

NAVIGATING DOJ CONSENT DECREES

IN THE CONTEXT OF CAMPAIGNS TO DEFUND POLICE

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for the Community Resource Hub¹

The 1994 Violent Crime Control and Law Enforcement Act (VCCLEA) allows the Department of Justice (DOJ) to step in whenever it believes that a police department is engaging in “a pattern or practice of conduct” that deprives people of their constitutional rights. After conducting an investigation — which can have varying degrees of community involvement — the Department can enter into a memorandum of understanding with the city or county that runs the department, or file a lawsuit in federal court. Pattern and practice investigations are separate from federal criminal investigations of individual officers pursuant to federal law (18 U.S.C. section 242) for violations of an individual’s civil rights — which are rare, and rarely successful.

Consent decrees are settlement agreements between the federal government and a city or county that are approved by a federal court, and require the municipality to take a series of actions to address the constitutional violations identified during a DOJ investigation. The federal court judge will appoint an independent monitor to oversee implementation of the consent decree. The monitor will hire staff and set up an office for the duration of the decree.

Consent decrees generally focus on racial profiling and use of force, but recently have expanded to include investigations into police sexual violence, police responses to domestic violence and sexual assault, police response to mental health crises, and violations of the rights of disabled and LGBTQ people.

For decades, organizers and policy advocates — including the authors of this fact sheet — have pursued consent decrees as a strategy to reduce the harms of policing when local officials have failed to take any meaningful action, particularly in the aftermath of high profile incidents of police violence such as the post-Katrina police killings and violence in New Orleans, the murders of Mike Brown, Freddie Gray, John T. Williams, and Laquan McDonald, among others, as well as when blatant patterns of racial profiling and ongoing police violence come to light.² It is understandable that organizers may hope that federal intervention will have an impact on systemic police violence when policymakers fail to respond to local organizing demands.

But ultimately, the federal government is as invested in policing as a tool of racialized surveillance, criminalization, containment and control — including racial profiling, police violence and criminalization of Black, Indigenous, migrant, disabled, low-income, and queer and trans people — as state and local governments. In fact, federal law enforcement agents who operate out of the DOJ and the Department of Homeland Security (DHS) — including Drug Enforcement Agency (DEA), Alcohol Tobacco and Firearms (ATF), federal Marshals, Immigration and Customs Enforcement (ICE), and Customs and Border Patrol (CBP) agents — engage in the exact same patterns and practices of violation of constitutional rights the DOJ investigates at the local level.

1 With gratitude and appreciation for contributions from Hiram Rivera, Jared Knowles, and Lydia Pelot-Hobbs.

2 For more information on pattern and practice investigations, please see <https://www.justice.gov/crt/file/922421/download>

Ultimately, it is clear from efforts to secure systemic change through federal consent decrees that they have failed to stop police from killing, harming or criminalizing people.

And, while the evidence is mixed³ on whether consent decrees have any at all impact on rates of police profiling or violence while a municipality is under the decree, they have never been shown to have any impact at all on reducing police violence. And, they almost always result in **increased police powers like access to technology and surveillance, and increased funding through millions of dollars flooding into local police departments for increased training, development of new policies on paper that are rarely enforced in practice, “early warning systems,” body cameras and other failed reform measures.**⁴ They also come at tremendous expense: the cost of the process itself runs into the millions.

THE HIGH COST OF CONSENT DECREES

According to a recent article in the *Baltimore Sun*:

*Each year, Baltimore spends nearly \$1.5 million for the consent decree monitoring team, a group of experts responsible for helping implement reforms as required by the agreement. That money, however, does not include a number of associated expenses, such as relocating the police academy and upgrades in technology. City officials have said they expect the total cost of implementing the reforms will reach tens of millions of dollars.*⁵

- Oakland has spent over \$28 million⁶ in the past 17 years of its consent decree.
- Seattle has invested over \$100 million to reform the Seattle Police Department since its consent decree began.⁹
- New Orleans spends nearly \$1.4 million on monitors each year⁷ with estimates of the total cost of the decree as high as \$55 million.⁸
- Albuquerque \$4.5 million for 4 years for the court monitor alone.¹⁰

3 See, e.g., Li Sian Goh, “Consent decrees can reduce the number of police-related killings, but only when used alongside court-appointed monitoring, London School of Economics, US Centre, available at: <https://blogs.lse.ac.uk/usappblog/2020/03/18/consent-decrees-can-reduce-the-number-of-police-related-killings-but-only-when-used-alongside-court-appointed-monitoring/>, citing Li Sian Goh (2020) Going Local: Do Consent Decrees and Other Forms of Federal Intervention in Municipal Police Departments Reduce Police Killings?, *Justice Quarterly*, 37:5, 900-929, DOI: 10.1080/07418825.2020.1733637.

