Responses of Robert N Driscoll to Senator Cruz's QFR's

I. Follow-Up on Hearing Testimony

1. **Is it your view that it is the obligation of the Civil Rights Division, under current federal civil rights statutes, to target or limit remedies for civil rights violations to the specific patterns or practices found, per the language in 42 U.S.C. § 14141? If your answer is yes, please provide an explanation as to why.**

Yes. First this is a simple matter of statutory interpretation. The statute's enforcement mechanism allows the Attorney General to "obtain appropriate equitable and declaratory relief *to eliminate the pattern or practice*." 42 U.S.C. § 14141 (emphasis added). The "pattern and practice" referred to is a pattern and practice of violations or violations of rights secured by the constitution or federal law. 42 U.S.C. § 14141 (a). Thus the statute only authorizes relief necessary to eliminate the pattern and practice—not relief unrelated to the pattern and practice. Second, as a constitutional matter, the only source of authority for Congressional enactment of section 14141 is section 5 of the 14th Amendment. Thus, the statute may properly be interpreted to enforce and remedy violations of those rights protected by the 14th Amendment but does not change those substantive rights. Accordingly, in order to be a constitutional enactment, section 14141's remedies must be limited to those pattern and practices of violations of rights that are identified. *See U.S. v. City of Columbus*, No. Civ.A.2;99CV1097, 2000 WL 1133166, at *9 (S.D. Ohio Aug. 3, 2000).

2. **Do you believe the Civil Rights Division may be exceeding its authority by imposing sweeping consent decree-based remedies (on state and local law enforcement agencies) that are not tailored to the specific patterns or practices of those agencies? If your answer is yes, please provide an explanation as to why.**

The issue is one of constitutional interpretation of the statute. Specifically, the Constitution creates a federal government of limited powers, and the powers granted are articulated within the Constitution. Section 5 of the 14th Amendment grants the federal government the right to enforce the constitutional limits on state and local law enforcement, but does not grant unlimited powers to set policies and procedure, nor does it grant unlimited authority to require "best practices" as defined by the federal government. Section 14141 remains constitutional only to the extent it is interpreted as an enforcement remedy for those rights protected by the statute. Any remedy created by the statute must be congruent and proportional to the rights being protected. *See City of Boerne v. Flores*, 521 U.S. 507, 508 (1997). Thus, while constitutional remedies may be broader than the right protected in order to prophylactically protect that right, if the statute is interpreted without regard to, or any connection with, the constitutional violations found, it would be an unconstitutional statute. *See City of Boerne*, 521 U.S. at 530 ("While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented."). It can be difficult to draw a line as to when a proper remedy to a constitutional violation expands in scope to the point where it is no longer congruent and proportional to the right being protected, but clearly some of the consent decrees entered into by DOJ and law enforcement agencies test and exceed those limits. For example, setting up entirely new

requirements for citizen review panels or other requirements that specific forms of community engagement be implemented appear to further a *policy* of community engagement and do not prevent, prophylactically, a particular constitutional violation. Many experts may advocate for more community engagement, but creating a citizen review board and the like is not a constitutional requirement, nor, in my view, closely enough tied to, for example, use of force violations, to be a valid remedy. Conversely, a decree requiring the specific use of force policy (e.g., a prohibition on use of pepper spray against restrained individuals where a pattern of unconstitutional use of pepper spray against such individuals has been found) would, in my view, be supported by a constitutional interpretation of the statute.

