"WE'RE FROM THE GOVERNMENT, AND WE'RE HERE TO HELP"

RESPONDING TO A DOJ CIVIL RIGHTS PATTERN AND PRACTICE INVESTIGATION

By Robert N. Driscoll and Bradley J. Schlozman

You wake up one day, and your sheriff's office is in the news. A series of excessive force complaints (some justified, most not) against your deputies, or maybe a high-profile use of force resulting in death, has brought the circus to town. The media and local civil rights leaders are attacking you and complaining about "tensions" between law enforcement and the community. They recount incidents going back years (regardless of whether investigations cleared the deputies involved).

Soon, politicians are in front of the cameras calling for an "independent" investigation by the U.S. Department of Justice (DOJ). You are being compared to "hot spots" such as Ferguson, Chicago, Staten Island, New Orleans, and Baltimore. Then you get a letter from the DOJ's Civil Rights Division as you simultaneously see a televised press conference in which DOJ announces a "pattern or practice" investigation of your office.

What do you do now? Just the name of the investigating entity—the Civil Rights Division of the United States Department of Justice—makes many in the media and the community instinctively assume that your sheriff's office is racist, even if racial profiling and discriminatory policing aren't part of the investigation. Local political leaders thank DOJ and encourage you to cooperate fully. After all, if you have nothing to hide, why not?

We have been on both sides of this fight, as senior officials in the Civil Rights Division and in defending law enforcement agencies being investigated by DOJ. In a previous article, we discussed in detail the jurisdictional limitations on DOJ's investigatory authority. Our objective here is to provide insight into the process of a pattern or practice investigation, and to point out some of the best practices we have seen among law enforcement agencies confronting this challenge.

Naturally, every situation and every agency is unique. Each has its own political and budgetary structure, and each serves its own constituencies. But there are principles and traps for the unwary that are common to all investigations. We hope that the information in this article can guide you, particularly early in the process when key decisions must be made.

WHAT IS A PATTERN OR PRACTICE INVESTIGATION?

It is important to distinguish a *civil* pattern or practice investigation from a *criminal* civil rights investigation. DOJ prosecutes federal criminal civil rights cases against law enforcement, most often focusing on excessive force by local police departments and sheriffs' offices. Deprivation of rights protected by the U.S. Constitution and

federal law is a federal crime, and individual officers can be criminally prosecuted. Criminal cases usually focus on a particular incident and the officers involved, and are handled by the Criminal Section of the Civil Rights Division.

To take one high-profile example, Officer Darren Wilson of the Ferguson (Missouri) Police Department was the subject of a DOJ criminal investigation and was cleared. General media publicity and cries from civil rights activists notwithstanding, the result of the Wilson case is by far the most common outcome in a federal criminal civil rights investigation. The DOJ must prove that the defendant law enforcement officer *intended* to deprive someone of his/her civil rights; simply making a mistake, violating procedure, or using poor judgment is generally not enough to secure an indictment, let alone a conviction. Thus, if one reviews the Criminal Section website, which lists successful prosecutions, one will see that almost all successful convictions come in the context of prisons, jails, or other circumstances in which a prisoner or suspect is detained. Almost no successful prosecutions result from the split-second, "shoot/don't shoot" encounters that generate adverse publicity.

DOJ officials know that, absent unusual circumstances, a criminal civil rights prosecution is unlikely to succeed. Moreover, grand jury proceedings necessary to secure an indictment are secret, so there is little DOJ can say with respect to an individual incident beyond "We are looking into it."

In contrast, DOJ has the authority under 42 U.S.C. § 14141 to investigate and seek civil relief against an entire law enforcement agency if a "pattern or practice" of violations of constitutional rights is suspected. DOJ has similar authority to investigate jails and prisons under the Civil Rights of Institutionalized Persons Act, or CRIPA. These kinds of civil cases do not involve monetary damages (as a 42 U.S.C. § 1983 case brought by an individual would), but instead seek injunctive relief—that is, a court order forcing systematic policy changes at a law enforcement agency.

