Insight

Recent Federal Proposals to Police Reform

TARA O'NEILL HAYES | JUNE 18, 2020

Executive Summary

In the wake of recent deaths and widespread civic unrest, there have been several efforts to reform policing practices. The president has issued an executive order. Next week the House will vote on the George Floyd Justice in Policing Act and the Senate will vote on the Just and Unifying Solutions to Invigorate Communities Everywhere (JUSTICE) Act. While the details of each proposal differ, the elements of a common strategy include:

- Standards to reduce the use of force, in general, and eliminate specific practices such as chokeholds;
- Mandates to collect and transparently display data on incidents and officer misconduct;
- Enhanced federal oversight of policing practices; and
- Training and education in order to reduce racial bias.

Many of the policy changes sought would leverage the existing Community Oriented Policing Services (COPS) and Byrne policing grant funds provided by the Department of Justice by conditioning eligibility for such funds on compliance with the new policies outlined.

Recent Federal Proposals for Police Reform

The recent deaths of several Black individuals at the hands of law enforcement have triggered both widespread protests and calls for police reform. Many states and localities have already passed laws and amended their budgets to address some of the concerns, while others are considering changes. Federal policymakers are looking to make additional,

nation-wide changes, as well.

The president has issued an executive order (EO) that both includes several noncontroversial proposals and creates a baseline for legislative action. Both chambers of Congress are actively considering legislation, too. The following summarizes the EO and then summarizes and compares the House and Senate proposals. Overall, there is significant overlap between the bills in the House and Senate, each of which builds on the directives set forth by the president.

Comparison of the House and Senate Proposals

	H.R. 7120, the George Floyd Justice in Policing Act	**S. 3985, The JUSTICE Act**
Use of Force	Lethal force only permitted when necessary (rather than reasonable); verbal warning must be issued, alternatives exhausted; training on de-escalation required	$350 million to develop training programs on alternative use of force and de-escalation techniques; training not required but agencies must report how many officers complete it
Duty to Intervene When Witnessing Police Misconduct	Applied to federal officers; training on how to intervene required	$500 million provided for intervention training but no duty established for officers
Chokeholds	Made a federal crime and conditions grant funds on state bans	Conditions grant funds on state bans
No-Knock Warrants	Banned for drug cases	Increased reporting on use
Military Equipment	Extremely limited allowances	
Police Misconduct	Creation of National Police Misconduct Registry	Creation of national database for police personnel records
False Police Reports		Punishable up to 20 years
Denial of Rights	Mens rea standard of intent relaxed from “willfully” to “knowingly or with reckless disregard” when an officer has violated a citizen’s rights	

Qualified Immunity	De facto eliminated	
Use of Body Cameras	Required for federal officers; detailed requirements for use of cameras and footage; facial recognition software prohibited	Grant funding conditioned on use of body cameras and discipline for non-compliant officers; standards for use must be developed with community input
Data Collection	Agencies must report quarterly on incidents involving shootings, use of force, deaths, arrests, and bookings, all with demographic data; must report information on stops and searches, with details on race to analyze disparities	Agencies must report annually to FBI's Use-of-Force Database on incidents involving use of force and firearm discharge; failure to comply results in reduced funds
Investigations and Oversight	National oversight taskforce established; Grants DOJ Civil Rights Division subpoena power and State AGs given greater power to conduct practice and pattern investigations; creation of Law Enforcement Accreditation Agencies; grant funding conditioned on use of independent prosecution of officers who use deadly force; funding for civilian review boards	National Criminal Justice Commission established to review criminal justice system and make recommendations for reform, develop best practices guidelines and performance metrics; policing grants funds dependent on meeting benchmarks
Addressing Racial Issues	Training on racial profiling, implicit bias, and procedural justice; racial profiling banned	Funds for hiring/recruiting officers that reflect racial demographics of community; $10 million to develop curriculum to educate officers about history of racism; establish Commission on Social Status of Black Men and Boys to conduct a systematic study of conditions that affect their lives

Lynching	Made a federal crime to conspire to violate existing federal hate crimes laws	Made a federal crime to conspire to violate existing federal hate crimes laws
Closing Law Enforcement Consent Loophole		Makes it a crime for anyone acting under "color of law" (i.e. with the appearance of legal authority) to engage in a sexual act with an individual being held by federal law enforcement; states incentivized to adopt same policy

Executive Order

On Tuesday, June 16, 2020, President Trump issued an Executive Order on Safe Policing for Safe Communitiesexecutive order (EO) on Safe Policing for Safe Communities. The EO includes several broadly supported, non-controversial directives and sets a baseline for further work by Congress.

