

The Honorable Hank Johnson
2240 Rayburn House Office Building
Washington, DC 20515

The Honorable Sheldon Whitehouse
530 Hart Senate Office Building
Washington, DC 20510

The Honorable Jamie Raskin
2242 Rayburn House Office Building
Washington, DC, 20515

The Honorable Alex Padilla
B03 Russell Senate Office Building
Washington, DC 20510

Dear Representatives Johnson and Raskin and Senators Whitehouse and Padilla:

As nonpartisan organizations working to protect civil and human rights and ensure government accountability, we write in strong support of the Bivens Act, which would ensure that federal officials cannot violate constitutional rights with impunity.

During Reconstruction, Congress passed a civil rights law giving individuals the right to sue state or local officials who violate their constitutional rights. The provision, codified at 42 U.S.C. § 1983 (“Section 1983”), was designed to be one of the most important civil rights laws in the United States — **but it does not give individuals the right to sue federal officials who violate the Constitution, nor does any other statute.**¹

In the 1970s, the Supreme Court recognized an implied right of action for an individual to sue under the Constitution itself for damages resulting from rights violations perpetrated by federal officials, in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Bivens* is grounded in the principle that “the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury,” as the Supreme Court stated in *Marbury v. Madison*, 5 U.S. 137 (1803). In recent years, though, the Supreme Court and lower courts have all but eliminated the ability to bring *Bivens* lawsuits even for the gravest violations of constitutional rights.

As Fifth Circuit Judge Don Willett wrote in a recent decision:

redress for a federal officer’s unconstitutional acts is either extremely limited or wholly nonexistent, allowing federal officials to operate in something resembling a Constitution-free zone. ... If you wear a federal badge, you can inflict excessive force on someone with little fear of liability.²

¹ At the time that Section 1983 was enacted, federal officials were routinely sued at common law, and there was no worry that these officials, unlike those working for state and local governments, would get preferential treatment in state courts. Congress, however, restricted the ability to sue federal officials in state courts when it passed the Westfall Act in 1988. See Carlos M. Vázquez and Steven I. Vladeck, “State Law, the Westfall Act, and the Nature of the *Bivens* Question,” *University of Pennsylvania Law Review* 161, 509 (2013), <https://www.pennlawreview.com/wp-content/uploads/2020/04/Vazquez-Vladeck-161-U-Pa-L-Rev-509.pdf>.

² *Byrd v. Lamb*, 990 F.3d 879, 884 (5th Cir. 2021) (Willett, J., concurring).

As a result of the extreme narrowing of *Bivens* and the lack of a statutory cause of action to sue federal officials for damages resulting from constitutional violations, our courts have recently closed their doors to countless individuals whose rights federal officials have violated, including:

- parents whose children were killed by Border Patrol agents;³
- Muslim immigrants who were rounded up, subjected to punitive strip searches, and imprisoned in solitary confinement for months on the basis of their religion;⁴
- a 70-year-old Vietnam veteran whom security officers beat and choked on his way to a doctor's appointment in a Veterans Administration hospital;⁵
- children deliberately separated from their parents as part of the "zero tolerance" immigration policy;⁶
- a Canadian citizen whom the CIA "rendered" to Syria for months of torture;⁷
- a woman who was wrongfully convicted based on false testimony from a federal law enforcement officer;⁸
- peaceful demonstrators who were teargassed and assaulted in Lafayette Park in June 2020 for protesting against police violence and racism;⁹ and
- military servicemen and servicewomen who were victims of sexual assault and retaliation.¹⁰

The Supreme Court has recently agreed to hear a case that could narrow *Bivens* still further, if not overrule it altogether.¹¹

By adding five simple words to Section 1983 ("of the United States or"), the Bivens Act would prevent injustices like those above, and ensure that federal officials are held to the same standards as state and local officials when constitutional rights are implicated.

Thank you for your leadership in introducing the Bivens Act. We urge bipartisan, bicameral support for this critical legislation.

Sincerely,

American Civil Liberties Union
Amnesty International USA
Asylum Seeker Advocacy Project (ASAP)
Autistic Self Advocacy Network

³ *Hernandez v. Mesa*, 140 S.Ct. 735 (2020); *Swartz v. Rodriguez*, 140 S. Ct. 1258 (2020).

⁴ *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017).

⁵ *Oliva v. Nivar*, 973 F.3d 438 (5th Cir. 2020).

⁶ *K.O. v. United States Immigration and Customs Enforcement*, 468 F. Supp. 3d 350 (D.D.C. 2020).

⁷ *Arar v. Ashcroft*, 585 F.3d 559 (2nd Cir. 2009).

⁸ *Ahmed v. Weyker*, 984 F.3d 564 (8th Cir. 2020).

⁹ *Black Lives Matter D.C. v. Trump*, 2021 U.S. Dist. LEXIS 114699 (D.D.C. 2021).

¹⁰ *Cioca v. Rumsfeld*, 720 F.3d 505 (4th Cir. 2013).

¹¹ *Boule v. Egbert*, 998 F.3d 370 (9th Cir. 2021), *cert. granted* at <https://www.supremecourt.gov/qp/21-00147qp.pdf>.

Blacks in Law Enforcement of America
Border Network for Human Rights
Center for Disability Rights
Center for Victims of Torture
Central American Resource Center of Northern CA – CARACEN SF
Church of Scientology National Affairs Office
Constitutional Accountability Center
Defending Rights & Dissent
Drug Policy Alliance
Fair and Just Prosecution
Government Information Watch
Incarcerated Nation Network
Innocence Project
Institute for Justice
Just Futures Law
Justice in Motion
Kids in Need of Defense (KIND)
Lawyers for Good Government (LAGG)
Legal Aid Justice Center
Massachusetts Jobs with Justice
NAACP Legal Defense and Education Fund, Inc.
National Crittenton
National Immigration Project (NIPNLG)
National Network for Immigrant and Refugee Rights
National Network to End Domestic Violence
Open Society Policy Center
Project On Government Oversight
Protect Democracy
Rebuilding Independence My Style
Restore the Fourth
The Black Police Experience
The Daniel Initiative
Vday