Using a panel dataset of over 900 departments from the year 2000 to the year 2016, 36 of which had experienced some level of federal intervention, my analysis revealed that where the Department of Justice initiated investigations in departments suspected of engaging in a pattern or practice of police misconduct, these departments were subsequently responsible for fewer fatalities – a reduction of 27 percent. In the absence of court-appointed monitors, consent decrees did not result in significant changes to the number of citizen fatalities. However, when federal courts appointed monitor teams to oversee the consent decree settlement, police departments saw a 29 percent decrease in fatalities. Surprisingly, however, technical assistance letters also influenced the number of reported deaths – in an unexpected direction. Police forces which had a letter issued witnessed an 85 percent increase in fatalities. [emphasis added]

4 See also: Lydia Pelot-Hobbs, “Accept Nothing Less Than Police Abolition,” *Boston Review*, June 24, 2020, available at: <http://bostonreview.net/law-justice/lydia-pelot-hobbs-accept-nothing-less-police-abolition>

5 Jessica Anderson, “Aspects of the national ‘defund the police’ movement can fit into Baltimore’s consent decree reforms, federal judge says,” *Baltimore Sun*, April 30, 2021.

6 Fired Oakland Police Chief, City Councilman Call For End To Federal Oversight Of Department, CBS News, March 2, 2020, available at: <https://sanfrancisco.cbslocal.com/2020/03/02/fired-oakland-police-chief-city-councilman-anne-kirkpatrick-noel-gallo-federal-oversight>

7 Ramon Antonio Vargas, “New Orleans police ‘a changed agency,’ but reforms lag, federal monitors find,” *Nola.com*, February 17, 2021, available at: https://www.nola.com/news/crime_police/article_3e26586c-7173-11eb-8527-b3586daa56bc.html

8 Matthew Nesvet, “My Year as a New Orleans Consnt Decree Insider,” *The Appeal*, July 30, 2019, available at: <https://theappeal.org/my-year-as-a-new-orleans-consent-decree-insider/>

9 Seattle Consent Decree, https://www.wawd.uscourts.gov/sites/wawd/files/12-1282_Memorandum_Seattle.pdf

10 Bloomberg pattern and practice

We don't need more consent decrees. Any reductions in police violence or harm achieved through DOJ investigations and consent decrees could be achieved at much lower cost by simply reducing police power and contacts, with tremendous savings that could be directly invested in community-based safety strategies and meeting communities' material needs.

Where consent decrees already exist, they are being wielded as an obstacle to community demands to divest from policing and invest in community safety — but they don't have to be. The surest way to address issues of racial profiling, use of force, and other violations of constitutional rights by cops is to reduce police power and contact and ensure that communities have what they need to be safe, survive, and thrive. Instead of increasing resources to cops,

cities and courts could achieve the goals set out in consent decrees by decreasing police contact, power, and funding.

It's time to stop throwing good money after bad to invest millions in investigations, failed reforms and consent decree oversight that could be spent on building genuine and lasting safety through community-based safety strategies and supportive services.



WHAT IS A CONSENT DECREE?

A **consent decree** is a settlement of a federal lawsuit brought by the Department of Justice against a city or county. Under a consent decree, the city, county or law enforcement agency do not have to admit wrongdoing. The consent decree is an agreement to implement specific reforms, usually by a certain date. An independent **court monitor** is selected to oversee the implementation of the consent decree and report to a federal judge about the law enforcement agency's progress.

Under the Obama administration, the DOJ entered into 15 consent decrees with local law enforcement agencies (up from 3 under the Bush administration).