The order directs the attorney general (AG) to disburse federal policing grants from the Department of Justice (DOJ) only to those police departments that seek independent credentialing from a reputable independent body certified by the AG. Credentialing bodies should consider an agency's policies and training regarding use of force and de-escalation, performance management tools for identifying officers who may require intervention, and best practices regarding community engagement, and must confirm an agency's policies adhere to all applicable laws and that the use of chokeholds is prohibited, except when the use of deadly force is allowed by law.

The AG is directed to create a database to facilitate the sharing of information between law enforcement agencies regarding instances of excessive use of force, as well as information pertaining to officers' termination or de-certification (or resignation or retirement in the middle of an investigation), criminal convictions for on-duty conduct, and civil judgements for improper use of force. The AG would be required to regularly make this information public but only after aggregating and anonymizing the data. Agencies that fail to submit the required data would be ineligible for funding.

The AG is instructed to identify and develop opportunities to train law enforcement officers on how to engage with individuals suffering from impaired mental health, homelessness,

and addiction. The AG is also instructed to work to increase the capacity of social workers working directly with law enforcement and provide guidance for developing and implementing co-responder programs.

The secretary of Health and Human Services is directed to survey and report to the president on community-support models and provide recommendations on how funds can be reallocated (or recommendations on new funding needed) to support more widespread adoption and implementation of successful models.

Finally, the AG and presidential policy advisors must propose to Congress legislation that could enhance the tools and resources available to improve community engagement by law enforcement agencies. The legislation should also include recommendations to improve training on the adoption and implementation of improved use-of-force and de-escalation techniques, retention (and recruitment) of (likely-to-be) high performing officers, confidential access to mental health services for law enforcement officers, and programs aimed at improving relationships between law enforcement agencies and the communities they serve.

Legislative Proposals

House Democrats and Senate Republicans have each introduced their own pieces of legislation on police reform, and there is significant overlap between the bills. Both seek to improve police accountability, impose national operating standards to reduce the use of force, and mandate data collection to study and improve transparency. Many of the policy changes sought would leverage the importance of the Community Oriented Policing Services (COPS) and Byrne policing grant funds provided by the DOJ by conditioning eligibility for such funds on compliance with the new policies outlined. In 2020, the COPS program is providing state and local law enforcement agencies with $343 million. In 2019, $424 million was appropriated for Byrne grants.

H.R. 7120, the George Floyd Justice in Policing Act, was introduced by Rep. Karen Bass (D-CA) and is expected to be considered by the House next week. The JUSTICE Act, introduced by Senator Tim Scott (R-SC), is expected to be considered by the Senate next week.

Use of Force

Under H.R. 7120, the use of a chokehold would be a federal civil rights violation. To incentivize states to ban chokeholds and carotid holds—holds or maneuvers that disrupt, prevent, or hinder breathing or restrict blood or oxygen flow to the brain—funding under the COPS and Byrne grants programs would be restricted to states that have outlawed such holds or maneuvers. Further, an act would be considered to result in death if it is a

substantial factor contributing to one's death.

Under the PEACE Act provisions of H.R. 7120, federal law enforcement would be prohibited from using lethal force unless it is necessary (a change from the current "reasonable" standard) as a last resort to prevent imminent and serious bodily injury or death to the police officer or another person; it creates no substantial risk of injury to a third person; and reasonable alternatives have been exhausted. When feasible, a verbal warning must be issued in advance and must include a request to surrender. Federal law enforcement officers would also have a duty to intervene when another officer is using excessive force against a civilian and a training program must be developed to teach officers how to intervene.

H.R. 7120 would require the attorney general (AG) to issue guidance, in consultation with others from the community, on how to assess when force is necessary and how to ensure the use of the least amount of force that is necessary and appropriate. Officers would be required to take special training to learn how to deal with pregnant women; minors; the elderly; persons with mental, physical, and behavioral disabilities; people under the influence; people suffering from a serious medical condition; and people with limited English proficiency. An officer would not be able to use as a justifying defense that use of force was necessary if the officer's gross negligence prior to the use of force contributed to its necessitation.

