



# NATIONAL DISTRICT ATTORNEYS ASSOCIATION

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## **NDAA Policy Recommendations on Improving the Criminal Justice System**

ARLINGTON, VA – The murder of George Floyd has sparked a national conversation on reforming policies governing the criminal justice system to ensure all Americans are treated equally under the law. Prosecutors across the country are proud to serve with the over 800,000 sworn law enforcement officers in this great nation, who stand for, represent, and defend our communities. But, we are emphatically in the accountability profession, and it is appropriate after any tragic failure that we re-examine how we can constantly improve law enforcement and prosecution policies and practices to be better both individually and systemically.

No matter how much the law enforcement community may believe that it is deserving of the public's trust, we accept that trust must be earned, and we are committed to doing what we can, with what we have, from where we are, to re-earn the trust that has been lost. Therefore, our membership recognizes now is not the time for an incremental approach and we join in the call for reforms that will have real impacts in addressing racial bias and systemic inequality within our justice system. In doing so, we hope to build on the innovative and productive approaches by our members that have had such positive results in their own communities.

As Federal, state, local, and tribal lawmakers take steps to ensure the effective and fair administration of justice, NDAA recommends the following policy guidelines to assist lawmakers in the urgent challenge of improving the law enforcement community as it serves the public good.

**Adopting Best Practices in Independent Investigations & Appointments of Prosecutors:** Our members recognize the importance of avoiding conflicts of interest to ensure an investigation into the potential criminal misconduct of a law enforcement officer is conducted with integrity and independence. Thus, prosecutors should take reasonable steps to avoid conflicts when investigating those law enforcement agencies in their jurisdictions that they interact with on a daily basis. NDAA is supportive of enacting systems and providing resources to allow a state or local prosecutor to transfer jurisdiction when appropriate. However, we are concerned about calls for special appointments of prosecutors or automatic transfers to a State Attorney General's office. The elected prosecutor of the jurisdiction involved is in the best position to seek justice for the members of that community; indeed, that prosecutor has been elected by the constituents to do precisely that. In cases where a special prosecutor may be necessary, these appointments can involve incentives that violate the principles of fairness and impartiality, including paying independent prosecutors by the hour or where compensation may depend on particular charging decisions. Instead, these conflicted cases can be handled appropriately through memorandums of understanding between jurisdictions within a state or another process that provides adequate resources to ensure an independent state or local prosecutor's office can take over the investigation when appropriate. Prosecutions involving the criminal misconduct of police officers are some of the most difficult cases to try. When prosecutors are called upon to review use of force incidents, they can only file charges if the amount of force used was illegal; prosecutors cannot charge an officer who may have used force that was ill-advised. There is no pool of more capable, experienced, dedicated trial lawyers than state and local prosecutors. By ensuring that an impartial state or local prosecutor is provided the resources and support to review police misconduct, our members are confident they can hold bad actors within the law enforcement community accountable.

