

## Tactic shields federal agents in killings

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Families of people killed by police rarely see the officers taken to trial. It was supposed to be different for the children of Larry Jackson: The Austin, Texas, police detective who shot and killed Jackson was scheduled to be tried last week for manslaughter.

At the last minute, however, a judge dismissed the charges against the white detective, Charles Kleinert, ruling that he was acting as a member of a federal task force when he shot Jackson, an unarmed black man, in 2013.

As a federal agent, the judge ruled, Kleinert is shielded from state prosecution.

The ruling stunned Jackson's family, whose attorney called it a "great civil rights injustice," and dismayed the local prosecutor, who has vowed to appeal. Meanwhile, the case is shining a spotlight on a legal tactic rarely used in criminal cases, one that raises the question of when, if ever, a federal law enforcement officer can be charged with a crime for killing someone in the line of duty.

The question is not theoretical: So far this year, federal officers have been involved in 33 fatal shootings nationwide, according to a *Washington Post* database tracking shootings by police — more than any state or local department. More than two-thirds involved the U.S. Marshals Service, the federal agency responsible for corralling fugitives.

The vast majority also involved local police officers acting in concert with federal officials, the database shows. If the ruling in the Austin case stands, the blanket of federal immunity could extend to hundreds, if not thousands, of state and local police officers who participate in federal task forces set up to handle matters as varied as immigration offenses and sex crimes.

Tim Lynch, director of the National Police Misconduct Reporting Project at the Cato Institute, a libertarian think tank, called granting federal immunity to local task force officers "an outrageous assertion of federal power."

The ruling in the Austin case relies on the Supremacy Clause, a provision in Article VI of the U.S. Constitution that establishes that federal law trumps state laws where they are in conflict. Historically, the Supremacy Clause has been used to resolve a litany of disputes over issues as mundane as interstate commerce.

The first use of the Supremacy Clause in a criminal case involving a law enforcement officer was in 1889 after a police officer shot and killed a man who attacked Supreme Court Justice Stephen Field. A local prosecutor filed murder charges, but the U.S. Supreme Court ruled that the officer could not be tried under state law because he had been acting as a U.S. marshal under federal orders to protect Field.

Since then, the Supremacy Clause has been a rarely employed defense in use-of-force cases, according to a 2004 article published in the *American Criminal Law Review*. Author James Wallace, then a law student at Georgetown University, found just four cases involving law enforcement officers in federal circuit court; in three of those cases, judges granted the officers immunity and dismissed state charges that had been filed against them.

In the fourth case, a court allowed state criminal charges to proceed against military police officers who shot and killed a suspected copper thief after chasing him off military property.

“It’s a very hazy area of the law,” said Wallace, now an entrepreneur and filmmaker in New York. “You never know how the courts are going to rule, or how a judge might handle it on appeal.”

Cases involving the Supremacy Clause tend to be memorable.

In the early 1970s, federal agent Lloyd Clifton escaped murder charges after shooting Dirk Dickenson in a botched drug raid on Dickenson’s home in Humboldt County, Calif. The site turned out not to be a drug lab and did not even have running water. Dickenson has since been described by some as the first fatality in the nation’s war on drugs.

In 1998, the Supremacy Clause was one of several defense tactics used to dismiss a charge of involuntary manslaughter against FBI sniper Lon Horiuchi, who shot and killed Vicki Weaver, the unarmed wife of white nationalist Randy Weaver, during the infamous 1992 standoff in Ruby Ridge, Idaho.

More recently, manslaughter charges were dismissed against Jude Tanella, a Drug Enforcement Administration officer who in Brooklyn in May 2002 shot and killed Egbert Dewgard, who was suspected of trafficking cocaine.

Attorney Adam Hoffinger, who represented Horiuchi and Tanella, said the defense amounts to a simple “two-prong test: “Prong one, was it in the scope of his federal duties? And prong two, were those actions necessary and proper?”

If the shooting passes those tests, the officer is immune, Hoffinger said.