The JUSTICE Act would incentivize bans on chokeholds—defined as any physical maneuver that restricts an individual's ability to breathe for the purposes of incapacitation—by conditioning all funds provided through the COPS and Byrne grant programs on a state or locality imposing a ban. Again, because of how much agencies rely on these grant programs, it is expected that such a condition of funds would effectively result in bans across the country.

No-Knock Warrants

H.R. 7120 would ban no-knock warrants in drug cases at the federal level, and funds would not be available to state and local governments under the COPS grant program if they have not implemented a similar ban on no-knock warrants.

The JUSTICE Act would not go so far as to ban no-knock warrants but would instead require better reporting on their use. Through the Breonna Taylor Notification Act provisions, states would be required to report and make public information pertaining to non-knock warrants, including, among other things, the reason the warrant was issued, whether force was used while carrying out the warrant and whether anyone was injured, and demographic

information of all people present during the search. Through the AG, $112 million in grants would be made available to assist in complying with these requirements.

Acquisition of Military Equipment

H.R. 7120 would reform the 1033 program, which allows for the transference of military equipment to local law enforcement. Localities would be required to obtain approval from the city council or other appropriate local authority and notify the public at least 30 days in advance of receiving any military equipment, though most items, including various types of weapons and vehicles, would be newly prohibited from transference under this program and these limitations would apply to any previously transferred property, implying that any items previously transferred that are now banned must be returned . The new prohibition pertaining to vehicles (except for mine-resistant ambush-protected vehicles) may be waived if it is determined that a waiver is necessary for disaster or rescue purposes. Any inability to account for 100 percent of transferred property from one year to the next would result in the locality being prohibited from further participation in the program.

Police Accountability and Transparency

H.R. 7120 would include the establishment of a public National Police Misconduct Registry that must include information pertaining to every complaint filed against a law enforcement officer, as well as records of discipline, termination, lawsuits, and settlements. States would be responsible for updating the registry every 6 months, and all Byrne grant funds would be subject to compliance with state certification requirements.

The JUSTICE Act would require law enforcement agencies to maintain for 30 years records pertaining to officers' disciplinary actions, internal investigations, and awards and commendations, and such records must be made available to other government entities. Before hiring a law enforcement officer, the agency would be required to search the database and, if any records for the officer being considered exist, review those records in their entirety before making a hiring decision. COPS and Byrne grant funds would be restricted for any agency not in compliance, and $100 million would be provided for assistance with these requirements.

False Police Reports

Under the JUSTICE Act, anyone, including law enforcement officers, who knowingly and willfully falsifies a police report in a material way when death or seriously bodily injury has occurred would be fined and/or imprisoned for up to 20 years, and sentencing guidelines would be increased such that the penalty is increased at least 4 offense levels.

Citizen Denial of Rights and Qualified Immunity

H.R. 7120 would change several existing judicial standards in the public's favor. The mens rea standard (which has to do with the intentionality of the act) regarding the denial of rights under the "color of law" (i.e. with the appearance of legal authority) would be amended such that a violation would no longer require that an officer "willfully" denies an individual their rights, but more simply does so "knowingly or with reckless disregard." Qualified immunity would essentially be eliminated as it would no longer be possible for a law enforcement officer to rely on a defense that he or she was acting in good faith or believed (reasonably or not) their action was lawful at the time; or that the law was unclear and the officer could not have been expected to know whether the conduct was unlawful. This change will allow individuals to recover damages in civil court when their constitutional rights are violated. (Existing union contracts, however, may make this change difficult, if not impossible, to achieve.)

Use of Body Cameras

H.R. 7120 would require federal uniformed officers to wear a body camera, which must have a field of view as broad as the officer's vision. Audio and video recording would be required most of the time with few exceptions, such as to protect undercover agents and national security. Under certain circumstances an officer should ask if the individual wants the officer to deactivate the camera, such as before entering a private residence without a warrant, when interacting with an apparent crime victim, and when interacting with an individual seeking to anonymously report a crime or assist in an ongoing investigation. Facial recognition software would be prohibited (with few exceptions). Footage must be kept for 6 months and then permanently deleted. The following individuals would have the right to inspect the video: any person who is the subject of the footage or their legal counsel; the parent of a minor who is the subject; the spouse, next of kin, or legally authorized designee of the deceased subject or their legal counsel; the officer who recorded the video or their legal designee; the superior officer of the recording officer; and any defense counsel who has a written affidavit that they believe the footage may exculpate a client. Any of these individuals may request that the video be kept for at least three years. If the video is of an encounter in which there was use of force or a complaint registered by a subject of the video, it must be kept for three years. Any video in which the subject is shot, grievously injured, or recorded being killed must be provided to the requestor within 5 days. A recording officer may not view the footage before completing any necessary initial reports, statements, or interviews. Car dash cameras must also be used and video should be stored for at least 90 days.