Under the Biden Administration, the DOJ has declared that it will resume investigation of local law enforcement agencies after the Trump administration essentially called a halt to them, and has announced investigations in Minneapolis and Louisville sparked by the murders of George Floyd and Breonna Taylor.¹¹

¹¹ David Nakamura, "Justice Dept. to investigate Louisville police practices after Breonna Taylor's fatal shooting," *Washington Post*, April 26, 2021, available at: https://www.washingtonpost.com/national-security/merrick-garland-breonna-taylor-louisville-police-investigation/2021/04/26/822f756c-a6ab-11eb-8c1a-56f0cb4ff3b5_story.html



WHO ARE THE PLAYERS IN A CONSENT DECREE?

Mayor

The Mayor is often named as a defendant in the federal case resulting in a consent decree as a representative of the city or county. The Mayor will have their own interests in the process: they may have called for a DOJ investigation in order to restore legitimacy to the police department, they may welcome the DOJ in order to appear responsive to the community and reform-minded, or they may fight the consent decree (sometimes by filing an appeal). The Mayor also proposes the city budget, which will include the costs of compliance with the DOJ investigation and implementation of the consent decree.

City Council or County Board

Usually, the city council or county board will vote on a budget, which includes funding for consent decree compliance. Just like the Mayor, they may also have their own opinions and political interests around the consent decree.

Police Department

Often, the police department (or other law enforcement agency) will not want to engage with the DOJ, but may cooperate in order to appear responsive to the community and reform-minded. They will fight to limit or discredit community involvement, attempt to block the city's agreement to reforms that will significantly impact the way they police as well as the appointment of monitors who are likely to strictly interpret the consent decree requirements.

Department of Justice

The Department of Justice is the federal agency responsible for initiating and conducting an

investigation into a police department's patterns and practices, drafting the terms of the consent decree, and seeking enforcement of its terms. Attorneys from the Civil Rights Division may be in communication with community members during the investigation and implementation phases to gather information about people's experiences with the police.

Federal Judge

The federal judge assigned to the case brought against the city or county by the DOJ may seek to hear from community members about their experiences, or welcome submissions from community-based organizations. However, if contacted directly by community members, the judge will be unable to share information about the progress of the case, and likely will not respond. The judge may hold parties in contempt if terms of the decree are not being met, or if progress is too slow.

Court Monitor(s)

Usually a "policing expert" with a connection to law enforcement or law firm, the independent monitor(s) appointed by the Court are responsible for issuing regular public reports about the progress of reforms required by the consent decree. They are often directed to remain in communication with community members, and can sometimes offer insider information on the progress of the consent decree. They often have unlimited access to police records, body camera footage, or other records, but can be bound by confidentiality agreements. If the parties can't agree to a court monitor, the judge will choose one. In some cases, community members may weigh in on the selection process.

Compliance Officer(s)

Compliance officer(s) are one or more staff positions, typically inside the police department, charged with overseeing the department's compliance with the consent decree.

Fraternal Associations of Police

Police fraternal associations often oppose consent decrees and work hard to prevent them from being entered or effective, claiming they interfere with police duties by requiring them to do more work under a higher degree of scrutiny with increased possibility for disciplinary measures.

Community Members

Community members are often consulted by the DOJ during the investigation phase to hear about their experiences with police. The judge may also allow public comments to be submitted in connection with court proceedings. Often, consent decrees themselves also include a community component, like creation of Advisory Boards or conducting regular community surveys. These Advisory Boards often have little to no formal power, and the community satisfaction surveys are often administered by police and return questionable data.

DOJ & OTHER FEDERAL INVOLVEMENT IN LOCAL LAW ENFORCEMENT :

Investigation — when the DOJ investigates a law enforcement agency to determine if it engages in a “pattern or practice” of unconstitutional behavior. The process may end at the completion of the investigation or continue through DOJ intervention.

Technical Assistance Letters — a letter sent by the DOJ to make recommendations and offer support to police departments as they implement reforms. This is the lowest level of intervention by the DOJ.

Memorandums of Understanding — a more formal contract between law enforcement agencies and the DOJ wherein they agree to work together to implement reforms. This represents a more formal intervention by the DOJ, but is less structured than a consent decree, and is not overseen by a federal judge.

Lawsuit Against a Local Jurisdiction — the DOJ may file a lawsuit against the city or county regarding a law enforcement agency if it determines there is a pattern or practice of unconstitutional behavior.

