adequately implement current consent decrees. Consent decree implementation is how patterns of unlawful conduct are actually eliminated; adequately staffing cases at the remedial/consent decree stage is critical to protecting civil rights and the legitimacy of the Division.

The Department has continued to be entirely nonresponsive to its enforcement responsibility even after the policing protests in the Spring and Summer of 2020, which comprised the most significant challenge to the policing status quo in our nation's history. As DOJ's own OIG Report noted, the erosion of confidence in law enforcement is one of the "most significant challenges facing the Department," alongside the need to "embrace its leadership role" and "[use] all available tools to address these issues to the fullest extent possible."³⁴ The report also observed:

Given recent events [] there have been bipartisan calls for the Department to maximize use of its pattern-or-practice authority to establish accountability and public trust in law enforcement. The Department faces challenges in balancing its stated policy favoring local control and local accountability over nonfederal law enforcement agencies with the need to assure the public that the Department is using its available authorities to vindicate and prevent civil rights violations in policing at the state and local levels.³⁵

The biggest obstacle to DOJ exercising its unique police misconduct enforcement authority by opening pattern-or-practice police investigations and using consent decrees, was the Trump administration's hostility to this work. Some obstacles stemming from this hostility, however, were formalized in Sessions' consent decree memo, which, as described above, established specific barriers to effective enforcement and encouraged timidity and bureaucratic thinking among Civil Rights Division attorneys, rather than the innovative thinking required by the moment.

Sessions' 2017 memo ordering a review of all policing consent decrees, described above, also has policy and normative implications. There was no public acknowledgement that these changes were made at the command of an administration that had a blanket opposition to the use of consent decrees, despite their utility or even necessity to protect constitutional rights against law enforcement infringement. There is not even any information publicly available regarding which consent decrees were changed at Sessions' behest; what these consent decree changes were; or the purported reason for the changes. We do not know whether these changes can be expected to make consent decrees more or less effective at remedying patterns of civil rights violations. We do know that this level of opacity for this type of government decision making is unnecessary and undermines democratic values.

The blanket rescission of 49 guidance letters similarly has had an impact both practical and symbolic. The rescission of the *Dear Colleague* Fines and Fees letter, developed in the wake of the Division's Ferguson Police Department pattern-or-practice investigation, is particularly problematic. Retracting this guidance could lend the impression that DOJ no longer stands behind the letter's legal arguments. At least one court system has been so concerned about this potential misunderstanding that it has reissued the letter on its own, with explicit affirmations that the letter's iteration of requirements remains good law: the Chief Justice of Ohio's Supreme Court sent a letter to the state's judges acknowledging DOJ's rescission of the fines and fees *Dear Colleague* letter, and declaring "[t]hat guidance reminded state court leaders of our obligation to follow the constitutional standards articulated in [the Supreme Court opinion] *Beardon*," and noting that "[n]otwithstanding the rescission of the guidance by the Department, the constitutional requirements of *Beardon* remain unaltered."³⁶ The letter

³⁴ USDOJ Office of Inspector General *Top Management and Performance Challenges Facing the Department of Justice-2020* at 2 (Oct. 2020).

³⁵ USDOJ Office of Inspector General *Top Management and Performance Challenges Facing the Department of Justice-2020* at 3 (Oct. 2020).

³⁶ Letter from Ohio Supreme Court Chief Justice O'Connor to State Court Judges (January 29, 2018), <http://www.supremecourt.ohio.gov/SCO/justices/oconnor/finesFeesBaillLetter.pdf>.

concludes with a passage that underscores not only the importance of the fines and fees letter but also the rights the letter is meant to protect:

Notwithstanding the rescission of the Department of Justice’s guidance letter of March 14, 2016, our role as state judges does not change. We are as responsible for both abiding by and protecting constitutional rights as are our federal counterparts. Indeed, because of the sheer volume of cases and constant contact with our fellow citizens, we have a special responsibility to act in a manner that bolsters public trust and confidence in the fair administration of justice for everyone. Practices that penalize the poor simply because of their economic state; that impose unreasonable fines, fees, or bail requirements upon our citizens to raise money or cave to local funding pressure; or that create barriers to access to justice are simply wrong. No rescission of guidance by the Department changes that. I urge you to remain committed to ensuring that our courts’ practices remain fully compliant with constitutional standards and that we continue to act in a manner that increases confidence in the fairness of our justice system. “Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States.”³⁷

