

Center for American Progress



Promoting Accountability

State and Federal Officials Shouldn't Be Above the Law

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Contents

- 1 Introduction and summary**
- 3 The lack of accountability
for state actors**
- 5 The lack of accountability
for federal actors**
- 8 The need for reform**
- 10 Conclusion**
- 10 About the authors**
- 11 Endnotes**

Introduction and summary

This summer, Black Lives Matter protests opposing police brutality and systemic racism swept the nation. The federal government's use of federal troops to violently quell these protests illustrated two legal doctrines in pressing need of reform—qualified immunity and *Bivens* liability. As courts over the years have expanded qualified immunity and narrowed *Bivens* liability, these two doctrines now provide state and federal government officials near-total protection against personal liability for unlawful and abusive actions they take when carrying out their duties.

In 1982, the U.S. Supreme Court established the controlling interpretation of the doctrine known as qualified immunity that makes it nearly impossible for individuals to establish the personal liability of public officials who violate constitutional or statutory law. While qualified immunity most often makes headlines as a shield that protects law enforcement, its protections extend to all state and federal government employees as well as to individuals acting under the color of state law, such as a private entity carrying out work under a government contract. An additional barrier to accountability for federal officers exists where there is no clear statutory authority guaranteeing the right of individuals to sue federal officials and those acting under color of federal law when individuals' constitutional and civil rights have been violated. Although in the 1971 case *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,¹ the Supreme Court recognized the ability of individuals to bring damages claims against federal officers in certain circumstances, that decision has been almost completely gutted over the past 30 years.

The result has been significant abuses of power being perpetuated against people, even children, with next to no accountability. Furthermore, this violence falls most heavily on communities of color. As a result of the court's current jurisprudence, the burden falls to legislators to ensure that government officials can be held accountable when their actions violate constitutional and civil rights.

This must include not only the elimination of qualified immunity altogether but also enactment of legislation that codifies the right to bring civil damages actions against federal officials and individuals who commit violations under color of federal law.

This type of comprehensive reform is needed to correct the severe imbalance that has closed the doors of justice to people across the country who have had their civil rights violated by government officials and to breathe life into the rights and liberties guaranteed to individuals by the U.S. Constitution and federal law.

The lack of accountability for state actors

Section 1983 was passed as part of the reconstruction-era Civil Rights Act of 1871 in recognition of the terror that state officials were waging on Black Americans in concert with the Ku Klux Klan.² It established the right of individuals to sue government officials who violate constitutional rights while acting “under color of” state or local law. Beginning in the late 1960s,³ with the defining interpretation set in the 1982 case *Harlow v. Fitzgerald*,⁴ the qualified immunity doctrine was created by the Supreme Court and imposed on Section 1983 based on reasoning that has been criticized by legal experts on both the right and left as a creation of the court without strong legal or historic basis.⁵ And as the doctrine evolved, it became clear that it provided a shield against accountability even in cases of shocking civil rights violations.

Qualified immunity shields government officials from civil liability unless their conduct at the time violated “clearly established statutory or constitutional rights of which a reasonable person would have known.”⁶ The court in *Harlow* initially defended qualified immunity as protecting government officials from frivolous suits, but the scope of the doctrine and its protections for government officials quickly and dramatically grew, with the court explaining just four years later that “as the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.”⁷ For some time, Supreme Court precedent did require that federal courts at least determine whether a constitutional right had been violated even when granting a defendant protection from liability pursuant to qualified immunity. But the court did away with even that requirement in the 2009 case *Pearson v. Callahan*. In doing so, the court not only cemented qualified immunity protections by reaffirming the requirement that a violation already have been “clearly established” at the time of the violation but also discouraged courts in the future from establishing more conduct as being unlawful.⁸

As a result, the doctrine has been taken to absurd lengths. While the Supreme Court recently issued one decision to the surprise of many legal observers that reversed a 5th Circuit decision granting qualified immunity to prison officials who had held a prisoner for nearly a week in a cell “teeming” with human waste,⁹ the doctrine largely is interpreted to essentially require plaintiffs to establish fact patterns virtually identical to those in a small set of previous cases in order to trigger liability. Indeed, the fact that this recent decision surprised many legal observers is a sign of how extreme the current state of the doctrine is in practice. For example, despite clear caselaw within the 5th Circuit finding that “[i]f a prison guard punched an inmate ‘for no reason,’ that assault would violate clearly established law,” that circuit recently allowed a qualified immunity defense to stand in a case where an inmate brought what the judges agreed was strong evidence that a guard had pepper-sprayed him without justification. As the dissent in the case explains, the circuit largely did so due to a lack of published cases on the use of pepper spray specifically.¹⁰ The case has been appealed to the Supreme Court, but the court has not yet decided whether to take it up.¹¹

