



Reforming Patterns of Unconstitutional Policing: Enforcement of 34 U.S.C. § 12601

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In the early 1990s, bystander [video footage](#) of Los Angeles police beating, clubbing, and [stomping on](#) black motorist Rodney King sparked national outrage, protests, and rioting. [In response](#), Congress passed the [Violent Crime Control and Law Enforcement Act of 1994](#), which contained a notable provision originally codified as 42 U.S.C. § 14141 and now found at [34 U.S.C. § 12601](#) (Section 12601). Specifically, Section 12601 serves as the primary federal law aiming to ensure that law enforcement agencies comply with the Constitution. More recently, bystander footage of [Minneapolis police](#) pinning George Floyd in a neckhold ignited protests, anger, and violence throughout the nation, prompting renewed interest among lawmakers in the role of the federal government in ensuring constitutional policing. Indeed, Floyd’s death is only one in a series of similar incidents arousing public concern and [protest](#). Some of these events, including the death of [Freddie Gray](#) in [Baltimore](#) police custody and the fatal shooting of [Michael Brown](#) by [Ferguson](#), Missouri, police, spurred not only public outcry but also [legal action by the Department of Justice](#) (DOJ) under Section 12601. This Sidebar discusses the Section’s requirements, DOJ’s enforcement actions in recent years, and considerations for Congress.

Section 12601’s Requirements and Procedures

Section 12601 authorizes the Attorney General to sue local law enforcement agencies for “engag[ing] in a pattern or practice of conduct” that “deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.” The statute provides no private right of action, meaning that individuals cannot sue to enforce it. Private parties may pursue [other civil remedies](#) for unconstitutional behavior, and separate, [criminal statutes empower DOJ](#) to prosecute individual officers for unconstitutional behavior. Section 12601, however, aims at institutional reform. These cases, as DOJ explains, are “[geared toward changing polices, practices, and culture across a law enforcement agency](#).” The term “pattern or practice,” used in [other statutes](#) authorizing the Attorney General’s enforcement, requires “[more than an isolated, sporadic incident](#),” and wrongdoing must be “[repeated, routine, or of a generalized nature](#).”

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Constitutional Violations and Section 12601

Once they become a pattern or practice of police misconduct, violations of any constitutional right can support Section 12601 enforcement. DOJ's cases typically address multiple constitutional harms. Perhaps the most frequent focus of Section 12601 cases is a potential pattern of Fourth Amendment violations (including improper searches, seizures, detentions, and use of force). For example, investigation of the Warren Police Department in Ohio revealed a pattern of [improper strip and body cavity searches](#), while in [Newark, New Jersey](#), and [Maricopa County, Arizona](#), investigators discovered widespread theft of property by police officers. Maricopa County deputies routinely seized small items as “[trophies](#).” In [Baltimore](#) and [New Orleans](#) DOJ identified patterns of unlawful stops. DOJ also brought to light excessive use of force in the [Yonkers Police Department](#), the [Seattle Police Department](#), the [Puerto Rico Police Department](#), and others.

Nonetheless, any constitutional protection can justify a Section 12601 case. Other constitutional violations uncovered in Section 12601 investigations have included alleged Fifth Amendment and due process violations, such as [coerced confessions](#) in the [Ville Platte Police Department and Evangeline Parrish Sherriff's Office of Louisiana](#). In settlements with the [Puerto Rico Police Department](#) and the [Baltimore Police Department](#), DOJ imposed measures to curb patterns of First Amendment violations—officers' retaliation for perceived insulting remarks and attempts to stop bystanders from [filming police](#) with cell phone cameras. In another instance, DOJ charged [Colorado City, Arizona, and Hildale, Utah](#), police with a pattern of violating the Establishment Clause for carrying out orders of fundamentalist Mormon leader Warren Jeffs.

Often DOJ's cases aim to remedy [racial discrimination](#), in violation of the [Equal Protection Clause of the Fourteenth Amendment](#). (Title VI of the [Civil Rights Act of 1964](#) also authorizes these suits for departments with federal funding.) In [Maricopa County](#), DOJ found that the sheriff department targeted Hispanics—[responding to complaints](#) that alleged no criminal activity, but reported people with “dark skin” congregating in an area, or employees speaking Spanish at a local business. In [Suffolk County, New York](#), DOJ concluded police discouraged Latinos from filing complaints and failed to investigate anti-Latino hate crimes. In Baltimore, Maryland; Newark, New Jersey; and East Haven, Connecticut, DOJ imposed remedies for patterns of racially targeted traffic and pedestrian stops.

