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Legal Sidebar

Regulating Federal Law Enforcement: Considerations for Congress

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In the wake of unrest arising from the May 2020 death of George Floyd, broader questions have arisen regarding Congress's authority to regulate law enforcement officers. While federalism principles limit the extent to which Congress may pass laws directly affecting state and local police officers, Congress has broader authority to regulate *federal* law enforcement officers and agencies such as the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA), or the Customs and Border Protection (CBP). This Sidebar explores the existing criminal, administrative, and civil remedies that impose liability on federal law enforcement officials for claims of excessive use of force, including those brought under the *Bivens* doctrine and the Federal Tort Claims Act (FTCA). It then concludes by discussing considerations for Congress regarding further regulation of federal law enforcement officials.

Current Law Regulating Federal Law Enforcement

Existing federal laws provide a number of criminal, administrative, and civil remedies for holding law enforcement officers and agencies accountable for misconduct.

Federal Criminal Law

Perhaps the most stringent way to regulate the behavior of federal law enforcement officials is through criminal law. The chief criminal law regulating not only federal law enforcement officials, but state and locals ones as well, is 18 U.S.C. § 242 (Section 242)—described more in depth in this Sidebar. In relevant part, that statute makes it a crime for a person "acting under the color of law" to deprive someone of their constitutionally protected rights. "Under the color of law" means that an individual is acting "using power given to him or her by a governmental agency," and it is irrelevant whether the actor is "exceeding his or her rightful power." Moreover, the Supreme Court has explained that to successfully prosecute an alleged offender—such as a police officer—under Section 242, the Department of Justice (DOJ) must show that the defendant had "a specific intent to deprive a person of a federal right made definite by decision or other rule of law." According to the DOJ, which enforces Section 242, examples of misconduct prosecuted under the statute include "excessive force, sexual assault, intentional false arrests, theft, or the intentional fabrication of evidence resulting in a loss of liberty to another."

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Use of Section 242 against federal law enforcement officials is not the primary use of the statute. According to one study looking at Section 242 cases from last decade, 12.4% of all prosecutions studied targeted federal defendants. Section 242 covers federal officials, as well, and has been used in recent years to investigate border patrol agents, United States Park Police, and FBI agents for instance. Violations of Section 242 are punishable by fine and/or up to a year in prison or, if certain aggravating factors are present, up to life in prison or death.

Administrative Remedies

Beyond criminal law, other federal statutes and guidelines provide more limited methods of remedying misconduct by federal law enforcement within the confines of a given agency. Internal policies may address how federal law enforcement agents conduct themselves during investigations, including provisions on when the use of force is appropriate. For example, the Attorney General's Guidelines for Domestic FBI Operations instructs that "acts of violence" are not authorized unless the FBI agent is engaging in the lawful use of force, such as in incidents of self-defense or "otherwise in the lawful discharge of their duties." Federal law enforcement agencies, similar to other federal agencies, have various legal avenues to address employees whose conduct departs from established norms, such as through censures, reprimands, suspensions, demotions, and removals.

Beyond the ordinary employee discipline process, federal law enforcement agencies may have other review processes to examine civil rights violations by federal agents. For example, Section 1001 of the USA PATRIOT Act directs the Office of the Inspector General (OIG) of the DOJ to "review information and receive complaints alleging abuses of civil rights and civil liberties" by DOJ employees, including employees of the FBI, DEA, Federal Bureau of Prisons (BOP), the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), and the U.S. Marshals Service (USMS). The DOJ has relied on this congressional directive to investigate allegations of civil rights violations against "ethnic and religious groups who would be vulnerable to abuse due to a possible backlash from the terrorist attacks of September 11, 2001." Under Section 1001, for example, the OIG has investigated allegations that BOP employees tortured a prisoner because of his Muslim religion. Pursuant to statutes like Section 1001 and more general authorities, Inspectors General have sometimes investigated allegations of illicit use of force by federal law enforcement agents and reported findings to the DOJ Civil Rights Division to review for possible prosecution or other administrative misconduct.

Civil Remedies Under *Bivens* and the FTCA

Beyond criminal and administrative remedies to address illicit use of force, some limited civil remedies also exist to police federal law enforcement conduct.

Bivens Claims

As discussed in this Sidebar, a key federal law designed to prevent and redress constitutional violations, such as the right to be free from excessive force under the Fourth Amendment, by *state and local* government actors is found in 42 U.S.C. § 1983 (Section 1983). That statute provides a civil cause of action to recover money damages for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by any person acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." However, *federal* action is beyond the statute's reach.

Nonetheless, the Supreme Court has recognized an implied cause of action, similar to the remedy found in Section 1983, for individuals seeking money damages against individual federal law enforcement officers. In a 1971 decision, *Bivens v. Six Unknown Named Agent of Federal Bureau of Narcotics*, the Supreme Court established that in limited circumstances, "victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute

conferring such a right." In *Bivens*, the plaintiff filed a claim against a group of federal narcotics agents after they conducted what he alleged to be an unconstitutional search of his home in violation of the Fourth Amendment. The Court, in holding that the plaintiff could pursue money damages for his Fourth Amendment claim, reasoned that when federally protected rights have been "invaded," a plaintiff is entitled to a remedy—whether that remedy is statutorily or judicially created. Thus, the Court implied a private cause of action for individuals seeking money damages for Fourth Amendment violations.