It would be the height of naiveté to ignore the political implications of the preceding paragraphs, particularly in the wake of a high-profile incident or series of incidents. Community and political interest groups will express outrage and demand that DOJ "do something." Yet experienced DOJ officials are well aware that a criminal investigation is unlikely to yield an indictment, much less a conviction, of a law enforcement officer. There is, therefore, a strong temptation within the corridors of DOJ to announce the opening of a civil "pattern or practice" investigation of the law enforcement agency in question.

Here, politics is king. After all, whether they are warranted or not, such investigations provide community members and activists a chance to voice their grievances to DOJ, provide politicians the ability to say that an "outside" or "independent" body is reviewing local law enforcement, and allow the DOJ's political leadership the opportunity to appear responsive to local concerns about the incident(s), the facts and the law be damned.

What DOJ will then seek in almost every instance (even if it cannot prove its allegations in court) is a voluntary agreement to enter into a consent decree to require a template series of reforms that DOJ has imposed on other jurisdictions. It will also insist on independent monitoring, under federal court supervision, to ensure that such reforms are implemented.

The cost of these "reforms," compliance, and monitoring requirements can run into the millions of dollars, not even counting the diverted resources of senior staff time spent interfacing with DOJ and eventually a monitor. Unfortunately, many jurisdictions think they have no other choice. To oppose the Civil Rights Division is, in some misguided circles, interpreted as having something to hide.

In our experience, however, local law enforcement can—and often *should*—push back against the DOJ, if justified by the facts and circumstances. We have repeatedly seen such efforts allow the jurisdiction to prevail or at least minimize the cost and impact of any resolution. To preserve all options, though, it is important to consider each of the following steps:

