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Legal Sidebar

Congress and Law Enforcement Reform: Constitutional Authority

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Incidents involving the use of force by law enforcement, such as the 2020 death of George Floyd and the 2023 death of Tyre Nichols, have generated heightened interest in the issue of reforming the policing practices of state and local law enforcement. As discussed in another Legal Sidebar, several *existing* federal laws seek to prevent and redress constitutional violations by state and local authorities. Congress is constitutionally limited in its ability to legislate on matters related to state and local law enforcement—limits that may inform any *new* laws Congress seeks to enact on this evolving issue. This Legal Sidebar begins with an overview of Congress's authority to enact legislation and the limits on those powers. It then discusses in more detail two of Congress's enumerated constitutional powers that may be most relevant to federal legislation on matters relating to state and local law enforcement.

Limits to Congressional Authority

The Constitution establishes a "system of dual sovereignty between the States and the Federal Government." Under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Supreme Court has recognized that there are certain subjects that are largely of local concern where states "historically have been sovereign," such as issues related to the family, crime, and education. In contrast, Congress may only enact legislation under a specific power enumerated in the Constitution, and it cannot use its power to intrude impermissibly on the sovereign powers of the states.

Because of these principles, the Supreme Court has recognized various limitations on Congress's power to legislate in areas that fall within a state's purview, observing that congressional power is "subject to outer limits," and that Congress must take care not to "effectually obliterate the distinction between what is national and what is local." For example, although Congress has invoked its power to regulate interstate and foreign commerce to legislate on a wide range of economic and social activities, the Court has limited its reach when the legislation seeks to regulate purely local, non-economic activities. Additionally, under the anti-commandeering doctrine, Congress is prohibited from directing states or localities to regulate the activities of private parties on behalf of the federal government.

Although these principles constrain Congress's power, Congress can sometimes rely on its enumerated powers to regulate in areas of state and local concern. The spending power and Section 5 of the

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Fourteenth Amendment are two of the most relevant authorities used by Congress to address state and local law enforcement issues.

Spending Power

The Spending Clause empowers Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." The Supreme Court has held that incident to the spending power, Congress may further its policy objectives by attaching conditions on the receipt of federal funds. These conditions often involve compliance with statutory or administrative directives and can apply to any entity receiving federal funds, including states and localities. In *South Dakota v. Dole*, for example, the Supreme Court upheld as a valid exercise of Congress's spending power a statute that conditioned the grant of federal highway funds to any state upon that state prohibiting the legal purchase or possession of alcohol by individuals less than 21 years old.

There are, however, several limitations on Congress's authority to attach conditions to federal funds. First, a funding condition must be "in pursuit of the general welfare." However, courts generally afford Congress substantial deference in determining what expenditures are "intended to serve general public purposes." Second, if Congress intends to place conditions on federal funds, it must do so "unambiguously" so that states can knowingly choose whether or not to accept the funds. Third, conditions on federal funding must be related or "germane" to "the federal interest in particular national projects or programs." Fourth, other constitutional provisions may bar the conditions placed on the grant of federal funds. For instance, Congress may not condition a monetary grant on "discriminatory state action or the infliction of cruel and unusual punishment." Relatedly, conditions on federal funding are unconstitutional when they become coercive to the point that "pressure turns into compulsion" or commandeering. For example, in *National Federation of Independent Business (NFIB) v. Sebelius*, the Supreme Court held that a provision in the Affordable Care Act that withheld all Medicaid grants from any state that refused to accept expanded Medicaid funding was unconstitutionally coercive because it threatened to terminate "significant independent grants" that were already provided to the states.

Courts have rarely used these spending power limitations to invalidate conditions placed on the receipt of federal funds. *NFIB* remains the only instance in the modern era of the Supreme Court invalidating an exercise of the congressional spending power. Post-*NFIB* Spending Clause challenges have largely been unsuccessful in the lower courts.

Congress has used its spending power to enact legislation to influence the activities of state and local law enforcement. Federal regulation of state and local law enforcement primarily comes in the form of grant programs that provide money to local governments and police forces. For example, the Community Oriented Policing Services (COPS) program authorizes the Department of Justice to distribute grants to support community policing. Recipients can use these grants for hiring officers, procuring equipment, or establishing partnerships between local law enforcement agencies and local school districts. Additionally, the Edward Byrne Memorial Justice Assistance Grant (Byrne JAG) program provides federal financial support for state and local criminal justice programs. Funding for these grant programs is subject to various conditions that may further federal interests in regulating law enforcement activities. For instance, grants under the COPS program prohibit the grantee from subjecting any person to discrimination on the basis of race, color, or national origin (among other protected classes) in connection with any programs or activities funded in whole or in part with federal funds. Funds under the JAG program are conditioned on, among other things, compliance with the Death in Custody Reporting Act, which requires states to report information regarding the deaths of individuals in law enforcement custody.