Consent Decree — after a lawsuit is filed, parties usually enter into a Consent Decree to avoid costly litigation.

FBI Investigation — the FBI may also become engaged to investigate criminal behavior of officers for federal prosecution (which rarely happens).

The federal government can also become involved in local law enforcement through **federal funding, the 1033 program**, and more.



WHY ARE CONSENT DECREES AT ODDS WITH MOVEMENTS TO DEFUND THE POLICE?

1

Consent decrees drastically increase local police budgets at a time when organizers across the country are calling on cities to defund the police and limit their scope and powers.

Organizers across the country are calling for reductions in police department budgets, scope and powers, and investments in meeting the community needs and community-based safety strategies.

Consent decrees do nothing to meet these demands — and in fact they operate at cross-purposes to them.

In most cases, consent decrees cost cities millions of dollars and actually *increase* the size and powers of the police. **In some situations, like in Ferguson, MO, the consent decree actually included a pay increase for officers.**¹² And in some jurisdictions like Seattle and Chicago, policymakers are pointing to consent decree requirements as reasons they can't cut funding to the police department.

To meet the demands of the consent decree, cities must drain funds from their own budgets to pour into police departments for training, new positions like compliance officers, increased salaries, new

systems and technologies, and more — money that could be better spent elsewhere.

Moreover, police departments, which already receive millions in federal grant dollars to support training, technology and other initiatives, will often receive additional federal funds under a consent decree. **In 2020 alone, two of the biggest such Justice Department grant programs accounted for \$504 million in federal expenditures.**

Though federal funding may help offset initial costs of consent decrees to cities (money that could also be better spent elsewhere), cities are left with a hefty price tag for reform when they enter into a consent decree, and can expect to pay millions of dollars outside of the police budget on court costs, attorneys, court monitors and staff time — in addition to an increased police budget.

Of course, all of this is money that could be spent on housing, mental health services, youth programs and community-based safety strategies that actually keep people safe.

2

Cities with consent decrees continue to kill, brutalize, profile and harass Black, Indigenous, disabled, migrant, queer and trans people and people of color.

The evidence is mixed on whether consent decrees actually have any lasting impact on police killings or misconduct over the long-term.¹³ For instance, a 2005 study by the Vera Institute found

that after eight years under a consent decree, Pittsburgh's police department made "long-term improvements in police accountability." But since then, Pittsburgh's police department has made

12 See Ferguson Consent Decree at: <https://www.documentcloud.org/documents/2699153-Negotiated-Ferguson-Draft-Consent-Decree.html>

13 See note 2.

headlines for a number of violent incidents, including the 2010 beating of an unarmed high school student. A former police chief, Nate Harper, is serving time in federal prison for conspiracy and fraud charges.¹⁴

It is certainly clear that consent decrees do not stop police violence from happening altogether: the most recent example is the police killing of 13 year old Adam Toledo by the Chicago Police Department — a department that's been under

an active consent decree since 2019. At the time George Floyd was murdered by Derek Chauvin, the department had been collaborating with the Department of Justice in a review of its policies and practices since 2015.¹⁵ Additionally, it is very difficult to track their impacts due to the absence of publicly available data on racial profiling, stops, arrests, use of force, sexual violence by police, and other forms of policing and criminalization.

3

Consent decrees almost always result in increased police power through increased access to technology and surveillance, including “predictive policing,” data sharing with other law enforcement agencies, including the FBI, and other mechanisms.

With an influx of funds almost always comes an influx of technology and expansion of police powers, particularly as departments come under scrutiny for lack of data or transparency. This can not only result in extensive new systems of data collection and management, but tech overhauls also often include getting access to “cutting edge” policing technologies like body

cameras, extensive surveillance systems and Real Time Crime Centers, facial recognition software, predictive policing systems and COMPSTAT, “state-of-the-art” early warning systems, or even contracts with big data to store body-camera footage and information obtained during law enforcement activities.

4

Consent decrees, by nature of being a court-driven process, shut community members out of the process and rely on the police, or the state, to fix themselves.

Consent decrees are a court-involved legal process concerning two or more parties to the litigation. While the investigation, consent decree, monitor reports and court proceedings are usually public, the majority of meetings and negotiations (including the terms of the consent decree itself) occur behind closed doors. Independent oversight agencies are also shut out of the process. This means that community members have no real mechanisms to make

demands to limit the scope and powers of the police through a consent decree.