HIRE EXPERIENCED COUNSEL

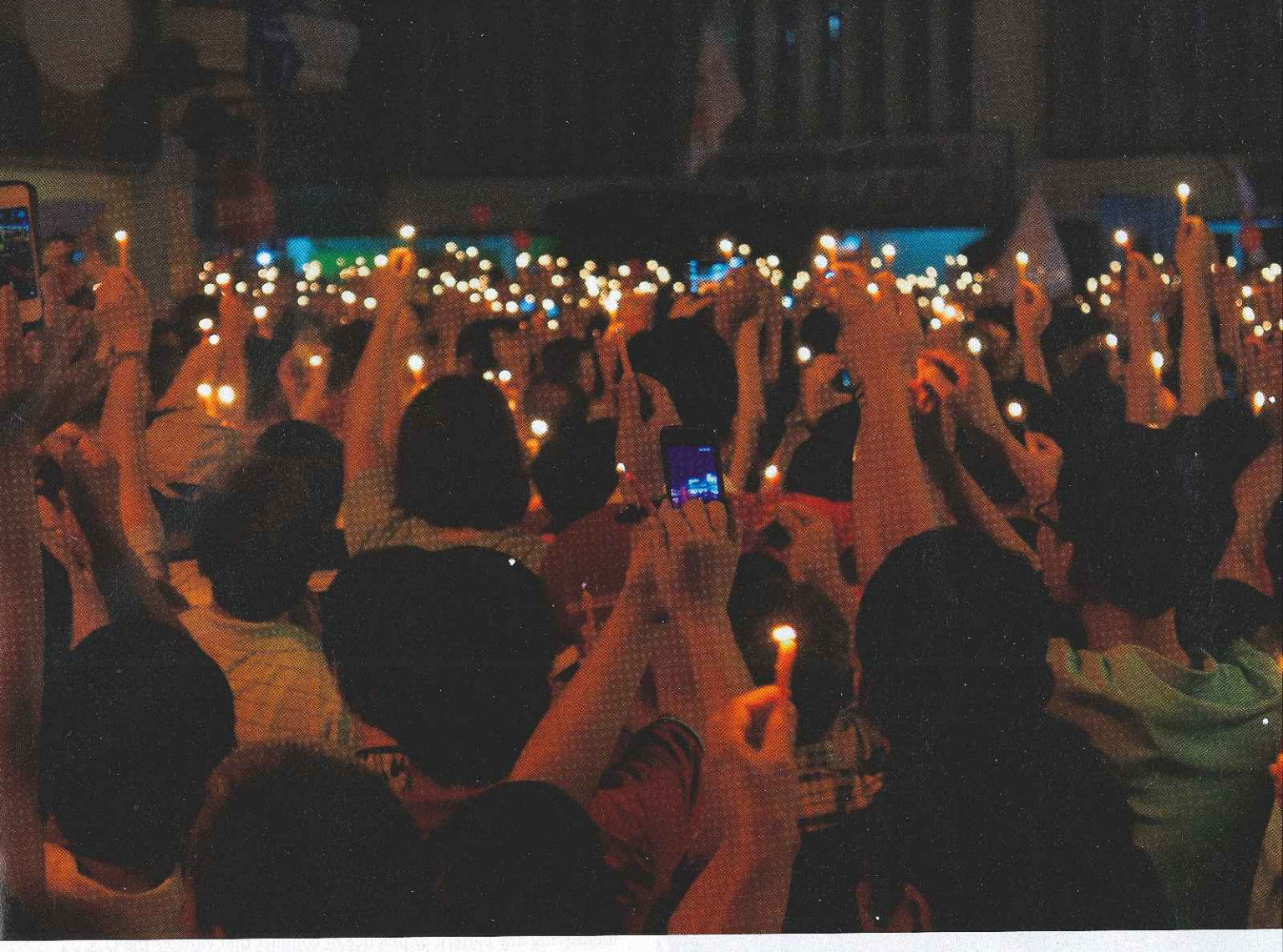
A DOJ pattern or practice investigation blends political, legal, and practical problems like almost nothing else a sheriff's office will confront. Because such investigations are uncommon compared to typical civil rights claims, even excellent lawyers who routinely handle civil rights claims brought by individuals have likely never confronted a DOJ pattern or practice matter. But lawyers who have opposed and are familiar with the inner workings of DOJ have. To get the full value of that experience, you need to consult with experienced counsel immediately.

For example, when DOJ opens an investigation, a sheriff's office likely will receive a lengthy document request, and a request for meetings and interviews with senior command staff. The question of whether and/or how to respond must be promptly addressed. *Section 14141 does not grant DOJ subpoena power, so compliance with such requests is, as a legal matter, purely voluntary.*

Yet under CRIPA, DOJ does have some ability to compel the production of evidence. Lawyers familiar with both statutes can more readily negotiate with DOJ to narrow the scope of the requests, or agree to production only in exchange for DOJ identifying the specific pattern of constitutional violations that form the alleged basis of the investigation. You want to prevent aiding a "fishing expedition" by DOJ.

Moreover, experienced counsel will not be intimidated by DOJ and can credibly threaten to force DOJ to litigate and prove its case if any proposed resolution is unduly burdensome or expensive. The DOJ Civil Rights Division does not litigate many cases, and has, at best, a spotty record at trial. Alamance County, North Carolina, is the most recent jurisdiction to force DOJ to trial (on a racial profiling matter) and prevail. The credible threat of a trial can help minimize the impact of any resolution.

You will also need to protect your agency's rights during the investigation. Absent experienced counsel setting appropriate ground rules, DOJ will interview represented parties (including your staff) without counsel present, despite professional ethics rules barring them from such behavior. They will ask for access and documents to which they may not be entitled, and will generally use the relative informality of the investigation to their advantage. Retaining counsel that is accustomed to dealing with the DOJ's Civil Rights Division attorneys will



convey the message that your department is sophisticated and is not simply going to roll over.