3. **Does the Civil Rights Division currently have to make any evidentiary showing before the federal court that would enforce a consent decree against a state or local law enforcement agency in order for that consent decree to be accepted by (or acceptable to) the court?**

If the jurisdiction contested the DOJ, yes. But the vast majority of investigations resolve by agreement (for reason that span from factual to political), and thus the factual basis for the vast majority of decrees are never challenged or presented to a court. Rather, summary allegations are made by the DOJ and the jurisdiction agrees to the remedy. Where DOJ has been challenged, Courts have been skeptical of DOJ's proof. *See U.S. v. Johnson*, No. 1:12cv1349, 2015 WL 4715312 (M.D.N.C. Aug. 7, 2015); *U.S. v. City of Columbus*, No. Civ.A.2;99CV1097, 2000 WL 1133166 (S.D. Ohio Aug. 3, 2000). For your reference, Westlaw links to both cases are below:
https://a.next.westlaw.com/Document/Ic173ca503f7611e590d4edf60ce7d742/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.DocLink)&userEnteredCitation=2015+WL+4715312

https://a.next.westlaw.com/Document/I868c6b4653d111d997e0acd5cbb90d3f/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=2000+WL+1133166

4. **Do you have any sense of how much, on average, it might cost a state or local law enforcement agency to challenge Civil Rights Division-initiated civil rights charges in federal court, in the event such agency rejected the allegations and refused to accept a consent decree?**

There is no comprehensive list that could provide an average of costs, but federal intervention can be quite expensive. For example, the cost to monitor Cleveland's progress under the settlement agreement could cost up to $4.95 million. Similarly, Cincinnati paid approximately $4.2 million for an independent monitor to oversee reforms in their police department, while the Los Angeles consent decree cost about $15 million to monitor. For your reference, see the articles below:
http://www.cleveland.com/court-justice/index.ssf/2015/10/los_angeles_consulting_firm_ch.html

http://www.newsnet5.com/news/local-news/cleveland-metro/implementing-doj-consent-decree-expected-to-cost-cleveland-millions-of-dollars

http://www.policeforum.org/assets/docs/Critical_Issues_Series/civil%20rights%20investigations%20of%20local%20police%20-%20lessons%20learned%202013.pdf

5. **When the Civil Rights Division requires, via consent decree, that a state or local law enforcement agency must accept an infrastructural remedy in order to accord with federal civil rights law, do you know if the federal government also provides accompanying federal funding to the state or locality to pay for the new infrastructural remedy, or is the expectation that that the state or locality will absorb the associated costs?**

The costs of a decree must be borne by the jurisdiction. Some jurisdictions apply for federal grants from the Justice Department COPS office or Office of Justice programs, but that process is independent of the Civil Rights Division.

6. **In a situation where the federal government creates a financial, court-ordered burden on a state or local law enforcement agency, do you think this might fairly be construed as an unfunded mandate on that state or local government?**

If the decree in question were limited to remedying constitutional violations, I do not think it would create an "unfunded mandate." Constitutional minimum standards must be met, irrespective of costs. However, this fact is why expansive definitions of what constitutes a constitutional violation are dangerous, because remedies, being court-ordered, are anti-democratic, not subject to local control, and must be paid for and financed before any state or local expenditure that would be discretionary (e.g., schools, roads, social services, etc.). Thus, for example, without a decree or order, a citizen review board must compete with other worthy projects (e.g., roads, schools, equipment, business development) that seek funding through municipal or state appropriations processes. A decree short circuits that process by compelling the creation of such a board.

7. **Can you provide some examples of how the Department of Justice has used the consent decree process to impose political goals and policies via federal court order that could not be achieved through democratic means?**

The establishment of a Community Policing Commission in the Cleveland Consent Decree. *See* ¶¶15-22 of the Settlement Agreement:
http://www.justice.gov/sites/default/files/crt/legacy/2015/05/27/cleveland_agreement_5-26-15.pdf

The Cleveland Consent Decree's requirements regarding diversity in hiring and recruitment. *See* ¶¶300-311 of the Settlement Agreement.

The establishment of the Community Police Commission in the Seattle Consent Decree. *See* ¶¶3-12 of the Settlement Agreement:

http://www.justice.gov/sites/default/files/crt/legacy/2012/07/31/spd_consentdecree_7-27-12.pdf

Note that none of these examples are necessarily bad policy and are reasonable choices for jurisdictions to make. My concern is that they are not remedies to a pattern and practice of constitutional violations that are appropriate for Court Order.

