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Legal Sidebar

Regulating Federal Law Enforcement: Considerations for Congress

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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 raised questions 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 Customs and Border Protection (CBP). This Sidebar explores the existing criminal, administrative, and civil remedies that impose liability on federal law enforcement officers 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 officers.

Current Law Regulating Federal Law Enforcement

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

Federal Criminal Law

One way to regulate the behavior of federal law enforcement officers is through criminal law. The chief criminal law regulating federal, state, and local law enforcement officers is 18 U.S.C. § 242 (Section 242)—described in more 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. According to the U.S. Department of Justice (DOJ), *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." The Supreme Court has explained that to successfully prosecute an alleged offender—such as a police officer—under Section 242, 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 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." Section 242 has been used in recent years to investigate Border

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Patrol agents, U.S. Park Police, and FBI agents. 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 guidelines and statutes provide more limited methods of remedying misconduct by federal law enforcement within the confines of a given agency. Agencies' internal policies may address how federal law enforcement agents conduct themselves in specific situations, including provisions on when the use of force is appropriate. For example, the Attorney General's Guidelines for Domestic FBI Operations instruct that "acts of violence" are not authorized unless FBI agents are 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, more general 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 DOJ to "review information and receive complaints alleging abuses of civil rights and civil liberties" by DOJ employees, including employees of the FBI; the DEA; the Federal Bureau of Prisons (BOP); the Bureau of Alcohol, Tobacco, Firearms, and Explosives; and the U.S. Marshals Service. 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 excessive use of force by federal law enforcement agents and reported findings to the DOJ Civil Rights Division for possible prosecution or other administrative misconduct.

Civil Remedies Under *Bivens* and the FTCA

Beyond criminal and administrative remedies that the government may use to address excessive use of force, some limited civil remedies also exist for individuals to seek redress against federal law enforcement officials for misconduct.

Bivens Claims

42 U.S.C. § 1983 (Section 1983), as discussed in more detail in this Legal Sidebar, is a 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. No federal statute provides an equivalent cause of action against federal officials. Instead, the Supreme Court has recognized an implied cause of action, similar to the Section 1983 remedy, for individuals seeking money damages against individual federal law enforcement officers in certain circumstances.

In its 1971 decision *Bivens v. Six Unknown Named Agents 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. 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 held that the Constitution implicitly includes a private cause of action for individuals seeking money damages for Fourth Amendment violations.

The Court recognized an implied 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 a claim under the equal protection principles embodied in the Fifth Amendment's Due Process Clause. One year later, in *Carlson v. Green*, the Court extended a *Bivens* remedy to a federal prisoner's estate against the director of BOP for allegedly failing to provide adequate medical treatment in violation of the Eighth Amendment.

The Supreme Court has not recognized a new implied 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 BOP, 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 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. Second, if the case does present a new context, the Court considers whether there are "special factors" counseling against creating a remedy. If any such factors are present, then the *Bivens* approach of an implied remedy is inappropriate. 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. The Court has most recently declined to extend a *Bivens* remedy in the 2020 case *Hernandez v. Mesa* and the 2022 case *Egbert v. Boule*.

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 in more depth in this Sidebar—may 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 federal employees within the scope of their employment. In contrast to a *Bivens* claim, which is brought against the individual official, an action brought pursuant to the FTCA is one against the United States. The FTCA does not allow such a suit until the plaintiff first exhausts administrative remedies in the relevant federal agency.

Generally, plaintiffs may not recover for intentional torts, such as assault or battery, committed by federal employees. However, in 1974—in response to a series of no-knock drug enforcement raids by federal law

enforcement agents on private homes—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]," which is 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 FTCA claims. 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 that 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 serves a "deterrent purpose" because it seeks damages against individual officers; (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 trial in an FTCA action; and (4) an action under the 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 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 consideration has been whether existing law adequately regulates federal law enforcement. Police reform bills introduced in the 116th and 117th Congresses included several proposed reforms that would have regulated how federal officers operate in the field. The JUSTICE Acts of 2020 and of 2021, for example, included provisions that would have directed the Attorney General to develop a policy banning the use of chokeholds by federal law enforcement agents except in situations involving deadly force. The Justice in Policing Acts of 2020 and 2021 (JIPA) would have banned no-knock warrants in drug cases at the federal level and would have required 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 these bills can be found in this Sidebar.)

These and other proposals would have more broadly restructured existing criminal and administrative remedies regulating federal law enforcement officers. Provisions in both the JUSTICE Act and the JIPA sought to create or amend existing criminal liability for police, including federal officers. For example, Section 106 of the JUSTICE Acts of 2020 and 2021 would have created 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. Section 101 of the JIPA of 2020 and 2021 would have amended the mental state required for a conviction under Section 242, changing it from "willfully" to "knowingly or recklessly." Other bills would have imposed additional *administrative* oversight of federal law enforcement agencies. Legislation introduced in the 116th Congress, such as H.R. 2203 and S. 2691, and in the 117th Congress, such as H.R. 3557, would have established a position within the Department of

Homeland Security that would have addressed complaints related to the CBP and Immigration and Customs Enforcement and required training on the use of force and civil rights violations.

Legislation introduced in the 116th and 117th Congresses would also have reformed *civil* liability for law enforcement. Many of these efforts focused on Section 1983, which would have had no effect on federal law enforcement. For example, H.R. 7085/S. 4142, the Ending Qualified Immunity Act, and S. 4036, the Reforming Qualified Immunity Act (introduced in the 116th Congress), would have abolished or curtailed qualified immunity under Section 1983. (The Ending Qualified Immunity Act was reintroduced in the House and the Senate in the 117th Congress). Because Section 1983 applies only to state and local officials, these proposals would not have applied to federal law enforcement in *Bivens* actions. The JIPA, however, would also have abrogated the qualified immunity 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 have appeared to eliminate the availability of qualified immunity in *Bivens* actions.

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 disfavor with extending the *Bivens* doctrine to 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. The Court's caution in this area, however, is explicitly intended to allow Congress to consider remedies for such violations, and the Court has continued to emphasize that point in recent cases. Congress, therefore, could choose to create a 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, and whether officials are entitled to qualified immunity. For example, Congress could make all federal officials liable for violations of all constitutional rights—much as Section 1983 does for 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.

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, as in Section 1983, or whether the action would be against the United States, as in the FTCA. Members of Congress have in the past proposed legislation to allow recovery against the United States for constitutional violations committed by federal 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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