At a minimum, withdrawing the *Dear Colleague* letter and the related Advisory for recipients of financial assistance on levying fines and fees on juveniles introduces confusion about whether DOJ still interprets the law as set out in these guidance documents—a consideration of some consequence for agencies seeking to avoid federal investigation or ensure they abide by the requirements of DOJ grants. Rescinding the guidance document also clearly signaled that the Department no longer prioritized ensuring that fines and fees do not operate to undermine, rather than bolster, public safety, and do not cause unnecessary and sometimes debilitating hardship to already-marginalized groups.

Finally, in contrast to the closed and ultimately unlawful operations of Barr’s Law Enforcement Commission, the Fines and Fees *Dear Colleague* letter was developed in direct response to, and close collaboration with, a broad spectrum of criminal justice stakeholders. It is a model for how DOJ should encourage innovation and action to protect civil rights, even as it provides guidance and assistance on understanding the current state of the law.

In sum, the following proposed actions are necessary to set the Civil Rights Division back on the right path so that it can realize its potential to lead and innovate on one of the most challenging issues we face as a country. Prompt action is necessary to ensure the Department does not squander the opportunity of this moment.

IV. Proposed Action

Rescind Sessions’ Consent Decree Memorandum

As discussed above, Sessions’ November 7, 2018, consent decree memo has tremendous symbolic import, and places tangible constraints on DOJ’s ability to implement what is arguably the most powerful tool it has to ensure constitutional policing.³⁸ Further, the very existence of the memo serves to stifle creativity and innovation. The new administration should immediately rescind the Sessions consent decree memo.

³⁷ Letter from Ohio Supreme Court Chief Justice O’Connor to State Court Judges (January 29, 2018), <http://www.supremecourt.ohio.gov/SCO/justices/oconnor/finesFeesBailLetter.pdf>.

³⁸ See, *supra* note 7; see also Ian MacDougall, *Why Jeff Sessions’ Final Act Could Have More Impact than Expected*, PROPUBLICA (Nov. 12, 2018, 11:58 AM EST), <https://www.propublica.org/article/why-jeff-sessions-final-act-could-have-more-impact-than-expected>.

It appears logistically straightforward to rescind the memo. The incoming Attorney General need only issue a memorandum stating that the Sessions consent decree memorandum is rescinded, effective immediately. This is the method that Sessions himself used in January 2018 to rescind the Cole Memorandum and related guidance regarding enforcement of federal marijuana laws.³⁹

Restore Certain Rescinded Guidance Documents, including the Fines and Fees “Dear Colleague” Letter

The incoming DOJ should update and reissue the Fines and Fees letter, and the Civil Rights Division should undertake a similar analysis of whether other rescinded guidance documents should be updated and reissued.

While it might seem that the incoming administration should simply dial back the clock and reinstate the memos rescinded by Sessions, this would not be the right approach. Given the complexity of reverting back to the previous framework, and how the Division appears to use guidance documents, the better approach is to review relevant guidance documents and update and reissue particular guidance documents deemed important to furthering the Division’s mission. Among the documents that should be updated and reissued are the Dear Colleague Letter on Fines and Fees Enforcement, and the related advisory related to fines and fees levied against youth.

As noted in section II of this memorandum, the Sessions and Brand memos were incorporated into Justice Manual §§[1-19.000](#) and [1-20.000](#) in December 2018, and codified as regulations in August and October of 2020.⁴⁰ Thus, the Session memo regarding guidance documents cannot be undone as simply as his consent decree memo: modifying the Justice Manual, while not particularly cumbersome, is not as simple as rescinding memoranda promulgated by officials in previous administrations,⁴¹ and promulgating a new rule to replace the previous one would be even more complex and time consuming.⁴²

Further, given how the Division uses guidance documents in policing cases, the limitations placed on the issuance and use of guidance documents are not problematic *per se*, at least from the perspective of the Special Litigation Section.⁴³ To the contrary, in some respects these new regulations, alongside the revisions to the Justice Manual, arguably provided helpful clarity and could enhance the import of DOJ guidance documents related to enforcement of the police misconduct statute.

