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What Role Might the Federal Government Play in Law Enforcement Reform?

Over the past few years, several high-profile police-involved shootings and alleged instances of excessive force have generated congressional interest in state and local policing. After declining in both 2014 and 2015, confidence in law enforcement has rebounded to historical norms, but Gallup poll data indicate that confidence varies by race, ethnicity, ideology (i.e., liberal, moderate, and conservative), and age. Congressional interest in policing revolves around confidence and accountability. What role should Congress play in facilitating efforts to bolster confidence in the police? Should Congress seek to improve law enforcement's accountability regarding the excessive use-of-force? These questions are bounded by limits of congressional authority.

Limits of Congressional Authority

The federalized system of government in the United States limits the influence Congress can have over state and local law enforcement policies.

The U.S. Constitution established a federal government of limited powers. A general police power is not among them. That authority is largely reserved for the states. The Constitution, however, does vest Congress with legislative powers under the Spending, Commerce, Territorial, and Necessary and Proper Clauses, as well as under the enforcement sections of the Civil War Amendments. Congress has exercised this authority in the past to enact legislation that relates to law enforcement matters. Yet even here, its authority is not boundless.

Congress may spend for the general welfare and thereby encourage states to take or refrain from various activities. In doing so, however, the encouraged state action must relate to the purpose for which federal funds are spent. Moreover, state action may be encouraged, not commandeered or compelled. Commandeering and compulsion are also beyond the scope of the Commerce Clause, which otherwise empowers Congress to regulate the flow, instrumentalities, and substantial impacts of interstate and foreign commerce. Congress may enact model legislation for federal enclaves, but its reach there is geographically limited. The Necessary and Proper Clause permits implementing legislation, but only to the extent this legislation reasonably relates to powers that the Constitution elsewhere grants to the federal government. Finally, each of the Civil War Amendments—the Thirteenth, Fourteenth, and Fifteenth Amendments—conveys the power to enforce its provisions by appropriate legislation, but that power is cabined by the terms of the amendment and by judicial interpretation of its breadth.

Tools Available to the Federal Government to Promote Law Enforcement Reform

If Congress wants to influence local policing, it can hone at least three items in the federal criminal justice toolkit: policing-related data collection by the U.S. government, federal processes to investigate local police misconduct, and the relationship between the Department of Justice (DOJ) and police throughout the United States.

Federal Data Collection Efforts on Police Use-of-Force

The federal government collects and disseminates limited data on the use-of-force by state and local police. Several programs gather this kind of information, but none collects data on every use-of-force incident in the United States.

- The Federal Bureau of Investigation (FBI) is working with state and local law enforcement to develop a use-of-force national data collection program. The FBI program is to collect data on incidents that result in the death or serious bodily injury of a person, or when a law enforcement officer discharges a firearm at or in the direction of a person. The FBI is expected to launch this program in 2018, pending the approval of the Office of Management and Budget.
- Every three years, in its Police Public Contact Survey (PPCS), the Bureau of Justice Statistics collects data on citizens' interactions with police, including police use-of-force. While the PPCS produces reliable national estimates of police use-of-force, it is a survey, not a census of all such incidents.
- The National Violent Death Reporting System (NVDRS), administered by the Centers for Disease Control and Prevention, operates in 40 states. Researchers in these states gather and link records from law enforcement, coroners and medical examiners, vital statistics, and crime laboratories. The NVDRS can provide data on deaths resulting from "legal interventions."
- Congress passed the Death in Custody Reporting Act of 2013 (P.L. 113-242), which reauthorized the Death in Custody Reporting program. This act requires states to submit data to DOJ regarding the death of any person who is detained, under arrest, in the process of being arrested, en route to be incarcerated, or incarcerated at a municipal or county jail, a state prison, a state-run boot camp prison, a boot camp prison that is contracted out

by the state, any local or state contract facility, or any other local or state correctional facility (including juvenile facilities). States face up to a 10% reduction in their funding under the Edward Byrne Memorial Justice Assistance Grant (JAG) program if they do not provide the data.

Investigating Law Enforcement Misconduct

The federal government has several ways to ensure that state and local law enforcement practices and procedures adhere to constitutional norms. The first is *criminal* enforcement brought directly against an offending officer under federal civil rights statutes. Section 242 of Title 18 makes it a federal crime to willfully deprive a person of his or her constitutional rights while acting under color of law. Similarly, Section 241 of Title 18 outlaws conspiracies to deprive someone of his or her constitutional rights.

More broadly, a key federal statute focuses on the *civil* liability of law enforcement agencies as a whole, rather than the wrongdoing of individual officers. Section 12601 of Title 34 prohibits government authorities or their agents from engaging in a “pattern or practice of conduct by law enforcement officers ... that deprives persons of rights ... secured or protected by the Constitution or laws of the United States.” It authorizes the Attorney General to sue for equitable or declaratory relief when he or she has “reasonable cause to believe” that such a pattern of constitutional violations has occurred.

The Influence of DOJ in the Criminal Justice Realm

DOJ and its component agencies, such as the FBI, can help shape policing in the United States. Such influence can be seen in at least four roles that DOJ and its components play on this stage:

- *Enforcer*—DOJ can investigate and prosecute federal laws related to police abuse of power. For example, the FBI can initiate cases involving official misconduct, which DOJ can prosecute. In addition, DOJ’s Civil Rights Division can review the patterns or practices “of law enforcement agencies that may be violating people’s federal rights” and seek civil remedies when “law enforcement agencies have policies or practices that foster a pattern of misconduct by employees.”
- *Policy leader*—DOJ can serve as a model for state and local law enforcement. For example, it issues guidance for law enforcement agencies; sets policies for its own agencies that resonate broadly in federal, state, and local law enforcement; sponsors studies that examine policing practices; and provides training.
- *Convener*—DOJ brings together representatives from law enforcement agencies and local communities to discuss policing issues. For example, its Community Relations Service facilitates discussions among police, government officials, community residents, and various community groups. This component of DOJ *does not*

investigate or prosecute crimes, take sides in a dispute, impose solutions, assign blame, or assess fault.

- *Funder*—DOJ awards grants to state and local police, as well as researchers probing important policing questions.

Law Enforcement Reform Efforts in the Past Congress

Despite limits on congressional power to shore up trust and accountability within local policing contexts, legislation was introduced in the 114th and 115th Congresses to influence police practices. Such legislation included attempts to (1) better understand and track use-of-force by law enforcement; (2) promote independent investigation of the use of deadly force by police; (3) minimize police use of military-grade gear and vehicles; (4) require law enforcement agencies to provide more training on issues such as implicit bias or racial profiling to their officers; (5) promoting diversity in police hiring; and (6) expanding the use of body-worn cameras. Much of the legislation introduced in the past two Congresses focused on altering existing federal tools historically used to shape local policing.

Policy Options

There are several options policymakers might examine should they choose to play a role in facilitating better police-community relations, including the following:

- placing conditions on federal funding to encourage law enforcement to adopt policy changes to promote better community relations;
- expanding efforts to collect more comprehensive data on the use-of-force by law enforcement officers;
- providing grants to law enforcement agencies for the purchase of body-worn cameras for their officers;
- taking steps to facilitate investigations and prosecutions of excessive force by amending 18 U.S.C. Section 242 to reduce the mens rea standard in federal prosecutions, or place conditions on federal funds to promote the use of special prosecutors at the state level;
- funding Community Oriented Policing Services (COPS) hiring grants so law enforcement agencies can have more officers engaging in community policing activities; or
- using the influence of congressional authority to affect the direction of national criminal justice policy.

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