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Legal Sidebar

Congress and Law Enforcement Reform: Current Law and Recent Proposals

June 4, 2020

In May and June 2020, protests erupted nationwide after the publication of video footage of a Minneapolis police officer pressing his knee into the neck of George Floyd, leading to his death. That incident and its aftermath have sparked heightened interest in Congress's ability to implement reforms of state and local law enforcement.

As a companion to this Sidebar outlines in greater detail, congressional power to regulate state and local law enforcement is not without limits. The Constitution grants the federal government only certain enumerated authorities, with the Tenth Amendment reserving all other powers for the states. The regulation of state and municipal law enforcement is an area that the Constitution generally entrusts to the states. However, Congress possesses some authority to legislate on that subject, primarily through statutes designed to enforce the protections of the Fourteenth Amendment and legislation requiring states to take specified action in exchange for federal funds disbursed under the Spending Clause. This Sidebar provides an overview of existing federal statutes intended to prevent and redress constitutional violations by state and local public safety officials. It then presents some recent proposals that would change federal regulation of state and local law enforcement.

Federal Regulation of State and Local Law Enforcement

Existing federal remedies for constitutional violations by state and local law enforcement include civil and criminal enforcement by the U.S. Department of Justice (DOJ) and private suits by individuals deprived of their rights by someone acting "under color of" state law. In addition, the federal government encourages states to enact certain policies related to law enforcement by placing conditions on federal funding. Federal agencies also independently investigate and gather data on law enforcement activities.

Federal Criminal Law

A provision of the federal criminal code, 18 U.S.C. § 242 (Section 242), makes it a crime for (among other things) a person acting "under color of any law, statute, ordinance, regulation, or custom" to "willfully subject[ ] any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States[.]" A simple violation of the statute is punishable by a fine and/or up to a year in prison. If bodily injury results, the offender may be fined

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LSB10486

and/or imprisoned for up to ten years. If death results or other aggravating factors are present, Section 242 provides for a fine and/or imprisonment for ten years to life or a death sentence (though the Constitution forbids imposition of the death penalty for non-homicide offenses). A related provision, 18 U.S.C. § 241 (Section 241), makes it a crime for "two or more persons [to] conspire to injure, oppress, threaten, or intimidate any person . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States[.]" Violations of Section 241 are punishable by up to ten years in prison or, if certain aggravating factors are present, up to life in prison or death.

The Supreme Court has held that "officers of the State . . . performing official duties," including public safety officials, act "under color of . . . law" for purposes of Section 242. As DOJ has explained, law enforcement officers may violate Section 242 through "excessive force, sexual assault, intentional false arrests, theft, or the intentional fabrication of evidence resulting in a loss of liberty to another." DOJ enforces Sections 241 and 242 by bringing criminal charges against officers accused of violating those statutes. People who believe their rights have been infringed may report such violations to DOJ, but Sections 241 and 242 provide no private right of enforcement. Notably, if DOJ elects to pursue criminal charges under Section 242, it faces a high standard of proof: in *Screws v. United States*, the Supreme Court held that to show a violation of a prior statute whose wording mirrored that of Section 242, the prosecution must prove the defendant had "a specific intent to deprive a person of a federal right made definite by decision or other rule of law." The Supreme Court extended this holding to Section 241 cases in *United States v. Guest*. In practice, the specific intent requirement requires the prosecution to prove that a local official intended to violate a federal right, as opposed to simply intending to, for example, assault a victim. This results in what some view as a significant hurdle to bringing Section 241 and 242 claims.

DOJ Civil Enforcement

Another section of the U.S. Code, 34 U.S.C. § 12601 (formerly codified at 42 U.S.C. § 14141) renders it "unlawful for any governmental authority, or any agent thereof, . . . to engage in a pattern or practice of conduct by law enforcement officers or by officials . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." According to DOJ, potential violations of this provision include "excessive force, discriminatory harassment, false arrests, coercive sexual conduct, and unlawful stops, searches or arrests." DOJ enforces this provision by filing civil complaints against allegedly offending law enforcement agencies. The statute does not create a private right of action (*i.e.*, a right for individuals harmed by violations to sue). Moreover, because the law applies only to a "pattern or practice of conduct," it cannot remedy isolated instances of misconduct. Finally, the statute does not provide for monetary penalties. If DOJ successfully sues under the provision, it may "obtain appropriate equitable and declaratory relief to eliminate the pattern or practice."

Private Civil Rights Litigation

Federal law also allows individuals to seek civil redress for violations of their legal rights. The applicable statute, 42 U.S.C. § 1983 (Section 1983), provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured[.]

Unlike the foregoing statutory provisions, Section 1983 creates a private right of action, meaning that anyone suffering a covered deprivation of rights may sue the persons responsible. Moreover, unlike Sections 241 and 242, courts have interpreted Section 1983 *not* to contain a specific intent requirement. A prevailing Section 1983 plaintiff may be entitled to injunctive relief, attorney's fees, and/or money damages. Recovery may include both compensatory damages (designed to make the plaintiff whole and

compensate for the legal injury) and punitive damages (designed to punish the defendant and deter future, similar misconduct).

Similar to Section 242, Section 1983 applies to persons acting "under color of" state law. State and local public safety officers generally act under color of state law for purposes of Section 1983: as the Supreme Court has stated, "a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law." However, law enforcement liability under Section 1983 is subject to a significant judicially created limitation: based on concerns that frequent litigation could interfere with the work of law enforcement officers, the Supreme Court has held that law enforcement officers benefit from *qualified immunity* from suit. The Supreme Court announced the modern qualified immunity test in *Harlow v. Fitzgerald*, holding that "government officials performing discretionary functions, generally are shielded from liability for civil damages" if they do not "violate clearly established statutory or constitutional rights of which a reasonable person would have known."