The JUSTICE Act would establish a new Body-Worn Camera Partnership Grant program to

fund the purchase of cameras and necessary technology and to develop policies and provide training for their use. In order to receive funds, a jurisdiction's policies must be developed with input from the community, including prosecutors and individuals representing crime victims; require the camera be activated whenever an individual is being arrested or detained, with consideration of sensitive cases; apply discipline to any officer intentionally violating the policy; require training; provide clear standards for privacy, data retention, and use for evidentiary purposes; and make footage available to the public without compromising an ongoing investigation, violating a third party's privacy, and with consideration for a victim and any surviving family. The $500 million in funds provided should supplement, not supplant, existing funds, and may not exceed 50 percent of the costs. Any state that fails to comply with the requirements pertaining to camera use and discipline for non-compliant officers would have their police grant funds reduced by up to 20 percent in the first year and up to 25 percent in subsequent years of non-compliance, and these funds would then be reallocated to other compliant states.

Data Collection

H.R. 7120 would require state and federal law enforcement agencies to report quarterly on shootings of civilians by law enforcement (including school resource officers) and vice versa, any incident involving the death or arrest of a law enforcement officer, any incident of use of force by or against an officer, any deaths in custody, and arrests and bookings. A host of significant details of the event as well as various demographic details would be required. Failure to report this information would result in up to a 10 percent reduction in Byrne grant funds.

H.R. 7120 would also require states to provide to a public federal database information on law enforcement practices related to traffic stops, pedestrian stops, and frisk and body searches, racial distribution of drug charges, and use of deadly force by and against law enforcement. Data would also be collected and publicly reported pertaining to incidence rates of stops and searches to analyze disparities in hit rates and the frequency of searches of minorities. The Government Accountability Office would be required to conduct a study on federal law enforcement training, vehicle pursuits, use of force, and interaction with citizens.

The George Floyd and Walter Scott Notification Act provisions within the JUSTICE Act would require state and local law enforcement agencies to report annually to the Federal Bureau of Investigation's National Use-of-Force Data Collection on incidents involving use of force that resulted in death or serious bodily injury and, when a firearm was discharged, whether a law enforcement officer is the one acting or being acted upon. Failure to do so would result in the state initially facing up to a 20 percent reduction in federal police grant

funds and up to a 25 percent cut in subsequent years; lost funds would be reallocated to states that have complied.

Investigations and Oversight

H.R. 7120 would establish a national task force on law enforcement oversight, and the DOJ Civil Rights Division would be given subpoena power. The legislation calls for the creation and review of Law Enforcement Accreditation Agencies. The AG would be required to conduct an analysis of existing policing practices, based on the recommendations of the Taskforce on 21st Century Policing, commissioned by President Obama in May 2015. The AG should then develop uniform national standards related to early warning systems and intervention programs, use of force and civilian review procedures, traffic and pedestrian stop-and-search procedures, data collection and transparency, administrative due process requirements, video monitoring technology, juvenile justice and school safety, training, and other areas as needed.

H.R. 7120 would provide significant funds to improve oversight, increase prosecutorial powers, and develop best practices. State AGs would be provided $300 million in grants to conduct pattern and practice investigations. The COPS program would be amended to allow its use for the development of best practices. States without laws in effect requiring the use of independent prosecution of law enforcement officers who use deadly force that results in death or bodily injury would be prohibited from accessing $2.25 billion in new grant funding to assist in implementation of such a law.

Byrne grant recipients would be required under H.R. 7120 to use at least 5 percent of grant funds to study and implement effective management, training, recruiting, hiring, and oversight standards to implement effective community and problem-solving strategies. Performance evaluations must be conducted periodically, and funding would be reduced or revoked if a grant recipient is not compliant.

Under H.R. 7120, COPS grant funds could be used to create civilian review boards. These boards must be independent and adequately funded, have investigatory authority and staff subpoena powers, reflect community diversity, have policymaking authority, provide advocates for civilian complainants, have power to conduct hearings, and conduct statistical studies on common complaints.

