



SUING FEDERAL OFFICERS FOR VIOLATING THE CONSTITUTION

HISTORY *and* BACKGROUND

When an officer employed by a state or local government violates someone’s rights through, for example, excessive use of force, the person can sue the officer in federal court. That is because there is a statute called “section 1983” which specifically provides for lawsuits against officers acting “under color of *state* law.” There is, however, no similar statute for officers acting under color of *federal* law. This is significant given the extraordinary array of federal law enforcement powers, including officers who work for the FBI, U.S. Immigration and Customs Enforcement, U.S. Customs and Border Protection, the Federal Bureau of Prisons, the Drug Enforcement Administration, and, importantly, the many unidentified officers who have appeared in full force at protests in the summer of 2020.

In 1971, in a case called *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,¹ the Supreme Court ruled that, even though there was no law specifically allowing it, the federal courts could decide to award damages to people whose rights were violated by federal government officials. The theory underlying this decision was that there can be no *right* unless there is a *remedy* to enforce violation of that right. Without the ability to go to court to seek monetary damages when harmed by government actors, the Court reasoned, constitutional rights would be meaningless. In *Bivens*, the plaintiff claimed that federal officers had searched his home without a warrant in violation of the Fourth Amendment. Under the Court’s ruling, he could go to court against the officers and sue them for damages.

After *Bivens*, the Supreme Court ruled in two other cases that people aggrieved by federal officers could sue for constitutional violations. In 1979, the Court ruled that a woman who was fired from her employment with a U.S. Congressman could sue for sex discrimination in violation of her right to equal protection of the law under the Fifth Amendment.² And, in 1980, the Court ruled that the family of a man who died in federal prison custody could sue prison officers for failing to provide him with adequate medical care in violation of the Eighth Amendment.³

The Court’s 1980 decision outlined the reasons why so-called *Bivens* actions were critical to holding federal law enforcement officers accountable for their conduct. In that case, the federal government had argued that the prisoner’s family could only sue under a law called the Federal Tort Claims Act. Under that law, the federal government stands in place of the individual federal officer and takes responsibility for the payment of any damages to persons harmed by the officer.⁴ The Court ruled, however, that *Bivens* actions served a critical purpose and were not barred by the opportunity to sue under the Federal Tort Claims Act. Specifically, the Court noted that because *Bivens* actions were brought against federal officers in their individual capacity—meaning that federal officers have to pay damages themselves when they are found liable—such lawsuits serve the important purpose of deterring federal officers from violating the Constitution.

¹ 403 U.S. 388 (1971).

² *Davis v. Passman*, 442 U.S. 228 (1979).

³ *Carlson v. Green*, 446 U.S. 14 (1980).

⁴ The Federal Tort Claims Act is often an appropriate means of recovery for harm caused by federal officers. Lawsuits brought under that law, however, are subject to many complicated defenses, which are not addressed further here.

Since that 1980 decision, however, the Supreme Court, due in large part to its membership growing more conservative, has sharply limited the availability of *Bivens* actions. Despite acknowledging that *Bivens* actions are the only available remedy to deter federal officers from violating the Constitution, in multiple cases, the Court has ruled that federal officers could not be sued. The Court adopted a two-pronged analysis to determine whether it should permit someone to bring a *Bivens* action in any given case. First, the Court asks whether the case presents a “new context,” meaning, whether the facts and circumstances of the case are different from previous decisions that have allowed lawsuits to proceed. Second, the Court asks whether there are “special factors counseling hesitation” to allow a *Bivens* action to proceed. In this analysis, the Court has considered a laundry list of factors to justify the denial of an opportunity to sue a federal officer for a constitutional violation.

The Supreme Court’s two most recent decisions illustrate just how restrictive the Court has become. In 2017, in *Ziglar v. Abbasi*,⁵ the Court considered a case brought regarding the actions of FBI and immigration officers in detaining hundreds of men of South Asian and Arabic descent in the wake of the September 11, 2001 attacks. In relevant part, the Court ruled that the men who were detained could not sue the responsible officers. The case presented a “new context” because it was different from previous cases based on the most minor of facts, including that the rank of the officers sued was different from those in previous cases. And, the Court ruled, “special factors” weighed against allowing the suit to go forward because doing so would call into question governmental “policy decisions” and would interfere with “national security.”

These factors resurfaced in the Court’s most recent *Bivens* decision, *Hernandez v. Mesa*.⁶ In that case, a federal immigration officer shot and killed a 15-year-old boy who was playing on the Mexican side of the Texas-Mexico border. The boy’s family sued the officer under *Bivens*, and the Court ruled that the claim could not go forward. It did so based on its conclusion that allowing the case to proceed would have a potential effect on foreign relations and would risk undermining border security.

The combined effect of these developments in the law, especially the decisions in *Abbasi* and *Hernandez*, is that it is very difficult for persons whose rights are violated by federal officers to sue the federal officers for their conduct. Based on the guidance provided by the Supreme Court, at the start of any case brought against a federal officer, lower federal courts consider as a threshold issue whether the case can go forward. When they do so, they do not consider the merits of the plaintiff’s constitutional claim—that is, they do not even address whether the officer violated the Constitution. This means that, not only are victims prevented from bringing their cases, but courts are declining the opportunity to provide guidance to federal officers about whether conduct is unconstitutional in the first place.

