



Federal Law Enforcement and the Portland Protests: Legal Considerations

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During the spring and summer of 2020, protests in response to the death of George Floyd erupted in major cities across the country. Responding to a [perceived failure by state and local officials](#) to control the protests, President Trump threatened [to take action](#) by, for example, deploying the military into cities to restore order. Recently, in the midst of ongoing [protests](#) in Portland, Oregon, the Trump Administration deployed [hundreds](#) of agents from the Department of Homeland Security (DHS). Although, [according to some](#), the Portland protests were largely nonviolent, DHS reported numerous instances of what it terms “[violent anarchists](#)” committing crimes against federal property, justifying the presence of federal officers. [Reports](#) of unidentified federal law enforcement officers detaining protestors and transporting them in unmarked vehicles [escalated tensions](#) between local officials and the Trump administration.

The federal law enforcement presence in Portland comes after federal agents were used to [respond to similar protests](#) in Washington, DC. Because of Washington, DC’s [unique status](#) as a federal district, the federal government had [more leeway](#) to direct federal agents to assist in law enforcement. However, because Portland is under the authority of the State of Oregon, unique concerns have arisen over what legal authority the federal government possesses to use federal officers to respond to local protests, particularly as the Trump administration seeks to [expand](#) the use of federal law enforcement in other cities. And beyond the legal justification, the [tactics](#) reportedly [being used](#) by federal officers in Portland have raised legal questions and have led to a number of [lawsuits](#) filed against the federal government. This Sidebar discusses the general legal authorities relied on by DHS to allow for the federal presence in Portland and explores the potential legal questions raised by the presence of federal law enforcement in Portland, including the constitutional implications of the various tactics used by the federal officers.

Legal Authorities Supporting Local Presence of Federal Law Enforcement

Reports [indicate](#) that the federal law enforcement presence in Portland largely has consisted of officers from DHS, an agency that [includes](#), among other components, the Transportation Security Administration (TSA), Customs and Border Protection (CBP), and Immigration and Customs Enforcement (ICE). It also appears that the United States Marshals Service (USMS) within the Department of Justice (DOJ) has been [involved](#). Public statements from administration officials have [cited](#) DHS’s authority to protect federal property as the central [justification](#) for enhanced DHS law enforcement activity in Portland (USMS has

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its own, distinct [statutory authority](#) to secure federal courts, among other things.) DHS’s authority with respect to the protection of federal property is [established](#) in 40 U.S.C. § 1315, which requires the DHS Secretary to “protect the buildings, grounds, and property that are owned, occupied, or secured by the Federal Government . . . and the persons on the property.”

The component within DHS with primary responsibility under this authority is the [Federal Protective Service](#) (FPS). However, Section 1315 more broadly [authorizes](#) the DHS Secretary to “designate employees” of DHS “as officers and agents for duty in connection with the protection” of federal property and persons on the property, as well as (1) to “detail” designated officers and agents to protect specific federal property at the request of a federal agency head, and (2) to “utilize the facilities and services” of other federal, state, and local law enforcement agencies (with their consent) when determined to be “economical and in the public interest.” It appears that Acting Secretary Wolf has used his Section 1315 authority to [dispatch](#) officers from TSA, CBP, and ICE (among others) to assist FPS in Portland.

Under Section 1315, officers and agents [may](#) be designated for duty “in areas outside” federal property “to the extent necessary to protect the property and persons on the property.” Designated officers and agents may [also](#) “conduct investigations, on and off the property in question, of offenses that may have been committed against [federal] property . . . or persons on the property” and “carry out such other activities for the promotion of homeland security as the [DHS] Secretary may prescribe.” In other words, the statute allows for designated agents and officers to operate outside of federal property provided that there is a nexus to property protection or a federal property offense. These federal property offenses include (1) [statutes](#) that [criminalize](#) damaging or destroying federal property in some circumstances and (2) regulations [promulgated](#) under Section 1315 itself that carry criminal penalties.

Furthermore, federal agencies or state or local governments with broader law enforcement mandates may agree to give designated officers and agents the authority to enforce [concurrently](#) unrelated federal, state, or local laws, and state law may also [authorize](#) federal agents to enforce state criminal provisions in some circumstances. But even setting aside those prospects, designated officers or agents engaged in the performance of their official duties under Section 1315 may [make](#) arrests without a warrant for any federal offense committed in their presence or any federal felony if there are “reasonable grounds to believe that the person to be arrested” committed the felony.

Although judicial authority construing the scope of the Section 1315 provisions described above is limited, at least one circuit court has [held](#) that FPS officers “reasonably exercised their investigative and protective authority” under the statute when they followed a woman who had caused a disturbance in a federal building and ultimately stopped and arrested her four or five blocks from the building. The court [agreed](#) that the officers’ “monitoring [beyond the property of] what they reasonably believed to be an ongoing threat to the orderly functioning of” the federal building fell within the “protective and investigative roles prescribed by the statute.” The court also held that the FPS officers had [authority](#) to arrest the woman based on threatening hand gestures she made while they were following her outside the property, as the gestures gave the officers probable cause to believe she was threatening assault of a federal law enforcement officer in violation of federal law.