DETERMINE WHETHER AND HOW TO COOPERATE

Because Section 14141 does not include subpoena power, the decision whether to cooperate is a more important question than most jurisdictions realize. As a legal matter, without a basis to investigate other than Section 14141, there is nothing DOJ can do in response to a refusal to cooperate other than file suit. The problem for DOJ is that it is difficult to file suit without independent evidence of a pattern of constitutional violations, which is what DOJ is seeking the documents and interviews to prove. In other words, DOJ would have to put the cart before the horse, something it technically has no jurisdictional authority to do.

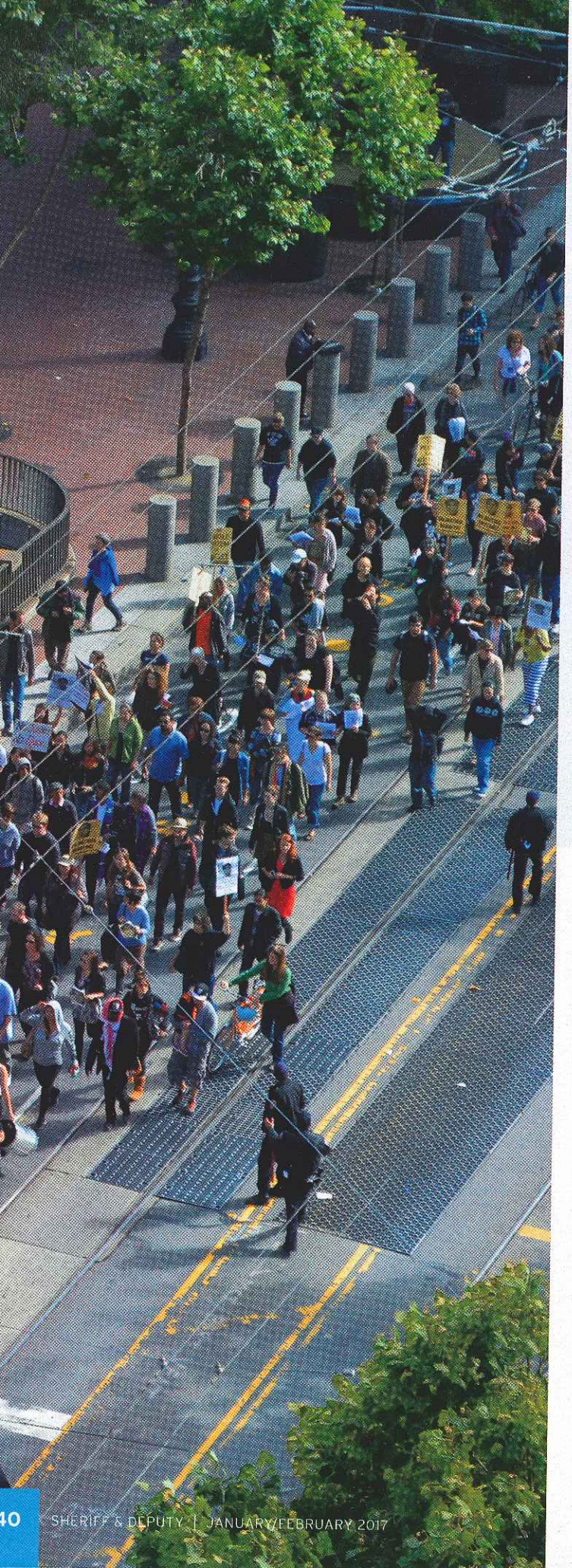
We recognize, of course, that there will be political pressure to cooperate with DOJ. But by working with counsel, you can offer principled reasons for resistance. For example, has DOJ identified any problems, or is the investigation a mere fishing expedition? Is there any record of Section 1983 settlements or other damages awards against individual officers in the department for constitutional violations, such as excessive force? If not, what is DOJ's basis to investigate? How do the office's existing policies and procedures stack up against what DOJ typically dictates in its settlement agreements?