The requirement that guidance documents must avoid using mandatory language except when restating and citing clear legal mandates (Justice Manual § 1-19.000; 28 C.F.R. §50.26), for example, seems reasonable and likely would not prevent guidance documents from serving what is arguably their central purpose: to convey to those trying to stay on the right side of the law how DOJ interprets relevant laws.⁴⁴ Moreover, the new set of

³⁹ See, Jefferson B. Sessions, Attorney General, Memorandum for All United States Attorneys: Marijuana Enforcement (Jan. 4, 2018), <https://www.documentcloud.org/documents/4343764-Sessions-marijuana-memo.html>

⁴⁰ See, 28 C.F.R. §50.26 (Limitation on issuance of guidance documents); 28 C.F.R. §50.27 (Processes and procedures for issuance and use of guidance documents).

⁴¹ See, Justice Manual §1-1.300, Revisions.

⁴² These two rules regarding guidance documents were issued as interim final rules (IFRs). That is, they became effective upon being listed in the Federal Register and prior to the Department receiving comments. See, Prohibition on the issuance of improper guidance documents within the Justice Departments, 85 Fed. Reg. 50951-50953 (August 19, 2020) (revising 28 C.F.R. §50); Processes and procedures for issuance and use of guidance documents, 85 Fed. Reg. 63200-63204 (October 7, 2020) (revising 28 C.F.R. §50.27).

⁴³ This memorandum does not address how Division sections other than the Special Litigation Section use guidance documents. If those sections use guidance documents differently, the balance of equities might counsel a different approach. Similarly, other Divisions and even other agencies may have more difficulty working within the constraints of the new rules and may appropriately counsel trying to change them. In other words, this memorandum takes no position on whether DOJ or other agencies should seek to modify these rules. Rather, the argument is that the determination whether to seek to revise or rescind the regulations should be left to those who more clearly have a dog in this fight and need not be taken on account of the law enforcement misconduct work.

⁴⁴ See, e.g., Remarks by Deputy Associate Attorney General Stephen Cox at the Federal Bar Association Qui Tam Conference (February 28, 2018) (consistent with Brand memo, guidance documents properly provide parties notice how DOJ is interpreting the law).

rules makes clear that it *is* appropriate to use guidance documents as probative evidence that a party has failed to satisfy professional standards or practices related to applicable law (Justice Manual § 1-20.202; 28 C.F.R. §50.27 (b)). Thus, to the extent that guidance documents set forth what professional standards are and suggest how criminal justice stakeholders can promote good practices and ensure adherence to law, they can still be useful from both a policy and litigation perspective.

Pursuant to this approach, the Civil Rights Division should review each of the rescinded guidance documents relevant to the Division’s work and determine which to update and reissue. This review likely should include all twenty-four of the guidance documents rescinded on July 3, 2018. Each of these guidance documents is related to the work of the Division. At least two, *FAQs About the Protection of Limited English Proficiency (LEP) Individuals under Title VI of the Civil Rights Acts of 1964 and Title VI Regulations, March 1, 2011*, and *Draft language Access Planning and Technical Assistance Tool for Courts, December 18, 2012*, have been useful in the work of the Special Litigation Section in particular.

