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Legal Sidebar

Congress and Police Reform: Current Law

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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, causing his death. That incident and others like it sparked heightened interest in Congress's ability to implement reforms of state and local law enforcement. More recently, the January 2023 death of Tyre Nichols after a beating by Memphis police officers prompted renewed calls for law enforcement reform. This Legal Sidebar provides an overview of existing federal authorities intended to prevent and redress constitutional violations by state and local public safety officials. A companion Sidebar presents selected recent proposals related to federal regulation of federal, state, and local law enforcement.

Federal Regulation of State and Local Law Enforcement

As another Legal 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 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.

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[.]" As another Legal Sidebar discusses further, Section 242 also prohibits a person acting under color of law from subjecting any person to "different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or

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race, than are prescribed for the punishment of citizens[.]" A simple violation of the statute is punishable by a fine and/or up to a year in prison, and the penalties increase if the violation leads to bodily injury or death. 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 10 years in prison—or more if certain aggravating factors are present.

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 do not authorize suits by individuals. If DOJ elects to pursue criminal charges under Section 241 or 242, it faces a high standard of proof. Under the cases *Screws v. United States* and *United States v. Guest*, 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." *Specific intent* means that the defendant must not intend only to, for example, assault a victim but must also intend to violate a federal right by doing so. This results in what some view as a significant hurdle to bringing Section 241 and 242 claims.

DOJ brought charges under Section 242 against the officers involved in the deaths of George Floyd and Breonna Taylor. The officers involved in Mr. Floyd's killing pled guilty or were convicted by a jury. As of February 2023, charges against the officers involved in Ms. Taylor's death remain pending.

DOJ Civil Enforcement

Another section of the U.S. Code, 34 U.S.C. § 12601 (Section 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." Another CRS Legal Sidebar discusses this statute in more detail. According to DOJ, potential violations of the provision include "excessive force, discriminatory harassment, false arrests, coercive sexual conduct, and unlawful stops, searches or arrests." DOJ enforces the provision by filing civil complaints against allegedly offending law enforcement agencies. The statute does not create a private 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 other statutory provisions discussed above, 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, making it easier for plaintiffs to prove violations of the statute. 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 compensate the plaintiff for the legal injury) and punitive damages (designed to punish the defendant and deter future 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. However, based on concerns that frequent litigation could interfere with the work of law enforcement officers, the courts have created a significant limitation on liability: Under Section 1983, 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 if the court finds that a defendant is not entitled to qualified immunity, the defendant 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 Supreme 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. This can create a high bar for plaintiffs.

The Supreme Court articulated another limitation on Section 1983 suits in *Monell v. Department of Social Services*. In that case, the Court held that a municipality is a "person" subject to suit under Section 1983. However, the Court further held that a local government cannot be sued "for an injury inflicted solely by its employees or agents" under the theory of *respondeat superior* (the legal doctrine that an employer may be liable to suit for wrongful acts of its employees). Rather, under *Monell*, a Section 1983 plaintiff must show that an injury stems from a "policy or custom" of the municipality. This requires a showing that "through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged," and that the municipality acted with "deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow." This exacting standard has led one commentator to assert that municipal liability "is practically a dead letter." Plaintiffs may still sue individual officers under Section 1983, subject to the limitation of qualified immunity, but they may be less likely to recover significant damages or induce change in a municipality's practices.

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 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.

Executive Orders

On June 16, 2020, President Donald Trump issued an Executive Order on Safe Policing for Safe Communities. Among other things, the 2020 executive order directed the Attorney General to establish best practices for law enforcement agencies; certify independent credentialing bodies that could assess agencies' policies in areas such as use of force, de-escalation, and identifying officers who may require intervention; and condition federal grants on compliance with those standards.

In addition, the 2020 executive order directed the Attorney General to create a database to track and publish data related to instances of excessive use of force by law enforcement, requiring law enforcement agencies that receive discretionary grant funding to submit information to the database. (Recent court rulings, however, have expressed skepticism of the executive branch's ability to unilaterally change conditions related to federal grants.) The executive order also required the Attorney General to develop and propose legislation to improve law enforcement practices and build community engagement, and to identify and develop opportunities to train law enforcement officers with respect to encounters with individuals suffering from impaired mental health, homelessness, and addiction.

On May 25, 2022, President Joe Biden issued an Executive Order on Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety. Among other things, the 2022 executive order directed the Attorney General to take steps to enhance DOJ's enforcement of Section 242 and Section 12601. It sought to improve law enforcement recruitment, hiring, promotion, and retention practices at all levels. It also provided for the establishment of a National Law Enforcement Accountability Database; expanded collection of various criminal justice statistics; and sought to limit the transfer of military equipment to state, local, and tribal law enforcement.

The 2022 executive order imposed numerous requirements on federal law enforcement. It directed the Attorney General to ensure timely investigations into federal law enforcement uses of deadly force and deaths in federal custody. It also directed federal law enforcement agencies to ban the use of chokeholds and carotid restraints "except where the use of deadly force is authorized by law," limited the use of no-knock entries, required the use of body cameras in appropriate circumstances, called for clear guidance on use-of-force standards, and required anti-bias training for federal law enforcement officers.

Author Information

Joanna R. Lampe
Legislative Attorney

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