



RECOMMENDED ACTION MEMO

Agency: Executive Office of the President; Office of the Attorney General
Topic: Building Police–Community Trust in Communities of Color with High Rates of Gun Violence
Date: November 2020

Recommendation: Use executive authority to restore DOJ’s critical role in promoting oversight and reform of unconstitutional policing practices, and significantly expand the federal government’s role in promoting the reforms necessary to build police-community trust nationwide.

I. Summary

Description of recommended executive action

A major barrier to reducing gun violence in communities around America is the lack of trust between these communities and law enforcement. Too often, communities of color experience disparate, harmful treatment at the hands of the criminal justice system, including the police. The harmful treatment takes the form of over-enforcement of minor infractions and police use of force, including shootings. As a result, community residents are less likely to report shootings and other crimes, cooperate with the police, or serve as witnesses. Without active community trust and collaboration, law enforcement often finds it challenging to solve violent crimes and fails to make an arrest in over half of homicides of Black Americans.¹ Unable to trust police for protection, some young people seek protection outside law enforcement, including carrying guns, despite the risks, or turning to groups that offer the perception of safety. A very small number of men within these groups, which constitute a fraction of 1% of the average city’s population, drive a majority of shootings and homicides in our cities.²

To reduce gun violence in underserved communities of color, relationships between the community and the law enforcement officers who pledged to serve and protect need to be improved; trust needs to be built and earned; and communities need to feel justly and effectively protected from violence.

This memo is not intended to be a complete review of recommended criminal justice and policing reforms, but will identify key proposals for executive action to help address gun violence through renewed investment in efforts to build the police–community trust necessary to produce community safety and reverse cycles of violence. Under this proposal, the new administration

¹ A recent in-depth investigation by the *Washington Post* found that across 52 of the nation’s largest cities over the past decade, 53 percent of all murders of Black Americans never led to an arrest, let alone a conviction. Nearly three-quarters of all unsolved murders in these cities involved a victim who was Black. Gun homicides and nonfatal shootings are even less likely to lead to an arrest. Giffords Law Center to Prevent Gun Violence, “In Pursuit of Peace: Building Police–Community Trust to Break the Cycle of Violence,” January 17, 2020, <https://giffords.org/lawcenter/report/in-pursuit-of-peace-building-police-community-trust-to-break-the-cycle-of-violence/>.

² See Stephen Lurie, et al., “The Less Than 1%: Groups and the Extreme Concentration of Urban Violence,” National Network for Safe Communities (forthcoming); Stephen Lurie, Alexis Acevedo, and Kyle Ott, “Presentation: The Less Than 1%: Groups and the Extreme Concentration of Urban Violence,” National Network for Safe Communities, November 14, 2018, https://cdn.theatlantic.com/assets/media/files/npsc_gmi_concentration_asc_v1.91.pdf.

should, via executive orders (EOs), budgetary action, and certain actions by specific DOJ agencies, restore the DOJ's critical role in promoting oversight and reform of unconstitutional policing practices; and significantly expand the federal government's role in promoting reform by implementing the recommendations of the 2015 Task Force on 21st Century Policing; the Leadership Conference Education Fund's recommended [best practices for 21st century policing](#); and Giffords Law Center to Prevent Gun Violence's [report](#) on building police–community trust to stop cycles of violence. Finally, the administration should, in the absence of legislation, adopt, by executive action, key provisions of the George Floyd Justice in Policing Act.

Overview of process and time to enactment

(1) Executive order

Issuing executive orders to establish various task forces is within the president's authority and should be stood up within the first 100 days of the next administration, signaling a commitment to address the public health crisis of gun violence in America. To do that, the next president should issue EOs to create task forces. The EOs should include details related to each task force's mission, membership, administration, and directives.

(1) Budgetary action

Each year the president submits a budget request for the coming fiscal year to Congress. The new administration will need to submit their budget request within the first 100 days of their administration.