The Court implied a remedy for constitutional violations committed by federal actors in two other circumstances following *Bivens*. In a 1979 case, *Davis v. Passman*, the Court held that an administrative assistant, who sued a Congressman for gender discrimination, could pursue money damages for violating the equal protection principles embodied in the Fifth Amendment's Due Process Clause. And a year later in *Carlson v. Green,* the Court extended a *Bivens* remedy to a federal prisoner's estate seeking money damages against the Director of the Federal Bureau of Prisons for allegedly failing to provide adequate medical treatment in violation of the Eighth Amendment.

The Supreme Court, however, has not implied a new cause of action under *Bivens* in more than 30 years. For example, the Court declined to extend a *Bivens* remedy in a First Amendment suit against a federal employer, in several Eighth Amendment cases brought against private prison officials under contract with the Federal Bureau of Prisons, and in a Fifth Amendment case for federal government interference with a landowner's property rights. The Court continued its trend of limiting *Bivens* remedies in its 2017 decision *Ziglar v. Abassi*. In *Abassi*, the Court considered the availability of a *Bivens* remedy for a group of non-citizens—mostly of Arab or South Asian decent—who had been detained following the September 11, 2001 attacks. In declining to extend the doctrine, the Court noted that since *Bivens* was decided, the Court had "adopted a far more cautious course" in allowing recovery under judicially created causes of action, recognizing that it is a "significant step under separation-of-powers principles for a court to determine that it has the authority . . . to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation." As a result, further expansion of the *Bivens* doctrine, according to the Court, is now considered a "disfavored judicial activity."

The *Abassi* Court provided a two-part test used to determine whether a *Bivens* remedy is available. First, the Court looks at whether the case presents a "new context"–that is, whether the case differs meaningfully from the three cases where a *Bivens* remedy has been established (i.e., *Bivens*, *Davis*, or *Carlson*). Second, if the case does present a new context, the Court considers whether there are "special factors" counseling against creating a remedy. Central to this analysis, according to the Court, are separation-of-powers principles, and the Court has declined to extend *Bivens* remedies in cases implicating issues more appropriate for the other branches, such as federal fiscal policy or international relations.

Applying this test earlier this year in *Hernandez v. Mesa*, the Court declined to extend a *Bivens* remedy in a case involving a United States Border Patrol agent who fatally shot a 15-year-old Mexican national who was on the Mexican side of the U.S.-Mexico border. In so holding, the Court determined that the case arose under a "new context" because it involved a cross-border shooting claim. Moreover, the special factors analysis precluded extension of a *Bivens* remedy because the necessity of a damages remedy for incidents arising on foreign soil implicated considerations involving foreign policy, counseling hesitation about extending *Bivens* to this context.

Despite these limitations on the *Bivens* doctrine, the Court has emphasized that *Bivens* itself is "well-settled law," and it continues to allow for claims against federal actors for money damages in the three limited contexts the Court has already recognized, including those against federal law enforcement officers for violations of the Fourth Amendment—such as claims alleging excessive use of force. Nonetheless, even if a federal court allows a plaintiff to pursue a *Bivens* remedy for an alleged constitutional violation by a federal official, qualified immunity—discussed more in depth in this Sidebar—may nevertheless shield that federal official from liability.

The FTCA

The FTCA also provides a remedy for the wrongful acts of federal officials, including federal law enforcement. Subject to various exceptions, limitations, and prerequisites, the FTCA—enacted in 1946—allows plaintiffs to sue the United States for money damages for certain types of state law torts committed by its employees. The FTCA acts as a waiver of federal sovereign immunity in limited cases involving tortious acts—such as negligence—committed by United States employees within the scope of their employment. Unlike a *Bivens* claim, an action brought pursuant to the FTCA is one *against the United States* and not the individual employee. And a plaintiff may not sue the United States in federal court under the FTCA until he or she first exhausts administrative remedies in the relevant federal agency.

Generally, plaintiffs may not recover for intentional conduct committed by federal employees. However, in 1974—in response to a series of no-knock drug enforcement raids on private homes performed by federal law enforcement agents—Congress amended the FTCA to allow for claims of intentional torts of assault, battery, false imprisonment, false arrest, abuse of process, and malicious prosecution committed by certain federal law enforcement officers. The amendment applies to "investigative or law enforcement officer[s]" defined as "any officer of the United States who is empowered by law to (1) execute searches, (2) seize evidence, or (3) make arrests for violations of Federal law."

