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Post-Election Update on Criminal Justice Reform

By Stephen F. Smith, Academy for Justice Affiliate and Professor of Law at Notre Dame Law School

Thursday, December 10, 2020 - The 2020 presidential election saw record-breaking levels of voter participation from coast to coast. The electorate weighed sharply contrasting visions of pandemic response, presidential leadership, race relations, and America's role in the world. Also at stake in the election were potentially momentous changes to policing and the criminal justice system more broadly, spurred by a bipartisan push for criminal justice reform and nationwide protests in the months leading up to the election.

This post-election newsletter highlights the incoming administration's proposed reforms concerning policing and identifies a number of additional reforms the new administration should consider in this area.

President-elect Biden's Policing Reforms

In the months leading up to the November election, protestors took to the streets in the nation's capital and across the country to protest police brutality following the killing of George Floyd in Minneapolis and Breonna Taylor in Louisville, among others. The protests gave rise to a "Defund the Police" movement, which seeks to reallocate large chunks of funding from local police departments to social workers and other forms of intervention. The hope is that these alternatives to criminal law enforcement can address mental-health crises and other non-violent situations without the threat of force inherent in police involvement. The movement also seeks to empower localities to create police departments that are more sensitive to the needs and concerns of local communities, such as restraining the use of excessive force.

For more on the goals of the “Defund the Police” movement, see this article, [What does ‘defund the police’ mean and does it have merit?](#) by Dr. Rashawn Ray, a David M. Rubenstein Fellow in Governance Studies at The Brookings Institution.

President-elect Biden has endorsed the need for major policing reforms but rejected the idea of “defunding” police. “We don’t have to defund police departments,” he said. “We have to make sure they meet minimum standards of decency.” Listen to more in this interview with President-elect Biden on NPR, [What A Biden Administration May Do To Change Policing.](#)

Key Initiatives

The new administration’s approach to police reform features several key initiatives:

Structural reform litigation.

The Biden administration plans to rely heavily on “pattern-or-practice” investigations and proceedings under 32 U.S.C. § 12601 (formerly codified at 42 U.S.C. § 14141) to reform troubled police departments. Section 12601, a landmark statute authored by then-Senator Biden in the wake of the 1991 beating of Rodney King by Los Angeles police officers, empowers the Justice Department to investigate police departments with a history of systemic misconduct in violation of federal law. If the investigation concludes with a finding of a violation, the Department tries to reach a negotiated resolution with the police agency and, if necessary, it may file suit in federal court to obtain a court order requiring the agency to reform discriminatory or other unlawful police practices.

The Obama-Biden administration to reform numerous troubled police departments nationwide, including those in Baltimore, Chicago, and Ferguson, Missouri, and Newark.

See: [The Civil Rights Division’s Pattern and Practice Police Reform Work:1994-Present](#)

The Trump administration, however, made little use of this tool for curbing police misconduct and eliminating discriminatory enforcement practices. Indeed, the current administration sought to release police departments from previously negotiated consent decrees.

See: [The Trump administration abandoned a proven way to reduce police violence](#)

In the Biden administration, the Justice Department will prioritize the use of pattern-or-practice investigations to root out unlawful policing, and reverse the limitations put in place by the previous administration. The President-elect has pledged to appoint Justice Department leadership who value pattern-or-practice investigations as a necessary tool to strengthen the criminal justice system. In addition, the administration plans to submit legislation extending the pattern-or-practice investigation authority to systemic misconduct by prosecutors' offices. Through these measures, the Biden administration will try to revitalize the Justice Department's role in ensuring that law enforcement agencies nationwide operate in full compliance with federal law in serving and protecting local communities.

See: [The Biden Plan for Strengthening America's Commitment to Justice](#)

Less incarceration, more preventative policing.

President-elect Biden has recognized that “mass incarceration”—the overreliance on prisons and jails as a means of protecting the public—is not only unjust but an enormous waste of resources that would be better spent on actually preventing crime. In the effort to appear “tough” on crime, politicians of both parties have enacted unusually severe sentencing policies, including mandatory minimum sentences, that have filled many of the nation's prisons and jails to or near their rated capacity and made the United States the world's leader in incarceration. Subsequent experience has taught us that many of the millions of people behind bars on any given day in the United States are not dangerous persons or major offenders. Many committed minor, non-violent offenses only or crimes resulting from homelessness or untreated mental-health or substance-abuse problems, none of which are dealt with effectively by incarceration. The criminal justice system has proven to be ineffective in dealing with homelessness, mental illness, and substance abuse. A reduced footprint for the criminal justice system would allow stepped-up enforcement against offenders who truly *are* menaces to the public safety.

At the federal level, the President-elect has endorsed comprehensive reform from “front-end sentencing . . . to back-end release policies.” As part of this larger commitment, the incoming administration favors eliminating statutory mandatory minimum punishments

and abolishing sentencing disparities between “crack” and power cocaine, both of which have contributed to racial disparities in the federal prison system. The President-elect opposes incarcerating people for drug use alone and favors alternatives such as drug-treatment programs and drug courts alternatives to incarceration. He supports federal funding for states to use such alternatives for drug users and other non-violent offenders, including juveniles, the mentally ill, and homeless persons. The President-elect also favors efforts to address mental illness, substance abuse, and other risk factors, such as illiteracy, through federal funding for states that redirect enforcement efforts from mass incarceration to crime prevention.

Reinvigorated community-oriented policing.

The President-elect intends to advance community-oriented policing as a means to reduce crime and improve community-police relations in poor urban communities. As a member of the U.S. Senate, Biden spearheaded the Community Oriented Policing Services (COPS) program, which sought to put 100,000 new police officers on the beat across America. He believed then, and still believes now, that police are most effective in fighting crime and building trust when they engage directly with the communities they serve. The President-elect intends to revitalize the COPS program by providing the full funding for additional officers the program has long been denied and by requiring police departments to ensure that their ranks mirror the demographics of the communities they serve.