(2) Actions within the DOJ

The attorney general has broad authority over the DOJ.³ The mission of the Office of the Attorney General is to supervise and direct the administration and operation of all DOJ agencies.⁴ Consequently, the attorney general should take the lead at the start of the next administration and issue directives to DOJ agencies to take the actions recommended below. These actions should be a priority for these agencies.

II. Current state

Gun violence in communities of color

Nowhere is the gun violence crisis more evident than in our underserved communities of color, where homicide rates often reach 10 times the national average,⁵ and the rate of gun injuries is 10 times higher for Black children and teens than for white children and teens.⁶ Black men

³ See 28 U.S.C. § 509.

⁴ Dep't of Justice, *Organization, Functions and Missions Manual*, <https://www.justice.gov/jmd/organization-mission-and-functions-manual-attorney-general>.

⁵ Giffords, "Urban Gun Violence," last accessed July 15, 2020, <https://giffords.org/issue/urban-gun-violence/>.

⁶ The rate of non-fatal shootings is 51.1 per 100,000 people for young black Americans versus 5.0 per 100,000 people for young whites. Arthur R. Kamm, Violence Policy Center, and Amnesty International, "African-American Gun Violence Victimization in the United States, Response to the Periodic Report of the United States to the United Nations Committee on the Elimination of Racial Discrimination," June 30, 2014, http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_NGO_USA_17803_E.pdf.

constitute 7% of the US population but account for more than 50% of all gun homicides each year.⁷ In 2016, violence was responsible for 4% of deaths among young white men and boys aged 15–24, 20% of deaths among young Hispanic men and boys ages 15 to 24, and, incredibly, more than half of all deaths among young Black men and boys of the same age.⁸ Nearly all these deaths were caused by guns. The chance of a Black American family losing a son to a bullet is 62% greater than losing him to a car accident.⁹

This high concentration of violence creates a vicious cycle.¹⁰ A study of adolescents participating in an urban violence intervention program showed that 26% of participants had witnessed a person being shot and killed, while *half* had lost a loved one to gun violence.¹¹ The impact of this is compounded because exposure to firearm violence—being shot, being shot at, or witnessing a shooting—doubles the probability that a young person will commit a violent act within two years.¹² In other words, exposure to violence perpetuates further violent behavior, creating a chain of killing and violence that will continue, absent an intervention.

Further, in city after city, an incredibly small and identifiable segment of a given community is responsible for the vast majority of gun violence.¹³ Shootings and homicides in America are highly concentrated within city neighborhoods marked by high levels of racial segregation, severe concentrated poverty, and estrangement from law enforcement. An analysis by *The Guardian* observed that more than a quarter of the nation’s gun homicides occurred in city neighborhoods containing just 1.5% of the US population.¹⁴ In 2019, research from the National Network for Safe Communities, based on data from nearly two dozen cities, confirmed that at least half of homicides and nonfatal shootings involve people—as victims and/or perpetrators—known by law enforcement to be affiliated with social networks involved in violence. These networks were found to constitute, on average, less than 0.6% of a city’s population; an even smaller subset actually commits violent crime.¹⁵

⁷ Giffords, “Community Violence,” last accessed October 1, 2020, <https://giffords.org/issues/community-violence/>.

⁸ Giffords Law Center to Prevent Gun Violence, “In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence,” January 17, 2020, <https://giffords.org/lawcenter/report/in-pursuit-of-peace-building-police-community-trust-to-break-the-cycle-of-violence/>.

⁹ Giffords, “As Teens Gather in South Side Chicago to Protest Lack of Action on Gun Violence Crisis, Giffords Law Center Releases New Report Highlighting How Summer Months Bring Spikes in Shootings,” news release, <https://giffords.org/press-release/2018/06/summertime-gun-violence/>,

¹⁰ Giffords Law Center to Prevent Gun Violence, “Intervention Strategies,” last accessed July 15, 2020, <https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/intervention-strategies/>.

