

May 26, 2021

The Honorable Charles Schumer
Majority Leader, U.S. Senate
Washington, DC 20004

The Honorable Mitch McConnell
Minority Leader, U.S. Senate
Washington, DC 20004

Subject: Ensure the right to sue federal officials who violate the Constitution in the Senate version of the George Floyd Justice in Policing Act

Dear Senator Schumer and Senator McConnell:

As organizations working to protect civil and human rights and ensure government accountability, we write to ask you to strengthen the George Floyd Justice in Policing Act of 2021 (JPA) by closing the loophole that prevents victims of abuses by federal law enforcement from suing for violations of their rights.

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”), is 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.**

At one point, the Supreme Court recognized a right to sue under the Constitution itself for damages resulting from rights violations, in the case of *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.¹

¹ *Byrd v. Lamb*, 990 F.3d 879, 884 (5th Cir. 2021) (Willett, J., concurring).

As a result of the 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:

- parents whose children were killed by border patrol agents.²
- Muslim immigrants who were rounded up, subjected to punitive strip searches, and imprisoned in solitary confinement for months on the basis of their religion.³
- 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.⁴
- children deliberately separated from their parents as part of the "zero tolerance" policy.⁵
- a Canadian citizen whom the CIA "rendered" to Syria for months of torture.⁶
- a woman who was wrongfully convicted based on false testimony from a federal law enforcement officer.⁷

The officials responsible for teargassing peaceful protesters in Lafayette Park last summer are now attempting to have a judge throw out a lawsuit against them on the same basis.⁸

Congress could deter injustices like these, and ensure federal officials are held to the same standards as state and local officials, by adding a few short words to Section 1983 to make it clear that it also applies to individuals acting under color of federal law.⁹ There is no reason or justification for federal agents to be held to a lower standard than state or local law enforcement, or allowed to violate people's constitutional rights with impunity.

Thank you for your consideration.

Sincerely,

American Civil Liberties Union
Amnesty International USA
Asylum Seeker Advocacy Project (ASAP)
Autistic Self Advocacy Network
Blacks in Law Enforcement of America
Center for Constitutional Rights

² *Hernandez v. Mesa*, 140 S.Ct. 735 (2020); *Swartz v. Rodriguez*, 140 S. Ct. 1258 (2020).

³ *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017).

⁴ *Oliva v. Nivar*, 973 F.3d 438 (5th Cir. 2020).

⁵ *K.O. v. United States Immigration and Customs Enforcement*, 468 F. Supp. 3d 350 (D.D.C. 2020)

⁶ *Arar v. Ashcroft*, 585 F.3d 559 (2nd Cir. 2009)

⁷ *Ahmed v. Weyker*, 984 F.3d 564 (8th Cir. 2020).

⁸ *Black Lives Matter D.C. v. Trump* (pending before the U.S. District Court for the District of Columbia, docket no. 20-cv-01469).

⁹ For an example of proposed statutory text that would accomplish this, see H.R. 7213, *Bivens Act of 2020* (116th Congress) (2020).

Center for Disability Rights
Center for Victims of Torture
Constitutional Accountability Center
Council on American-Islamic Relations (CAIR)
Defending Rights & Dissent
Farmworker Justice
GOSO—Getting Out & Staying Out
Government Information Watch
Human Rights Campaign
Institute for Justice
Just Futures Law
Law Enforcement Action Partnership
Lawyers' Committee for Civil Rights of the San Francisco Bay Area
National Council of Churches
NAMINYS Criminal Justice
Open Society Policy Center
Project On Government Oversight
Protect Democracy
Refugee and Immigrant Center for Education and Legal Services (RAICES)
Southern Border Communities Coalition
The Law Office of Dr Curtis FJ Doebbler
The Daniel Initiative
Vday

Cc: Chairman Dick Durbin, Ranking Member Chuck Grassley, Senator Cory Booker, Senator Tim Scott, members of the U.S. Senate Committee on the Judiciary, U.S. Senate, Representative Karen Bass