The bottom line is that it is a serious mistake to presume that cooperation is the automatic choice in response to an investigation. You may decide to cooperate in the end or you may not, but a dispassionate analysis of the risks and benefits of the strategy must be weighed early on.

KEEP TABS ON THE INVESTIGATION

If the investigation proceeds, it is crucial to keep track of DOJ's requests and your responses. Documents produced should be numbered and tracked, a list of persons interviewed and a summary of what was discussed should be kept, and—to the extent it can be determined through media coverage—a list of outside interest groups or individuals that DOJ contacted should be maintained. You (or an entity working on your behalf) might also consider submitting a Freedom of Information Act (FOIA) request to the Civil Rights Division's FOIA officer demanding copies of all communications between DOJ and the third-party organizations and/or individuals who seem to be most vocal in their public attacks on your office.

By tracking this information, your counsel can review the material and determine whether any evidence of a pattern or practice of



constitutional violations is likely to be developed. Careful document management also will help identify early in the process on which areas DOJ appears to be focused.

IMPLEMENT REFORMS DURING THE INVESTIGATION

DOJ will retain experts to advise them on training and policy issues. Often, they are retired police chiefs or sheriffs (or, in correctional facility investigations, former wardens). Other times, they are academics who "specialize" in the area. Do not be misled by possible praise coming from such individuals. In our experience, such compliments typically disappear in the expert's final analysis of the agency. If, during the investigation, these experts identify any polices or procedures that are problematic (and they most assuredly will in virtually every case, or DOJ won't rehire them), it is a clear sign that DOJ will likely ask for modifications in those areas.

Even so, opportunity abounds. If the expert's suggestions are reasonable or valid, there is no reason not to implement the changes *prior to* the conclusion of the DOJ inquiry. This allows the expert to "bless" the then-existing policies at the conclusion of the investigation, and it will give your counsel the ability to argue that no injunction is needed, because, at the conclusion of the investigation, no policy changes are necessary. In fact, although largely unknown, the CRIPA statute (42 U.S.C. § 1997b) requires that DOJ give a jurisdiction the opportunity to fix any problems before a suit is filed. Insist on exercising this right.

THE "FINDINGS LETTER"

When DOJ has completed its investigation, it will issue what it terms a "findings letter" detailing the results of its investigation and identifying any pattern or practice of conduct that violates the U.S. Constitution. Unfortunately, this letter does not contain "findings" in the traditional legal sense (i.e., the conclusion of a neutral party who has heard competing evidence). Rather, it is more akin to a civil complaint. It may credit witnesses with no credibility, it may ignore contrary evidence, and it may draw conclusions that are not justified by the facts.

The findings letter does, however, give you a road map of what DOJ thinks it can prove. You should consult with counsel about whether or not the allegations *can* be proven, and whether or not you will *require* that they be proven, rather than settle on DOJ's proposed terms. You might also need to push back somewhat in the media, as most reports incorrectly assume that "findings letters" represent a conclusion to a matter, rather than a mere summary of allegations that have never been proven to an independent third party, such as a court.

"CLIMBING THE CHAIN"

We all have bosses, and so do DOJ attorneys. This is important to remember as an investigation closes. Once DOJ has made its findings and proposed a resolution, counsel can obtain a meeting with senior officials (either the Special Litigation Section chief or a political appointee) to push back against any unjustified findings or onerous provisions in a proposed resolution. While the instinct, as in

any institution, is for supervisors to back their subordinates, a well-prepared presentation has, on occasion, led to favorable modifications of the resolution.

Additionally, experienced counsel can compare the proposed resolution to others entered into by DOJ and point out any shortcomings or distinctions that may be helpful. Your willingness to litigate, if necessary, will also bring you heightened leverage at the bargaining table. No DOJ attorney, let alone a senior political official, wants to face an embarrassing judicial defeat due to factual deficiencies in the case.