Legal Issues with Local Presence of Federal Law Enforcement

As discussed, DHS officials [maintain](#) that federal law enforcement activity in Portland is grounded in protecting federal property and agents under Section 1315. Despite this cited legal justification, some state and local officials have taken issue with federal [policing](#) in Portland, especially because it was initiated without invitation by the city or state. One [lawsuit](#)—filed by Portland-based organizations and Oregon elected officials—alleges that the use of federal law enforcement officers violates the [Tenth Amendment](#) by infringing on Oregon’s police power, noting that under the federal constitution, “whether, and how, to police is left to the states and their municipalities.” Conversely, DHS has [asserted](#) that

“[e]nforcing federal law is not by invitation” and that “federal law enforcement agencies do not require local requests from communities to enforce federal law.”

Regardless of whether the *presence* of federal law enforcement officers is in fact legal, some reports from the Portland protests allegedly show federal officers engaging in conduct that could raise constitutional concerns under the First and Fourth Amendments.

First Amendment

The [First Amendment](#) generally protects individuals’ right to peaceably assemble. According to the [Supreme Court](#), the [right to assembly](#) protects the right “not only to speak or to take action, but also to listen, observe, and learn; [and] assemble for any lawful purpose.” While public [city streets](#) have largely [been protected](#) as venues for expression, the [government](#) also has “a strong interest in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks, and in protecting the property rights of all its citizens.” As a result, while the Constitution protects the right to assemble, protestors have no right to harm [people or property](#), and protests may be subject to “[reasonable regulation](#)” such as [time, place, or manner restrictions](#). For example, at least one [circuit court](#) has held that a “spontaneous police order” requiring demonstrators to relocate can be considered a reasonable time, place, or manner regulation. In deciding whether a restriction is reasonable, the Court has said that the [crucial question](#) is “whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.”

Relying on allegations that federal officers have used tear gas and non-lethal ammunition on [peaceful protestors](#), some have argued that federal policing in Portland runs afoul of the First Amendment. And a federal judge recently [granted](#) a temporary restraining order (TRO) acknowledging that in some circumstances the Portland police’s use of tear gas may have violated protestors’ First Amendment rights. Beyond the general right to assemble, a [recently filed lawsuit](#) claims that federal officers in Portland violated the First Amendment by assaulting news reporters, photographers, and legal observers. The lawsuit [claims](#) that federal officers attacked journalists and legal observers with tear gas, batons, and rubber bullets in retaliation for watching or reporting on the protests. Another federal judge [issued a TRO](#) prohibiting officers from arresting or using force against any journalists or legal observer. In granting the TRO, the court [noted that](#) the “public streets, sidewalks, and parks historically have been open to the press and general public, and public observation of law enforcement activities in these public fora plays a significant positive role in ensuring conduct remains consistent with the Constitution.”

Fourth Amendment

The [Fourth Amendment](#) prohibits unreasonable searches and seizures by the government, and police may violate the Fourth Amendment, for example, if they use [excessive force](#) during an investigatory stop or arrest. According to the Supreme Court, force is unconstitutional when it is [unreasonable](#) considering the facts and circumstances of the case. This analysis requires a careful [balancing](#) of “the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.”

DHS [use of force policies](#) state that DHS officers may only use force that is “objectively reasonable in light of the facts and circumstances confronting him or her at the time force is applied.” Several reports, however, have raised questions about the extent of federal officers’ use of force. In [one instance](#), officers allegedly used a non-lethal impact munition to shoot and injure a man who was standing across the street holding a speaker. Another [video](#) appears to show federal officers using pepper spray and a baton to beat a man standing in the street. [USMS](#) and [DHS](#) authorities have claimed they are investigating whether the use of force was appropriate in these instances, and the DOJ Inspector General has [opened an investigation](#) into federal officers’ use of force in Portland.

Beyond the use of force, police must also comply with the Fourth Amendment when [conducting arrests](#). For an arrest to be constitutional under the Fourth Amendment, a law enforcement officer must either have a warrant or [conduct the arrest](#) in a public place upon probable cause that an individual has committed a crime. Some [reports](#) from Portland allege that federal officers are “driving up to people, detaining individuals with no explanation of why they are being arrested, and driving off.” One video appears to show federal officers [detaining a man](#) without a stated reason and placing him in an unmarked van. CBP officials [justified the incident](#) by asserting they “had information indicating the person in the video was suspected of assaults against federal agents or destruction of federal property.” The Oregon DOJ, however, filed a [lawsuit](#) claiming that federal officers were illegally seizing individuals off the street in violation of the Fourth Amendment. Without deciding the merits, a federal judge recently [dismissed the claims](#), holding that Oregon lacked standing to seek injunctive relief.