This jurisprudence has led to extreme violations of rights going unpunished. Qualified immunity has protected officers who set a police dog on a man who had surrendered and was sitting on the ground with his hands up and has let officers who stole \$225,000 from a bedroom when executing a search warrant escape legal punishment.¹² The doctrine also protected officers who debated how to tase a woman—seven months pregnant and in the process of driving her 11-year-old son to school—who they had pulled over for speeding before repeatedly attacking her and dragging her to the ground.¹³

Communities of color are overwhelmingly more likely to experience this abuse, with Black men being two-and-a-half times more likely to be killed by law enforcement over their lifetime than white men.¹⁴ This state of affairs is not only an unacceptable tragedy but also a direct contradiction of the intent of Section 1983. Moreover, despite the Supreme Court’s recent decision in the prison abuse case referenced above,¹⁵ over the years, the high court has overwhelmingly declined to take up cases that would have allowed the justices to revisit the sweeping implications of the doctrine they and their predecessors have cemented into place.¹⁶

The lack of accountability for federal actors

While Section 1983 created a statutory cause of action for damages against individuals who violate a person’s constitutional rights while acting under color of state law, there is no parallel statutory provision that generally extends a cause of action against individuals who commit similar abuses while acting under color of federal law. Such a cause of action was only recognized by the Supreme Court in the 1971 case *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.

Bivens arose out of a search and arrest conducted by federal agents that allegedly violated the Fourth Amendment prohibition against unreasonable searches and seizures.¹⁷ In the years following *Bivens*, the court similarly recognized causes of action for damages pertaining to two additional amendments. In the 1979 case *Davis v. Passman*, the court recognized a cause of action within the Fifth Amendment’s due process clause in the context of sex discrimination.¹⁸ A year later, in the 1980 case *Carlson v. Green*, the court recognized a cause of action within the Eighth Amendment’s ban on cruel and unusual punishment in the context of constitutionally deficient medical care provided to a federal prisoner in a federal prison.¹⁹

But shortly after the Supreme Court pronounced this authority to hold federal actors accountable and provide adequate remedies to aggrieved parties, it began to narrow the *Bivens* holding. Subsequent decisions seized upon a single phrase in *Bivens* that referenced the absence of “special factors counseling hesitation in the absence of affirmative action by Congress,” and described *Bivens* as having been decided during a long-abandoned era of jurisprudence in which federal courts were more comfortable inferring causes of action for damages in cases arising out of alleged statutory violations.²⁰

An unbroken string of decisions dating back more than 30 years demonstrates the extent to which the Supreme Court has declined to extend *Bivens* liability “to any new context or new category of defendants.”²¹ For instance, though in *Carlson* the court recognized the right of federal prisoners to bring damages actions alleging

Eighth Amendment violations against prisons run directly by the federal government, the Supreme Court in 2001 ruled that a federal prisoner could not bring such an action against a private company that had contracted with the federal government to operate a correctional center.²² Eleven years later, the court also refused to extend *Bivens* liability to individual employees of such private correctional companies.²³

This past term, the Supreme Court ruled in *Hernández v. Mesa* that the family of a 15-year-old Mexican boy who was shot and killed in Mexico by a Border Patrol agent standing in the United States could not bring a *Bivens* claim for damages against the agent.²⁴ The court explained that the cross-border nature of the shooting constituted a “new context,” and that various “special factors” counseled against recognizing a cause of action absent explicit congressional action.²⁵ As the Supreme Court has explicitly refused to say what types of claims would constitute a “new context” and what types of “special factors counselling hesitation” would militate against extending the *Bivens* remedy to such new contexts,²⁶ federal courts have been given tremendous leeway to bar suits from going forward and the Supreme Court and U.S. Courts of Appeals have frequently reversed lower courts that have allowed such claims to proceed. Recently, the 5th Circuit even ruled that when a defendant fails to raise “special factors” as part of a qualified immunity defense, the court must conduct the analysis on its own to see if any exist.²⁷

Creating a license to violate the law

As discussed above, the qualified immunity doctrine has resulted in liability for government officials only being found in extremely narrow circumstances. Layered on top of that are additional barriers to accountability for federal actors. Whereas qualified immunity is a defense that can be raised against a cause of action, the federal courts’ sustained attacks on *Bivens* are ultimately about eliminating the cause of action itself. By refusing for decades to recognize *Bivens* liability in any new context or against new defendants, the Supreme Court has created a rule that not only shields federal officials from liability if they clearly violate an individual’s constitutional rights, but it also puts federal officers on notice that they will enjoy the same shield from liability even if they commit the exact same unlawful conduct in the future. In the *Hernández v. Mesa* case, for instance, by concluding that cross-border shootings are a new context where special factors counsel against recognizing a cause of action under *Bivens*, the Supreme Court not only absolved Agent Mesa of liability, but it also granted all other Border Patrol agents a prospective license to shoot and kill Mexican nationals across the border without fear of individual civil liability.²⁸