¹¹ Jonathan Purtle et al., “Scared safe? Abandoning the Use of Fear in Urban Violence Prevention Programmes,” *Injury Prevention*, 21, no. 2 (2015): 140–141, doi: 10.1136/injuryprev-2014-041530.

¹² Jeffery B. Bingenheimer, Robert T. Brennan, and Felton J. Earls, “Firearm Violence, Exposure and Serious Violent Behavior,” *Science* 308 (2005): 1323–1326.

¹³ David M. Kennedy et al., “Reducing Gun Violence: The Boston Gun Project’s Operation Ceasefire,” US Department of Justice, Sept. 2001, <https://www.ncjrs.gov/pdffiles1/nij/188741.pdf>.

¹⁴ Aliza Aufferichtig, et al., “Want to fix gun violence in America? Go local,” *The Guardian*, January 9, 2017, <https://www.theguardian.com/us-news/nginteractive/2017/jan/09/special-report-fixing-gun-violence-in-america>.

¹⁵ See Stephen Lurie, et al., “The Less Than 1%: Groups and the Extreme Concentration of Urban Violence,” National Network for Safe Communities (forthcoming); Stephen Lurie, Alexis Acevedo, and Kyle Ott, “Presentation: The Less Than 1%: Groups and the Extreme Concentration of Urban Violence,” National Network for Safe Communities, November 14, 2018, https://cdn.theatlantic.com/assets/media/files/npsc_gmi_concentration_asc_v1.91.pdf; Giffords Law Center to Prevent Gun Violence, “In Pursuit of Peace: Building Police-Community Trust to Break the

Law enforcement

The vast majority of residents who live in cities with high rates of gun violence are not perpetrators, and in many cases hold positions of trust in their neighborhoods. This makes them valuable partners to law enforcement in interrupting cycles of violence. However, our country's most effective police departments know that to be successful in interrupting cycles of community violence, law enforcement officers "must have active public cooperation, not simply political support and approval."¹⁶ They need witnesses to trust them, come forward with information, and testify. They need to work closely with community organizations and service providers to intervene and prevent violence before it occurs. They need grieving victims to trust that the justice system will deliver justice and keep them safe, so a desperate few don't resort to vigilante forms of justice.¹⁷

The challenge of building trust and collaboration is made much more difficult by policing tactics used in some cities. Reliance on an aggressive, punitive approach to low-level offenders does little to address the violence and trauma in communities most impacted;¹⁸ instead, it often contributes to community distrust. Nationwide, our police forces arrest more people for possessing personal quantities of marijuana than for all violent crimes combined, while failing to make any arrests in the majority of murders of Black Americans.¹⁹ This overenforcement and under-protection are two sides of the same coin.²⁰ Both devalue the lives and priorities of communities of color, and reinforce a destabilizing lack of trust that undermines public safety.

Research has also documented significant and durable declines in 911 calls following publicized incidents of police violence.²¹ In 2016, a team of researchers demonstrated that after on- and off-duty officers brutally attacked Milwaukee resident Frank Jude in October 2004, city residents became significantly less likely to call 911 for over a year. The police department saw a significant drop in 911 calls reporting violent crimes after the incident was publicized, especially from predominantly Black neighborhoods. The police department received an estimated 22,000 fewer 911 calls after the incident, despite a concurrent 30% increase in the number of homicides citywide.

Cycle of Violence," January 17, 2020, 31-32, <https://lawcenter.giffords.org/wp-content/uploads/2020/01/Giffords-Law-Center-In-Pursuit-of-Peace.pdf>.

¹⁶ Tom R. Tyler and Jeffrey Fagan, "Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?" *Ohio State Journal of Criminal Law*, Vol. 6 (2008), 266–267, https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4027&context=fss_papers.

¹⁷ Giffords Law Center to Prevent Gun Violence, "In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence," January 17, 2020, <https://giffords.org/lawcenter/report/in-pursuit-of-peace-building-police-community-trust-to-break-the-cycle-of-violence/>.

