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Legal Sidebar

Police Use of Force: Overview and Considerations for Congress

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Recent events have focused congressional attention on the policing practices of federal, state, and local law enforcement officers. One area of particular focus has been police use of force against criminal suspects. Currently, the federal government collects some data on state and local police use of force, but substantive standards on law enforcement use of force in general do not exist in federal statute. Rather, the applicable legal standards for permissible use of force are a function of the Fourth Amendment's prohibition on "unreasonable … seizures." Violations of constitutional excessive force standards can be enforced through various federal criminal and civil provisions and are often incorporated into (and in some cases elaborated on by) jurisdiction- or agency-specific use-of-force policies and state statutes.

Scholars and commentators have debated for years how meaningful current standards are in cabining law enforcement use of force. Amid recent reform efforts, a legislative proposal passed by the House—the George Floyd Justice in Policing Act of 2020 (Justice in Policing Act)—would make changes to current use-of-force doctrine. A separate proposal in the Senate, the Just and Unifying Solutions to Invigorate Communities Everywhere Act of 2020 (JUSTICE Act), would supplement existing standards in narrower circumstances. This Sidebar provides an overview of Fourth Amendment use-of-force doctrine, briefly surveys some of the standards and variations in current use-of-force policies, and examines how the Justice in Policing Act and the JUSTICE Act would alter police use of force.

Overview of Fourth Amendment Use-of-Force Doctrine

The Fourth Amendment provides, in relevant part, that "the right of the people to be secure in their persons, houses, papers, and effects, from unreasonable searches and seizures, shall not be violated[.]" The provision is most well-known for its application in the context of *searches* of the home or person of a criminal suspect, with a long line of Supreme Court precedents establishing that a warrant based on probable cause is required for a search to be deemed "reasonable" (and thus constitutional) unless certain exceptions apply. However, the Court has also recognized that a law enforcement officer's application of force to effect a stop or arrest of a criminal suspect can constitute a "seizure" of the person within the meaning of the constitutional provision. Accordingly, a claim that a law enforcement officer has used excessive force "in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen" is

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"analyzed under the Fourth Amendment" (though uses of force following arrest or incarceration are analyzed under other constitutional provisions).

Put differently, the Fourth Amendment protects the "right to be free from the use of excessive force in the course of an arrest." At the same time, according to the Court, the lawful powers of a police officer "necessarily" include "the right to use *some* degree of physical coercion or threat thereof[.]" As a result, the permissibility of an officer's use of force in a given situation is governed by an amorphous "reasonableness" standard, which "is not capable of precise definition or mechanical application." Rather, the Court has said that assessing whether a use of force is "reasonable" requires balancing "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," which will depend on "the facts and circumstances of each particular case[.]"

That said, the Supreme Court has announced some general principles that lower courts employ to guide their assessment of the reasonableness of both lethal and other uses of force by police officers. First, reasonableness is judged "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." In other words, the calculus must allow "for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving[.]" Second, the reasonableness inquiry is an *objective* one; that is, the appropriateness of a use of force is gauged by what is "'objectively reasonable' in light of the facts and circumstances confronting" an officer. As such, the officer's "underlying intent or motivation" is irrelevant. The Court has also noted several factors to be included in the assessment of the reasonableness of a particular use of force: (1) "the severity of the crime at issue," (2) "whether the suspect poses an immediate threat to the safety of the officers or others," and (3) whether the suspect "is actively resisting arrest or attempting to evade arrest by flight." And with respect to *lethal* force specifically, the Court has said that use of such force is permissible where "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others[.]" Thus, "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given."

Notwithstanding the latter guidance in the context of the use of deadly force, the Court has counseled that every use-of-force case involves a totality-of-the-circumstances inquiry. In *Scott v. Harris*, a 2007 use-of-force decision, the Court employed this approach in considering the reasonableness of an officer's use of his police cruiser to ram a fleeing suspect's car. Notably, the Court rejected the notion of "a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force,'" concluding that even though ramming the suspect's car "posed a high likelihood of serious injury or death" to the suspect, the maneuver was reasonable given the threat to innocent bystanders posed by the high-speed car chase. In light of *Scott*, some lower courts have eschewed the guidance announced in the Court's earlier lethal-force decisions in favor of the more fluid totality-of-the-circumstances approach, though many courts continue to apply the factors and distinctive deadly-force standard drawn from pre-*Scott* jurisprudence in some capacity. Courts have also split on whether police conduct leading up to or provoking the need for force is relevant to this inquiry, though in 2017 the Supreme Court did reject a categorical lower court rule that permitted an excessive force claim if an officer committed an independent Fourth Amendment violation that "provoke[d] a violent confrontation."

With respect to the reasonableness of particular uses of force in specific cases, the necessarily fact-bound nature of the inquiry makes generalizations difficult. Nevertheless, some trends in the case law exist. When it comes to the use of deadly force—most often discharge of a firearm—such force may be generally deemed reasonable where the suspect is brandishing a dangerous weapon in a threatening way or is reasonably believed to be reaching for a weapon (even if the suspect does not, in fact, have one). However, mere possession of a weapon does not always justify the use of deadly force if there is no

indication of a *threat to others* from it. More broadly, courts have shown willingness to defer to a reasonable officer's judgment in the moment as to the threat posed by a suspect, and thus the need to use deadly force, meaning that the availability of "less intrusive" means of subduing a suspect or addressing an exigent situation does not necessarily render the use of deadly force unreasonable.

