

Protecting Against Police Brutality and Official Misconduct

Statutory Language for a More Robust Federal Criminal Civil Rights Law

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For almost all incidents involving violence by law enforcement officials (including police, federal agents, and probation and correctional officers), there is one federal criminal law that applies: 18 U.S.C. § 242. But federal prosecutors face obstacles due to the law’s vague language and lack of clarity about what conduct is illegal. The current standard for criminal intent is also difficult to meet.

Congress should enact new statutory language to better protect the constitutional rights of all people who come into contact with law enforcement and other public officials. The statutory text proposed here would create a more protective civil rights framework by specifically prohibiting three especially egregious types of official misconduct — excessive use of force, sexual contact involving a public official, and delib-

erate indifference to the medical needs of people in custody — and by lowering the standard of intent to prove a violation. This proposal does not advocate for the repeal of the current version of § 242, which covers a broader range of possible rights violations. Instead, it recommends additional language, which could be either a new subsection within § 242 or a new section of Title 18.

As discussed in the accompanying report, before passing a new civil rights law, Congress must make detailed findings that the statute will address the harm that it is working to prevent or remedy. Backed by such a record, an amended § 242 will be a powerful tool to address breaches of public trust and deter law enforcement brutality.

Proposed Amendments to 18 U.S.C. § 242

1. Like 18 U.S.C. § 242, this statute would apply to public officials acting in their official capacity or those relying on governmental authority to act (even if acting beyond the scope of their authorized power) — including police officers, federal agents, judges, probation officers, and correctional officers, among others.

2. The mens rea standard proposed here, “knowingly” or “recklessly,” is a lower standard of intent than the “willfully” standard currently required under § 242.

3. For a guilty verdict, the structure of this statute would require a jury to find that a defendant “knowingly or recklessly” took one of the specified actions. In contrast, under current law, a jury is required to find that the defendant acted wrongfully, with the specific intent to deprive a person of a right — which can be confusing for juries. If passed, the George Floyd Justice in Policing Act (JPA) would also change the intent standard of § 242 to “knowingly or recklessly,” but because of how § 242 is structured, it could still be interpreted to require a jury to find that a defendant had the intent to *violate a person’s rights*.

The inclusion of specific illegal actions, together with the definitions below as to what these terms mean, provides possible criminal defendants with clearer notice of what the law forbids.

(a) Whoever, under color of any law,¹ statute, ordinance, regulation, or custom, knowingly or recklessly² —

(1) uses excessive force;

(2) engages in sexual misconduct with any person; or

(3) and with deliberate indifference fails to provide medical treatment for another person who is in custody or under an official’s custodial, supervisory, or disciplinary authority,³

shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this subsection or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, or a sexual act as defined by 18 U.S.C. § 2246(2), or an attempt to commit a sexual act,⁴ shall be [sentenced];⁵ and if death results from the acts committed in violation of this subsection or if such acts include kidnapping or an attempt to kidnap, or aggravated sexual abuse as defined by 18 U.S.C. § 2241, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be [sentenced]. For purposes of this subsection, an act shall be considered to have resulted in death if the act was a substantial factor contributing to the death of the person.⁶

4. Section 242 does not currently include cross-references to the definitions of “sexual act,” “sexual contact,” or “aggravated sexual abuse” contained elsewhere in the federal criminal code. Their inclusion here and in the definition of “sexual misconduct” below would put public officials on clear notice of what actions constitute a civil rights violation, better protecting people from sexual abuse and harassment by officials acting under color of law.

5. This penalty language proposes a misdemeanor punishable by up to one year for cases that do not result in bodily injury and anticipates graduated sentences for felony cases depending upon their severity. The death penalty is not included as a recommended sentencing option in this section.

6. This provision, which was also proposed in the JPA, would make clear that a defendant’s actions need only be a “substantial factor” in contributing to a person’s death, meaning that prosecutors would not have to prove that the defendant’s actions were the proximate cause of death.

7. With the inclusion of attempts, conspiracies, and aiding and abetting liability in this subsection, people who jointly participated in a rights violation could be charged and sentenced under the new provision without reference to other sections of the federal code, such as the general federal conspiracy statute, 18 U.S.C. § 371 (which carries a five-year statutory maximum).

8. As set forth below, aiding and abetting liability under this subsection could include active engagement to commit the offense or failing to intervene while a fellow public official commits an illegal act.

9. The case law defines excessive force in the arrest context as force that is “objectively unreasonable.” If new statutory language is structured as proposed, juries will no longer be required to find that a defendant *willfully* used objectively unreasonable force — i.e., that the defendant wrongfully sought to violate a person’s rights by using more force than was objectively reasonable — a potentially confusing inquiry for juries.

(b) Any person who, under color of any law, statute, ordinance, regulation, or custom —

(1) knowingly **attempts or conspires**⁷ to commit any offense defined in this subsection shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy; or

(2) knowingly **aids, abets, counsels, commands, induces, or procures**⁸ any offense defined in this subsection shall be subject to the same penalties as those prescribed for the offense.

