

Testimony of Jonathan M. Smith

Before the House Judiciary Committee, Subcommittee on the Constitution and Civil Justice

Oversight Hearing on the Civil Rights Division of the United States Department of Justice

September 24, 2020

Chairman Nadler and Members of the Judiciary Committee, thank you for the opportunity to testify concerning the Civil Rights Division of the United States Department of Justice. For the last three-and-a-half years, the Division has, in critical ways, abdicated its responsibility to enforce the civil rights laws and in some cases asserted positions that have set back the cause of civil rights. As the nation struggles with its history of racial injustice, the Division has largely been absent. Moreover, the politicization of certain enforcement decisions has undermined the credibility of the Division and done serious damage to the reputation of the Department.

I am currently the Executive Director of the Washington Lawyers' Committee for Civil Rights and Urban Affairs. From 2010 through 2015, I served as the Chief of the Special Litigation Section of the Civil Rights Division. The Special Litigation Section is one of ten Sections. The Section is responsible for the enforcement of the law enforcement provisions of the Omnibus Violent Crime Control and Law Enforcement Act, 42 U.S.C. 14141 (recodified 34 U.S.C. 12601); the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. 1997, et. seq.; the civil provisions of the Freedom of Access to Clinic Entrances Act, 18 U.S.C 248; and the corrections portions of the Religious Land Use and Institutionalized Persons Act 42 U.S.C. §§ 2000cc, et seq. We also shared responsibility with the Disability Rights Section to enforce the integration mandate of the Americans with Disabilities, Act 42 U.S.C. § 12101, et seq. In short, the Special Litigation Section has the authority to address patterns and practices of the violation of the Constitution and federal law with regard to a broad range of criminal justice institutions – police, prisons, jails, and juvenile justice systems.

Created as part of the 1957 Civil Rights Act, for more than 60 years, the Division has enforced the nation's laws prohibiting discrimination on the basis of race, color, gender, sex, disability, religion, familial status, and national origin. Since its founding, the Civil Rights Division has played an essential role in the nation's halting progress towards equal opportunity and equal justice. Division lawyers, along with their counterparts in the civil rights community, have brought some of the most consequential cases to make the promise of our Constitution and our civil rights laws a reality. The Division is often referred to as the "conscience" of the Department of Justice. That legacy has been severely tarnished in the last three and a half years.

This summer's demonstrations demanding that the nation reckon with systemic racism in policing and in the carceral system underscore the important work left to be done by the Division and the Section. Dedicated career staff have been hobbled by the political leadership in their efforts to pursue the Division's mission. The sidelining of the career staff is particularly harmful

at this critical moment in our history. While the Section engages in other important work, because of the urgency of this moment, I will focus on police, prisons, and jails in my testimony.

Policing

In the wake of the death of George Floyd, Breonna Taylor, Ahmaud Arbery and others, the nation has, yet again, embarked on a summer of protest. Communities have flooded the streets demanding changes in the policing of communities of color and that the criminalization of Black and Brown people cease. At this historic inflection point, the Civil Rights Division has been conspicuously absent.

The Division's retreat from its critical role in ensuring that law enforcement agencies operate within the limits of the Constitution started long before this summer's protests. From the very early days of this administration, the leadership of the Department sought to undermine and dismantle the work of the Special Litigation Section. Attorney General Jeff Sessions, upon taking office, criticized the Section's investigations and the use of consent decrees. Admitting that he had not even read the findings letters issued by the Section, he called them "anecdotal."¹ He immediately ordered a review of existing consent decrees and made clear that the Department of Justice would no longer work to ensure that police agencies meet their obligation to comply with the Constitution and civil rights laws.² The very last act of Attorney General Sessions before he left office was to issue a directive limiting the use of consent decrees to achieve reform. His memo required that consent decrees last no longer than two years, could be used in only very limited circumstances, and imposed onerous burdens on government attorneys to secure approval for one of the very few remedies that has proven effective in police reform cases.³

During this same time period, the President of the United States also signaled that the administration would refuse to protect the constitutional rights of its residents in interactions with law enforcement. Speaking to a gathering of police officials, he urged them to bang the heads of arrestees on squad car doors and stated that the "handcuffs" on law enforcement had been removed.⁴ Attorney General Barr continued this theme by frequently criticizing those who

¹ "I have not read those reports, frankly. We've had summaries of them, and some of it was pretty anecdotal, and not so scientifically based." Brandon Patterson, Jeff Sessions Hasn't Even Read the DOJ's Landmark Reports on Police Abuse in Ferguson and Chicago, Mother Jones, February 2017, <https://www.motherjones.com/politics/2017/02/sessions-comments-chicago-ferguson-reports-doj/>