The Supreme Court has explained that qualified immunity is "an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." As a result, courts generally consider qualified immunity early in a Section 1983 case, and a defendant whose qualified immunity defense is denied is entitled to an immediate interlocutory appeal. A court evaluating a claim of qualified immunity considers two questions: (1) whether, viewed in the light most favorable to the plaintiff, "the facts alleged show the officer's conduct violated a constitutional right"; and (2) "whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case." While that two-step analysis was once considered mandatory, in the 2009 case *Pearson v. Callahan*, the Supreme Court held that judges could "exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first." In a series of recent cases involving police use of force, the Roberts Court has reversed lower court denials of qualified immunity, stating that "clearly established law" must not be defined at a high level of generality and instead needs to be particularized to the facts of the case, which can amount to a high bar for plaintiffs to overcome.

Grant Conditions and Federal Oversight

The federal government provides financial support to state and local law enforcement in the form of grants, and may require states to enact certain policies to qualify for such funding. As one example, the Edward Byrne Memorial Justice Assistance Grant (Byrne JAG) Program provides federal support for state and local criminal justice programs. Among other conditions, states that receive Byrne JAG funding must certify compliance with the Death in Custody Reporting Act (DCRA). Enacted in 2014 the DCRA requires states to report to the Attorney General certain information regarding the deaths of individuals in the custody of law enforcement agencies. Byrne JAG grants have also have been used to train officers on use of force and de-escalation of conflict. In addition to guiding state and local law enforcement policy through grant funding, federal government agencies independently collect data related to the use of force by state and local law enforcement.

Proposals for Law Enforcement Reform in Congress

Even before the high-profile events of May and June 2020, commentators and legislators had made numerous proposals for congressional reform and oversight of state and local law enforcement. This section provides a sample of proposals in this area.

Qualified Immunity

Qualified immunity has been the subject of significant debate in recent years. A May 2020 report by Reuters found that "since 2005, the [federal appellate] courts have shown an increasing tendency to grant

immunity in excessive force cases." Critics of qualified immunity assert that the test the Supreme Court announced in *Pearson v. Callahan* improperly hinders Section 1983 claims. Not only is it difficult for plaintiffs to overcome a claim of qualified immunity, these commentators assert, but furthermore courts often consider *only* whether a defendant violated clearly established law, without reaching the question of whether the defendant violated the plaintiff's rights—albeit in circumstances courts have not yet assessed. Legal commentators have argued that this limited inquiry prevents the development of clearly established law that could govern future Section 1983 cases. Some commentators also assert that the current doctrine of qualified immunity fails to protect law enforcement officers from suit. Others defend the doctrine or favor limited judicial reforms, asserting the need to afford police officers some level of deference when making split-second decisions about the use of force, for example to subdue a fleeing or resisting suspect.

The doctrine of qualified immunity arises from the Supreme Court's interpretation of Section 1983. Thus, either the Court or Congress could modify the doctrine, and some legal scholars have called on both branches to address the issue. The Court is currently considering multiple petitions for certiorari raising challenges to qualified immunity, and Justice Thomas and Justice Sotomayor have both expressed concerns about the doctrine. On the legislative side, in May and June 2020, Reps. Justin Amash and Ayanna Pressley announced their intention to introduce legislation that would "eliminate" qualified immunity.

Criminal Liability

While changes to the doctrine of qualified immunity could alter *civil* liability for law enforcement officers, other proposals would aim to expand *criminal* liability for civil rights violations by officers. For example, the Eric Garner Excessive Use of Force Prevention Act of 2019 would amend Section 242 to provide explicitly that "the application of any pressure to the throat or windpipe which may prevent or hinder breathing or reduce intake of air is a punishment" that may not be imposed on a racially disparate basis. The Police Accountability Act of 2020 would amend the federal criminal code to provide a penalty for assault or homicide committed by certain state or local law enforcement officers. Some commentators also advocate removing the specific intent requirement for Sections 241 and 242 announced in *Screws* and *Guest*.

Limitations on Military-Grade Equipment

Under a federal program known as the 1033 Program, the federal government transfers certain excess military equipment to state and local law enforcement agencies. Some commentators contend that this type of equipment contributes to militarization of police forces without increasing public safety and increases the risk of incidents of excessive force. The 1033 Program is authorized by statute, so Congress has the power to alter or discontinue the program. On May 31, 2020, Sen. Brian Schatz announced his intention to introduce legislation that would end the 1033 Program. Another proposal currently pending before Congress, the Stop Militarizing Law Enforcement Act, would maintain the program but would impose additional limitations and reporting requirements.

Grants and Conditions on Federal Funds

Numerous proposals currently before Congress would invoke the Spending Clause in an effort to regulate state and local law enforcement activities. Some proposals would fund voluntary state and local measures, such as use of force and bias awareness training or body cameras. Other proposals would require states to enact certain policies in exchange for federal grants. For instance, the Police Training and Independent Review Act of 2019 would fund training on cultural diversity and de-escalation tactics while requiring participating states to "enact laws requiring the independent investigation and prosecution of the use of deadly force by law

enforcement officers." The Preventing Tragedies Between Police and Communities Act of 2019 would oblige Byrne JAG grant recipients to mandate training on ways to reduce the use of force. The Police Exercising Absolute Care With Everyone Act of 2019 would require Byrne JAG grantees to enact laws limiting the use of lethal and less than lethal force by law enforcement. The Next Step Act of 2019 would, among other things, direct Byrne JAG grant recipients to submit quarterly reports to the Attorney General on officers' use of force.

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