Once negotiated without direct public input beyond public hearings and DOJ meetings with community members, consent decrees set out a list of benchmarks that police departments must achieve in order to be released from the consent decree. It is up to the police department themselves to make these changes, often with the

14 Bloomberg, *A Pattern or Practice of Violence in America*, <https://www.bloomberg.com/graphics/2015-doj-and-police-violence/> and Robert C. Davis, Nicole Henderson and Christopher W. Ortiz, *Can Federal Intervention Bring Lasting Improvement in Local Policing? The Pittsburgh Consent Decree*, Vera Institute 2005, available at: https://www.vera.org/downloads/Publications/can-federal-intervention-bring-lasting-improvement-in-local-policing-the-pittsburgh-consent-decree/legacy_downloads/277_530.pdf

15 See Minnesota Department of Human Rights, *Timeline* <https://mn.gov/mdhr/mpd/timeline/> and Office of Justice Programs, *Diagnostic Analysis of the Minneapolis Police Department*, January 2015, available at: https://mn.gov/mdhr/assets/2015.01%20JP%20Minneapolis%20Police%20Report_tcm1061-457047.pdf and DEPARTMENT OF JUSTICE RELEASES AFTER-ACTION ASSESSMENT OF THE RESPONSE TO MINNEAPOLIS PROTESTS, March 20, 2017, <https://cops.usdoj.gov/pressrelease/departments-justice-releases-after-action-assessment-response-minneapolis-protests>

support of policing “experts,” often former law enforcement agents, and to declare when they have reached “compliance.” Unsurprisingly, this has resulted in reports of police departments using selective metrics, suppressing unfavorable audits, officers coaching each other on undergoing third-party audits, and other forms of scapegoating and continued corruption.¹⁶

Although many consent decrees actually require community involvement in oversight of the process through Advisory Boards or other bodies, these have little to no actual power or access to information, and often fizzle out.

5

Consent decrees reinforce the legitimacy of policing and the “bad apples” premise of police reform.

Consent decrees, at their core, are based on legitimizing policing so long as departments meet a certain set of metrics that serve as proxies for standards of “constitutional policing.” But we know that the Constitution, as interpreted by a Supreme Court that has been eroding constitutional protections in the context of policing for decades, permits many forms of racial profiling and discriminatory policing, use of force, and killings — for example, by requiring that racial profiling and discrimination be provably “intentional” rather than by measuring impact of policing practices, and by justifying use of force, up to deadly force, any time a cop claims they were afraid for their safety, even if any purported fear is baseless or rooted in anti-Blackness, or the force used is disproportional to any threat posed, or in a racially discriminatory fashion.

This is why efforts to reduce police harm must not be limited to the meter protections provided in federal law. Change requires entirely new approaches to public safety, informed by the experiences and experts of the Black and brown communities most likely to experience police violence.¹⁷

— SHEILA BEDI, COUNSEL FOR COMMUNITY GROUPS ON CHICAGO CONSENT DECREE

Consent decrees also presume that the problem is individual officers, units, or departments, rather than inherent to the entire system of policing itself. To the extent that issues are framed as systemic, consent decrees are premised on the notion that it is possible to root out problematic players and practices while leaving the overall framework of policing intact.

¹⁶ Matthew Nesvet, “My Year as a New Orleans Consent Decree Insider,” *The Appeal*, July 30, 2019, available at: <https://theappeal.org/my-year-as-a-new-orleans-consent-decree-insider/>

¹⁷ Sheila Bedi, “Chicago police ‘reform’ failed Adam Toledo. New thinking is essential,” *Washington Post*, April 17, 2021, available at: <https://www.washingtonpost.com/opinions/2021/04/17/chicago-police-reform-failed-adam-toledo-new-thinking-is-essential/>

ALREADY HAVE A CONSENT DECREE?

Having a consent decree in place does not prevent your city from defunding the police.

Decision makers may try to tell you they can't defund the police because of a current consent decree. But plenty of cities have, including Oakland, CA, which has been under a consent decree since 2003.