² Memorandum from the Attorney General, Supporting Federal, State, Local and Tribal Law Enforcement, March 31, 2017 ("It is not the responsibility of the federal government to manage non-federal law enforcement agencies.") <https://www.documentcloud.org/documents/3535148-Consentdecreebaltimore.html>

³ Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Governmental Entities, November 7, 2018, <https://www.justice.gov/opa/press-release/file/1109621/download>

⁴ Mark Berman, Trump tells police not to worry about injuring suspects during arrests, Washington Post, July 28, 2017, <https://www.washingtonpost.com/news/post-nation/wp/2017/07/28/trump-tells-police-not-to-worry-about-injuring-suspects-during-arrests/>

exercised their constitutionally protected right to protest police brutality and by threatening that if communities do not show adequate support for police that they will not be provided police protection.⁵

In the 25 years since the statute authorizing pattern and practice investigations of law enforcement was enacted, the Section has conducted more than 70 investigations of police agencies. During the last administration, 25 investigations were opened resulting in comprehensive consent decrees in major cities across the country, including Cleveland, Ohio; Newark New Jersey; Albuquerque, New Mexico; Seattle, Washington; New Orleans, Louisiana; Ferguson, Missouri; and the Commonwealth of Puerto Rico.⁶ During the Trump Administration, the Section has opened one.⁷ It has entered into no police reform consent decrees.⁸

When the new administration took office, it inherited the recently completed investigation of the Chicago Police Department and the recently completed, but not yet entered, consent decree in Baltimore. In January of 2017, the Section issued an extensive and damning report on the Chicago Police Department.⁹ The report found patterns of excessive force and racial profiling, as well as material failures in hiring, training, supervision, and accountability.¹⁰ In any other case with these findings, the Section would have moved immediately to begin to negotiate a comprehensive consent decree. Instead, the Division took no action and opposed comprehensive reform when Illinois Attorney General Lisa Madigan stepped in to fill the void.¹¹ The irony of the Department's action in this case cannot be avoided – on the one hand insisting that oversight of law enforcement is a local matter and on the other opposing reforms sought and agreed to by local officials.

⁵ Katie Benner, *Barr Says Communities That Protest the Police Risk Losing Protection*, New York Times, December 4, 2019, <https://www.nytimes.com/2019/12/04/us/politics/barr-police.html>

⁶The Civil Rights Division's Pattern and Practice Police Reform Work: 1994-Present, January 2017, <https://www.justice.gov/crt/file/922421/download>

⁷ PolitiFact: Fact-checking Kamala Harris' claim about Donald Trump and investigations of police misconduct; <https://www.tampabay.com/news/nation-world/2020/06/10/politifact-fact-checking-kamala-harris-claim-about-donald-trump-and-investigations-of-police-misconduct/>

⁸ Findings letters and consent decrees are posted on the Section's webpage. No law enforcement consent decrees have been posted during this administration. <https://www.justice.gov/crt/special-litigation-section-cases-and-matters/download>

⁹Report of the Investigation of the Chicago Police Department, <https://www.justice.gov/crt/case-document/file/925771/download>

¹⁰ Id.

¹¹ Statement of Interest Opposing Chicago Consent Decree, <https://www.justice.gov/opa/press-release/file/1100631/download> (Nota Benne, statements of interest are usually signed by members of the career staff. This statement was signed by political appointees and no member of the Section appears on the pleadings, despite that the Section conducted the investigation.)

Similarly, the Department attempted to withdraw from the consent decree in Baltimore, despite that it had been agreed to by the City and submitted to the Court.¹² The consent decree was, nevertheless, entered and reform in Baltimore is underway. It is important to note that, despite these actions by the Department's political leadership, the career staff in the Section continue to work hard and effectively to implement the reforms in existing consent decrees.

The harm caused by this administration's actions regarding law enforcement are incalculable. While the implications are too many to meaningfully address in this testimony, a simple contrast between the last administration's response to the death of Michael Brown and this administration's response to the death of George Floyd is illustrative.

When Michael Brown died in Ferguson, Missouri in August of 2014, the Special Litigation Section was involved in significant investigations and enforcement actions across the country. Addressing systemic unconstitutional practices by law enforcement had been a long-standing priority. The Section's track record gave it credibility in the law enforcement and the civil rights communities.

Michael Brown's death and the resulting uprisings on the streets in Ferguson and elsewhere caused the Department to spring into action. The Attorney General authorized a civil investigation of the Ferguson Police Department, a criminal investigation in Michael Brown's death, and ordered that the Community Oriented Policing Office of the Department review the law enforcement response to the demonstrations. The Community Relations Services was dispatched and the Attorney General personally travelled to Ferguson to meet with a broad swath of community members and public officials. The President ordered the creation of the Task Force on 21st Century Policing, which made extensive and detailed recommendations for reforming police practices, creating greater community trust, and working towards racial equity.¹³ The Section acted with similar urgency following the death of Freddie Gray in Baltimore and the revelations regarding the death of Laquan McDonald in Chicago. Investigations were opened and pursued with vigor and reports of the investigative findings issued.