Regarding other uses of force—such as discharge of a taser or pepper spray—courts may view applications of force as unreasonable against persons suspected of committing minor infractions who are not fleeing or resisting arrest and reasonable against persons who are behaving in a belligerent or violent manner. When a suspect is ignoring an officer's commands but is not physically resisting, the outcome may depend on factors such as safety concerns and whether a warning was given. As with the use of deadly force, the Fourth Amendment does not necessarily require that the least amount of force available be used so long as the amount of force actually used is reasonable.

Use-of-Force Policies

Beyond Fourth Amendment doctrine, many jurisdictions have explicit use-of-force standards in statute or policy. At the federal level, there is no generally applicable statute that governs the use of force by law enforcement. However, specific federal departments and agencies may have policies governing the use of force. For instance, the Office of the Inspector General within the Department of Justice (DOJ), which contains one of the largest complements of law enforcement officers in the federal government, issued a report in 2009 on DOJ use of certain weapons and took note of DOJ's deadly force policy. That policy appears to adopt the standard from Supreme Court case law by providing that deadly force may be used where a DOJ officer has "a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person." Additionally, use-of-force policies of individual DOJ components described in the same 2009 report appear to reflect the standard that use of force "must be reasonable in the specific circumstance that the force is used."

With respect to state and local law enforcement, the vast majority of states have enacted law enforcement use-of-force statutes defining the circumstances in which police officers are permitted to use deadly force, force more generally, or both. However, some of these statutes may likewise mirror, sometimes with minor elaborations, the parameters of Fourth Amendment excessive force jurisprudence. That said, some state statutes do provide more specific limitations on the circumstances in which deadly force or certain kinds of force tactics—such as chokeholds—may be employed.

Supplementing these statutes, almost all law enforcement agencies have established policies regarding police use of force. There is wide variation among jurisdictions with respect to the stringency and specificity of these polices, however. On one end of the spectrum are policies that largely track the constitutional standards enunciated in Supreme Court use-of-force decisions. According to one study, however, the trend appears to be in the direction of promulgating "detailed rules" that exceed the constitutional minimum and "incorporate lessons from decades of police-tactics research." Some commonalities among these types of polices may include

- a "force continuum or matrix" that provides "detailed descriptions of what force is appropriate at various levels of encounters";
- an emphasis on force proportionality, minimization, and de-escalation or conflict avoidance tactics;
- a requirement that officers warn before using lethal (and sometimes other) force ("warning requirement");
- a requirement that officers exhaust available forms of force short of deadly force before using deadly force ("exhaustion requirement"); and

- "detailed rules for reporting and reviewing all uses of deadly force and many other types of uses of force."

A statute or policy implementing detailed requirements for uses of force does not necessarily establish or alter what a court will consider "reasonable" under the Fourth Amendment, however. While some courts have noted that a violation of departmental policy may be "relevant" to whether a use of force is constitutionally reasonable under the totality of the circumstances, other courts have indicated that whether a departmental policy forbids particular force tactics "says nothing about whether such tactics are constitutional." Thus, although an officer's use of force in violation of statute or departmental policy may subject the officer to internal discipline or liability under state standards, it does not necessarily mean that such force would be deemed unreasonable under the Fourth Amendment in a federal civil suit or enforcement action.

JUSTICE Act and Justice in Policing Act Use-of-Force Provisions

Bills in both the House and Senate would address law enforcement use of force to differing degrees. Though varying in the details, both the JUSTICE Act (S. 3985) and Justice in Policing Act (H.R. 7120) contain provisions seeking to (1) establish best practices for law enforcement officers with respect to use of force through development of uniform standards, training, and guidance; (2) bolster federal data collection and reporting regarding police use of force; and (3) limit or eliminate the use by law enforcement of chokeholds specifically. (For more information on these provisions, see this Sidebar.)

In addition, a section of the Justice in Policing Act would establish new requirements for federal law enforcement use of deadly force (defined to include chokeholds and multiple discharges of tasers, among other things) and "less lethal" force (defined as "any degree of force … not likely to cause death or serious bodily injury") while also encouraging state and local adoption of "consistent" laws as a condition of receipt of certain federal grant funds. Among other things, the bill would require force to be "necessary and proportional" to effectuate an arrest (in the case of less lethal force) or "necessary … as a last resort" to prevent "imminent and serious bodily injury or death" (in the case of deadly force). An exhaustion requirement (as defined in the bill) would also apply to any use of force, as would a warning requirement "[w]hen feasible." Any use of deadly force additionally would be authorized only when it "creates no substantial risk of injury to a third person." Federal law enforcement officers charged with murder or manslaughter under federal law would be restricted in arguing that a killing was justified if they failed to comply with these requirements or if their own "gross negligence, leading up to and at the time of the use of force, contributed to the necessity of the use of such force."

Imposing requirements for police use of force beyond what current case law may require under the Fourth Amendment could raise a number of questions. For instance, at least one observer has argued that a "necessity" standard for permissible law enforcement use of force would be difficult to apply in practice, as one might "never know how much force was or wasn't necessary." However, others have pointed out that the standard of necessity exists in other jurisdictions and thus is not "unheard of." Another question is one of enforcement. Though failure to comply with the standards in the Justice in Policing Act would preclude a justification defense in the limited scenario where a federal officer is charged with murder or manslaughter under federal law, and failure to adopt a "consistent" limitation could impact a state or local government's receipt of federal funds, the standard of reasonableness would still govern allegations of excessive force raised through the existing federal criminal and civil provisions for enforcement of constitutional violations. Thus, at most, it seems that a court could consider a violation of a more stringent use-of-force requirement as relevant to whether a use of force was reasonable in an action alleging a constitutional violation under one of those existing provisions.

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