¹⁸ See Giffords Law Center to Prevent Gun Violence, PICO National Network, and the Community Justice Reform Coalition, "Investing in Intervention: The Critical Role of State-Level Support in Breaking the Cycle of Urban Gun Violence," December 18, 2017, <https://giffords.org/lawcenter/report/investing-intervention-critical-role-state-level-support-breaking-cycle-urban-gun-violence/>.

¹⁹ See Timothy Williams, "Marijuana Arrests Outnumber Those for Violent Crimes, Study Finds," *The New York Times*, October 12, 2016, <https://www.nytimes.com/2016/10/13/us/marijuana-arrests.html>.

²⁰ Jill Leovy, *Ghettoside: A True Story of Murder in America* (New York: Penguin Random House, 2015), 283.

²¹ Matthew Desmond, Andrew V. Papachristos, and David S. Kirk, "Police Violence and Citizen Crime Reporting in the Black Community," *American Sociological Review* (2016): 1–20, <https://assets.documentcloud.org/documents/3114813/Jude-911-Call-Study.pdf>.

Effective and sustained police reforms and a large-scale investment in building earned police-community trust are therefore critical to promote proactive, just, and effective responses to community violence.

Obama administration action

Under President Obama, the DOJ's Civil Rights Division completed thorough, independent investigations of unconstitutional policing practices, obtained consent decrees with 14 out of the nation's 18,000 law enforcement agencies, and finalized other oversight and reform agreements with 10 others.²² (The department also concluded investigations of at least six other agencies without finding patterns or practices of unconstitutional policing).²³ While at times contentious, these decrees led to documented improvements in police practices and community trust; in Seattle, for instance, the independent monitor appointed by the court to oversee the consent decree concluded that Seattle had largely complied with its reform requirements, and found that "the results have been impressive," as "public trust in the Seattle Police Department ha[d] steadily increased."²⁴ After the police department implemented new training and reform requirements, the number of incidents in which officers used "moderate to severe force" against civilians dropped by 60%, and public surveys found notable gains in community approval of the department, especially among Black and Latino residents.²⁵

In 2011, the DOJ also launched the Collaborative Reform Initiative, a voluntary alternative to the consent decree process in which "law enforcement agencies facing significant issues that may impact public trust undergo a comprehensive assessment, are provided with recommendations on how to address those issues, and receive technical assistance to implement such recommendations."²⁶ By the end of the administration, 16 law enforcement agencies had voluntarily requested to participate,²⁷ and an early review of the initiative's impact concluded that it had "been shown to be a valuable tool for inspiring and accelerating change in many of the departments" and that evidence for "organizational transformation" in those police departments was "abundant."²⁸

In 2014, following the highly publicized death of Michael Brown at the hand of law enforcement, and in response to a recommendation in the My Brother's Keeper Task Force report, the DOJ launched and funded the National Initiative for Building Community Trust and Justice (National Initiative) pilot program. The National Initiative funded programs in six cities to work with

²² "An Interactive Guide to the Civil Rights Division's Police Reforms," US Department of Justice, January 18, 2017, <https://www.justice.gov/crt/page/file/922456/download>.

²³ "Police Reform and Accountability Accomplishments," US Department of Justice, last accessed October 17, 2019, <https://www.justice.gov/opa/file/797666/download>.

²⁴ Merrick J. Bobb, "Op-Ed: Jeff Sessions thinks consent decrees increase crime. He's just plain wrong," Los Angeles Times, April 25, 2017, <https://www.latimes.com/opinion/op-ed/la-oe-bobb-consent-decrees-work-20170425-story.html>.

²⁵ *Id.*

²⁶ Megan Collins, et al., "Assessment of the Collaborative Reform Initiative in the Las Vegas Metropolitan Police Department: A Catalyst for Change," Crime and Justice Institute, last accessed January 14, 2018, <https://www.hsdl.org/?abstract&did=804080>.

²⁷ Giffords Law Center to Prevent Gun Violence, "In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence," January 17, 2020, <https://giffords.org/lawcenter/report/in-pursuit-of-peace-building-police-community-trust-to-break-the-cycle-of-violence/>.