The JUSTICE Act would establish The National Criminal Justice Commission to perform a comprehensive review of the criminal justice system, disseminate findings, and make recommendations for reform to the president and Congress. The 14-member commission representing a broad array of expertise would be required to hold public hearings and

consult with various professional and civilian stakeholders, including among others the U.S. Sentencing Commission, public health officials, criminologists, and formerly incarcerated individuals. The report should include the input received from the various parties consulted. No individual would be eligible for appointment to the commission if they have a personal financial interest in the work of the commission. $14 million would be provide for carrying out the work of the commission.

The commission would also be tasked with developing best practices guidelines for fair and effective policing tactics that encourage equitable justice, community trust, and law enforcement safety, as well as best practices for developing standards for law enforcement officer due process. The commission would study the establishment and operation of use-of-force review boards that allow citizen input, law enforcement officer training, crisis intervention teams, co-responder programs, personnel requirements, federal resources, and pilot programs needed to improve nationwide law enforcement engagement on issues related to mental health, homelessness, and addiction.

The commission would be required to study and submit a proposal for improving accountability for law enforcement agencies that receive DOJ grants and to develop discrete performance metrics and establish benchmarks. States would be required to report their performance annually, and failure to meet the benchmarks would constitute a violation of the terms of the grant agreement. If that violation was not resolved within 90 days, the recipient would not be eligible for the grant the following year.

Improving Police Training and Policies

H.R. 7120 would prohibit racial and religious profiling, though there are no specific details on what that means or specific policies to stop. Agencies would be required to use 10 percent of funds to develop and implement best practices to eliminate racial profiling. If profiling practices are not stopped, funds would be restricted. The federal AG would be required to establish a training program on racial profiling, implicit bias, and procedural justice; this training would be mandatory for federal law enforcement officers and state and local agencies would not be eligible for federal funds if they do not require all officers to participate in such training annually. Funds from COPS grants would be used to support the development of best practices and local task forces on policing innovation. Training on de-escalation techniques and best practices for crisis intervention teams should also be developed.

The JUSTICE Act would require the development of training programs by the AG in consultation with law enforcement agencies, labor organizations, professional law enforcement organizations, and behavioral health organizations. Training programs must

teach methods for de-escalation and alternative uses of force, as well as how to deal with individuals with behavioral health challenges. These programs would have to be certified and law enforcement agencies would be required to publish the number of officers who have completed the training. Grant funding of $350 million would be available to develop and provide this training. Another $500 million would be provided for the development and provision of training officers on the duty to intervene, though no federal duty to intervene would be established.

The JUSTICE Act would allow funds from federal policing grants to be used to hire and recruit law enforcement officers and candidates that better reflect the racial and ethnic demographic characteristics of the community. $10 million would be provided under the JUSTICE Act to the director of the African American History and Culture Museum to develop and nationally disseminate, in consultation with the National Law Enforcement Museum, a curriculum to educate law enforcement officers about the history of racism in the United States. Funds could also be used to provide training on racial reconciliation, improving relationships between law enforcement and the communities they serve, and training officers who can effectively train their peers. Educational resources should also be made available online.

Lynching

Both pieces of legislation would define and make lynching a federal crime: Anyone who conspires with someone to commit a hate crime or violate someone's federally protected rights to engage in various activities would be punished in the same manner as the individual who committed the crime, with up to 10 years in prison.

Closing the Law Enforcement Consent Loophole Act

The JUSTICE Act would make it a crime, subject to up to 15 years in prison and a fine, for any person acting under the color of law to knowingly engage in a sexual act with an individual being held by a federal law enforcement officer; consent would not be an allowed defense. States would be incentivized to adopt the same measures by increasing grant amounts to states that also make such acts a crime and report to Congress information pertaining to any offenses or allegations.

Commission on the Social Status of Black Men and Boys

The JUSTICE Act would establish the Commission on the Social Status of Black Men and Boys within the U.S. Commission on Civil Rights. The commission would be tasked with conducting a systematic study of the conditions that affect the lives of Black men and boys, including crime and incarceration rates, poverty, violence, fatherhood, mentorship, drug

abuse, death rates, disparate income and wealth levels, school performance, and health issues. The commission should report annually on trends and the impact of relevant government programs, and then make recommendations to improve conditions and accept comments from both government officials and members of the public.