(c) As used in this subsection —

(1) the term “excessive force” means —

(A) use of force greater than that which is **objectively reasonable to effect a lawful arrest or bring a person or incident under control**;⁹

(B) **force used to cause harm, or with a knowing willingness that harm will occur**;¹⁰

(C) force used against an individual **who is in restraints or under law enforcement control**,¹¹ except use of the minimal amount of force that is reasonably necessary to transport the individual, or to prevent the individual from fleeing the scene or causing imminent bodily injury to the officer or another person, including the individual;

10. This paragraph could be used to prosecute cases involving force against people who are serving a prison sentence. It codifies the prohibitions on (1) using force to purposefully cause harm and (2) using force knowing harm would occur — actions that violate the Eighth Amendment’s prohibition on cruel and unusual punishment. Knowing or reckless use of force to harm someone who is *not* serving a prison sentence could also run afoul of the Fourth, Fifth, and Fourteenth Amendments, depending on the person’s circumstances.

11. It is well established that “the use of force after a suspect has been incapacitated or neutralized is excessive as a matter of law.” *Baker v. City of Hamilton, Ohio*, 471 F.3d 601, 607 (6th Cir. 2006).

12. “Deadly or lethal” force, which is defined below, is included here as a prohibited type of excessive force unless the use of deadly or lethal force is objectively reasonable to protect against an imminent threat of death or serious bodily injury. This definition would require juries to evaluate the facts of a case objectively, reducing reliance on an officer’s claim of his or her subjective perception.

13. These proposed provisions flow from the Supreme Court’s opinion in *Tennessee v. Garner*, which expressly recognized that preservation of life is more important than preventing the escape of a person who does not pose an imminent threat of death or bodily injury.

As the Supreme Court observed long ago: “The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape.” *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

14. This definition of “deadly or lethal force” is similar to the language proposed by the JPA. The broad definition recognizes that many force options could result in death or serious bodily injury, depending on the circumstances.

(D) **deadly or lethal force**¹² unless the use of such force is objectively reasonable under the totality of the circumstances and necessary to protect the officer or another from an imminent threat of death or serious bodily injury;

(E) **deadly or lethal force against a fleeing individual, including an individual in a moving vehicle, unless the officer has probable cause to conclude that there is an imminent risk of serious bodily injury or death to the officer or another if the subject is not immediately apprehended;**¹³ or

(F) **deadly or lethal force against any individual whose actions are a threat only to himself or herself or to property;**

(2) the term “**deadly or lethal force**”¹⁴ means physical force that a **reasonable person**¹⁵ would conclude creates a substantial risk of death or serious bodily injury, including but not limited to —

(A) the discharge of a firearm;

(B) **a maneuver that restricts blood or oxygen flow to the brain, including choke holds, strangleholds, neck restraints, neck holds, and carotid artery restraints;**¹⁶ and

(C) multiple discharges of an electronic control weapon;

15. Including “reasonable person” in the definitional provision means that if there is a question at trial regarding whether the degree of force was “deadly or lethal,” juries should be tasked with making an objective determination.

16. This paragraph includes the use of a choke hold or other neck restraint as a form of deadly or lethal force, which would constitute a prosecutable civil rights violation unless deadly force was justified to prevent an imminent threat of death or serious bodily injury.

17. This definition, which includes cross-references to the definitions of “sexual act” and “sexual contact” contained in Title 18 of the United States Code, would prohibit an official from engaging in such contact with a person under his or her official control or authority.

18. Courts have recognized that sexual contact with an incarcerated person (that serves no legitimate penological purpose, such as a valid pat-down or body cavity search) constitutes an Eighth Amendment violation. The Supreme Court has also recognized that the Fourteenth Amendment offers protection against intrusions of bodily integrity and privacy committed by public officials who abuse their authority by engaging in unwanted sexual contact. With appropriate fact-finding about the power dynamics at play in official interactions, Congress should enact the proposed statute to create a bright-line rule prohibiting sexual contact by officials acting under color of law.

(3) the term “sexual misconduct” means knowingly engaging or attempting to engage in any sexual act, as defined by 18 U.S.C. § 2246(2), or sexual contact, as defined by 18 U.S.C. § 2246(3), with another person under the custodial, supervisory, disciplinary, or other authority of the person engaging in such contact, which conduct¹⁷ —

(A) is not incidental to legitimate official duties, such as a pat-down, frisk, or strip search;¹⁸ or

(B) is undertaken with the intent to gratify the person’s sexual desire or humiliate another person under his or her custodial, supervisory, disciplinary, or other authority;

(4) the term “deliberate indifference” means knowing and disregarding an excessive risk of harm to another person;

(5) the phrase “aids, abets, counsels, commands, induces, or procures” includes, but is not limited to —

(A) participating in the commission of the underlying offense; or

(B) knowingly failing to intervene to stop, prevent, or attempt to stop or prevent the commission of the underlying offense by another.

19. The inclusion of commonsense limitations on legally irrelevant defenses would reduce some of the barriers to successful prosecution of civil rights violations and lessen potential jury confusion.

20. This provision would permit juries to evaluate the defendant's actions leading up to the use of force. A similar limitation is proposed in the JPA as to cases involving federal law enforcement officers.

21. This paragraph would render consent unavailable as a defense in cases alleging sexual misconduct under the new law.

(d) **Limitation on defenses.**¹⁹

(1) It shall not be a defense to prosecution under this subsection that —

(A) the defendant was acting in good faith, or that the defendant believed, reasonably or otherwise, that his or her conduct was lawful at the time that the conduct was committed; or

(B) the defendant believed that his or her actions were authorized by state law, local law or ordinance, or law enforcement practice.

(2) In a prosecution under paragraph (a)(1), it is not a defense that the use of force was justified if the defendant's actions, leading up to and at the time of the use of force, created the necessity for the use of such force.²⁰

(3) In a prosecution under paragraph (a)(2), it is not a defense that the other individual consented to the sexual act or contact.²¹