²⁸ Christine Cole, et al, "The Collaborative Reform Initiative: Experiences of Selected Sites," Office of Community Oriented Policing Services (2017), http://www.crj.org/assets/2017/07/4_COPS_CRI_report.pdf.

community members and police departments to strengthen mutual trust and engagement. The National Initiative provided technical assistance and training to law enforcement on community-policing strategies and implicit bias; made recommendations for department policy changes to promote procedural justice, accountability, and transparency; and launched new public-facing efforts to interact with and engage community residents, acknowledge harms, and reset patterns of distrust.²⁹ In each city, law enforcement held listening sessions with residents to facilitate trust-building and reconciliation.

A survey of the residents in “street segments” that had the highest rates of both poverty and crime in each of the six pilot cities found modest but critical gains in various measures of community–police relations three years after an initial survey was conducted, including:

- An 8% increase in respondents who said they felt comfortable around the police
- An 11% increase in respondents who said they felt relatively safe in their neighborhood
- A 10% decrease in respondents who said that shootings or shooting attempts were a weekly or daily occurrence in their neighborhood
- A 13% decrease in respondents who said they knew someone who had been the victim of a shooting or an attempted shooting in the previous year³⁰

Finally, a few months after the National Initiative was launched, President Obama signed an executive order to create a national blue-ribbon Task Force on 21st Century Policing. The task force studied best practices from cities and police forces around the country, holding hearings in which they received testimony of community members, crime experts, researchers, police chiefs, unions, frontline officers, mayors, and civil rights advocates. In May 2015, the task force released its comprehensive final report of concrete recommendations for how police departments could “promote effective crime reduction while building public trust.”

Trump administration action

The Trump administration has sharply curtailed federal efforts to investigate, collaborate with, and reform troubled police departments to build community trust, forsaking these powerful tools to inspire and accelerate change.³¹ The Trump administration has not entered into a new consent decree with any law enforcement agency suspected of “systemic abuses of constitutional rights,” and has only announced the completion of one pattern-or-practice

²⁹ Giffords Law Center to Prevent Gun Violence, “In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence,” January 17, 2020, <https://giffords.org/lawcenter/report/in-pursuit-of-peace-building-police-community-trust-to-break-the-cycle-of-violence/>.

³⁰ Giffords Law Center to Prevent Gun Violence, “In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence,” January 17, 2020, <https://giffords.org/lawcenter/report/in-pursuit-of-peace-building-police-community-trust-to-break-the-cycle-of-violence/>.

³¹ Giffords Law Center to Prevent Gun Violence, “In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence,” January 17, 2020, <https://giffords.org/lawcenter/report/in-pursuit-of-peace-building-police-community-trust-to-break-the-cycle-of-violence/>.

investigation.³² Though the Trump administration inherited 15 consent decrees from the Obama administration, it has also withdrawn from at least one, and relaxed enforcement of the others.³³

In addition, by September 2017, the DOJ had effectively ended the Collaborative Reform initiative, and blocked release of reports assessing systemic practices contributing to community distrust in cities from North Charleston to Milwaukee.³⁴

Despite the administration's actions described above, in 2018, President Trump signed into law a modest but important piece of criminal justice reform legislation, called the FIRST STEP Act. And, in October 2019, he signed an executive order to establish the Commission on Law Enforcement and the Administration of Justice, tasked with "review[ing]...relevant research and expertise and mak[ing] recommendations [to the attorney general] regarding important current issues facing law enforcement and the criminal justice system" in the United States.³⁵ However, the 18-member Commission is solely composed of local, state, and federal law enforcement officials, and created 15 working groups of 112 members, with only five non-law enforcement members.³⁶ On October 1, 2020, a judge ordered that "the Commission's proceedings be halted—and no work product released—until the requirements of [the Federal Advisory Committee Act] are satisfied."³⁷ Following the murder of George Floyd at the hands of law enforcement in May 2020, President Trump issued an executive order on "safe policing for safer communities," which called for federally approved credentialing of state and local law enforcement; information sharing between federal, state, and local law enforcement on use of force incidents; law enforcement training on engaging with persons living with a mental illness or an addiction, or experiencing homelessness; and improving other law enforcement practices and building community engagement.³⁸