This review also should consider several of the twenty-five guidance documents rescinded on December 21, 2017, including, in particular, the *Dear Colleague Letter on Enforcement of Fines and Fees (March 2016)*. As discussed above, this letter is of great symbolic and practical importance. A review of Dear Colleague Fines and Fees guidance document indicates that the letter does not conflict with the legitimate intent of the new regulations or Justice Manual policies. Rather, this letter does exactly what guidance documents are intended to do. Consistent with the purported intent of the new rules and policies, the Fines and Fees letter reflects exemplary transparency and responsiveness to stakeholder concerns. The letter begins by explaining that the guidance is being issued at the request of a “diverse group of stakeholders—judges, court administrators, lawmakers, prosecutors, defense attorneys, advocates, and impacted individuals” convened by the Justice Department. These convening participants “called on the Department to provide greater clarity to state and local courts regarding their legal obligations with respect to fines and fees and to share best practices.” “Accordingly,” the letter continues, “this letter is intended to address some of the most common practices that run afoul of the United States Constitution and/or other federal laws and to assist court leadership in ensuring that courts at every level of the justice system operate fairly and lawfully, as well as to *suggest* alternative practices that can address legitimate public safety needs while also protecting the rights of participants in the justice system” (emphasis added).⁴⁵ The letter then sets out seven key principles and discusses them for several pages. Each of the principles is supported by case law, generally United States Supreme Court case law. Further, as has been noted since its rescission, “several state Supreme Court justices have reaffirmed the validity of the Department’s original legal analysis.”⁴⁶

Notwithstanding its substantive legitimacy, the Fines and Fees letter does technically conflict with the new rules, albeit in ways that are easy to correct. The letter does not, for example, explicitly disclaim any force or effect of law,⁴⁷ or explicitly state that it does not bind the public except as authorized by law.⁴⁸ More importantly, there have been significant legislative and case law advances in this area,⁴⁹ and an updated letter could incorporate these changes and thus provide better guidance to courts, police departments, impacted communities, and other criminal justice stakeholders.⁵⁰

<https://www.justice.gov/opa/speech/deputy-associate-attorney-general-stephen-cox-delivers-remarks-federal-bar-association>

⁴⁵ Department of Justice Dear Colleague Fines and Fees Letter (March 14, 2016).

<https://finesandfeesjusticecenter.org/content/uploads/2018/11/Dear-Colleague-letter.pdf>

⁴⁶ <https://finesandfeesjusticecenter.org/articles/us-doj-dear-colleague-letter/>. See also, Letter from Ohio Supreme Court Chief Justice O’Connor to State Court Judges (January 29, 2018) (reminding Judges that constitutional requirements discussed in Fines and Fees letter still binding even though letter rescinded). <http://www.supremecourt.ohio.gov/SCO/justices/oconnor/finesFeesBailletter.pdf>;

⁴⁷ 28 C.F.R. §50.26(b)(1).

⁴⁸ 28 C.F.R. §50.26(b)(2).

⁴⁹ See, e.g. *People v. Duenas*, 30 Cal. App. 5th 1157 (2019); See, generally, *Fines & Fees Justice Center Clearinghouse*, <https://finesandfeesjusticecenter.org/clearinghouse>; *Advancing Justice Together: Courts and Communities, Arizona Courts 2019 Update*, <https://www.azcourts.gov/Portals/0/Communications/StrategicAgendaUpdate2019.pdf>.

⁵⁰ It may be useful to form a working group comprised of individuals from relevant USDOJ components and other federal agencies to consider which of the 49 guidance documents should be updated and reissued (and perhaps to explore ways to make guidance document terminology more consistent). Reportedly, memoranda were drafted to explain the decision to rescind at least some guidance documents. These memoranda could inform what guidance

Undertake Comprehensive Review of Special Litigation Docket and Establish Interdisciplinary Task Force to Undo Past Harms and Encourage Innovation

The new administration's Civil Rights Division leadership should immediately begin a close review of the Special Litigation Section Police Practice Group's open matters (whether at the investigative or remedy (generally consent decree) stage) and proposed investigations. Relatedly, Division leadership should initiate an interdisciplinary, inter-sectional task force to determine how the civil rights enforcement authority of the Division's sections might collectively address police misconduct more effectively.

