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President's Task Force on 21<sup>st</sup> Century Policing

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**Re: President's Task Force on 21<sup>st</sup> Century Policing: Policy and Oversight**

Dear Messrs. Davis and Ramsey and Ms. Robinson:

Thank you for your invitation to submit written testimony on the topic of Policy and Oversight for consideration by the President's Task Force on 21<sup>st</sup> Century Policing.

My professional experience has shaped my impressions of oversight from a few different perspectives. I served for ten years as a trial attorney for the Civil Rights Division of the United States Department of Justice, with a focus on the investigation and prosecution of law enforcement officers for violations of federal law. I dealt with allegations of excessive force and false arrest in jurisdictions around the country. Subsequently, I served for six additional years in a similar capacity as an Assistant United States Attorney in the Central District of California, and eventually worked to create the first Civil Rights Section for the Office. Starting in 2001, I spent thirteen years as the head of a new model of full-time, independent civilian oversight entity for the Los Angeles County Sheriff's Department. Additionally, I have devised civilian oversight systems for a number of other law enforcement agencies, worked as a court expert to help develop remedial plans for Constitutional defects in policing, conducted independent reviews of critical incidents for police departments, and conducted independent audits for numerous law enforcement entities, with an emphasis on force, accountability, and related police practices.

I applaud President Obama for creating this task force in response to the recent crisis in American policing. Each of you also deserves acknowledgement and appreciation for your efforts in soliciting and evaluating recommendations for the advancement of stronger, more constructive relationships between law enforcement and the public. *I fully support the sentiments and recommendations set forth by Brian Buchner, President of the National Association for Civilian Oversight of Law Enforcement (“NACOLE”) in his January 9, 2015 correspondence to the Task Force.* I write separately to advance additional thoughts and recommendations for your consideration. Because the Task Force was created under the President’s Executive authority, my recommendations are centered on how the federal government can use its resources, expertise, and authority to assist in achieving President Obama’s overarching objectives.

**Recommendation 1: The federal government should give renewed emphasis to the value of robust civilian oversight, and should consider the existence of effective oversight when evaluating police agencies and designing remedial plans.**

Ensuring accountability and respect-based policing is primarily the responsibility of the local agencies that have the vast majority of law enforcement responsibility in this country. Each entity has its own policies and a significant measure of autonomy. Accordingly, each one relies on internal investigations and self-policing to ensure that *its officers perform effectively and in keeping with Constitutional principles.* As set out in more detail in Mr. Buchner’s letter, experience has demonstrated that effective and constructive civilian oversight can provide an invaluable resource for these critical functions. Rigorous independent review adds an obvious level of accountability and public trust; just as importantly, it can introduce an outside perspective that strengthens a police agency’s own process. While the call for civilian oversight has grown steadily louder in the aftermath of recent incidents, the large majority of jurisdictions still lack formal and consistent outside review.

The “best” approach to civilian oversight continues to be a subject of debate. In part, this is because so many different factors influence what particular agencies and communities need and can sustain. Nonetheless, there is general agreement that for oversight to be meaningful and effective, three critical precepts must exist. First, the oversight entity must have unfettered access to the agency’s internal reports, investigations, related documents, and decision-makers. Second, civilian oversight should have the ability to interface and provide input into police agency decision-making at both the “micro” level of individual cases and the “macro” level of policy development and systemic reform. Finally, civilian oversight should have the authority to report to the public about its findings and recommendations, consistent with the limits of law.

The Task Force should recommend that the federal government use its influence and authority over local law enforcement to encourage the initiation of civilian oversight in those jurisdictions that have none, and to strengthen oversight where it has proven to

be ineffective. The federal government should also consider providing fiscal resources to assist local entities that are interested in creating or enhancing existing civilian oversight.

*In addition to using the “bully pulpit” and federal resources to promote civilian oversight among its local law enforcement partners, the Civil Rights Division should also routinely consider the presence (or absence) of effective oversight in investigating whether a particular police agency has a pattern or practice of unconstitutional policing. Federal investigators can gain considerable insight from oversight entities in both the evaluation phase, and – if warranted – the subsequent remediation phase. The Civil Rights Division should also consider whether civilian oversight should serve as part of the remedial solution in appropriate cases.*

**Recommendation 2: The federal government should solicit civilian oversight perspectives in considering or developing progressive police practices.**

To its credit, the federal government has partnered with national police organizations to formulate white papers on a range of topics related to progressive policing. For example, the COPS office, under the leadership of Mr. Davis and his predecessors, has produced papers that provide local agencies with a valuable resource in tackling issues such as body-worn cameras. While this is an admirable venture, the development of such papers has *relied to date exclusively on input from police executives*. Oversight practitioners that specialize in police practices represent a different stakeholder perspective that could diversify and enhance the finished product. Accordingly, the federal government should solicit and include the contributions of the oversight community in developing such resource materials.