III. Proposed action

³² Robert Faturechi, "The Obama Justice Department Had a Plan to Hold Police Accountable for Abuses. The Trump DOJ Has Undermined It." ProPublica, September 29, 2020, <https://www.propublica.org/article/the-obama-justice-department-had-a-plan-to-hold-police-accountable-for-abuses-the-trump-doj-has-undermined-it>.

³³ *Id.*

³⁴ Giffords Law Center to Prevent Gun Violence, "In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence," January 17, 2020, <https://giffords.org/lawcenter/report/in-pursuit-of-peace-building-police-community-trust-to-break-the-cycle-of-violence/>.

³⁵ See President Donald J. Trump, "Executive Order on the Commission on Law Enforcement and the Administration of Justice," October 28, 2019, <https://www.whitehouse.gov/presidential-actions/executive-order-commission-law-enforcement-administration-justice/>.

³⁶ Tom Jackman, "Judge rules federal law enforcement commission violates law, orders work stopped as attorney general prepares to issue report," Washington Post, October 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/?utm_source=The+Trace+mailing+list&utm_campaign=27081e2736-EMAIL_CAMPAIGN_2019_09_24_04_06_COPY_01&utm_medium=email.

³⁷ NAACP Legal Defense Fund, Inc. v. Barr, Civil Action No. 20-1132 (JDB) (October 1, 2020), https://www.washingtonpost.com/context/judge-s-ruling-on-presidential-commission-on-law-enforcement/68e1dad7-bbb9-4207-81c9-ec7e74800f58/?itid=lk_inline_manual_3. (The NAACP LDF challenged the composition and operation of the Commission—the Commission failed to file a charter, provide public notice of its meetings, and open its meetings to the public—are required under the Federal Advisory Committee Act.)

³⁸ President Donald J. Trump, "Executive Order on Safe Policing for Safer Communities," June 16, 2020, <https://www.whitehouse.gov/presidential-actions/executive-order-safe-policing-safe-communities/>.

To build police–community trust in communities of color with high rates of gun violence, the next administration should, via executive orders, budgetary action, and certain actions by specific DOJ agencies, restore the DOJ’s critical role in promoting oversight and reform of unconstitutional policing practices; and significantly expand the federal government’s role in promoting reform. The list of key proposals for executive actions below should not be considered exhaustive. The actions are compiled from and based on the Task Force on 21st Century Policing [final report](#), The Leadership Conference Education Fund’s recommended [best practices for 21st century policing](#) (which builds on the recommendations of the Task Force report), Giffords Law Center’s [In Pursuit of Peace report](#), and the [George Floyd Justice in Policing Act](#).

(1) Executive orders

- The administration should issue separate EOs directing the DOJ to:
 - rescind and replace the Trump administration’s directives, which currently limit the Civil Rights Division’s ability to robustly investigate unconstitutional policing practices or pursue consent decrees and collaborative reform
 - establish a Law Enforcement Diversity initiative “to help communities diversify law enforcement departments to reflect the demographics of the community”
 - establish a Task Force on Law Enforcement Oversight to develop recommendations specific to policing. This task force should address:
 - “effective management, training, recruiting, hiring, and oversight standards and programs to promote effective community and problem-solving strategies for law enforcement agencies”
 - the creation of civilian review boards with subpoena power and effective enforcement authority
 - certification and decertification program standards
 - the involvement of trauma-informed community intervention workers in law enforcement responses to non-violent calls (e.g., homelessness); intimate partner violence situations; the serving of extreme risk protection orders; and in other situations where the addition of this expertise would facilitate de-escalation, increase safety, and assist in connecting people to services
 - reporting of incidents involving the use of force by or against law enforcement, including the demographics of civilians and substantive details surrounding the incident
 - establishing a policy on the elimination of, and process for administrative complaints on racial, religious, and discriminatory profiling by law enforcement
 - establish a National Crime and Justice Task Force “to review and evaluate all components of the criminal justice system,” (including drug policy, the bail system, and sentencing and incarceration) and make recommendations for reform.