Congress enacted the 1974 FTCA amendment nearly three years after the Supreme Court's *Bivens* decision. In 1980, the Court clarified that the 1974 amendment to the FTCA did not preempt a *Bivens* claim, meaning that the judicially created *Bivens* remedies were still available to plaintiffs who could also bring an FTCA claim. In reaching its decision, the Court emphasized that Congress had expressed its intent that the FTCA and *Bivens* actions be "parallel, complementary causes of action." The Court also highlighted four factors that suggested the *Bivens* remedy is more "effective" than the FTCA, and therefore a *Bivens* claim should coexist with claims brought under the FTCA: (1) the *Bivens* remedy, because it seeks damages against individual officers, serves a "deterrent purpose," (2) a court may award punitive damages in a *Bivens* suit, while 28 U.S.C. § 2674 generally prohibits courts from awarding punitive damages against the United States in FTCA cases, (3) a plaintiff cannot opt for a jury in an FTCA action, and (4) an action under FTCA exists only if the state in which the alleged misconduct occurred has a law prohibiting the conduct.

In 1988, Congress passed the Westfall Act to substitute the United States as the defendant in FTCA claims to "protect Federal employees from personal liability for common law torts committed within the scope of their employment." Congress, however, did not extend the Westfall Act's protections for individual federal employees who commit *constitutional violations*, thus effectively preserving the *Bivens* remedy. Therefore, FTCA claims against the United States for certain intentional torts committed by federal law enforcement may remain available alongside the limited *Bivens* actions available against individual federal law enforcement officials. Some courts, however, have interpreted provisions of the FTCA to preclude recovery under both the FTCA and a *Bivens* action; thus in some jurisdictions, plaintiffs must choose whether to proceed under the FTCA or *Bivens*.

Considerations for Congress

As Congress continues to explore police reform proposals, one issue of consideration has been whether existing law adequately regulates federal law enforcement. Recently announced police reform bills in the House and the Senate include several proposed reforms that specifically aim to regulate how federal officers operate in the field. The Just and Unifying Solutions to Invigorate Communities Everywhere Act of 2020 (JUSTICE Act), for example, includes a provision that would direct the Attorney General to develop a policy banning the use of chokeholds by federal law enforcement agents except in situations involving deadly force. And the Justice in Policing Act of 2020 (JIPA), for example, would ban no-knock warrants in drug cases at the federal level, and would require federal law enforcement officers to use

deadly force only as a last resort when necessary to prevent death or serious bodily injury. (A more detailed overview of the provisions in each bill can be found in this Sidebar.)

These and other recent proposals aim to more broadly restructure existing criminal and administrative remedies regulating federal law enforcement officers. For instance, provisions in both the JUSTICE Act and the JIPA seek to create or amend existing criminal liability for police, including federal law enforcement officers. For example, Section 106 of the JUSTICE Act would create a new criminal offense for "knowingly and willfully falsify[ing] a report" that involved a law enforcement officer's violation of an individual's constitutional rights. And Section 101 of the JIPA would amend the mental state required for a conviction under Section 242 from "willfully" to "knowingly or recklessly." Other bills have been introduced to impose additional *administrative* oversight of federal law enforcement agencies. Current proposed legislation, such as H.R. 2203 and S. 2691, would establish a position within the Department of Homeland Security that would address complaints related to the CBP and Immigration and Customs Enforcement (ICE) and conduct training on the use of force and civil rights violations.

While recent legislation has addressed *civil* reforms, many of these efforts have focused on Section 1983 and would have no effect on federal law enforcement officers. For example, H.R. 7085—the Ending Qualified Immunity Act—and the Reforming Qualified Immunity Act would abolish or curtail qualified immunity for all officials who may be liable under Section 1983 and would therefore not apply to federal law enforcement agents in *Bivens* actions. The JIPA, however, would not only amend Section 1983 by effectively abolishing the qualified immunity defense for certain state and local police officers, but would also abrogate the defense in "any action under any source of law against" federal investigative or law enforcement officers, as defined in 28 U.S.C. § 2680(h). This provision would appear to eliminate the availability of qualified immunity in *Bivens* actions.

And with regard to *Bivens* actions generally, although the Supreme Court has recognized an implied cause of action for Fourth Amendment violations committed by federal law enforcement, as discussed above, the Court has expressed its disfavor with extending the *Bivens* doctrine in new contexts. According to some commentators, this judicial restraint in extending *Bivens* leaves individuals without a civil damages remedy against many federal actors who may have violated their constitutional rights. And there may be room for legislation with respect to *Bivens* and the FTCA as they relate to federal law enforcement. 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 a similar Section 1983-type 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. For example, Congress could make all federal officials liable for violations of all constitutional rights—much like how Section 1983 regulates state and local officials—or could limit the remedy to cases involving federal law enforcement officials who commit certain Fourth Amendment violations—such as excessive use of force.

And if Congress chose to create a cause of action specifically for money damages against federal officials, it could also decide whether to make the individual actor liable, or whether the action would be—similar to claims brought under the FTCA—against the United States. Members of Congress have in the past proposed legislation to allow recovery against the United States for constitutional violations committed by its employees. Exposing the United States or federal employees to liability may present other policy considerations such as increased costs to the federal government in paying for judgments and additional burdens on the federal agencies in defending such lawsuits.

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