The 25 investigations in the last administration followed the same pattern. When serious systemic issues were revealed in a community, a public investigation was opened. The Section performed a thorough review of the police department, but also engaged in extensive outreach to understand the experience of diverse community members with the policies and practices of the police. At the conclusion of the investigation, a findings report was issued that disclosed the facts

¹² Kevin Rector, Federal Judge Approves Baltimore Consent Decree Denying Justice Department's Request for Delay, Baltimore Sun, April 17, 2017, <https://www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-consent-decree-approved-20170407-story.html>

¹³ Final Report, President's Task Force on 21st Century Policing, May 2015, https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf

that we found, applied those facts to the legal standard and introduced broad recommendations for reform. In this way, the entire community had a baseline to address the necessary changes in a department. The transparency of the investigation created credibility and set the stage for the hard project of reform. Community members could see, in some cases for the first time, the official acknowledgement of their experience. The Section then pursued a consent decree, or in some cases, an out-of-court reform agreement.

By contrast, despite repeated in-custody deaths of people of color under circumstances that suggest widespread systemic deficiencies and racial bias, this administration has opened no investigations and entered into no consent decrees. Not in Minneapolis, not in Louisville, not in Fort Worth, not in Rochester, not in Kenosha, nor any other city. To the contrary, the administration has worked to suppress and punish the legitimate First Amendment protected protests by those seeking race equity in policing.

As the Department's commitment to police reform came to a halt in January of 2017, and as leadership in the Department of Justice sent the message that civil rights in interactions with law enforcement no longer mattered, the national movement for police accountability took a blow. The Section and the Division are not and will never be the sole motivators of reform or the sole guarantors of civil rights, but the role of the Division is important. By making police accountability a priority, by issuing findings reports that publicly accounted for police misconduct, and by pursuing enforceable consent decrees, the Department, and the federal government, sent a message that the lives and experiences of everyone who encounter a police officer matter. The conduct of the present Department of Justice is having the opposite effect and the Attorney General and other political leadership have supported and encouraged practices that have increased systemic racism in law enforcement.

Prisons, Jails and Juvenile Detention

Cases under the CRIPA have been a core part of the Section's docket since the law was enacted in 1980. Regardless of administration, CRIPA has been actively applied to address unconstitutional conditions of confinement and address practices including excessive force and the unreasonable risk of violence, denial of medical or mental health care, or the excessive use of solitary confinement. As with policing, the Section's work on prison, jail, and juvenile detention conditions has been muted. There have been fewer investigations, findings letters, or consent decrees than in any other administration since CRIPA became law.

In the last three and a half years, the Section completed a comprehensive investigation of the Alabama State Prisons for Men and issued two findings letters.¹⁴ The Section also issued

¹⁴ Findings letter, April 2019 regarding general conditions, <https://www.justice.gov/crt/case-document/file/1149971/download>; findings letter regarding use of force, July 23, 2020, <https://www.justice.gov/crt/case-document/file/1297031/download>.

findings letters regarding three jails – Boyd County, Kentucky; Union, New Jersey; and Hampden Roads, Virginia – entered into one consent decree in Hampden Roads and continues to enforce existing consent decrees and reform agreements. No findings letters have been issued or consent decrees reached with regard to juvenile detention facilities. In the first four years of the last administration, at least twelve corrections or juvenile justice findings reports were issued and thirteen settlements reached.¹⁵ A disturbing contrast given the national focus on the impact of mass incarceration and the racialization of our prison system.

There are serious constitutional issues in America’s prisons and jails that justify a significantly more robust docket, including sexual assault of women prisoners,¹⁶ excessive solitary confinement and the solitary confinement of prisoners with mental illness,¹⁷ cruel treatment of juveniles including physical and sexual abuse,¹⁸ denial of medical and mental health care,¹⁹ and illegally overlong detention.²⁰

The need for CRIPA enforcement actions has never been more apparent than in recent months. COVID-19 hit first and hardest people confined to institutions, including correctional facilities. More than 125,000 prisoners have become infected with COVID-19 and almost 1100 died.²¹ The infection rate in prison is more than five and a half times the rate of the general population and a prisoner is three times more likely to die of COVID-19 than a member of the general public.²²

The conditions in prisons, jails and detention facility have been the subject of scores of lawsuits brought by civil and prisoners’ rights advocates.²³ In these cases, courts have been critical of the response by local and state officials to take the steps necessary to stop the spread of

¹⁵ <https://www.justice.gov/crt/special-litigation-section-cases-and-matters/download>

¹⁶ E.g., Alabama, https://www.justice.gov/crt/about/spl/documents/tutwiler_findings_1-17-14.pdf; Kansas, https://www.justice.gov/crt/about/spl/documents/topeka_findings_9-6-12.pdf