He offered several hypothetical situations to justify immunity. Imagine, he said, that a federal officer is ordered to protect a doctor who performs abortions in a state where the procedure is deeply unpopular. What if the doctor is attacked, and the officer shoots and kills an attacker — and a local prosecutor decides to charge the officer with murder.

“If we allowed state officials to prosecute federal officers, we could see all types of political prosecutions,” said Daphne Silverman, an Austin-based civil rights lawyer who closely follows police shootings. “What’s missing here is that we need the Department of Justice to bring federal charges” when a federal agent kills someone.

So far this year, law enforcement officials at all levels of government have shot and killed nearly 830 people, according to *The Post*’s data.

In absolute terms, the 33 people killed by federal agents are a minuscule part of that total. However, the U.S. Marshals Service has been involved in 18 fatal shootings, the most of any single law enforcement agency. The Los Angeles Police Department, with 15 fatal shootings, and the Los Angeles County Sheriff’s Department, with 12, rank second and third.

Marshals Service spokesman Drew Wade said the agency arrests tens of thousands of fugitives each year, many of them “violent, career criminals who pose a threat to our communities.”

Wade said every shooting is investigated by local prosecutors and officials of the Marshals Service. But he said he could not recall a case that led to criminal charges.

Overall, police officers have been charged in connection with five fatal police shootings this year, none of them with federal ties.

Of the 18 people fatally shot by U.S. marshals this year, all but one were fugitives being served with arrest warrants or suspects in criminal cases who were being pursued by agents. The lone exception was Joaquin Hernandez, 28, who was shot in February in a busy Arizona intersection while giving a ride to Salvador Muna, 28, a fugitive wanted on a probation violation.

Nationally, police are inconsistent about how much information they release to the public about officer-involved shootings. But details about shootings involving federal officers tend to be particularly closely held.

On Sept. 11, a man was fatally shot when FBI agents raided a home in Chester, Pa., as part of a child pornography investigation. Police in Chester, a small town just south of Philadelphia, referred questions to the FBI, which in turn referred questions to a local medical examiner.

Last week — nearly two months after the shooting — the medical examiner identified the man as Robert Edwards, 31.

The shooting of Larry Jackson Jr. at Benchmark Bank in Austin was equally anonymous in the summer of 2013. The shooting occurred as Kleinert was investigating an armed robbery of a bank that had occurred earlier in the day.

Jackson showed up and gave a false name to a bank manager, which prompted the manager to summon Kleinert. After a few minutes of questioning, Jackson fled with Kleinert in pursuit.

The detective commandeered the vehicle of a passing motorist, ordering her to follow Jackson. When they caught up with him, Kleinert drew his gun, which accidentally discharged, according to Kleinert's attorneys, as the detective and Jackson scuffled.

Attorneys for Jackson's parents and children called the killing an execution, noting that Jackson was shot in the back of the neck. Travis County District Attorney Rosemary Lehmberg filed a manslaughter charge, which carries a penalty of up to 20 years in prison.

The facts of the shooting are unlikely to be litigated. After getting the case moved to federal court, Kleinert's attorneys persuaded a federal judge to declare their client immune from prosecution.

"From the time Kleinert began his conversations with Jackson until the time Jackson died, Kleinert was acting in his capacity as a federal officer," U.S. District Judge Lee Yeakel wrote in a 30-page ruling dismissing the manslaughter charge. "At all times, Kleinert was attempting to detain and arrest Jackson for committing federal offenses in Kleinert's presence — actions that Kleinert was authorized by federal law to perform."

Kleinert's attorney Randy Leavitt said he was ecstatic about the ruling, calling it "100 percent correct."

"The fact is that [Kleinert] was working in a federal capacity and carrying out his federal duties," Leavitt said. "So as long as he was acting in good faith, which he was, he is immune from state prosecution."

This week, Lehmberg vowed to appeal the ruling.

"I'm offended that a state grand jury and a Travis County grand jury — and they are not apt to indict police officers — spent a considerable amount of time on this, and then it just got dropped," Lehmberg told local reporters.

"I intend to pursue it as far as it takes."