8. **In situations where a state or local government has differences of opinion with a law enforcement agency, and the state or local government is the entity negotiating terms with the Department of Justice, does the law enforcement agency have a right to be "at the table" during these negotiations under current statutory law?**

This is an open legal question, but it points to a conflict of interest that often exists. For example, a mayor or a city council may well be in favor of certain policing "reforms" sought by DOJ. In the absence of a consent decree, such reforms would have to be negotiated/collectively bargained with the rank and file officers. But by agreeing to have a court order the change, that bargaining process may be short-circuited. Thus, on at least one occasion, local police have successfully sought to intervene in civil rights cases on the grounds that the party negotiating on behalf of the jurisdiction did not adequately represent them and the "remedy" would fall on them, not the parties agreeing to settle the case. *See generally U.S. v. City of Columbus*, No. Civ.A.2;99CV1097, 2000 WL 1133166 (S.D. Ohio Aug. 3, 2000).

9. **Do you think the consent decree process, as historically deployed by the Department of Justice, represents a threat to federalist and democratic principles?**

It has certainly challenged them. The issue is that, by their nature, constitutional rights are anti-democratic—it does not matter what the majority thinks, for example, about whether the 4th Amendment is a good idea or whether there should be a right to a jury trial in certain cases. Thus, a constitutional remedy will, in some sense, always override local control—the point of the Constitution is to limit the authority of governmental authorities. However, by "bootstrapping" either factually weak or legally tenuous alleged constitutional violations (e.g., using "disparate impact" analysis of arrest rates or police interaction rates without establishing proper baselines) to seek sweeping policy reforms unrelated to those violations, the DOJ has, at times, violated principles of federalism and democratic control. Thus, as mentioned above, requiring civilian review boards, or banning or requiring certain use of force polices that are unrelated to any pattern of constitutional violations established in that case are examples of remedies that threaten federalist principles and undermine local democracy.

II. General Question

10. **Are there any other points or issues that were not explored (or sufficiently explored) during the hearing that you would like to bring to the Subcommittee's attention?**

Yes. The Committee might wish to explore the standards used by the DOJ to determine whether to open a pattern and practice investigation and seek to clarify what standards DOJ uses to define a "pattern or practice." Entities being investigated are not given any definition of how many incidents constitute a pattern or what level of proof DOJ is using. Unfortunately, many cases appear to be opened, not in response to a previously known "pattern" of misconduct, but as a parallel to a controversial incident, such as in Ferguson, Missouri or Chicago, Illinois. While a pattern and practice investigation is civil and separate from a criminal investigation, it sometimes appears that such investigations can be used to provide "cover" for DOJ to be seen as "doing something" in the event a particular criminal investigation does not result in an indictment or conviction.

Thus, in Ferguson, Missouri, notwithstanding that DOJ found that Officer Wilson acted properly, it also issued a severely critical "findings" letter accusing the Ferguson Police of misconduct, based in large part on statistical analysis of the racial breakdown of arrests, police interactions, etc. This type of analysis would find racial disparities in virtually all law enforcement agencies (including the FBI, ATF, and DEA) and is thus available anytime the DOJ desires to be perceived as "doing something" in response to police community tension in a certain jurisdiction. While there may well be problems or constitutional violations in Ferguson, the investigation (of a small police department) does not appear to have been driven by any previous pattern of established constitutional violations, but a political exercise that would insulate DOJ from criticism if and when Officer Wilson was cleared (which he was, conclusively, by a thorough DOJ investigation). The public and law enforcement community would benefit by knowing what standards, if any, are used to decide which jurisdictions are investigated.

Similarly, in Chicago, Illinois, whatever record of a pattern or practice of constitutional violations that exist has existed for some time. The decision to open an investigation now, during the public outcry over an individual case, leads to the perception that either the McDonald case alone constituted sufficient ground to investigate a "pattern and practice," or that a pattern and practice of violations had existed for some time and was not investigated previously given the political clout of Mayor Emmanuel, a political ally of the Obama Administration. Whatever the true reasons for opening the Chicago investigation are, they should be made public to reassure the public and law enforcement that the decision was fact-based and not driven by political considerations.