Another potential Fourth Amendment issue concerns law enforcement identification. Some reports of detentions by personnel in [unmarked](#) vehicles, under circumstances where it could be [unclear](#) that the personnel are law enforcement, could implicate the Fourth Amendment’s prohibition on unreasonable seizures. One federal appellate court has [pronounced](#) that “it is generally not a reasonable tactic for plainclothes officers to fail to identify themselves when conducting a stop.” Nevertheless, because the reasonableness of a seizure is ultimately fact-dependent, failure to identify might not always be considered unreasonable. As the same court observed, “certain dangerous circumstances may permit plainclothes officers to initiate stops without identifying themselves, but that is . . . a rare exception, not the rule.” In any event, it [appears](#) that wearing a uniform or some other display of law enforcement involvement may be sufficient identification to be considered reasonable even if there is no verbal identification. For its part, DHS has [asserted](#) that officers in Portland are “clearly identifiable as law enforcement” and wear uniforms that contain insignia identifying their specific units or teams. Additionally, DHS has noted that officers in Portland are not wearing name tags “because of doxing attacks” that threaten their safety, but “each officer wears a unique identifier.” (As discussed in a separate [Sidebar](#), there is no generally applicable requirement in statute that federal law enforcement officers identify themselves or display identifying information on their person when acting in public.)

Remedies

If a court determines that federal law enforcement has violated substantive constitutional rights, the focus will turn to options for remedying such violations. Discussed in further detail in this [Sidebar](#), the Supreme Court recognized a cause of action for individuals seeking money damages against federal law enforcement officers for certain Fourth Amendment violations in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*. However, [some](#) suggest that it has become increasingly difficult for individuals to recover against federal officers, which could be further complicated by an inability to identify which officers are responsible for the alleged constitutional violations. While *Bivens* remains the primary civil remedy to recover for certain Fourth Amendment violations, individuals may also assert claims against the federal government under the Federal Tort Claims Act (FTCA) for [certain torts](#) committed by federal law enforcement officers.

Bivens or FTCA actions are likely the central remedies available for individuals injured by federal law enforcement officers. As discussed, a federal judge recently [dismissed a lawsuit](#) filed by the Oregon DOJ, holding that Oregon did not have standing to seek injunctive relief. Relying on a 1983 Supreme Court case, *City of Los Angeles v. Lyons*, the judge concluded that Oregon lacked standing because it had not shown a sufficient likelihood that federal officers would *continue* committing constitutional violations—a necessary showing for a federal court to exercise its power under Article III of the Constitution. In *Lyons*, the Court held that the plaintiff, who police had previously placed in a chokehold, did not have standing to seek an injunction against the future use of chokeholds. The Court reasoned that injunctive relief is unavailable absent a [showing](#) of “any real or immediate threat that the plaintiff will be wronged again.”

Further, state law is unlikely to be used to regulate federal police activity. The Supreme Court has long held that federal officers enforcing federal law are immune from [state criminal prosecution](#) so long as they do only what is “necessary and proper” in the scope of their duties.

Considerations for Congress

The [continued expansion](#) of federal law enforcement in cities across the country has been met with support from some and criticism from others. The administration recently announced additional federal law enforcement deployment to [Portland](#) and sent federal officers to assist with protecting federal property amidst similar [protests in Seattle](#), though it appears that additional DHS personnel in both cities [have](#) since [begun](#) to be withdrawn. While some Members of Congress have [expressed support](#) for the use of federal law enforcement to defend federal property, others are calling for an [investigation](#) into the administration’s use of federal law enforcement and potential civil rights violations. Some [local officials](#) have called for Congress to pass legislation requiring federal agents to obtain consent from local authorities, to visibly identify themselves and their vehicles unless undercover, and to limit “crowd control” actions to protecting federal property. Recently introduced [legislation](#) in response to the Portland protests seeks to limit the use of federal law enforcement officers for crowd control by, among other things, limiting law enforcement functions in that context to “[f]ederal property or in the immediate vicinity thereof” unless an exception applied. This provision would appear to limit the scope of 40 U.S.C. § 1315. Nevertheless, were the proposal to become law, questions might still arise as to the relationship between its limitations and existing DHS authority to investigate crimes against federal property outside of the property itself.

The same [legislation](#) and other recent legislative proposals would also impose new identification requirements on federal law enforcement officers. First, the PEACE Act, one [section](#) of the Justice in Policing Act of 2020 (H.R. 7120), would impose a limited requirement that federal law enforcement officers identify themselves as officers, among other things, “[w]hen feasible” prior to using force against any person. Separately, bills introduced in the [House](#) and [Senate](#) would require federal officers “engaged in any form of crowd control, riot control, or arrest or detainment of individuals engaged in an act of civil disobedience, demonstration, protest, or riot in the United States” to “at all times display identifying information in a clearly visible fashion,” including the agency, last name, and the officer’s badge number.

And in regard to potential remedies for those injured by federal law enforcement conduct, the limitations imposed by *Lyons* on injunctive relief are constitutionally based and [beyond Congress’s authority to alter](#). However, there may be room for legislation with respect to individuals’ ability to recover against federal law enforcement officers for potential constitutional violations under *Bivens*. The Supreme Court has [continued to emphasize](#) that it is Congress’s role to create a cause of action for monetary damages against federal government officials. Congress, therefore, could [choose to codify](#) an action for claims against federal officials. In creating a new statutory cause of action, Congress could establish its parameters, including which federal officials would be liable, what federal rights would be protected, or whether officials are entitled to [qualified immunity](#).

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