- **Funding to Improve Communities & Criminal Justice Responses:** Our members enthusiastically support increased funding for a wide variety of community programs that address social justice issues long before individuals come into contact with the criminal justice system. However, the reprioritization of law enforcement funding must be preceded by investment, not the other way around. Prosecutors have been fighting for decades for increased funding for a wide variety of services designed to divert people from the criminal justice system. Unfortunately, past efforts by state legislatures and local governments to save money has left law enforcement as the primary responders to challenges involving mental health and substance use problems, among others. In the absence of dedicated programming and social services, prosecutors have attempted to adopt innovative programs to reverse the trends of justice system involvement for those struggling with substance use or mental health issues. Yet, gaps still remain in the services available to our communities, leaving law enforcement as the only responsible actor and jail as the last remaining facility to deal with problems ranging from truancy and homelessness to suicide and addiction. Legislators across the country should take proactive steps to reverse policies that defunded social services to ensure law enforcement is not the de-facto first responders. Further, Congress can assist in ensuring prosecutors and law enforcement receive the training necessary to assist our community partners in taking on these societal challenges. Increasing the federal grants available to state and local prosecutors, as well as law enforcement agencies, to design trainings and develop programs to address these growing problems will move our Nation's criminal justice system in the right direction. NDAA calls upon Federal, state, local, and Tribal lawmakers to avoid rhetoric calling for the "defunding" of police agencies and instead increase funding and resources to programming both inside and outside the criminal justice system to improve both prevention and intervention for individuals suffering from issues such as mental illness or substance use in our communities.
- **Clarifying Use of Force Guidelines & Increasing Training:** Prosecutors recognize the challenging circumstances that empower law enforcement officers to use force, when necessary, to respond to an imminent threat of danger. However, this use of force must be applied with utmost discretion accounting for Constitutional requirements and the safety of all those involved. Excessive use of force in these incidents can deteriorate the law enforcement community's relationship with those they serve. Law enforcement agencies should take reasonable steps to limit the use of chokeholds and carotid strikes when officers are in contact with a suspect, while applying best practices when invoking any use of force that could cause substantial bodily harm or death. Our members support improved, detailed guidelines regarding when the use of force is appropriate, specifically in instances involving deadly force, as well as mandatory training on proportionality in the use of force and de-escalation tactics to improve the ability of law enforcement to serve their communities. Lawmakers can support this effort by providing incentive-based funding and grant programs to ensure law enforcement officers receive necessary training to reduce incidents involving the deadly use of force.
- **Improving Data Collection & Transparency:** Public calls for the law enforcement community to provide increased transparency have not gone unheard by prosecutors across the country. Increased data points and public access to detailed information can assist in holding law enforcement officers and agencies accountable to the communities they serve. Specifically, our members support the collection of data on officers with prior incidents of misconduct in a way that respects privacy and due process but also ensures that the information can be shared across jurisdictions so bad actors are held accountable. In addition, our members are open to contributing to these increased data collection efforts through advocating for additional resources to assist in gathering more information on criminal prosecutions into law enforcement officers and the use of "Brady lists" that identify problem-officers who may not be fit to testify during a criminal proceeding. Prosecutors must also be able to obtain access to this new data stream in order to effectively hold our policing partners accountable. Policymakers should ensure that prosecutors are provided with the authority to require our law enforcement partners to provide us with the necessary data and evidence that will allow for meaningful oversight. Our members are also in support of increased calls to ensure law enforcement officers are equipped with body-worn cameras and that this footage is reviewed in a timely, transparent manner. This cannot be accomplished without sufficient funding for state and local prosecutors to ensure they have the staff and resources available to review the hours of footage an officer's camera may collect. Finally, prosecutors continue to advocate for increased collaboration between law

enforcement agencies and the communities they serve. Whether through advisory panels or citizens academies, funding to support public programming will assist in strengthening the bonds between a community and those that serve to protect its members. As lawmakers examine improved data collection and transparency efforts, it is important to note that NDAA opposes decreasing the already limited federal grant funds available for state and local prosecutors and law enforcement. Congress can assist in achieving these goals by providing additional funding to strengthen existing data collection efforts and creating new incentives for State, local, and Tribal law enforcement to improve transparency with the communities they protect.

- **Addressing Qualified Immunity:** Prosecutors are uniquely positioned to understand the challenges involved with removing qualified immunity protections from law enforcement officers. According to current law, qualified immunity applies so long as law enforcement does not violate “law [that] was clearly established at the time an action occurred.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Some policymakers have called for the complete removal of this immunity protection or the application of a simple negligence standard to hold law enforcement officers civilly liable. These changes would place officers in an untenable situation of choosing between, “being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.” *Scheuer v. Rhodes*, 416 U.S. 232, 245 (1974). Our members support reforms to the qualified immunity doctrine that allow for civil liability only in appropriate circumstances, something that could be accomplished, for example, by revisiting the “clearly established” prong of the current legal standard. However, a drastic change in the qualified immunity doctrine would have the unintended consequence of decreasing public safety, while simultaneously discouraging talented recruits from joining law enforcement agencies.
- **Continuing Reform Efforts:** NDAA remains committed to advocating for changes to our criminal justice system that have long been supported by prosecutors. Our members are confident that we can use this movement to push forward important legislation such as restoring access to Pell grants for incarcerated students, closing the law enforcement loophole to prohibit officers from using consent as a defense when accused of sexually assaulting a person in their custody, and ensuring victim notification is consistent and mandated throughout the criminal justice system. We will also continue to expand use of rehabilitative courts, restorative justice models, and diversion programming. Prosecutors have long been on the front lines of reform and remain committed to pushing these and other changes to improve how law enforcement serves those who we are entrusted to protect.

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*Formed in 1950, NDAA is the oldest and largest national organization representing state and local prosecutors in the country. With more than 5,000 members representing over two thirds of the state and local prosecutors’ offices, NDAA is recognized as the leading source of national expertise on the prosecution function and is a valuable resource for the media, academia, government, and community leaders. NDAA’s mission is to provide state and local prosecutors with the knowledge, skills, and support they need to ensure that justice is done and that public safety rights are protected.*