But DOJ's Section 12601 enforcement has exposed other forms of unconstitutional discrimination, as well. For example, in investigating the New Orleans Police Department, DOJ discovered it provided virtually no translation services. If a citizen of New Orleans asked for police assistance in a [language other than English](#), according to DOJ findings, police routinely failed to [respond](#) to the call. DOJ has also found discrimination because of sex in Section 12601 investigations. For instance, DOJ determined that [New Orleans](#) police consistently declined to [investigate](#) domestic violence and rape because of stereotyped assumptions about female victims. In [Puerto Rico](#), similarly, DOJ found police disregarded sex-related crimes and domestic violence.

Investigation Targets and Investigation Challenges

Attorneys in the [Special Litigation Section](#) at DOJ's Civil Rights Division in Washington, DC, take charge of Section 12601 cases, with occasional support from [local United States Attorneys' offices](#). Some have noted that it can be [difficult for local United States Attorneys' offices](#) to take on cases against police, given their everyday work with local law enforcement.

DOJ relies on media reports, complaints, private litigation, and advocacy groups for leads on potential Section 12601 cases. Some have [criticized](#) the agency for opaque or [unsystematic](#) methods of choosing investigative targets. The Civil Rights Division [takes complaints directly](#) from community members,

judges, police officers, and advocacy groups, but has explained that it is “not a complaint-driven agency.” In addition to these sources, DOJ monitors academic investigative reports, leads from federal agencies, and private litigation. At times, jurisdictions invite DOJ to investigate. Sometimes these invitations amount to whistleblower complaints. But DOJ does not always investigate upon invitation. And critics note that such arrangements may not identify departments in greatest need of reform.

Investigations have sometimes trailed press coverage—as in Ferguson, where a civil investigation followed a decision not to criminally charge officers after a publicized shooting and nationwide protests. The agency has explained that a “high-profile incident—such as a shooting death, a use of excessive force, or a false arrest—standing alone never warrants opening a pattern-or-practice investigation” unless it turns out to be evidence of systematic failure. All in all, given finite resources, DOJ’s Special Litigation Section explains that it “identifies far more jurisdictions that meet the basic criteria for opening an investigation than it is able to investigate.”

Beyond resource questions, other factors may influence DOJ’s decision to initiate a Section 12601 investigation. For instance, some have suggested that evidentiary limitations, such as unreliable data, may prevent DOJ from appropriately targeting its enforcement and initiating Section 12601 investigations. While federal law requires DOJ to compile data on arrest-related deaths and officers’ use of excessive force, the Department’s Bureau of Justice Statistics must rely on self-reporting from the approximately 18,000 police agencies nationwide. Experts examining the Bureau of Justice Statistics’ 2003-2009 and 2011 data concluded that the reports had probably captured only half of relevant deaths. Furthermore, current law limits the Bureau’s ability to share data traceable to a specific person or entity and may restrict DOJ’s ability to use it for targeted enforcement. Currently, the DOJ’s Federal Bureau of Investigation (FBI) collects data on use of force through an initiative started in 2019. FBI plans on releasing the first tranche of data this summer. Because local law enforcement agencies voluntarily report numbers, incidents are undercounted.

Besides data collection, some have suggested that other informational barriers hamper DOJ’s efforts to enforce Section 12601. Many police department policies and some state laws limit public access to police disciplinary records based on privacy concerns, reducing the chance that misconduct will come to DOJ’s attention and that the agency can identify patterns. Some departments require records to be destroyed periodically; in Cleveland, for example, a 2013 collective bargaining agreement required the removal of all disciplinary actions and penalties more than two years old from police personnel files.

Local laws and regulations governing police misconduct investigations may also limit DOJ’s ability to establish a pattern of misconduct. Police departments routinely adopt rules such as imposing delays, sometimes of several days, before supervisors can question officers after an incident. Rules may also require police departments to give officers any available evidence before questioning them. Some departments bar investigation of anonymous complaints. These policies are sometimes enshrined in state-law “law enforcement officers’ bill of rights” statutes, which afford police due process protections unavailable to other public employees. In other instances, state civil service laws or collective bargaining agreements grant similar privileges. Such restrictions on investigation and documentation of potential wrongdoing can make it harder for DOJ to determine whether a pattern of constitutional violations exists. Indeed, even with well-maintained records or access to witnesses, investigators may find it hard to assess misconduct incidents. Because of “the highly unstructured nature of police work” they must often weigh an officer’s account against a civilian’s.

Given these challenges, investigations and reform measures can be wide ranging and expensive—engaging attorneys, paralegals, investigators, consultants, and experts, sometimes for several years.

In a formal investigation, DOJ investigators review records and policies, interview police, contact concerned community members, consult political leaders, meet with unions, and seek out civilian witnesses to alleged misconduct. They may engage statistical experts and employ regression analysis of

traffic stops or use of force. If DOJ concludes that it has uncovered a pattern or practice of unconstitutional behavior, it usually issues a [public findings report](#).