¹⁷ E.g., Pennsylvania, https://www.justice.gov/crt/about/spl/documents/pdoc_finding_2-24-14.pdf

¹⁸ Cases listed, <https://www.justice.gov/crt/special-litigation-section-cases-and-matters/download>

¹⁹ E.g., New Orleans, Louisiana, https://www.justice.gov/crt/about/spl/documents/opp_consentjudg_6-6-13.pdf; St. Tammany Parish, Louisiana, https://www.justice.gov/sites/default/files/crt/legacy/2012/07/16/tammany_findings_7-12-12.pdf

²⁰ E.g., Hinds County, Mississippi, https://www.justice.gov/crt/about/spl/documents/hinds_findings_5-21-15.pdf

²¹ A State by State Look at Coronavirus in Prison, Marshall Project, <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>

²² COVID-19 Cases and Deaths in Federal and State Prisons, Journal of the American Medical Association, July 8, 2020, <https://jamanetwork.com/journals/jama/fullarticle/2768249>

²³ Burton Bentley, The Growing Litigation Battle Over COVID-19 in the Nation’s Prisons and Jails, Law.com, August 25, 2020, <https://www.law.com/2020/08/25/the-growing-litigation-battle-over-covid-19-in-the-nations-prisons-and-jails/>

the virus.²⁴ Nevertheless, infection rates amongst prisoners is increasing at a rate of approximately 5% per week.²⁵

The Section's absence regarding the crisis of COVID-19 in prisons and jails is palpable. At this moment, the Section should be opening investigation in those places where the virus has placed prisoners at greatest risk. CRIPA gives the Section unique capacity to act rapidly and address emerging issues. Unlike private litigants, the Section does not need to exhaust byzantine and complex administrative remedies, does not need to meet standing requirements, and has access to resources that private litigants lack.

Politicization of the Section's work

A hallmark of the Section's work was that it exercised its enforcement authority without the influence of politics. As a result, the Section undertook investigations and pursued them regardless to the partisan leadership of the jurisdiction under investigation. I am proud that not once during my tenure was the political affiliation of an elected official a consideration in any of the Section's cases, either in the Section or in the front office. As a result, we investigated police departments in Democratic cities like Newark, New Jersey when Cory Booker was Mayor and Republican strongholds like Maricopa County, Arizona and Sheriff Joe Arpaio.

As I discussed above, partisan politics has influenced the Department's response to the crisis in our nation's police departments. However, the abuse of power does not end there. In August, the Department targeted the states of New York, New Jersey, Pennsylvania, and Michigan with threatened CRIPA actions for their response to COVID-19 in nursing homes.²⁶ There is an appropriate use of CRIPA to address nursing home conditions, but this was not such an instance. The targeted states and the tactics used belie the seriousness of the Department to engage in an actual inquiry as opposed to an effort to influence the upcoming elections. Typically, information requests are made by the career attorneys, not by the political leadership through a press release. Moreover, while nursing home deaths have declined nation-wide, and dramatically declined in the northeast, Sunbelt states are seeing a dramatic spike – 78% of nursing home cases and 69% of nursing home deaths are in a Sunbelt state.²⁷ The states targeted

²⁴ COVID Update, Prison Legal News, <https://www.prisonlegalnews.org/covid-19/>

²⁵ State by State Look, *supra*.

²⁶ Department of Justice Requesting Data From Governors of States that Issued COVID-19 Orders that May Have Resulted in Deaths of Elderly Nursing Home Residents, August 26, 2020. <https://www.justice.gov/opa/pr/departments-justice-requesting-data-governors-states-issued-covid-19-orders-may-have-resulted>

²⁷ Ginger Christ, Nursing home COVID-19 cases, deaths spike in Sun Belt states, Modern Health Care, Modern Health Care, August 17, 2020. <https://www.modernhealthcare.com/post-acute-care/nursing-home-covid-19-cases-deaths-spike-sun-belt-states>

were, in fact, not the places that pose the most serious concerns nor where the resources of the Department would have the biggest impact.

The politicization of enforcement decisions is corrosive to the Department's credibility and damaging to the morale of the career staff. The work of the Division is done largely by career lawyers, investigators, and paralegals who join the Department with dedication and idealism. The cynical abuse of enforcement actions for electoral political gain demeans and diminishes their hard work.

Conclusion

I was proud to serve in the Civil Rights Division and of our accomplishments across the country. I believe that we made a difference in the lives of thousands and, through our work, addressed critical drivers of systemic racial inequity. I am angered and saddened by the damage that is currently being done by the Attorney General and the political leadership of the Department to the integrity and reputation of the Division. This moment in history creates the opportunity to confront racial injustice and achieve change that will create greater equity. The Civil Rights Division is largely sitting on the sidelines.