EXAMPLES of FEDERAL OFFICERS *avoiding* ACCOUNTABILITY

The following are examples of cases illustrating the difficulty of holding federal officers accountable for violating the Constitution:

Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009): Mr. Arar was detained in the United States in harsh conditions and without access to counsel and then rendered to Syria, where United States officials knew he would be tortured. The Court ruled that he could not pursue a *Bivens* claim because special factors counseled against allowing a suit addressing the government’s “extraordinary rendition” program.

⁵ 137 S. Ct. 1843 (2017).

⁶ 140 S. Ct. 735 (2020).

Meshal v. Higgenbotham, 804 F.3d 417 (D.C. Cir. 2015): An American citizen was detained abroad and tortured over the course of four months by the FBI. He was denied access to counsel and court proceedings, was transferred between three different countries, and was subjected to inhumane conditions. Over the course of the four months, he was kept in handcuffs in an underground room with no windows or toilet, was left in solitary confinement for days at a time, and lost 80 pounds. He was never charged with a crime and was finally released by the FBI when they were unable to extract a confession to his involvement with al-Qaeda. In a decision authored by then-Judge (now Justice) Kavanaugh, the court ruled that no *Bivens* action could be brought addressing events that occurred outside the United States as such a case would interfere with national security and foreign policy concerns.

Bistrrian v. Levi, 912 F.3d 79 (3d Cir. 2018): The plaintiff was a federal prisoner who claimed that officers had violated his rights by placing him in punitive detention and by retaliating against him for making complaints. Even though the court had ruled in prior similar cases that a prisoner-plaintiff could bring constitutional claims under *Bivens*, the court ruled that because of the Supreme Court's recent decisions, this case presented a new context. It then ruled that the plaintiff could not bring these claims because of the potential interference with a prison's operations.

Vanderklok v. United States, 868 F.3d 189 (3d Cir. 2017): Vanderklok claimed that a Transportation Security Administration ("TSA") officer retaliated against him by calling police and falsely accusing him of making a bomb threat after Vanderklok asked for a complaint form to document the officer's unprofessional conduct. Vanderklok sued the officer for violating his First Amendment rights. The court, in one of the first lower court cases following *Abbasi*, ruled that the claim could not be brought, reasoning, in part, that allowing the case to proceed would open the floodgates to further litigation arising out of disputes between passengers and TSA officers.

Tun-Cos v. Perrotte, 922 F.3d 514 (4th Cir. 2019): Several Latino men brought a *Bivens* action against ICE agents who allegedly stopped and detained them without cause and invaded their homes without a warrant, consent, or probable cause. Even though the Supreme Court's original decision in *Bivens* applied to claims concerning Fourth Amendment violations like those in this case, the court drew a distinction between ICE agents and "traditional law enforcement officers," and ruled that this was an impermissible extension of *Bivens*. *See also De La Paz v. Coy*, 786 F.3d 367 (5th Cir. 2015).

Doe v. United States, 381 F.Supp.3d 573 (M.D.N.C. 2019): Families of students at elementary schools operated by the U.S. Department of Defense sued officials whom they claim failed to report and investigate allegations of an instructor's sexual abuse of children. The court ruled that the plaintiffs' *Bivens* claims could not proceed because they would burden the Department and would require the court to analyze military policy and practice, which, the court found, was a task that courts should defer to the legislative and executive branches.

Gustafson v. Thomas, No. 11-cv-5852, 2020 WL 1530556 (N.D. Ill. March 31, 2020): The plaintiff, a female police officer employed at a Veteran Affairs hospital, sued her supervising officers for installing hidden video surveillance cameras in the female changing area, arguing that it was an unconstitutional search under the Fourth Amendment. The court ruled that the claim could not proceed because, among other things, the plaintiff could pursue benefits under the Federal Employees' Compensation Act for a work-related injury.

LINKS *to* FURTHER READING

Reforms for a “*Bivens* fix” are readily available. Congress would only need to pass a law specifying that the protections of section 1983 (which applies to state and local officers) also apply to federal officers. Articles addressing these potential reforms include:

Joanna Schwartz, James Pfander, and Alexander Reinert, *The Simple Way Congress Can Stop Federal Officials From Abusing Protesters*, [Politico \(June 10, 2020\)](#)

Mark Joseph Stern, *Democrats’ Police Reform Bill Let Federal Agents Off the Hook*, [Slate \(June 8, 2020\)](#)

Justin Vail and Roy L. Austin, Jr., *Police reforms should include federal cops too*, [The Hill \(June 14, 2020\)](#)

CONTRIBUTORS

Jon Feinberg, *Kairys, Rudovsky, Messing, Feinberg & Lin*
Tilyn Bell, *Temple University Beasley School of Law*

Last Updated: 11.10.2020