**Recommendation 3: The federal government should incentivize local law enforcement to reduce the use of force when possible, and to develop robust investigative and review processes when force incidents do occur.**

*Police officers are not simply authorized to use force; they have a responsibility to do so in order to protect themselves or third parties and to carry out their law enforcement duties. However, as recent national events have demonstrated, the use of force by police can generate a significant amount of controversy and public distrust. As a result, it is incumbent upon local agencies to reduce the likelihood that police officers will resort to force when other means of handling the situation are available. As a result of traditional training and paradigms, sometimes police officers have used force because they can, even though there may have been other ways to resolve or defuse the encounter. Progressive police agencies have devised “force prevention” policies and training that create a paradigm shift toward alternatives, without compromising public or officer safety. These concepts should be disseminated and fostered by federal leadership.*

In addition, all local agencies should devise internal mechanisms to ensure a robust, timely and objective investigation into all force incidents when they do occur.

Each force incident is not only a significant exercise of police power that requires accountability, but also a potential learning opportunity for involved officers and the agency as a whole. Local law enforcement should embrace the opportunity to pursue thorough and wide-ranging evaluations, rather than settling for the “bottom-line” inquiry into whether the force was in-policy. Accordingly, police leadership should formally assess each force incident through the lenses of individual performance, policy review, quality of supervision, tactics, and equipment. The federal government can and should play a leadership role in incentivizing local law enforcement agencies to devise such protocols, and should also provide technical assistance for those interested in doing so.

**Recommendation 4: The Task Force should consider the roles that prosecutorial and disciplinary review authorities play in accountability, and should evaluate the potential value of independent civilian oversight in those arenas.**

While the responsibility for holding police officers accountable for most types of misconduct allegations generally rests with the leadership of the police agency, the criminal review of an allegation of excessive force lies primarily with the local prosecutor’s office. However, there is virtually no “oversight” of these prosecutorial decisions. While the federal government has involved itself under its parallel authority to criminally investigate Constitutional color of law violations, there are finite available resources. Accordingly, *only the most egregious decisions can be revisited*. And, more importantly, a federal civil rights prosecutor has much more limited statutory authority for the redress of excessive force violations.

As I expect the Task Force will hear during its listening sessions and review of recent literature, the relatively unchecked discretion of local prosecutors has contributed greatly to public concerns about the legitimacy of criminal investigations into police misconduct. While some entities have begun to consider confining that discretion or removing that authority entirely from local prosecutors, another approach would be to *encourage the formation of independent civilian oversight as part of those prosecutorial decisions*. Independent civilian oversight of policing is clearly underdeveloped, but the role of civilian oversight in prosecutorial decisions is virtually nonexistent. Because many of the same considerations for civilian oversight also apply to the local prosecutor’s office, the Task Force should encourage local prosecutors to consider the advantages of effective civilian oversight in providing an independent register as those offices evaluate allegations of police misconduct.

The role that post-disciplinary processes play in police accountability has also not received sufficient attention in the recent national discussion and debate. Virtually all jurisdictions provide a process for disciplined or terminated police officers to challenge their discipline. During these processes, disciplinary decisions made by police leadership are often undermined or undone by arbitrators, civil service boards, or other post-disciplinary entities. As with prosecutorial decisions by local entities, there is virtually no civilian oversight of these critical and influential decisions. More

consideration should be given to providing oversight of these entities and ensuring a higher level of transparency to these post-disciplinary processes.

**Recommendation 5: The Task Force should consider the potential applicability of effective civilian oversight to federal law enforcement agencies.**

Federal law enforcement agencies have virtually no tradition of creating or embracing civilian oversight over their policing functions. While there are internal review entities for force incidents, many local law enforcement agencies significantly surpass the federal level of transparency and civilian involvement in developing policy, reviewing cases, and providing input into critical incidents such as officer-involved shootings. The Task Force should recognize this difference in paradigms and recommend that federal law enforcement leadership and other stakeholders consider increasing civilian oversight and transparency with regard to these functions. If the federal government hopes to promote greater oversight, transparency, and citizen involvement at the local level, one impactful way to accomplish this would be through example.

I appreciate the opportunity to advance these suggestions as you carry out the President's important mission of improving national policing. Please feel free to contact me if further input of any kind would be useful. I wish the Task Force the best in addressing these critical issues.

Very truly yours,



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