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

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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—
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> > (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;
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> > (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;
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> (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—
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> (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;
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> (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
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> (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
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> (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.