We (Gail Heriot and Peter Kirsanow) are issuing this statement as two members of the eight-member bipartisan Commission on Civil Rights, and not on behalf of the Commission as a whole, in response to "U.S. Commission on Civil Rights Urges Department of Justice to Use All Available Tools to Work with Police Departments to Ensure Constitutional Policing." In that statement, our colleagues said that a memorandum from the Attorney General asking the Deputy Attorney General and Associate Attorney General to re-evaluate certain Department activities involving law enforcement, including consent decrees, sends a message that "reform agreements… may be in jeopardy."

First, our colleagues' concerns are premature. The memorandum has asked only for a review of these activities. We do not know yet what the outcome of the review will be.

The Commission correctly notes that an existing consent decree binds both parties until a new agreement is negotiated and that agreement is approved by a judge. But that does not mean that the Department of Justice cannot review its existing consent decrees and try to negotiate new agreements. Indeed, if there are consent decrees that are not serving the public interest's in securing justice, the Department is ethically obligated to review and revise them.

Second (and more important), our Commission colleagues appear to be confused about federalism. Although they state they are "concerned that the Attorney General's memorandum points to a deeper misunderstanding of the federal government's role with respect to state and local law enforcement," it is the Commission statement that actually misunderstands the federal government's role with respect to state and local law enforcement. The Attorney General's memorandum states that "It is not the responsibility of the federal government to manage non-federal law enforcement agencies." The Commission sees this statement as in tension with the fact that in 1994, Congress enacted a statute giving the Department of Justice with authority to bring pattern and practice investigations for systematic violations of constitutional rights within police departments. We agree with the memorandum that the federal government should not ordinarily be attempting to micromanage the affairs of state and local police departments from afar. Instead, generally police departments should be left to manage themselves. But we also acknowledge that there are cases of systematic violations of constitutional rights in which the federal government has the authority to intervene under the 1994 statute. We see no tension between acknowledging the norm of local control and some exceptions where federal intervention is appropriate.

Testifying as part of a congressional panel, Chair Lhamon went beyond the Commission's statement and said that "It was the height of arrogance to issue that memo." We are not convinced.