- The administration should also issue separate EOs directing:
 - the Department of Education and DOJ to establish a task force that develops model policies and programs “that address the needs of children and youth most at risk for crime or violence and reduce

aggressive law enforcement tactics that stigmatize youth and marginalize their participation in schools and communities.”

- the Department of Health and Human Services and the DOJ to “establish a task force to study mental health issues unique to officers and recommend tailored treatments.”
- “[A]ll federal law enforcement agencies to review the recommendations made by the Task Force on 21st Century Policing and, to the extent practicable, to adopt those that can be implemented at the federal level.”

(2) Budgetary actions

- The new administration should include in its FY 2022 budget proposal:
 - expanded targeted investments in community-based violence intervention and street outreach efforts (including group violence intervention) to build trust, interrupt cycles of violence, and protect those at greatest risk
 - funding for increased pattern-or-practice investigations, consent decrees, and collaborative reform efforts by the DOJ and state attorneys general.
 - targeted Community Oriented Policing Services (COPS) funding to help cities create and implement civilian oversight efforts; improve homicide and non-fatal shooting solve rates; expand partnerships and utilization of violence intervention professionals and mental health counselors when responding to public safety crises; and support evidence-based trust-building efforts modeled after the National Initiative
 - funding to “support research into the factors that have led to dramatic successes in crime reduction in some communities through the infusion of non-discriminatory policing and to determine replicable factors that could be used to guide law enforcement agencies in other communities.”

(3) Directives for agencies within the DOJ

- The DOJ should issue separate directives to:
 - the Civil Rights Division (CRD) to relaunch pattern-and-practice investigations and the use of settlement agreements and consent decrees, rescinding former Attorney General Jeff Sessions’ memorandum effectively eliminating the use of settlement agreements and consent decrees
 - the Bureau of Justice Assistance (BJA) to:
 - launch comprehensive training for local, state, and federal law enforcement on racial profiling, implicit bias, procedural justice, and investigatory activities
 - “[c]onduct research to develop and disseminate a toolkit on how law enforcement agencies and training programs can integrate community members into [the] training process”
 - the Bureau of Justice Statistics (BJS) to collect and analyze demographic data on detentions (including stops, frisks, searches, summons, and arrests), use of force, and police misconduct
 - COPS to:
 - “[p]rovide technical assistance and collect best practices from existing civilian oversight efforts”
 - work with the Office of Justice Programs to encourage law-enforcement professional organizations to modify their curricula to include prominent coverage of the topical areas addressed in the Task Force on 21st Century Policing final report

- the Federal Bureau of Investigation (FBI) to “modify the curriculum of the National Academy at Quantico to include prominent coverage of the topical areas addressed in” the Task Force on 21st Century Policing final report
- the National Institute of Justice (NIJ) to “expand its research agenda to include civilian oversight”
- the deputy attorney general and associate attorneys general to review all law enforcement–related activities, including the Collaborative Reform Initiative, to ensure that they promote just and effective policing

IV. Risk analysis

This memorandum recommends a variety of actions. The likelihood of successful judicial challenges will depend on the form and substance of the particular actions the administration takes, and the impact of these actions on relevant stakeholders. The following discussion includes some preliminary thoughts.

(1) Executive orders

Past presidents have established task forces using either EOs³⁹ or presidential memorandums.⁴⁰ As DOJ’s Office of Legal Counsel has consistently held, “there is no substantive difference in the legal effectiveness of an executive order and a presidential [memorandum] that is not styled as an executive order.”⁴¹ As such, whether the next administration creates a task force via EO or presidential memorandum will have no substantive legal effect on the council’s work. However, we recommend the task forces be established via EO as it will send a stronger signal to the public and to federal agencies that their work is a high priority.