In fact, you might be able to use the consent decree to your advantage when talking about your defund campaign, since they cost cities so much money and often focus on specific issues, like mental health crisis response, that can and should be handled outside of police.

Focus on reducing the number of police positions in your defund campaign.

Rarely do consent decrees require a department to maintain a specific number of police officers or department size. Reducing racial profiling and violence against people of color, unhoused people or people with unmet mental health needs can be achieved by reducing the number of patrol officers, limiting circumstances where they come into contact with the public, and eliminating "homeless outreach," SWAT and tactical, mental health crisis response, traffic enforcement, and protest policing units for instance. And since 90% of police budgets are salaries and benefits, mostly to sworn officers, defunding the police requires reducing the size of the force.¹⁸

Shrink the scope of the police department by moving duties away from the police, like mental health crisis response, school security, or traffic enforcement.

The scope of a consent decree is limited to the police department itself, not any other city agencies, and it rarely dictates the structure of the department. And, where a consent decree does focus on creating crisis response units or increasing or improving training on mental health and de-escalation, it doesn't prohibit a municipality removing these duties from police altogether to address the issues identified through a DOJ investigation.

In fact, when a consent decree focuses on mental health crisis response, it means that the DOJ has demonstrated a significant, repeated and well-documented problem with the way the department has historically responded to these calls. DOJ investigation findings can be used as talking points in support of demands to move these duties outside of the police department altogether: police are not equipped to respond to mental health crises, as evidenced by the number of people in crisis who have been killed by the police. Similarly, moving duties like traffic enforcement out of the police department, getting rid of police details (when officers take on additional duties like event security or traffic control before a big game), or cutting contracts to get cops out of schools are all things that can and should be pursued under a consent decree.

In fact, most of the goals of consent decrees — reducing use of force, racial profiling, lack of transparency and accountability — can be addressed by reducing the amount of contact people have with police, including by:

- Reducing the size of the force;
- Reducing the technology and weaponry police have access to; and
- Reducing the scope of police work, including by shifting mental health crisis response, "homeless outreach," traffic enforcement out of the police department;
- Reducing police department budgets.

¹⁸ See Jared Knowles, "How To Take Back Your Budget," Community Resource Hub, available at: https://communityresourcehub.org/wp-content/uploads/2020/09/CRH_HowToTakeBackTheBudget.pdf

Use the consent decree in your favor in your defund talking points.

The high cost of consent decrees could be used to your advantage in your defund campaign's talking points. Calling attention to the ways police departments continue to brutalize and harass Black people, migrants, LGBTQ people, disabled people and other marginalized groups even while under a costly consent decree can be used to bolster your talking points in calling for reduced police powers, scope, and funding by highlighting the failures of reform efforts.

Use data in your defund campaign.

Consent decrees often require increased data collection and transparency, as well as regular

monitor reports, open court hearings, and even access to internal police meetings or roll calls. This can lead to increased access to information about police priorities (like targeted "hot spot" areas), the number and nature of arrests, body camera data, civilian complaints, stop and frisk data, and information about training and calls for service. Though the collection and analysis of all this data is costly (and represents funds that could be better spent elsewhere), data from the police department obtained through a consent decree can be used against them to expose police practices and the dollars that follow — all of which could be better spent on services and community-based alternatives.

DOJ COMING TO YOUR TOWN?

There is a lot you can do to steer the process toward your campaign goals:

- **Demand a meeting with DOJ investigators and lay out your community demands:** less, not more money, power, technology or resources to police, and more investments in community safety.
- **Mobilize community members** to attend DOJ public forums, listening sessions, advisory committees and other public engagement forums and communicate your community's demands to investigators.
- **Develop a People's Consent Decree (borrowed from organizers in New Orleans) or a People's Defund Decree** that lays out your community demands and shows how they will address the issues identified during a DOJ investigation rather than embarking on a costly consent decree process.

THINKING ABOUT CALLING FOR A DOJ INVESTIGATION?

SOME ALTERNATIVE DEMANDS

Rather than calling for increased federal involvement and consent decrees, we can focus on defunding and dismantling the police altogether. Get ideas for different demands in Interrupting Criminalization's report *The Demand is Still Defund the Police*¹⁹ or at defundpolice.org.

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¹⁹ Available at bit.ly/DefundPoliceUpdate.