Evidence-based policing.

The incoming administration will place a premium on ensuring that all individuals who interact with the criminal justice system are treated fairly, without regard to race or ethnicity. Progress toward eradicating systemic racism, and ensuring equal treatment for all, cannot be achieved unless police agencies collect and report vital demographic information concerning searches, citations, arrests, and the use of force. The Biden administration could encourage police departments to collect and include in their reports to the federal government information regarding the race and ethnicity of the persons with whom police agencies interact.

Additional Areas of Police Reform

As the new administration addresses itself to the goal of reforming police departments and reforming the national approach to public safety, it may also wish to address certain other areas of potential reform:

Restore federal remedies for police misconduct.

Structural reform litigation under the Justice Department's "pattern-or-practice" authority is a potent tool for addressing systemic police misconduct. It does nothing, however, about individual police officers who commit misconduct. To ensure that officers obey the law they are sworn to uphold, those who engage in misconduct must be held accountable. Unfortunately, some local police departments and state prosecutors—and even their counterparts in the federal system—have been too reluctant to punish police officers who use excessive force or engage in other serious misconduct. Similarly, due to a controversial judicial doctrine known as "qualified immunity," victims of egregious police misconduct are often denied the ability to recover compensation in federal court for their losses. As explained below, Congress may seek to overturn this judicially-created protection for those who violate others' rights.

For more on police misconduct, see:

- [**Why It's So Rare For Police Officers To Face Legal Consequences**](#)

For more on qualified immunity, see:

- [**Unqualified Impunity: When Government Officials Break the Law, They Often Get Away With It**](#)
- [**The question before the Supreme Court is who polices the police**](#)

The Biden Administration's reform agenda may require strengthening federal remedies against police misconduct. Qualified immunity could be abolished—as Senators Markey, Sanders, and Warren proposed this summer, and as Justices Thomas and Sotomayor have urged—ensuring that deserving victims can obtain relief from police officers who violate their constitutional rights. Federal criminal statutes addressing police misconduct should be amended to eliminate requirements that needlessly ties the hands of federal enforcers. The President-elect should also appoint Justice Department leaders who will be willing to step in, particularly when state prosecutors unjustifiably refuse to act, to prosecute police officers who use excessive force or otherwise violate federal law. The potential for civil and criminal liability under federal law will give police

officers added incentives to respect the constitutional rights of citizens and help foster trust in the integrity of state and local law enforcement.

Demilitarize state and local police.

The problem of excessive lethal force by police and strained police-citizen relations in communities of color cannot be adequately addressed without taking on the rise of the “warrior cop.” As mentioned, the President-elect has long favored community-oriented policing as a means to bring police into partnership with the communities they serve. Militarized policing sits in opposition to community-oriented policing. When police departments outfit rank-and-file officers with military-grade equipment and vehicles, there is a danger that citizens will be treated as enemy combatants—and studies have shown that outfitting police with military equipment leads to more killings and more police aggression.

The federal government should work to end the militarization of police, by, among other things, stopping the Pentagon from supplying surplus military equipment to state and local police departments. Likewise, federal grant money to law enforcement should include restrictions prohibiting the use of federal funds to purchase military equipment. Instead of spending money on military equipment, police departments should be encouraged to hire more officers and invest in use-of-force training and technologies (such as body cameras) that curb unnecessary police violence and protect police.

For more on the militarization of police, see:

- [Rise of the Warrior Cop](#)
- [Demilitarization](#)

Podcast on warrior policing:

- [Radley Balko on the Militarization of America's Police Force: VICE Meets The question before the Supreme Court is who polices the police](#)

Additional Resources

- Congressional Research Service, [Federal Police Oversight: Criminal Civil Rights Enforcement Under 18 U.S.C. § 242](#) (June 15, 2020).
- President's Task Force on 21st Century Policing, Office of Cmty. Oriented Policing Servs., [Final Report of the President's Task Force on 21st Century Policing](#) (2015).
- Radley Balko, [Rise of the Warrior Cop: The Militarization of America's Police Forces](#) (2014). (Amazon link to purchase)
- Casey Delahunty, et al., [Militarization and Police Violence: The Case of the 1033 Program](#) (2017).
- Barry Friedman & Maria Ponomarenko, [Democratic Policing](#), 90 N.Y.U. L. Rev. 1827 (2015).
- Rachel Harmon, [Limited Leverage: Federal Remedies and Policing Reform](#), 32 St. Louis U. Pub. L. Rev. 33 (2012).
- Nancy C. Marcus, [From Edward to Eric Garner and Beyond: The Importance of Constitutional Limitations on Lethal Use of Force in Police Reform](#), 12 Duke Journal of Constitutional Law & Public Policy 53-106 (2016).
- Stephen Rushin, [Structural Reform Litigation in American Police Departments](#) 99 Minn. L. Rev. 1343 (2015).
- Joanna C. Schwartz, [How Governments Pay: Lawsuits, Budgets, and Police Reform](#), 63 U.C.L.A. L. Rev. 1144 (2016).

About the Guest Editor



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Smith previously served in the Supreme Court and appellate practice group of Sidley & Austin in Washington, D.C. He also served as associate majority counsel to a 1996 House of Representatives select subcommittee investigating U.S. involvement in Iranian arms transfers to Bosnia and as an adjunct professor at George Mason University School of Law. He is actively involved in a number of community service organizations and civic projects.

Smith's area of research is criminal law and criminal procedure. He teaches courses on criminal law, criminal adjudication, and federal criminal law.