The review of the Division's policing docket should include:

- **Comprehensive assessment of all the changes made to consent decrees as a result of Sessions' consent decree review.** As discussed above, it is known that changes to several consent decrees were made in response to this review, but the fact that Sessions' review was the catalyst for the changes has never been publicly acknowledged, and it is unclear exactly which changes were made in response to the review. While it appears that Section attorneys staved off the worst recommended revisions, the review should consider whether some of the changes career attorneys could not prevent might be compromising civil rights enforcement efforts. As discussed above, this reconsideration is required because the Trump/Sessions administration's extreme opposition to the use of consent decrees calls into question the propriety of the administration's orders regarding consent decrees.
- **Assessment of currently pending recommendations for new investigations.** For reasons of legitimacy and efficacy, it is critical that the Division open new pattern or practice police misconduct investigations. At the end of November there reportedly were recommendations pending with the front office to open four cases. Every investigation requires a significant investment of resources, often for the better part of a decade. It is therefore important that the Division consider the impact of the case not only on the jurisdiction at issue, but on policing more generally. Accordingly, among the potential cases that meet the predicate showing of a likely pattern or practice of unconstitutional law enforcement misconduct, Division leaders should consider:
 - **Impact on police reform:** whether and how the case will allow the Division to leverage the breadth of civil rights enforcement statutes and DOJ/federal technical and resource assistance to better address root causes of policing harm and related misconduct, for example the community response to persons in mental health crisis. In other words, whether the case would further the concept that to fix policing you need to look outside policing.
 - **Impact on police practices:** particular issue areas in which civil rights focus is needed and DOJ involvement could have an outsized impact, for example racial disparities and unreasonable force in the use of police canines for apprehension (i.e. using dogs as weapons that attack and hold people).
- **Consideration of Case Selection Advisory Committee (CSAC) priorities.** The Police Practice Group's Case Selection Advisory Committee develops Section-level priorities for the police pattern or practice enforcement work.⁵¹ Reportedly, the most recent iteration of these priorities was constrained by the limitations of the outgoing administration. Given the dynamics discussed above,

would be useful to update and reissue. To prevent unnecessary delay in providing helpful guidance and signal the importance of this work, guidance documents should be reviewed and reissued on a rolling basis and DOJ should prioritize reissuing guidance documents like the *Dear Colleague Letter on Enforcement of Fines and Fees*, as well as the *Advisory for Recipients of Financial Assistance from the U.S. Department of Justice on Levying Fines and Fees on Juveniles*.

⁵¹ USDOJ Office of Inspector General *Audit of the Department of Justice's Efforts to Address Patterns or Practices of Police Misconduct and Provide Technical Assistance on Accountability to Reform Police Departments* at 13 (Feb. 2018).

these priorities should be revisited and likely revised to ensure full and effective enforcement of the police misconduct statute.

- **Case needs.** As discussed above, even after the hiring freeze was lifted, the Division did not restore the positions that previously had been committed to enforcing the police misconduct statute. As a result, staffing has gone from thirty-three FTE (not including contract positions) during the Obama administration to being capped at twenty-one attorneys and investigators. This staffing complement is insufficient to adequately staff the consent decrees being implemented, much less to initiate new investigations. The new administration leadership should meet with current Special Litigation staff to get a clear understanding of the considerable amount of work that is necessary to effectively implement consent decrees and be able to make an informed decision on how much to increase the staffing cap. Consent decree implementation is how the pattern of unlawful conduct is actually eliminated, so this work is critical both to protecting civil rights and to the legitimacy of the Division.

Finally, as noted above, there is now a greater appreciation across our nation for the interrelatedness between systemic police misconduct and other government functions, from providing education and services for persons with disabilities, to housing and employment. Special Litigation Section career attorneys reportedly already have been considering how to update and adapt their civil rights enforcement work to meet the opportunities of this moment. The new administration should help coordinate, guide, and direct these efforts through the creation of an interdisciplinary, inter-sectional task force to rethink and update how the Division approaches its pattern or practice police misconduct work. Representatives from all Division sections, and from other DOJ and federal agencies, as appropriate, should develop a plan to address systemic police misconduct more comprehensively and effectively, including the race bias that is institutionalized not only in police agencies but in other societal components that impact policing. This task force would provide concrete guidance to the entire Division (and beyond) on the critically important issue of policing, and would be an important signal of the civil rights reboot that the Biden administration seeks to undertake.



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