Section 5 of the Fourteenth Amendment

The Fourteenth Amendment, in relevant part, provides that no state shall "deprive any person of life, liberty, or property, without due process of law" or "deny to any person within its jurisdiction the equal protection of the laws." The Supreme Court has interpreted the substantive component of the Due Process Clause as incorporating against state actors nearly all the rights found in the Bill of Rights, including those that pertain to criminal procedure and regulate the conduct of the police. In turn, Section 5 of the Fourteenth Amendment grants Congress the power to enforce the Amendment through "appropriate legislation." Section 5's "positive grant of legislative power" authorizes Congress to both deter and remedy constitutional violations; and in doing so, Congress may prohibit otherwise constitutional conduct that intrudes into "legislative spheres of autonomy previously reserved to the States." The Section 5 enforcement power (and the parallel enforcement powers found in the Thirteenth and Fifteenth Amendments) has been used to, for example, ban the use of literacy tests in state and national elections and abolish "all badges and incidents of slavery" by banning racial discrimination in the acquisition of real and personal property. Congress has also used its Section 5 power to provide remedies for the deprivation of constitutional rights. For example, 42 U.S.C. § 1983 (Section 1983) provides a private cause of action for individuals claiming that their constitutional rights were violated by state actors acting pursuant to state law. And 18 U.S.C. § 242 (Section 242)—also passed using the Section 5 power—imposes criminal liability on state actors who deprive individuals of their constitutional rights.

While Congress's Section 5 enforcement power is broad, it is not unlimited. Section 5 allows Congress to enforce constitutional rights directly through laws like Section 1983 and Section 242, however, the power does not allow Congress to supplement those rights through "prophylactic" legislation that regulates state and local matters without evidence of a history and pattern of past constitutional violations by the state. According to the Supreme Court, when Congress exercises its Section 5 authority, its response must be congruent and proportional to a demonstrated harm. Congress may justify the need for Section 5 legislation by establishing a legislative record that shows "evidence ... of a constitutional wrong." For example, in holding that Congress exceeded its Section 5 authority in enacting the Religious Freedom Restoration Act (RFRA)—which, in relevant part, supplanted normal First Amendment standards to impose a heightened standard of review for state government actions that substantially burdened a person's religious exercise—the Supreme Court determined that Congress had failed to establish a widespread pattern of religious discrimination by the states. As a result, RFRA could not be justified as a remedial measure designed to prevent unconstitutional conduct and was outside of Congress's power over the states. As a result, the Court struck down the law in so far as it applied to the states.

As a consequence of this case law, the scope of Congress's Section 5 power hinges in part on the scope of the constitutional right that a given law aims to protect. With respect to regulating state and local police forces, one constitutional right that may be particularly relevant to Congress's use of its Section 5 power is the Fourth Amendment, which prohibits unreasonable searches and seizures by the government. The Fourth Amendment applies to many situations involving law enforcement including when police stop an individual on the street for questioning, when police conduct traffic stops, or when police make an arrest. Police violate the Fourth Amendment, for example, if they use excessive force during an investigatory stop or arrest. According to the Supreme Court, the force used by law enforcement during an investigatory stop or arrest violates the Constitution 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." For example, the Supreme Court has held that police use of deadly force against a fleeing suspect who poses no immediate safety threat is unreasonable in violation of the Fourth Amendment. Determining whether an act of force is excessive in violation of the Constitution, however, requires a fact-specific analysis—a certain act may be reasonable under some facts while in a different case, it may amount to excessive force. For example, some courts have ruled that police use of a

chokehold is objectively unreasonable when used against individuals who are already under restraint and not a danger to others. In other circumstances, courts have upheld police use of a chokehold as reasonable when an individual was unrestrained and continued to pose a threat of serious harm.

Considerations for Congress

Although Congress is limited in its ability to regulate local policing, the Constitution does provide authority for some congressional reform and oversight of state and local law enforcement. Legislators proposed various avenues for reform and oversight of federal, state, and local law enforcement prior to the high-profile events surrounding the death of George Floyd, and events since May 2020 have prompted additional proposals to address police reforms. As discussed in another Legal Sidebar, several bills were introduced on the issue in the 116th and 117th Congresses, including comprehensive police reform proposals such as the George Floyd Justice in Policing Act and the JUSTICE Act. Multiple provisions of these bills would have placed conditions on the receipt of federal funds pursuant to Congress's spending power or utilized Congress's Section 5 authority to amend laws such as Section 242. The limitations on Congress's constitutional authority to regulate state and local police forces may be a consideration when evaluating these and other reforms.

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