Finally, it is important to recognize that some federal laws operate to further restrict the circumstances in which a *Bivens* claim can move forward even where one otherwise might be recognized. In *Hui v. Castaneda*, for instance, the Supreme Court refused to allow a *Bivens* claim to proceed against U.S. Public Health Service (USPHS) personnel who allegedly provided constitutionally deficient medical care to an individual in U.S. Immigration and Customs Enforcement custody because 42 U.S.C. 233(a) makes the Federal Tort Claims Act the exclusive remedy for complaints arising out of the medical care provided by USPHS personnel.²⁹ While the federal judge handling the case called it “one of the most, if not the most, egregious Eighth Amendment violations the Court has ever encountered,” the Supreme Court decision left Mr. Castaneda’s surviving family with no cause of action related to the deprivation of his constitutional rights and only claims against the United States for which punitive damages are unavailable and compensatory damages are capped by state law.³⁰

The need for reform

Legal experts from both the right and the left have long joined together in denouncing the current state of the law, both as a dramatic example of government overreach and as a degradation of individuals' civil and constitutional rights. In 2018, Supreme Court Justice Sonia Sotomayor wrote that the controlling precedent on qualified immunity “transforms the doctrine into an absolute shield for law enforcement officers.”³¹ The Institute for Justice and the Pacific Legal Foundation, two libertarian law firms, have advocated for the elimination of qualified immunity,³² even making their argument in the conservative *National Review*.³³ Meanwhile, Justices Clarence Thomas and Neil Gorsuch recently wrote that as a result of the near total success that they and their predecessors on the court have had in rendering the original *Bivens* decision nearly meaningless, they have effectively “cabined the doctrine’s scope, undermined its foundation, and limited its precedential value.”³⁴

Given the Supreme Court’s overall failure to address the injustices flowing from the state of the law regarding qualified immunity and *Bivens*, it is clear that reform must come from legislatures. State legislators have jurisdiction to act to address at least some of these abuses—though federal action, too, is vital.

State legislatures have important tools to strengthen protections for civil rights, as Colorado recently demonstrated. This year, the Colorado Legislature became the first state to bar qualified immunity as a defense to state constitutional violations.³⁵ While the new law does include exemptions to liability for some law enforcement and other government officials, it allows suits against peace officers to be brought in state court when rights under the Colorado Bill of Rights are alleged to have been violated.³⁶ Additional states could, and should, enact strong protections for their citizens using this same model.

Unfortunately, state approaches are unlikely to address wrongdoing—including unconstitutional conduct—by federal officers, due to the courts’ interpretation of a law known as the Westfall Act.³⁷ The Westfall Act forecloses the ability to

hold federal officers liable under state law and instead requires that such claims be brought pursuant to the Federal Tort Claims Act (FTCA), which is inapplicable to many types of claims and includes an expansive “discretionary function exception” that grants immunity when federal officials exercise judgment or choice.³⁸ Moreover, under the FTCA—which makes the United States itself the defendant in the action—plaintiffs face significant challenges in securing justice, including being prevented from having a jury trial and having the amount of damages they can be awarded significantly limited by caps that exist in state law.

As a result, federal action is essential to providing holistic change. In recent months, members of Congress in both chambers have put forward a variety of proposals focused on qualified immunity; in the House, a bipartisan bill was introduced by Rep. Ayanna Pressley (D-MA) and Rep. Justin Amash (L-MI) to eliminate qualified immunity altogether, while other legislation has focused on eliminating the doctrine as it applies to police officers.³⁹ Others, including at least one Republican, have put forward legislation that would modify the doctrine, though not eliminate it altogether.⁴⁰ No legislation has yet been introduced to establish a statutory right of action against federal officials and people acting under color of federal law—to codify *Bivens* and override the limitations judicially imposed on the doctrine.

It is clear that true reform to increase accountability and protect civil rights and civil liberties must address both circumstances. As a baseline, Congress should eliminate the doctrine of qualified immunity from all Section 1983 suits and enact new legislation that runs parallel to Section 1983 to establish a clear right of action against federal officials and individuals who act under color of federal law, particularly when they are performing quintessentially public functions such as operating prisons, jails, or detention facilities. As explained above, when Congress creates this new federal companion to Section 1983, it must also make clear that the provision overrides previously enacted provisions that make other statutory causes of action exclusive of all others.

The conversation on how to improve accountability for all government officials should be an ongoing one—but eliminating qualified immunity and codifying a federal companion to Section 1983 are essential to comprehensive reform.

Conclusion

The Supreme Court has claimed that qualified immunity and its *Bivens* jurisprudence can help strike a balance between allowing individuals to bring civil suits and protecting the state against the expenses of frivolous lawsuits.⁴¹ It is clear, however, that the current state of affairs cannot be seen as striking any such balance, given the violations of rights and violence that go unaddressed in the country's civil legal system. It is imperative that legislators significantly reform the law to bring accountability to state and federal government officials. In doing so, lawmakers will ensure that ordinary people have the tools they need to effectively hold accountable the government officials who violate their constitutional or civil rights.

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