Establishing task forces

Establishing a task force is squarely within the president’s authority and would follow similar models of past administrations in establishing task forces and councils to confront urgent issues facing the nation.

The power to create task forces draws on the president’s Article II powers. Article II, Section 2 of the US Constitution allows the president to “require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices,” which includes Cabinet members, who head executive departments. Article II, Section 3 speaks to the president’s power to convene and report to Congress issues that concern him.

(2) Budgetary actions

³⁹ See e.g., President Barack Obama, Executive Order 13684, “Establishment of the President’s Task Force on 21st Century Policing” (Dec. 18, 2014); President Barack Obama, Executive Order 13506, “Creating the White House Council on Women and Girls” (Mar. 11, 2009).

⁴⁰ See e.g., President Barack Obama, Presidential Memorandum, “Promoting Rehabilitation and Reintegration of Formerly Incarcerated Individuals” (Apr. 29, 2016); President Barack Obama, Presidential Memorandum, “Creating and Expanding Ladders of Opportunity for Boys and Young Men of Color,” (Feb. 27, 2014).

⁴¹ Off. Legal Counsel, “Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order” (Jan. 29, 2000), <https://www.justice.gov/file/19436/download>.

Each year, usually by the first week in February, the president submits a budget request for the upcoming fiscal year to Congress.

(3) Agency actions within the DOJ

Timing of review

An agency action is subject to judicial review only after it is final. Whether an agency action is final in this context has two components. One, the action must mark the consummation of the agency's decision-making process—it cannot be of a tentative or intermediate nature. Two, the action must be one by which “rights or obligations have been determined” or from which “legal consequences will flow.”⁴²

Agency action committed to discretion by law

The DOJ may argue that challenges to their directive fail as a matter of law because such decisions are committed to agency discretion by law. The Administrative Procedures Act withdraws judicial review when “an agency action is committed to agency discretion by law.”⁴³ “[I]f the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion,” then it is unreviewable.⁴⁴

In addition, the DOJ may argue that, pursuant to federal law or federal regulations, the recommended agency action described in the previous section is within the authority of BJA,⁴⁵ BJS,⁴⁶ CRD,⁴⁷ COPS,⁴⁸ FBI,⁴⁹ and NIJ,⁵⁰ respectively. These threshold arguments may or may not prevent judicial review of the directives proposed here.

Judicial challenges to agency actions

If challengers are able to overcome the threshold issues mentioned above—such as finality and the extent of agency discretion—they may challenge the DOJ directives as being beyond the agency's statutory authority, violating a constitutional right, not following rulemaking procedures, or arbitrary or capricious agency action.⁵¹

The actions mentioned above may be within the authority of the respective DOJ offices.⁵² Provided that these actions are consistent with the relevant statutes and constitutional principles, such as separation of powers and the Tenth Amendment's reservation of power to the states, there is a reasonable likelihood that these actions will be upheld. In addition, the BJA, BJS, CRD, COPS, FBI, and NIJ may avoid a challenge based on procedural concerns by carefully following the particular procedures applicable to the particular actions.

⁴² *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

⁴³ 5 U.S.C. § 701(a)(2).

⁴⁴ *Heckler v. Chaney*, 470 U.S. 821, 830, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985).

⁴⁵ 34 U.S.C. § 10142.

⁴⁶ 34 U.S.C. § 10132(c).

⁴⁷ 28 C.F.R. § 0.50.

⁴⁸ 34 U.S.C. § 10381(b).

⁴⁹ 28 C.F.R. § 0.85(e). *See also* 28 U.S.C. § 531 et seq.

⁵⁰ 34 U.S.C. § 10122(c).

⁵¹ 5 U.S.C. § 706.

⁵² 34 U.S.C. §§ 10122(c); 10132(c); 10142; 10381(b). 28 C.F.R. §§ 0.50; 0.85(e).