CONSENT DECREES

DOJ will always try to resolve an investigation through a consent decree. You will be told that the draft decree you are presented is essentially "non-negotiable." *This is emphatically not true.* If an agreement is not reached, litigation is DOJ's only option, and depending on the facts, it may not be a preferred one.

Once again, this is where credible, experienced counsel is the key. Counsel can act as a buffer against DOJ—e.g., "I can't recommend that my client enter into this decree because I don't see any evidence of violations. Explain the violations to me, and maybe I'll change my mind and take this to the client."—and test what "non-negotiables" actually are. In our experience, the length of agreement, the form of agreement (consent decree or out-of-court settlement), and the terms of the agreement are *all* negotiable.

MONITORS

In some instances, DOJ will insist on a monitor to oversee your law enforcement agency and report to the court periodically on compliance with any settlement agreement. While some monitors are better than others, monitors can be frightfully expensive and should be avoided at all costs.

Often, teams of monitors—typically consisting of lawyers charging $700 per hour or more—will be proposed. These costs can quickly spiral out of control, as the monitors might be around for years. Once appointed, your ability to contest their billings is extremely narrow; not only is a court going to be hostile about spending its time on such disputes, but ticking off the monitor by contesting certain fees is not exactly the best strategy for maintaining cordial relations.

Even worse, monitors know that a finding of full compliance by the jurisdiction will put them out of the engagement, so the financial incentive is to find and report problems. Whether they are acting consciously or unconsciously, there is little benefit in killing the goose that lays the golden egg. That is why, if monitors cannot be avoided altogether, you must, at a minimum, negotiate hard caps on their costs during the settlement discussions. Do not be put in a position of having to back up a Brink's truck to your office to fund the settlement agreement monitor.

"RACIAL PROFILING" AND "DISCRIMINATORY POLICING"

Racial profiling and discriminatory policing allegations deserve special mention, because although the political rhetoric and media pressure will flow hot and heavy, DOJ has historically presented weak or irrelevant evidence in this area. More often than not, DOJ will compare arrest or law enforcement contact rates by race with the racial composition of the community as a whole. This is a technique sure to find disparities, because it does not take into account the fact that certain groups may generally commit crimes at greater rates. You may need to hire your own expert statistician to poke holes in DOJ's flawed statistics and develop more relevant data.

For example, years ago, New Jersey's state troopers were forced into a racial profiling decree. But better data that tracked the number of speeders on the turnpike by race via cameras activated by radar guns actually proved that *fewer* minority drivers were stopped compared to the minority population of speeders. It turned out that some of the DOJ attorneys tried to suppress this favorable information from the political leadership at the time. In any event, if these allegations are part of a DOJ investigation, be aware that they can be rebutted.

COST

As you can see, pattern or practice investigations are complex and can be very expensive to resolve. In addition, hiring outside counsel is an expense that may not have been budgeted. There is an inevitable temptation at the outset of an investigation to "see how this works out" or to "wait to see if we need to push back" before hiring outside counsel. In our view (regardless of whether you hire either of us), this strategy is penny-wise and pound-foolish.

A consent decree and monitor can cost a jurisdiction millions of dollars, and the decisions that might avoid such a result must be made expeditiously. If you only object when a decree is first proposed and have not already laid a foundation demonstrating to DOJ that you know the law and are not afraid to assert your rights, there is little experienced counsel can do for you at the end of the process.

THE BOTTOM LINE

If DOJ's Civil Rights Division investigates your office for a pattern or practice of constitutional violations, it must be taken seriously. Do not assume, however, that your only recourse is to capitulate and give the DOJ everything it asks for. These investigations are always ugly. We can promise that they will not end with an apology from the DOJ attorneys. But if you know your rights, understand DOJ's jurisdictional limitations, and hire experienced counsel, you can greatly limit the damage, control your costs, and preserve at least a significant part of your sovereignty.

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