Section 12601 Remedies and Consent Decrees

Where there is a pattern or practice of unconstitutional policing, Section 12601 authorizes “[appropriate equitable and declaratory relief to eliminate the pattern or practice](#).” Thus, unlike a civil suit for monetary damages, Section 12601 requires a court to set rules to correct illegal behavior going forward. The Section aims “[to identify, remedy and even prevent substantive violations](#).” Typically, DOJ and the target jurisdiction negotiate a court-approved settlement—a [consent decree](#)—outlining steps for reform. If the parties cannot agree on appropriate measures, a court may try the case and impose reforms, but Section 12601 cases [rarely go to trial](#). Most consent decrees set up an independent monitoring team, appointed by the court, to review progress and issue reports. For agencies with only minor problems, however, DOJ may issue only a court-enforceable “[memorandum of agreement](#)” or a “[technical assistance](#)” letter of voluntary recommendations.

In designing its settlement orders, DOJ [relies on](#) local leaders, experts, and nationally recognized best practices. Typical provisions include enhanced [training](#), [peer intervention initiatives](#), improved officer-to-supervisor ratios, [hiring](#) programs, increased use of [equipment](#) such as video cameras, and revisions to agency [handbooks and policies](#).

As a police department implements changes, [the monitoring team may track](#) metrics like racial patterns in stops, documented grounds for suspicion supporting searches, and ratios of arrests to charged offenses. The monitoring process can last years—two years is a common goal—[ending](#) only with court approval. If a jurisdiction fails to comply, the court may intervene and even find officials in [contempt](#).

Some have criticized DOJ’s consent decrees in Section 12601 cases, and consent decrees generally, as expensive examples of federal overreach that sometimes distort separation of powers. In Baltimore and New Orleans, for example, the police departments’ reform measures and monitoring may have cost the cities [\\$10 million or more](#). Some complain unlitigated consent decrees can induce local and federal leaders to [collude in a costly solution](#). Even in litigated cases of institutional reform, some contend that “[n]ominal defendants are sometimes happy to be sued and happier still to lose,” escaping political accountability for the results. Court-ordered consent decrees may [circumvent voter approval](#) or typical [budgetary](#) processes, sometimes for years.

Perhaps in response to such criticisms, in 2017, then-Attorney General Jeff Sessions [announced a “course correction”](#) in police work toward providing “technical assistance and support” and away from “expensive wide-ranging investigative assessments.” Citing the importance of local control and officer morale, Sessions stated that “[i]t is not the responsibility of the federal government to manage non-federal law enforcement agencies.” Sessions [ordered an immediate review](#) of pending police matters.

Prosecutorial Discretion and DOJ’s Enforcement History

As with other law enforcement matters, DOJ may use its discretion in whether to pursue litigation, even if facts would support a case. Since 2017, [DOJ has reported no new](#) Section 12601 matters. [Commenters](#) vary in how they quantify Section 12601 enforcement in prior Administrations, employing different ways of assessing DOJ’s activity and dating a case’s beginning. By one observer’s count, DOJ opened [22 investigations](#) during the Clinton Administration and 21 during the George W. Bush Administration. [Another, more recent commentator](#) cites 20 new investigations during the Obama Administration, with 10 during the George W. Bush Administration. DOJ’s [website](#) lists some 23 matters between 2009 and 2016.

While the Trump Administration broke with prior Administrations’ enforcement priorities in forgoing formal investigations, Section 12601 cases were never frequent. As of 2017, DOJ reported that it had

opened [69 formal](#) investigations in the statute’s history. Historically, the DOJ has initiated about [three pattern-or-practice investigations a year](#), with one such investigation leading to [significant structural reform](#) through a detailed consent decree and monitoring. To help put this number in perspective, there are [about 18,000 law enforcement agencies](#) in the nation.

Considerations for Congress

Academics, advocates, and legislators have [proposed](#) many changes to Section 12601, and have identified other reforms that may indirectly enhance Section 12601 enforcement. To the extent that lack of resources hinders investigation, Congress could consider [targeted appropriations](#). Other suggestions for increasing prosecutorial capacity propose giving [state attorneys general](#) or [even private](#) litigants [authority](#) to bring pattern-or-practice cases. To address potential concerns about federal overreach, that right could be limited to those cases when [state law also authorizes](#) suit although such a limitation may not be constitutionally required.

Because information, too, is a barrier to reform, some proposals—most recently the Justice in Policing Act of 2020, [H.R. 7120](#), would [enhance data collection](#) for [police use of force](#), [accredit](#) law enforcement agencies, and [register police misconduct](#) to reveal patterns. H.R. 7120 would [give](#) the Department of Justice [administrative subpoena power](#) in Section 12601 investigations. Mandatory [record-keeping](#) and [retention](#) procedures are among provisions in the legislation.

Other CRS products further describe issues relevant to Congress’s consideration of Section 12601 and its enforcement, including [limits on congressional power](#) to regulate state and local law enforcement; additional [statutes and recent proposals](#); and general [policy considerations](#).

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